

(2009) 04 DEL CK 0089

In the Delhi High Court

Case No : IA No's. 7344 and 9687 of 2007 in Suit No. 1192 of 1997 and IA No. 9373 of 2008 in C.S.OS No. 382 of 2008

Gandhi Scientific Company

APPELLANT

Vs

Mr. Gulshan Kumar
 Mr. Gulshan Kumar Vs Gandhi Scientific Company

RESPONDENT

Date of Decision : 13-04-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 4
Trade Marks Act, 1999 — Section 134, 135, 27(2)

Citation : (2009) 40 PTC 22

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : S.K. Bansal, in IA Nos. 7344 and 9687/2007 in Suit No. 1192/1997 and Mohan Vidhani, Rahul Vidhani and Md. Sazid Rayeen, in IA No. 9373/2008 in C.S.[OS] No. 382/200, for the Appellant; Mohan Vidhani, Rahul Vidhani and Md. Sazid Rayeen, in IA Nos. 7344 and 9687/2007 in Suit No. 1192/1997 and S.K. Bansal in IA No. 9373/2008 in C.S.[OS] No. 382/2008, for the Respondent

Final Decision : Allowed

Judgement

Manmohan Singh, J.—By this common order, I shall dispose of the aforesaid pending applications in the two cross-suits filed by the parties against each other. C.S.[OS] No. 1192/1997 has been filed by M/s. Gandhi Scientific Company [hereinafter referred to as "plaintiff"] against Shri Gulshan Kumar [hereinafter referred to as "Defendant"] for permanent injunction, infringement of copyright, passing off and damages.

2. I need not discuss most of the facts as both the parties have admitted in their respective pleadings that the trademark and copyright is identical with each other except that the parties are claiming prior user of the trademark "DIAMOND" and copyright in question against each other and seeking interim injunction against each other. To establish the claim of prior user, various allegations and counter-allegations are made on the basis of forged and

fabricated documents.

3. It is not disputed between the parties that their applications for registration of the trademarks are under litigation by filing of notice of opposition in the Trade Marks registry, which are being proceeded further as per rules.

4. The main thrust of the plaintiff in the present suit i.e. CS[OS] No. 1192/2007 is that in the year 1995, plaintiff started manufacturing and marketing pumps and pump spare parts specifically including mechanical seals used in pumps, automobiles and industry.

5. It is further contended by Gandhi/plaintiff in the plaint that on 23.04.1995 Gandhi/plaintiff honestly and bonafidely adopted the trademark "DIAMOND" label in relation to the said goods. plaintiff's two applications bearing Nos. 836281 filed on 12.01.1998 and 1365378 filed on 20.06.2005 are pending for registration. The first application was filed by the plaintiff in relation to the part of the art work claimed by the plaintiff. In para-9 of the plaint, the plaintiff has given its annual turnover from the year 1997-98 till 2006-07.

6. In view of the facts stated in the plaint, the plaintiff has claimed the ownership of the trademark as well as copyright in question. It is contended by the plaintiff that plaintiff became aware of the impugned adoption and use of the trademark by the Defendant on 04.01.2007, when the plaintiff received the notice of opposition in Form TM-5 against its application bearing No. 1365378. On the receipt of the said notice of opposition, it appears to the plaintiff that the Defendant has claimed the user of the said mark since July, 1990. On enquiry, it was revealed to the plaintiff that the Defendant has only adopted the trademark in question in December 2006 and started commercially using the same. It is further stated that in April 2007 the plaintiff also noticed the Defendant's application appeared in the Trade Mark Journal for registration of the identical label mark which is duly opposed by the plaintiff.

7. Along with the suit, the plaintiff filed the interim application being IA No. 7344/2007, wherein an ex parte ad interim injunction order was issued against the Defendant restraining him from using the trademark/label "DIAMOND".

8. Thereafter the Defendant filed an application under Order 39 Rule 4 CPC being IA No. 9687/2007 for vacation of the ex parte order dated 06.07.2007 on the ground of prior user of the trademark/label "DIAMOND". Issues in this suit were framed on 19.02.2008 and the matter was sent to the Joint Registrar for recording the evidence. In another application being IA No. 10145/2008, which was decided by this Court on 26.08.2008, it was ordered that the file of CS [OS] No. 1191/2007 titled "M/s. Gandhi Scientific Company v. Shri Anil Jain and Anr." be summoned for perusal of this Court as the original documents relied upon by the plaintiff in the present case have been filed in the said suit.

9. During the pendency of this suit, Defendant has filed another suit u/s 27[2] read with Sections 134 and 135 of the Trade Marks Act for passing off etc.

against the plaintiff before the District Judge, Delhi on 07.09.2007. The said suit filed by the Defendant bearing CS[OS] No. 158/2007 has been transferred to this Court and a fresh suit number i.e. CS[OS] No. 382/2008 has been assigned by the Registry of this Court and the interim application has been given the number as IA No. 9373/2008.

10. In the said suit filed by the Defendant, the Defendant has claimed the ownership, proprietorship and prior adoption of the trademark/label "DIAMOND" since 12.07.1990.

11. The crux of the matter is that it is not in dispute between the parties that the trademark, copyright, area of use and description of goods are same and both the actions are of passing off actions. The only question left in the matter for consideration is that who is the prior user of the trademark/label in question. Both the parties were directed to file the original documents. Since, both the matters are between the same parties, some of the documents filed in two suits are also the same, therefore, this Court has to examine the documents filed by the parties in both the matters.

12. Counsel for the Defendant has raised some objections about the documents filed by the plaintiff beyond the time granted by the Court. It is matter of record that the time for filing the original document was further extended by order dated 26.8.2008 with the consent of the Defendant. Therefore, the documents filed till that date can be considered by the court. In the suit filed by the plaintiff, i.e. C.S. [OS] No. 1192/2007, the evidence is already under progress where the cross-examination of PW-1 is continuing and the matter is listed before the Joint Registrar for further cross-examination on 22.07.2009 at 2:00 P.M.

13. The following are the pictorial representation of the product/label used by the parties:

plaintiff's Label (M/s Gandhi Scientific Company)

Defendant's Label (Mr. Gulshan Kumar M/s SJK Trading Company)

14. From the perusal of the product of the parties, it is clear that the trademarks as well as the copyrights in question are almost identical except the label used by the Defendant does not contain the name and address on the packing. It appears from the record, as per the documents filed by the Defendant, that the Defendant has never used his trade name i.e. M/s. S J K Trading Company prior to 2007 [although the Defendant is claiming to have used the trademark/label "DIAMOND" from 10.07.1990]. No statement of sale figures, sales tax returns, income tax returns and advertisement material or any other cogent evidence are available on record to show that the Defendant has used the trademark/label "DIAMOND" prior to the year 2007.

15. In order to establish the prior user, the Defendant has filed the photocopies as well as the original Bills/documents from the year 1990 onwards. It also appears from the bills/cash memos filed by the Defendant prior to March 2007

that it does not contain the sales tax number and telephone number of concerned firm, if any, maintained by the Defendant either individually or in his firms name.

16. During the course of the arguments, the explanation has been given by the learned Counsel for the Defendant that the Defendant had a very small work and he did not come within the range of income tax and sales tax, therefore, it was not necessary for him to obtain the sales tax number or to file the income tax returns as per law. The explanation regarding the non-mentioning of the telephone number on the bills from the year 1990 till March, 2007 is that it is not compulsory for any citizen to maintain a telephone and the example of Film Actor, Amir Khan, was given by the learned Counsel for the Defendant that he does not have any telephone number as of today. I do not find the arguments addressed by the Learned Counsel for Defendant convincing and within the parameters of legal submissions rather they are casual in nature, which do not substantiate the case of the Defendant.

17. As regards the statement of sale figure is concerned, learned Counsel for the Defendant has assigned the reason that since the bills have been filed on record showing the sale of the product by the Defendant, therefore, the said documents are sufficient and it is not necessary to give separate sale figures of the product of the defendant.

18. Learned Counsel for the Defendant, in order to substantiate the claim of the defendant, has referred to the few bills of the Printer i.e. M/s. Efficient Printing Works, K-442, Mangol Puri, Delhi-110083, as well as Printer of packaging material of the Defendant's product i.e. M/s. Pioneer Packaging Industries, J-1245, Mahindra Park, Delhi-110033. It has been argued that the said bills of the Printer as well as Printer of the packaging material are from the year 1991, who are the third parties and not related to the present case. They have given the original bills for the job works done by them on behalf of the Defendant and not only that the Defendant has also filed three affidavits from the trade to establish his user claim from the year 1990. The aforesaid documents are sufficient to prove earlier user claimed by the Defendant from 10.07.1990.

19. I have also heard the learned Counsel for the plaintiff in this regard at length. He has raised various objections to the documents filed by the Defendant. This Court has gone through the documents filed by the Defendant very carefully and has come to the conclusion that most of the documents filed by the Defendant, particularly prior to the year 2007 are, prima facie, not genuine and are manipulated on the face of them and in fact, it is a clear case of *res ipsa loquitur* where the things speak for themselves.

20. One of the glaring example of manipulation are the documents relating to Bills in item No. 5 at page Nos. 49 and 68 filed with the list of documents dated 5th September, 2007 in CS (OS) 382/2008. The said two bills filed by the Defendants are scanned herein below for the sake of convenience and

comparison:

Bill No. 210 issued by Gulshan

Printer's Bill

21. It appears from the said two bills, i.e. one issued by the Defendant under his firm's name, M/s. S J K Trading Company, and another issued by the Printer, M/s. Efficient Printing Works in order to prove the printing work of the defendant's products bearing the trademark "DIAMOND", are not genuine and have been manufactured and managed by the Defendant. The reasons for my abovesaid observation can be enunciated as follows:

a] Formatting of the said two bills appears to be similar. In both the bills there is a note at the bottom of the said bills to the effect that "Goods once sold not be taken back. All Disputed Subject to Delhi jurisdiction only. E.& O,E." The same language of the note has been mentioned in both the bills. It is pertinent to mention here that whatever grammatical mistakes appeared in the bill of the defendant, the same grammatical errors have been appearing in the bills of the Printer, M/s. Efficient Printing Works. The example of the word "Disputed" on both the bills is the instance that the bills have been printed from the same machine/press. There would have been no occasion to write the word "disputed" instead of the word "dispute". The font size, lettering, arrangement and formatting of the two bills are virtually identical. The margin of the boxes and the details of the particular items are also the same. It is inconceivable that such an identical mistake continued to exist for 8 years in the bills raised by two different parties unless those are printed in the same press. Moreover, the Printer's bill also does not contain the sales tax number and telephone numbers. The other documents of similar nature are available and have been filed by the defendant.

b] It is also pertinent to mention here the packager bill issued by M/s. Pioneer Packaging Industries also does not contain the sales tax number and the telephone number. It does not seem convincing that all the parties be it Defendant, his printer and defendant, his packager do not have sales tax numbers and telephone numbers.

22. Further, the following are the few more examples whereby this Court has come to above-mentioned conclusion that the documents apparently are fabricated:

a) Along with the list of documents dated 5th September, 2007 in CS (OS) 382/2008 , the Defendant has filed the photocopies of the Bill No. 002 dated 10.07.1990 issued to M/s. Surindra Electrical, Begum Pur, Delhi. The said bill is for Rs. 3800/-. At the same time, the Defendant has also filed a carbon copy of the Bill No. 003 for the same date and having the same total bill amount issued to the same party. The said two bills are also identical in all respect except the bill numbers are different which seems impracticable.

23. The explanation to this given by the learned Counsel for the Defendant is

that the Defendant has filed both the bills bearing Nos. 002 and 003 as original documents before this Court. Learned Counsel for the Defendant has tried to demonstrate that two bills for the same date can be issued to a party on the same date for the same amount who is purchasing the goods from the defendant. The justification given by the learned Counsel for the Defendant cannot be accepted for the simple reason that it is not question of issuing two bills to the same party. Rather, the suspicion can be conveniently raised on the genuineness of the bills as there is no plausible reason as to why any party will sell the same quantity of items, itemised in the same manner of same amount on the same date and seems to be a carbon copy of each other.

24. Lastly, the falsehood of the Defendant documents is evident on the face of the record from the fact that when the application for registration of trademark was filed on 15.03.2005, it was filed by Mr. Gulshan Kumar and not in the name of the firm, M/s. S J K Trading Company. If the firm was in existence from the year 1990, the application ought to have been filed in the name of the firm and not in the individual name or otherwise it could have been filed as "Mr. Gulshan Kumar trading as M/s SJK Trading Company". The said fact is relevant as the user is claimed in the said trade mark application and one has to declare the same before the relevant authority.

25. From the above discussion, it can be said that there is certain doubt about the existence of the Defendant's firm prior to the year 2007. The said cloud of doubt is proved from seeing the documents file by the plaintiff containing the statement of Dealers of Defendants before Department of Trade and Taxes, Delhi wherein the Defendant himself has made the statement under his signatures. Some of the statements so made by the Defendant in the said "Statement of Dealer" are as follows:

7. That business commenced w.e.f. 19.01.2007. 9. A] Last Purchase Bill/Tax invoice No. R/050 dated 31.05.2007. 9. B] Last Sale Bill/Tax Invoice No. 007 dated 12.05.2007. 11. The approx. Value of stock as on 10.9.2007 is Rs. 34000/-.

12. That the firm has one employee and their total salary is Rs. 2800/-.

26. The said "Statement of Dealer" has been signed by the Defendant himself on 10.07.2007. It appears from the said "Statement of Dealer" filed before the Department of Trade and Taxes that there was no business carried out by the Defendant prior to the year 2007. The other documents are also questionable.

27. It is not necessary for this Court to deal with each and every document filed by the Defendant. During the course of the arguments, when these facts were pointed out to the learned Counsel for the Defendant, he tried to give several casual justifications vis-?-vis that these documents are genuine documents, formatting of the bills and details are not the same and the mentioning of the details of telephone and sales tax numbers on the bills are not necessary and mandatory under the law.

28. Learned Counsel for the defendant states that the documents referred above cannot be examined and looked into at this stage as the veracity of the documents can only be considered after the trial. I do not agree with the statement of the learned Counsel for the defendant. No doubt, in case the genuineness and the authenticity of the documents are doubtful, the same can be considered at the time of trial but in the present case, the documents filed by the defendants on the face of it are false and fabricated and I do not think that any trial is required in view of the reason given in paras 20 to 26 of my order. Therefore, the contention of the defendant is rejected.

29. Coming to the law relating to the subject that a party who is seeking the discretionary relief has to approach the court with clean hands and is required to disclose all the material facts, which may one way or the other affect the decision, otherwise, the party is not entitled for any discretionary relief, in the case of S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, it is held that:

In this case Jagannath had obtained preliminary decree for partition by suppressing and not disclosing all the material facts and by misrepresenting the facts obtained a preliminary decree of partition. An application for final decree was opposed on the ground that the preliminary decree was obtained by playing fraud upon the Court. The trial Court had dismissed the application but High Court reversed the findings of the trial Court. The Apex Court in appeal set aside the judgment of the High Court and restored that of the trial Court. The Apex Court held as under [para 8] : A litigant, who approaches the Court, is bound to produce all documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side, then he would be guilty of playing fraud on the Court as well as on the opposite party.

30. In the present case also, no doubt, the Defendant has tried to gain advantage by filing the ingenuine documents, therefore, he is guilty of fraud. The overt act of fraud vitiates all the actions and the party conducting the same is not worthy of any benevolence or discretionary relief from the court. In the case of A. Anuradha v. Canara Bank 2006 ALT 4 581 the Division Bench of the Andhra Pradesh High Court has held:

In this connection, it is apposite to observe that Satya [truth] and Ahinsa [nonviolence] are the two basic values of life, which have been cherished for centuries in this land of Mahavir and Mahatma Gandhi. People from different parties of the world come here to learn these fundamental principles of life. However, post-independence era and particularly the last two decades have witnessed sharp decline in these two basic values of life. Materialism has overshadowed the old ethos and quest for personal gain is so immense that people do not have any regard for the "truth". TRUTH was the hallmark of the justice delivery system which operated in the country till the establishment of the court system under British rule. The people used to tell truth and truth only without being influenced by its consequences. In the present day judicial system the

truth is perhaps the biggest casualty. Unscrupulous litigants like the petitioners leave no stone unturned to mislead the quasi-judicial and judicial authorities and the courts for material gains. The entire system has become victim of such persons. In order to meet this challenge, the courts have evolved new rules, strategies and techniques. One such rule is that the court will not grant hearing to a person who does not approach it with clean hands. To put it differently, a person who touches the fountain of justice with the tainted hand or who makes an attempt to pollute the course of justice by making false or misleading statements or by suppressing facts must be shown the door at the threshold.

31. In the case of Satish Khosla Vs. M/s Eli Lilly Ranbaxy Ltd. and another, the Division Bench of this Court has held as under:

19. As held by the Supreme Court in T. Arivandandam Vs. T.V. Satyapal and Another, the pathology of litigative addiction ruins the poor of this country and the Bar has a role to cure this deleterious tendency of parties to launch frivolous and vexatious cases. "It may be a valuable contribution to the cause of justice if Counsel screen wholly fraudulent and frivolous litigation refusing to be beguiled by dubious clients. And remembering that an Advocate is an officer of justice he owes it to society not to collaborate in shady actions. The Bar Council of India, we hope will activate this obligation. We are constrained to make these observations and hope that the co-operation of the Bar will be readily forthcoming to the Bench for spending judicial time on worthwhile disputes and avoiding the distraction of sham litigation such as the one we are disposing of. Another moral of this unrighteous chain litigation is the gullible grant of ex parte orders tempts gamblers in litigation into easy Courts. A Judge who succumbs to ex parte pressure in unmerited cases helps devalue the judicial process.

32. Learned Counsel for the parties have cited large number of judgments in order to support their respective submissions. I feel that it is not necessary for this Court to discuss the said judgments as the law on the subject of prior user is well settled particularly in the case of Century Traders v. Roshan Lal Duggar and Ors. AIR 1978 Del 250 wherein it is held that the prior user of the mark is the main consideration for deciding the matter of passing off.

33. From the above discussion and findings arrived in the preceding paragraphs, I am of the considered view that no prima facie case is made out for grant of temporary injunction in favour of Defendants. Rather, the ingenuine documents filed by the Defendant vitiates the action and I do not think any trial in the matter is required in CS (OS) 382/2008, therefore, the claim of prior user made by the Defendant alongwith the interim application of the defendant being C.S. [OS] No. 382/2008 does not survive. The application of the Defendant filed under Order 39 Rules 1 and 2 CPC being IA No. 9373/2008 and the C.S.[OS] No. 382/2008 are dismissed with costs of Rs. 2,00,000/- to be deposited by the Defendant in the name of Registrar General of this Court within four weeks of receipt of this order, who will make it available for utilization of Juvenile Justice.

34. List the matter before court on 6th July, 2009 for compliance of the order of cost and personal appearance of Mr. Gulshan Kumar.

35. As regards, the C.S.[OS] No. 1192/2007 filed by the plaintiff is concerned, the documents filed by the plaintiff have also been challenged by the counsel for the Defendant that there is no cogent evidence by the plaintiff to prove the user claimed by the plaintiff from the year 1995.

36. In the present case, the evidence is under progress and the truth is likely to come out very shortly as the witness of the plaintiff is already under cross-examination. Even if the statement of the Defendant is considered, the fact of the matter remains that the plaintiff has filed large number of documents i.e. official record in order to show that they were in business since the year 1995.

37. Even otherwise, if the user of the plaintiff is not accepted from the year 1995, still it is a matter of record on the basis of Govt. documents that the plaintiff has filed the application for registration of the trademark and the part of the label before the Trade Marks registry on 12.01.1999. Some of the original documents have also been filed in support of the user claimed by the plaintiff.

38. Even if the user of the plaintiff is not considered prior to January 1999, still the plaintiff is the prior user of the trademark/label in question. In case the statement made by the plaintiff in the plaint about the user of the mark since the year 1994 is not proved in trial, the plaintiff will also have to face the same consequence as that of the Defendant as decided, but at this stage since there is sufficient material placed by the plaintiff on record about the user of the trademark/label since the year 1999, the interim injunction, which is granted on 06.07.2007, is made absolute till the disposal of the present suit and IA 7344/2007 is allowed.

39. The application filed by the Defendant being IA No. 9687/2007 (Under Order 39 Rule 4) is dismissed with a cost of Rs. 25,000/-, to be deposited by the Defendant in the name of Registrar General of this Court within four weeks of receipt of this order, who will make it available for utilization of Juvenile Justice. C.S. [OS] No. 1192/2007

40. List before the Joint Registrar for further cross-examination on 22.07.2009 at 2:00 P.M., the date already fixed.