

(1974) 04 DEL CK 0012

In the Delhi High Court

Case No : Regular First Appeal No. 143D of 1965

Delhi Cloth and General Mills Co. Ltd.

APPELLANT

Vs

Parag Vanaspati Products

RESPONDENT

Date of Decision : 05-04-1974

Acts Referred:

Citation : (1974) 10 DLT 255 : (1974) ILR Delhi 150

Hon'ble Judges : S.N. Shankar, J;H.L. Anand, J

Bench : Division Bench

Advocate : Ravinder Sethi, R.M. Lal and Arun Mohan, for the Appellant;

Judgement

S.N. Shankar, J.

(1) M/S. Delhi Cloth and General Mills Co. Ltd., (hereinafter called "the appellants") have filed this appeal against the judgment and decree of the trial court dismissing their suit for injunction and rendition of accounts against M/s. Parag Vanaspati Products (hereinafter called "the respondents").

(2) The appellant Company runs a factory known as D.C.M. Vanaspati Manufacturing Works, Delhi and manufactures Vanaspati Ghee which is sold in containers bearings a label having the picture of a lady with a pitcher on her head moving away from a well underneath a tree and another lady with a pitcher on her head standing in the background of a well fitted with pulley and rope for drawing water. Under the device the word "PANGHAT" appears in bold letters. The said device as well as the word "PANGHAT" is the registered trade mark of the appellants which they have been using ever since they commenced the production of Vanaspati about 12 years before the filing of the suit. The respondents also started the manufacture of Vanaspati about 11 years before the institution of the suit. They sold their product in containers which bore the device of the picture of a lady in a moving pose carrying a pitcher on her head and another under her arm. Above the lady, on the left side of the label, there is the word "GOPI". This mark or label of the respondents was not registered. The

appellants claimed that the central theme and essential features of their mark was the lady with a pitcher on her head in a moving pose and that the respondents' mark was a colourable imitation of their registered trade mark and was deceptively similar to it. They maintained that their brand of vanaspati was popularly called in the market as "GUJRIWALA GHEE" and the respondents' label was likely to cause confusion in the mind of an unwary purchaser who because of the deceptively similar mark of the respondents' label was likely to be deceived in purchasing the respondents' goods believing the same to be manufactured by the appellants. In the suit they prayed for an injunction restraining the respondents from "using the mark of a lady with a pitcher on her head in a moving pose or any other colourable imitation" of their trade mark on the label of their (respondents) containers and for a decree for rendition of accounts in respect of the profits made by the respondents from the sale of vanaspati manufactured and/or sold by them in the containers bearing the aforesaid mark. The suit was resisted by the respondents. They controverted the allegations in the plaint and denied that the picture of the lady was associated in the mind of the purchasers of vanaspati to infer that the goods bearing the picture of a lady were the manufacture of the appellants or that the appellants' product was known in the market as "GUJRIWALA GHEE". They further maintained that their product was being sold in containers bearing the name "GOPI" and that their label had no similarity with the label on the tins of the appellants.

PARTIES went to trial on the following issues :

(1) Whether the label used by the defendants on their containers for Vanaspati Ghee is an infringement of the trade mark of the plaintiff ?

(2) Whether the label used by the defendants is liable to pass off their goods as those of the plaintiffs ?

(3) Whether the defendants are liable to render accounts ?

(4) Relief.

(3) The learned trial court compared the two labels and, after noticing detailed dissimilarities between them, observed :--

" There's not only a difference in details of the two labels, the same differ in general get up, design, colour, pictorial effect, size and contents. It is impossible to believe that the defendants' use of label like Ex. p.2. constitutes an infringement of the plaintiffs' trade mark or these labels are deceptively similar to the plaintiffs' labels. The divergence is in fact so marked that the first mentioned label would not pass off the goods covered by it as the plaintiffs' products".

(4) The appellants' case that their product had come to be known in the market as "GUJRIWALA GHEE" was also negated on evidence. In the result, it was found that no case of infringement or passing off was made out and the suit was dismissed.

(5) Shri Ravinder Sethi, appearing on behalf of the appellants, has urged that the approach of the trial court for the determination of the question involved in this case was erroneous. He argued that the cause of action of the appellants in the suit was infringement of their trade mark and for deciding this question the court had not to embark upon similarities and dissimilarities of the two marks but had to take into account the prominent features of the two labels in assessing the degrees of resemblance between them. For deciding this resemblance, the learned counsel urged, the standard to be adopted was that of an average purchaser with imperfect recollection.

(6) There is substance in this grievance of the appellants. The approach for decision of the question as to whether the plaintiffs' right to trade mark had been infringed has not to be the same as for an action for passing off goods. To constitute "infringement" it is not essential there should be absolute similarity of the two trade marks. It would be sufficient if one mark is found to be deceptively similar to the other in the broad and essential features. In *Kaviraj Pandit Durga Dutt Sharma Vs. Navaratna Pharmaceutical Laboratories*, the Supreme Court brought out this aspect in the following words:

"EXPRESSED in another way, if the essential features of the trade mark of the plaintiff have been adopted by the defendant, the fact that the get-up, packing and other writing or marks on the goods or on the packets in which he offers his goods for sale show marked differences, or indicate clearly a trade origin different from that of the registered proprietor of the mark would be immaterial, whereas in the case of passing off, the defendant may escape liability if he can show that the added matter is sufficient to distinguish his goods from those of the plaintiff".

(7) Section 29 of the Trade and Merchandise Marks Act, 1958 deals with the infringement of trade mark. It provides that a registered trade mark is infringed by a person who, not being the registered proprietor of the trade mark or a registered user thereof using by way of permitted use, uses in the course of trade a mark which is identical with, or deceptively similar to, the trade mark, in relation to any goods in respect of which the trade mark is registered and in such manner as to render the use of the mark likely to be taken as being used as a trade mark. The expression "deceptively similar" used in this section is defined by section 2(d) of the Act as under:-

"DECEPTIVELY similar" :- A mark shall be deemed to be deceptively similar to another mark if it so nearly resembles that other mark as to be likely to deceive or cause confusion".

(8) Absolute identity of the two marks is, Therefore, not necessary to complete "infringement". If the two marks so nearly resemble as to be likely to cause confusion, the case for infringement is made out. It is the overall similarity or the essential features of the two marks that determines the question. In *Parle Products (P) Ltd. Vs. J.P. and Co., Mysore*, Mitter. J. speaking for the Court said:-

".....In order to come to the conclusion whether one mark is deceptively similar to another the broad and essential features of the two are to be considered. They should not be placed side by side to find out if there are any differences in the design and if so, whether they are of such character as to prevent one design from being mistaken for the other. It would be enough if the impugned mark bears such an overall similarity to the registered mark as would be likely to mislead a person usually dealing with one to accept the other if offered to him.....and it would be of no use to note on how many points there was similarity and in how many others there was absence of it".

(9) THIS-COURT had occasion to deal with this subject in *M/s. Atlas Cycle Industries Ltd. v. Hind Cycles Limited*: ILR (1973) Del 393. The Bench observed that if the mark of the defendant was not identical it had still to be seen whether that mark was deceptively similar in the sense that it was likely to deceive or cause confusion in relation to goods in respect of which the plaintiff got his mark registered. The two marks for that purpose may be compared but not by placing them side by side. but by asking oneself whether, "having due regard to relevant surrounding circumstances, the defendant's mark as used is similar to the plaintiff's mark as it would be remembered by person possessed of an average memory with its usual imperfections". For such determination the distinguishing or essential features of the two marks and not every detail of it along with the main idea underlying the two marks with regard to a purchaser of average intelligence and imperfect memory would be the relevant consideration.

(10) This being the law, the learned trial court was in error in placing the two marks side by side and comparing them in minute details to find out the similarities and dissimilarities between them and to base its decision on the difference in the respective designs and get-up of the two labels.

(11) It would further be seen that in terms of section 29 the mere use by the defendant of a mark which is identical with, or deceptively similar to, the registered trade mark would constitute an "infringement". The section does not require proof of any actual deceit by reason of the imitation-(see *J. and P. Coats Ltd. Vs. Gurcharan Singh and Brothers and Another*,). In an action for infringement, Therefore, the plaintiff has not to prove actual deception to succeed in his action.

(12) As stated earlier, in order to decide whether one mark is deceptively similar to another, only broad and essential features of the two are to be considered. In *Corn Products Refining Co. Vs. Shangrila Food Products Ltd.*, the Court held that the question whether the two marks were likely to give rise to confusion or not was a question of first impression and it is for the Court to decide that question. For deciding it, similarities between the two marks have to be considered as a whole. In *Kaviraj Pandit Durga Dutt Sharma v. Navaratna Pharmaceutical Laboratories* (supra) on page 990 of the report, the Court said:-

"It should, however, be borne in mind that the object of the enquiry in ultimate

analysis is whether the mark used by the defendant as a whole is deceptively similar to that of the registered mark of the plaintiff".

(13) In this context, apart from any other considerations, the basic idea sought to be conveyed by the registered trade mark also assumes great importance and in some cases may be the determining factor. In *James Chadwick and Bros. Ltd. Vs. The National Sewing Thread Co. Ltd.*, dealing with section 10 of the Trade Marks Act, 1940 and the expression "likely to deceive or cause confusion", it was observed:-

"WHAT is important is to find out what is the distinguishing or essential feature of the trade mark already registered & what is the main feature or the main idea underlying that trade mark, & if it is found that the trade mark whose registration is sought contains the same distinguishing or essential feature or conveys the same idea, then ordinarily the Registrar would be right if he came to the conclusion that the trade mark should not be registered".

(14) In this background, we proceed to examine the two labels and the evidence on record.

(15) "PANGHAT" in ordinary parlance means a place where water is drawn. The device of the label of the appellants is that of a lady in a moving pose carrying a pitcher on her head and immediately behind her is the picture of a well with a pulley and a rope as also an empty pitcher lying by the side of the well. Another lady is shown standing behind also by the side of the well. She also has a pitcher on her head. The device as a whole was intended to convey, and successfully conveys, the idea of "panghat" to an ordinary purchaser. This is further highlighted by the word "panghat" appearing in bold letters in the middle of the label.

(16) The appellants pleaded that their product had also come to be known in the market by the name of "GUJRIWALA GHEE". This averment in the context of their claim for infringement was relevant but only to the extent that it indicated the probability of deception having regard to the circumstances usually attending the distribution and sale of the product in question. The evidence in support of the plea, Therefore, has to be looked into from this angle.

(17) The appellants examined Public Witness 1, Public Witness 2, Public Witness 3, Public Witness 4, Public Witness 6, and Public Witness 7 to prove this contention. These witnesses did state that the appellants' ghee was asked for by rural purchasers by the name of "GUJRIWALA GHEE" but all these witnesses are stockists of the appellants under their control and obligation. Besides, these witnesses are members of the trade itself. They have not said and could not be heard to say that they themselves were confused or deceived by the alleged similarity of the two labels. Neither any purchaser like the one mentioned by them nor any other independent evidence, to satisfactorily prove the deceptive similarity of the two labels, was produced by the appellants to corroborate the statement of these witnesses. On the contrary, these witnesses admitted in

cross-examination that in their records the product in question was described as "PANGHAT" ghee. They also admitted that even on the signboards displayed at their shops for promoting the sale of this product, it was shown as "panghat" and the mention of "GUJRI-WALA GHEE", did not at all appear. In these circumstances the oral statements of these witnesses, to our mind, are not sufficient to prove that the appellants' product had also come to be known as "GUJRIWALA GHEE". The inevitable conclusion, therefore, is that goods manufactured by the appellants in the instant case were not proved to be known to the public by any name other than the registered trade mark "PANGHAT".

(18) The question for determination, in these circumstances, has to be answered by the Court in this background, unaided by outside evidence after a comparison of the two labels as wholes, not by placing them side by side but by asking itself whether having regard to the surrounding circumstances, the respondents' mark is similar to that of the appellants' registered mark "Panghal" as it would be remembered by persons possessed of average memory with all its usual imperfections.

(19) Visually, the label of the respondents does not convey the idea of "panghat". The most that can be said about this label is that it shows a lady in a moving pose with a pitcher on her head and another under her arm against a village background but there is no well or water or river or anything of that sort suggesting that she is either moving away from or nearing a "panghat". The pitcher on the head of the lady on the contrary is shown to be overflowing with something white, intended either to be milk or butter or something else but not water. Unlike the word "PANGHAT" appearing in bold letters in the middle of the label of the appellants, on the left hand corner of the respondents' label appears in bold letters the word "GOPI".

(20) To determine whether this mark constitutes infringement of the registered trade mark of the appellants, the resemblance between the two marks and question of likely deception must be considered with reference as much to the ear as to the eye. Ocular test alone will not suffice to determine the question because the registered trade mark of the appellants is not only the depiction of "panghat" but also the word "panghat" and the product is associated with this name in the mind of the public and, for reasons already stated, is not proved to have acquired any other name.

(21) It is contended on behalf of the appellants that the lady in a moving pose with a pitcher is the essential feature of their trade mark and as this feature is the common denominator of their label and that of the respondents, it was a clear case of "infringement". We are unable to agree, firstly, because the product of the appellants is associated in the mind of the public not with the lady but with "panghat" and, secondly, because the lady is not the main feature of the appellants' trade mark. The lady in the appellants' trade mark is merely descriptive of the main theme of the mark, namely, the "panghat". The main

idea of the mark is neither the lady nor its pose but the "panghat", the central theme of the depiction as a whole. This is what was intended by the appellants at the time of registration and that is what was registered. The figure of a lady, it would further be seen, is common to the trade and is intended to evoke mass appeal. The mere coincidence that the two labels in this case bore one common descriptive mark while conveying different ideas and concepts taken along with the fact that even the common mark differs in its broad details will not be sufficient to constitute "infringement". In Kerly's Law of Trade marks and Trade Names, Ninth Edition, in Article 846 (on page 462) it is stated:

"THE trade mark is the whole thing-the picture on each has to be considered. There may be differences in the parts of each mark, but it is important to consider the mode in which the parts are put together and to judge whether the dissimilarity of the part or parts is enough to make the wholes dissimilar".

(22) The lady placed in the setting of the respondents' label in no way suggests a "panghat". Further, in the background that the appellants' product has not come to be associated in public mind with any name other than its registered trade name "PANGHAT" we find it hard to believe that a purchaser desiring to purchase in the market "PANGHAT" ghee by name is likely to be deceived in accepting "GOPI" ghee merely because the picture of a lady appears on the label, of the latter's container. If he accepts "GOPI" ghee in spite of being told that it is "GOPI" merely because the picture of a lady appears on its label, it would be the case of an idiot or a fool and not a man of average intelligence. Possibility of deception of such person will not justify the court to come to the conclusion that the use of the figure of a lady in the respondents' label constituted infringement of the registered trade mark of the appellants-(*scc J. and P. Coats Ltd. Vs. Gurcharan Singh and Brothers and Another*,).

(23) In our opinion, there is no phonetic or auditory resemblance between the two marks. The ideas of the two marks also differ radically from each other and they do not resemble even visually when looked at as a whole. The colour scheme and the background of the two marks is also conspicuously dissimilar.

(24) For all these reasons, we are of the opinion that the respondents' label does not constitute infringement of the appellants registered trade mark.

(25) In the plaint, we find that relief was also based on the plea of "passing off" but this aspect has not been urged before us in appeal, and rightly, in view of the evidence that actually came on record which we have dealt with above.

(26) For reasons aforesaid, we find no merit in this appeal and same is dismissed with costs. Counsel fee Rs. 250.00.