
(2002) 01 BOM CK 0081

In the Bombay High Court

Case No : Appeal Order No. 843 of 2001, Civil Suit No. 4 of 2001

Godrej Agrovat Ltd.

APPELLANT

Vs

Rohit Agrovat Pvt. Ltd. and Another

RESPONDENT

Date of Decision : 23-01-2002

Acts Referred:

Citation : (2002) 25 PTC 573

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Advocate : V.V. Tulzapurkar, instructed by Avesh I. Kayser, for the Appellant;
S.D. Dharmadhikari, for the Respondent

Judgement

D.Y. Chandrachud, J.

P.C.:

1. Admit. Respondents waive service. With the consent of the learned Counsel taken up for hearing and final disposal.

2. The dispute in the present case arises out of the use of the mark "Godrej Milk More" by the Appellants on their cattle feed products. The First Respondent, it is common ground, is also carrying on a similar line of business. The Appellants have commenced the use of the mark since 1997 and the details of their sales between 1997 and 2001 which were furnished before the Trial Court are as follows :

GODREJ AGROVET LIMITED, MIRAJ

Details of Sales of Milk More Pellet

Sr.No. Year Sale in MT Rs. in lacs

1. 1997-98 275 19.52

2. 1998-99 1267 89.95

3. 1999-00 1786 126.80

4. 2000-01 2271 161.38

The Appellants admittedly have the prior user of the mark. On 10th September 1998, the Appellants have filed an application before the Registrar of Trade Marks for the registration of the trade mark "Milk More". The Respondents commenced the use of the same mark "Milk More" on their products of cattle feed, upon which on 30th November 2000, a "cease and desist" notice was issued by the Appellants to the Respondents. A reply to the aforesaid notice was furnished by the Respondents on 21st December 2000 and it is the case of the Appellants that thereupon the Respondents ceased to use the mark "Milk More". A suit was instituted by the Appellants before the District Court, Sangli on 15th May 2001 on the basis of an action for passing off, claiming that a few days prior to the institution of the suit, the Respondents had commenced the marketing and sale of their product this time under the mark "Milk Much More". The Appellants claim that they have an established market for their product which has a substantial turn over and that they have incurred a considerable amount of expenditure in marketing the sales of their product. The case of the Appellants is that the mark which has been utilised by the Respondents is deceptively similar to that of the Appellants and is liable to cause confusion and deception amongst the members of the public.

3. In the suit that was instituted before the District Court, an application for interim relief was made which came to be dismissed by the impugned order dated 19th May 2001. The learned Trial Judge has adverted to the contention of the Appellants that it is only after the Appellants issued a notice dated 30th November 2000 to the Respondents on the earlier occasion that the Respondents stopped selling under the trade name "Milk More". The contention of the Respondents, however, which weighed with the District Judge in declining relief is that the products of the Respondents are being sold under the mark "Krishna Milk Much More", whereas the Appellants use the mark "Godrej Milk More". In the circumstances, it was sought to be urged that there is a difference between the trade mark which is used by the Appellants and the trade mark which is used by the Respondents. The learned Trial Judge was of the view that there was a great difference between the two trade marks. Having said this, the learned Judge in paragraph 15 of the order, made the following observations:

"It may, however, be said that in order to have a fair and healthy practice in the trade the defendants may use a different trade name not similar to MILK MORE or MILK MUCH MORE. They can use a trade name such as KRISHNA MILK RATION PELLET or KRISHNA CATTLE FEED etc. having no similarity with the words MILK MORE."

The application for the grant of an injunction was thus dismissed.

4. I have heard the learned Counsel appearing on behalf of the parties.

5. In an action for passing off, the question as to whether the Plaintiff is entitled to relief, must depend upon whether the use of a similar mark by the Defendant which is complained of has caused or is likely to cause confusion and deception amongst the members of the public. The Defendant is not entitled to use a mark which is deceptively similar to the mark of the Plaintiff for to do so would be to encroach upon the goodwill and reputation which attaches to the mark of the Plaintiff.

6. In the present case, there is no dispute about the fact that the use by the Plaintiffs is a prior user. The Plaintiffs have furnished before the Trial Court figures of their sales and turn over, and of the advertising expenditure which has been incurred by them. Significantly, no sales figures whatsoever or any data was forthcoming on the part of the Defendants, who are the Respondents herein. The factual background of the matter is also significant in the present case because it has a bearing on the prior conduct of the Respondents. The Respondent initially started marketing their products under an identical mark as that of the Plaintiffs viz., "Milk More". It is only after the Plaintiffs issued a notice dated 30th November 2000 that the Defendants discontinued the use of the mark. Thereafter, the Defendants have commenced marketing and sales by using and adopting the mark "Milk Much More". There can be no doubt that the two marks are phonetically similar. The mark "Milk Much More" is so close to the mark of the Plaintiffs that a purchaser is likely to confuse the mark of the Defendant for the mark of the Plaintiffs. It may be that the Plaintiffs who market their products belong to the Godrej Group of Companies and, therefore, associated with the mark as the utilisation of the Company's name Godrej however, that cannot detract from the phonetical similarity between the mark of the Defendants and the mark of the plaintiff. Following the recent judgment of the Supreme Court in Cadila Health Care Ltd. Vs. Cadila Pharmaceuticals Ltd., , it is now well settled that the Court trying an action for passing off and while considering the application for interim relief shall not regard the alleged dissimilarities between the two marks as a ground for denying relief but, must consider, over all, the similarities and the impression which is created in the mind of the ordinary purchaser. Regard must also be had to the fact that purchasers of cattle feed do not necessarily belong to the educated and literate strata of society.

7. Having regard to the aforesaid facts, I am of the view that the Appellants, who are the original Plaintiffs, made out more than a prima facie case for the grant of interim relief. The balance of convenience, in a case such as the present, clearly rests with the Appellants. The Appellants have a substantial market for their product, based on a considerable outlay and effort that has gone into the acquisition of goodwill and reputation. Significantly, the learned Trial Judge after having held against the Appellants observed that in order to have a fair and healthy practice in the trade, the defendants may use a different trade name not similar to MILK MORE or MILK MUCH MORE. The observations of the learned District Judge in paragraph 15 of the order besides lying beyond the compass of the jurisdiction of the Trial Court in an action for passing off, clearly reflects that

there is in fact, a distinct similarity between the two marks.

8. In the circumstances, this Appeal from Order is allowed. The Application at Exh. 5 filed by the Appellants before the Trial Court is accordingly allowed. The Appellants would be entitled to an injunction in terms of prayer clauses (a) and (b) of the application which are as follows :

"(a) That pending the hearing and final disposal of the suit the Defendants by themselves, their servants and agents or otherwise howsoever be restrained by an order of injunction of this Hon"ble Court from in any manner using in relation to any cattle feeds the impugned trade mark or the trade mark MILK MORE/MILK MUCH MORE on the containers so as to pass off the Defendants goods as that of the Plaintiffs.

(b) That pending the hearing and final disposal of the suit the Defendants by themselves, their servants and agents or otherwise howsoever be restrained by an order of injunction of this Hon"ble Court from in any manner using in relation to any cattle feeds the impugned trade mark MILK MORE so as to pass off the goods of the Defendants as that of the Plaintiffs.

9. The hearing of the suit before the Trial Court is expedited. The Trial Court is requested to dispose of the suit by the end of the year 2002.

Parties to act on a copy of this order duly authenticated by the Sheristedar/P.S. of the Court.