

(2003) 12 IPAB CK 0002

In the Intellectual Property Appellate Board

Case No : T.A. No. 28/2003/TM/CH (TMA No. 7/2000)

Kalyanapuri Flour Mills (P) Ltd.

APPELLANT

Vs

Tirupati Roller Flour Mills (P) Ltd.

RESPONDENT

Date of Decision : 31-12-2003

Acts Referred:

Citation : (2004) 28 PTC 322 (IPAB)

Hon'ble Judges : S. Jagadeesan, J; T.R. Subramanian, Technical Member

Bench : Division Bench

Final Decision : Allowed

Judgement

S. Jagadeesan, J

1. This appeal is by the appellant against the order of the Assistant Registrar of Trade Marks rejecting their objections for the registration

of the respondent's trade mark 'APPU' brand and the device of an Elephant in respect of wheat products viz., Maida, Rawa, Sooji,

Atta, in class 30.

2. The respondents filed an application in Form TM-1 on 1st April, 1987 under No. 470144 for registration of a trade mark APPU brand

and device of an Elephant in respect of wheat products. The mark was ordered to be advertised before acceptance in the Trade Marks

Journal dated 16.11.1992. The appellant filed their objections on 12.1.1993 stating that they are the proprietors of the trade mark APPU

brand in respect of Maida, Sooji, and Atta, in class 30 and have applied for registration of their trade mark on 16.1.1992 and the same is

pending with the Registry and that they have been continuously and extensively using the aforesaid APPU brand ever since January,

1983 and the said trade mark has become well known and much reputation and valuable goodwill have accrued. The trade mark sought

to be registered by the respondent is identical with and/or deceptively similar to the appellant's trade mark and as such the same is

prohibited under Sec. 12(2) of the Act. Further, the appellant being the established user, the registration of the respondent's mark is

prohibited under the provisions of Sec. 11(a) and 11(e). The respondents also

filed counter denying the averments made by the appellant in the notice of opposition. The Assistant Registrar of Trade Marks, under

the impugned order over-ruled the objections of the appellant and directed the acceptance of the trade mark of the respondent. The

appeal is against the said impugned order of the Assistant Registrar. We have heard Ms. Gladys Daniel on behalf of the appellant and

Ms. Usha on behalf of the respondent.

3. The main contention of the learned counsel for the appellant is that a mere look of both the trade marks would clearly give the picture

with regard to the identity of similarity for a naked eye. When that be so, the impugned order of the Assistant Registrar cannot be

sustained. Moreover, the Assistant Registrar is not correct in finding that APPU being the symbol of Asian Games has become a public

juris of general nature and consequently the appellant cannot raise any objection.

4. The learned counsel for the respondent fairly admitted that a sheer look of both the trade marks would make it clear that there is

similarity since both the marks are almost identical devices. But, however, in support of the reasoning given by the Assistant Registrar of

Trade Marks she contended that APPU having become a symbol of Asian Games, it cannot be said that the respondent has copied the

appellant's mark. Further, it was contended that the appellant has not led in any evidence that the use of the mark sought to be

registered had caused any confusion in the public with regard to the identity of the goods. In the absence of such evidence, the order of

the Assistant Registrar needs no interference.

5. We have considered the contentions of both the counsels. We have also perused the impugned order of the Assistant Registrar.

6. As already pointed out, admittedly there is no difference between the marks

used by the appellant as well as the respondent. Though the appellant filed an application in 1992 for the registration of their trade mark APPU brand, their claim is that they are using the trade mark from 1983. The respondent filed their application for registration on 1st April, 1987, which is much later to that of the appellants and they have also claimed use from 17th January, 1986. As regards the use of the trade mark by the appellants since 1983, there is no controversy. The Assistant Registrar also did not discuss anything on this aspect, perhaps on the basis of Exhibits-A, the sales turnover filed by the appellants from the years 1982-83 for which there is no serious objection. Hence, there is no dispute with regard to the earlier use of the appellant in respect of the trade mark APPU with a device Elephant.

7. The main ground on which the Assistant Registrar over-ruled the objections of the appellant is that the appellants have not produced any evidence to show that the use of the applicant's mark resulted in confusion and deception in the minds of the purchasers and the other ground is that the respondents have adopted their mark keeping in view the symbol of Asian Games.

8. On a careful consideration of the contentions of the learned counsel on either side, we are of the view that the reasoning of the Assistant Registrar of Trade Marks cannot be sustained. When the trade mark used by both the parties are identical, the question of producing any evidence to substantiate confusion and deception in the minds of the purchasers is absolutely unnecessary.

9. Only where the trade marks are with some variations and one can be differentiated from the other however slight it may be, it is incumbent on the party who pleads confusion by the use of such mark to produce evidence. In this case, both the trade marks are identical and there is no variation or difference in any manner and this aspect has been virtually accepted by the learned counsel for the respondent also. In such circumstances, we do not think that there is any obligation on the part of the appellants to produce evidence to establish confusion in the minds of the purchasers. When both the marks are identical, and the rival goods are same, it goes without

saying that there would be confusion in the minds of the purchasers by the use of such marks by both the traders of the same goods.

10. So far as the other reasoning of the Assistant Registrar that the respondent adopted the brand APPU on the basis of the symbol of

the Asian Games, admittedly, Asian Games is much later than the adoption of the said trade mark by the appellant. The appellant is

using the trade mark since 1983, and they had established reputation in the trade in respect of their goods in the State of Andhra

Pradesh. The respondent being a trader in the same goods, cannot be permitted to adopt the same trade mark as that of the appellant

even in the State of Andhra Pradesh. Assuming that the respondent adopted the trade mark on the basis of the symbol of the Asian

Games even then it cannot be allowed as the appellants are the prior adopted and user of the trade mark.

11. For the reasons stated above, we are unable to sustain the order of the Assistant Registrar of Trade Marks and consequently, the

same is set aside and the appeal is allowed. There is no order for costs.