

(2021) 01 P&H CK 0035

In the Punjab And Haryana At Chandigarh

Case No : First Appeal Order COM No. 4 Of 2020 (O&M)

Cremo Netureal Milk Llp & Another

APPELLANT

Vs

Cremo S.A.

RESPONDENT

Date of Decision : 05-01-2021

Acts Referred:

Citation : (2021) 01 P&H CK 0035

Hon'ble Judges : Daya Chaudhary, J;Meenakshi I. Mehta, J

Bench : Division Bench

Advocate : Vikas Bahl, Nirupam Lodha, hivani Narang, Aakritee Raj, Rajat Khanna, M. Lall, Davesb Vashistha, Chetan Chadha, Gopal Trivedi, Gaurav Mylani, Sarabh Srivastava, Nancy Roy

Final Decision : Dismissed

Judgement

Meenakshi I. Mehta, J

1. Feeling aggrieved by the order dated 28.08.2020, as handed down by the Presiding Officer-cum-Additional District Judge, Commercial Court,

Faridabad, whereby an application moved by the plaintiff-applicant (here-in-after referred to as 'the respondent') for seeking ad-interim injunction, has

been allowed and during the pendency of the suit, the defendants-respondents (here-in-after referred to as 'the appellants') have been restrained from

offering, advertising, manufacturing, selling their products under the name of 'Cremo' or promoting the respondent's goods and/or dealing in any

manner under the trade mark 'Cremo' and/or 'Cremo Netureal Milk LLP' or any other trade mark or the name identical with or

deceptively similar to the respondent's mark/name 'Cremo' as a trade mark, trade name, corporate name, domain name or in any other manner

whatsoever, either in full or in part, as may amount to passing off of the goods

and/or the services of the appellants as and for its (respondent's) goods and/or the services, while granting them (appellants) the liberty to sell their milk products by using any other name or trade mark which is not identical with or is not deceptively similar to the respondent's mark/name 'CREMO', the appellants have chosen to prefer the present appeal.

2. Shorn and short of unnecessary details, the facts culminating in the present appeal, are that the respondent filed a Civil Suit (Commercial) against

the appellants (plaint thereof annexed in the paper-book as P-3) while averring that it (respondent) was a company duly organized and existing in

accordance with the laws of Switzerland and has been in the business since 1927 and it innovates, creates, processes, manufactures and also markets

consumer dairy products. It decided to use the word 'CREMO' as its trade/corporate name and accordingly, it came to be known as 'CREMO

S.A.'. It has applied for the registration of mark 'CREMO' in India under IRDI No.-4392669 on 11.11.2019 and the said application is pending. On

20.01.2020, it received a notification from the WIPO (World Intellectual Property Organization) intimating it therein that the registration of its mark

'CREMO', so applied for, had been objected to on the ground that the same or similar marks had already been applied for before the Trade Marks

Registry for registration and it was called upon to make necessary submissions in this regard. Then, it came to know that appellant No.2 had also

applied for the registration of the word mark 'CREMO' on 04.07.2019 and he had set up a Limited Liability Partnership firm under the name and

style of 'CREMO NETUREAL MILK LLP', i.e appellant No.1. Being aggrieved by such dishonest adoption and illegal use of the identical goods

mark by the appellants in respect of the goods identical to those as offered by it (respondent), it served a notice upon the appellants on 12.02.2020

asking them therein to desist from using mark/name 'CREMO' and also to withdraw their above-said application but however, vide their reply dated

27.02.2020, the appellants controverted/disputed its version. On the self-same facts, the respondent moved the above-said application which has been

allowed vide the impugned order.

3. The appellants, in their written-statement as well as in written-reply to the afore-mentioned application, have asserted that on 5. 03.2019, appellant

No.1 was incorporated under the Limited Liability Partnership Act, 2008 and appellant No.2 has been running his business, as an individual

entrepreneur, under the name and style of 'CREMO NETUREAL MILK LLP' at Faridabad. He has established the brand 'CREMO' in India and has

invested time, money and skill to establish it as a reputed brand name and the same has also gained an envious goodwill. The Registrar of Companies

never objected for the name of appellant No.1 and he (appellant No.2) has already moved an application to the Registrar of Trade Marks for the

registration of trade mark 'CREMO' which is under process. The respondent has never pursued any manufacturing or business activities in India nor

has ever advertised the same and the registration of its (respondent's) alleged mark has also been refused by several countries. The usage of the

mark adopted by the appellants will not cause any commercial hardship to the respondent as it has no commercial existence in India.

4. After hearing the arguments of learned counsel for both the parties on the above-mentioned application, the Court below has passed the order,

giving rise to the present appeal.

5. We have heard learned counsel for the appellants as well as learned counsel for the respondent in the present appeal and have also perused the file

thoroughly.

6. Learned Senior counsel for the appellants has contended that the respondent company is based in Switzerland and has no customers in India and

the invoices, as placed by the respondent on the record to show the sale of its products in India, do not contain any particulars to connect the same

with it (respondent). Secondly, he has contended that the appellants had applied for the registration of their trade mark before the competent authority

on 04.07.2019 whereas the respondent has moved an application for the said purpose much later in November, 2019 and therefore, the appellants have

acquired a preferential right to use the trade mark 'CREMO NETUREAL MILK LLP'. Lastly, he has contended that the appellants have spent a lot

of time as well as money in complying with all the requisite formalities for manufacturing the products under the said trade name as applied for by

them for the registration and they have earned goodwill for their products although the process of manufacturing of the same has been got delayed

due to the outbreak of Pandemic Covid-19 and in these circumstances, the

appellants are entitled to use the trade mark, as applied for by them for registration, in respect of their milk/dairy products and the impugned order deserves to be set-aside accordingly. To buttress his contentions, he has placed reliance upon *Toyota Jidosha Kabushiki Kaisha vs. Prius Auto Industries Limited and Others*, (2018) 2 SCC ;1 *Uniply Industries Ltd. vs. Unicorn Plywood Pvt. Ltd. and Others*, (2001) 5 SCC 9;5 *ROCA Sanitario S.A. vs. Naresh Kumar Gupta and Another*, 2010 SCC Online Del 1135 and *Intex Technologies (India) Ltd. & Another vs. M/s AZ Tech (India) & Another*, 2017 SCC OnLine Del 7392.

7. Per contra, learned Senior counsel for the respondent has argued that the respondent has been running the business of the milk/dairy products as well as some other consumable items since its inception in Switzerland in 1927 and it (respondent) has acquired global goodwill for its products and it has been supplying its products in India since the year 2016 as is explicit from the invoices annexed at pages No.242 to 392 in the paper-book which clearly show that it had entered the Indian market even much prior to the registration of the Limited Liability Partnership venture of the appellants in March, 2019 and in such circumstances, the factum of the respondent having applied for the registration of its trade name/mark subsequent to the filing of the application by the appellants in this regard, pales into insignificance. He has further argued that a bare perusal of the above-said invoices reveals that the respondent had supplied/exported huge quantities of its products to the Indian customers/importers, ranging from 2500 Kgs to 50000 Kgs, on different occasions and this fact, in itself, speaks volumes of the factum of its (respondent's) having earned the goodwill for its products, in the Indian market and it being so, the order passed by the Commercial Court is perfectly logical and legal one.

8. Before advertng to our observations on the merits of this appeal while considering the afore-discussed respective contentions/ arguments as raised by learned counsel for both the parties, we deem it expedient and appropriate to briefly discuss here the undisputed facts of the case in hand.

Admittedly, both the parties have applied for the registration of the said trade-marks/names for their milk/dairy products and the application moved by the appellants for the afore-said purpose is prior in time to that of the respondent.

9. As regards the first contention of learned Senior counsel for the appellants regarding the said invoices as placed on the file by the respondent to show the sale of its products in India, though the respondent company, admittedly, has its base in Switzerland but as is revealed from the perusal of the copies of the above-referred invoices tagged at pages No.242 to 392 in the paper-book, the respondent-company has been supplying/exporting the goods/products to the Indian customers/importers since the year 2016 and the quantity of these products ranges from 2500 Kgs. upto 50000 Kgs as mentioned therein and the requisite certificates of the concerned Cantonal Deputy Veterinary Officer, as meant for the export of the said products to India, are also annexed with these invoices. It being so, there seems no reason, prima-facie, to doubt the connection between the respondent-company and the goods/products as mentioned in the said invoices. Rather, these facts unequivocally lead to the conclusion that the respondent-company was well known to the customers/importers in India at least since the year 2016, i.e even much prior to the incorporation of appellant No.1 on 5th March, 2019 as mentioned in Annexure A/1, i.e the copy of its Certificate of Incorporation.

10. So far as the second contention of learned Senior counsel for the appellants regarding the application for the registration of the said trade-mark having been moved by the appellants prior to that of the respondent is concerned, it is worth-while to mention here that the appellants have categorically pleaded in para 56 of their written-reply that they are facing operational problems due to the Pandemic and the temporary injunction would delay the production. In para 31 of this written-reply also, they have made the following specific assertions: -“the defendant had already made investment in India and set up a plant for manufacturing of milk and other products, however, due to Covid-19 pandemic situation, they cannot produce the product(s) well in time”.

The afore-mentioned contents of the written-reply, coupled with the fact that the appellants have not been able to place any material on the record to show that they had been manufacturing and marketing any milk/dairy products with the said trade name or mark prior to their applying for the registration thereof, lead to the only irresistible inference to the effect that they (appellants) are yet to manufacture and launch their products in the

market whereas, as already observed in the preceding paragraphs, the respondent has been catering to the orders/demands of the Indian importers since the year 2016. In such circumstances, the factum of the respondent having applied for the registration of the trade name/mark subsequent to the appellants, does not adversely affect its preferential right to use the said trade mark for its products.

11. Then, the last contention of learned Senior counsel for the appellants regarding the appellants having spent lot of time and money on preparing for manufacturing and launching its products in the market, also does not suffice at all to disentitle the respondent from seeking the ad-interim relief as granted vide the impugned order because as mentioned earlier also, they (appellants) have yet to manufacture and launch their products in the market whereas the respondent has already been exporting its products to the customers/ importers in India.

12. The observations, as made by Hon'ble Supreme Court in Toyota Jidosha Kabushiki Kaisha and Uniply Industries Ltd. (supra) and by Delhi High Court in ROCA Sanitario S.A. and Intex Technologies (India) Ltd. & Another (supra), are of no help to the appellants to further their cause in the present appeal as the facts and circumstances of the case in hand are distinguishable from those of the mentioned above. In Toyota Jidosha Kabushiki Kaisha (supra), the appellant-plaintiff had adopted the mark 'Prius' in India in the year 2009 and the commercial hybrid car called 'Prius' was launched in the year 2010 whereas the same mark had been adopted by the defendants in the year 2001 and the registration thereof was obtained in the year 2002-2003 and therefore, while applying the principle of territoriality, it was held that the brand name of the said car had not acquired the degree of goodwill, reputation and the market or popularity in the Indian market so as to vest in it the necessary attributes of the right of a prior user so as to successfully maintain an action of passing off even against the registered owner whereas in the present case, as discussed earlier, the respondent started supplying/exporting its products to the Indian importers way back in the year 2016 and the appellants have yet to start the manufacturing of their products and to launch the same in the Indian market.

13. Then, in Uniply Industries Ltd. (supra) also, it was held that although the advertisement of the goods had been made by the respondents in the year

1993 itself, the fact as to whether the same was followed up by the goods being dealt with the trade marks in question, was not clear and as regards

the invoices, it was not very clear from the same that they were in relation to the goods containing the trade marks in question and the letters issued to

the dealers were both in favour of the appellant and the respondents but in the instant case, as observed above, the afore-said invoices, as placed on

the file, clearly show that the products/goods, as mentioned therein, had been supplied by the respondent company to the Indian customers/importers.

14. Further, the observations made by Delhi High Court in ROCA Sanitario S.A. and Intex Technologies (India) Ltd. & Another (supra) are also not

applicable to this appeal because in both the above- said cases, the rival parties had launched their products in the market whereas in the appeal in

hand, it is not so as discussed in the preceding paragraphs.

15. It is well-settled that for seeking the relief of interim injunction, the plaintiff has to establish three ingredients: firstly, the prima-facie case and

secondly, the balance of convenience, in his favour and thirdly, an irreparable loss in case the injunction is not granted. In the present case, the

respondent (plaintiff) has been able to establish at this stage that it has been supplying/exporting its products to the Indian importers/customers since

the year 2016 whereas on the other hand, even if the version as put-forth by the appellants in Paras 31 and 56 of their written-reply to the said

application regarding the manufacturing of their products having been got delayed due to the outbreak of Pandemic Covid-19, is taken to be correct,

even then the fact remains that as discussed earlier, they (appellants) are yet to manufacture and introduce their products in the Indian market and it

being so, a prima-facie case can safely be held to be existing in the favour of the respondent and it further becomes quite explicit that the balance of

convenience also lies in its (respondent's) favour and in view of the afore-said discussed facts and circumstances, it is also clear that it is the

respondent company which is going to suffer an irreparable loss in case the relief of ad-interim injunction is not granted in its favour.

16. In the light of the fore-going discussion, we are of the considered opinion that there is no infirmity, illegality or irregularity in the impugned order as

passed by the Court below and therefore, the same does not warrant any interference by this Court. Resultantly, the present appeal, being devoid of

any merit, deserves dismissal and accordingly, the same is hereby dismissed.

17. However, we deem it necessary to clarify that nothing contained here-in-before shall be construed to be an expression of our opinion on the merits of the Civil Suit (Commercial) pending before the Court below.