
(1997) 08 DEL CK 0023

In the Delhi High Court

Case No : I.A. No. 1136 of 1996 in Suit No. 234 of 1996

Madan Lal Arora

APPELLANT

Vs

Soni Udyog and another

RESPONDENT

Date of Decision : 20-08-1997

Acts Referred:

Citation : (1997) 5 AD 369 : (1997) 2 ARBLR 529 : (1997) 68 DLT 355 : (1997) 42 DRJ 651

Hon'ble Judges : D.K. Jain, J

Bench : Single Bench

Advocate : Sh. S.K. Bansal, for the Appellant; Sh. Bharat Inder Singh, for the Respondent

Judgement

D.K. Jain, J.—In an action for passing off and damages, the plaintiff, sole proprietor of M/s. Calcutta Wire Netting Industries, has filed this application under Order 39, Rules 1 and 2 read with Section 151 of the CPC seeking temporary injunction restraining the defendants, the servants, agents, representatives, dealers and all others acting for and on behalf of the defendants from manufacturing, selling, offering for sale, advertising or displaying directly or indirectly, dealing in Wire and Wire Nettings and other allied and cognate goods under the trade mark "LION BRAND" label with device of lion or any other trade mark identical with or deceptively similar to the plaintiff's trade mark, "TIGER BRAND" label with device of Tiger.

2. The plaintiff's case is that it is engaged in the business of manufacturing and marketing Wire and Wire Nettings, since the year 1964; it adopted the trade mark "TIGER BRAND" label with devise of Tiger for its product and has been continuously using the same since then; it has established extensive business in major parts of the country; has widely advertised the said trade mark through different media, and has spent a substantial sum of money on wide publicity of the said trade mark and the said trade mark enjoys solid and enduring reputation of the market. In the documents filed by the plaintiff, he has given the sale

figures of its concern for the years from 1989 to 1995 which run into crores of rupees. It is claimed that on account of long, continuous, extensive and exclusive user thereafter, the public at large associates the said trade mark to the aforementioned goods of the plaintiff. It is claimed that in addition to the common law rights; in order to acquire statutory rights for the said mark, the plaintiff has filed an application for the registration of the said trade mark in respect of Wire u. I Wire Nettings in Class 6 of the Fourth Schedule of the Trade and Merchandise Marks Act. 1958 (for short, the Act).

3. The plaintiff alleges that defendant No. 1, who also is manufacturing Wire and Wire Nettings has, in September, 1995, adopted the trade mark "LION BRAND" label with device of Lion in respect of the said product with a view to take advantage of the reputation of the plaintiff's product and to cause deception and confusion in the minds of the public and to pass off its spurious goods as that of the plaintiff, which act amounts to passing off goods by the defendants as of the plaintiff, and it cannot be permitted. Defendant No. 2 is the distributor for defendant No. 1's goods.

4. The application is resisted by defendant No. 1 mainly on the pleas that : defendant No. 1 had started manufacturing its product since January, 1990 and had applied for registration of the trade mark "LION" brand in the same year; trade mark of defendant No. 1 is not similar to the alleged trade mark of the plaintiff, it is neither identical nor deceptive with that of plaintiff's trade mark, both LION & TIGER are different names and have no common resemblance, there is no visual or phonetic similarity between the two marks and, Therefore, there is no room for any deception or confusion being created in the market.

5. I have heard Mr. S. K. Bansal, Advocate for the plaintiff and Mr. Bharat Inder Singh, Advocate for the defendants.

6. There is no gain saying that no person can have any right to represent his goods as the goods another. It is an actionable wrong for any person to pass off his goods as that of another's goods, which have acquired a reputation and goodwill in its trade mark and has proprietary right in it.

7. In the instant case, the plaintiff has placed on record various documents from where it appears that he has been continuous user of the trade mark "TIGER BRAND" at least from February, 1967. As noticed above, it has also placed on record the year wise break-up of its sales, which shows that its sales in the year 1992-93 have been to the tune of Rs. 3.18 crores and in 1993-94 Rs. 2.75 crores, which tends to indicate that the plaintiff has established a substantial market for its product of wire nettings. Although the plaintiff has not filed document in support of the contention that its concern has spent substantial amounts on publicizing its product, but the quantum of sales is a safe indicator of the fact that it has acquired good reputation/goodwill in the market, in the use of trade mark "TIGER BRAND". plaintiff's invoices and letterheads prominently display its "TIGER BRAND" trade mark.

8. However, Mr. Bharat Inder Singh, learned counsel for the defendants has vehemently contended that the plaintiff has not filed any document regarding user of the trade mark "TIGER BRAND"; there is distinction in the logo of defendant No. 1, and both the trade marks in question are visually and phonetically different and, Therefore, there is no scope for confusion among the consumers. In support he had placed reliance on Amar Singh Chawalwala Vs. Shree Wardhman Rice and General Mills, , Kellogg Company Vs. Pravin Kumar Bhadabhai and another, , Rupee Gains Tele-Times Private Ltd. Vs. Rupee Times, , and J and P Coats Ltd. Vs. Popular Thread Mills, . In my view all the cited cases are clearly distinguishable on facts. In these cases, the courts, on examining minutely the trade marks in question, their get up, the way the respective trade marks were displayed and the products involved, came to the conclusion that there was no intention on the part of the defendants to misrepresent their goods as the goods of the plaintiff.

9. It is true that the words "TIGER" and "LION" are not phonetically similar but the test to be applied is whether an unwary and innocent purchaser could be persuaded to purchase the goods of the defendants as those of the plaintiff. The wire nettings are mostly purchased by the carpenters, who are barely literate. Both the words, "LION" and "TIGER" are known and called in Hindi, Urdu and Punjabi and perhaps in other local dialects as "SHER". When a product with either "LION" or "TIGER"s picture is shown to a customer, with his normal memory, he is not expected to first ascertain whether another brand depicting picture of LION in a different manner is also available and then examine the two brands of goods by keeping them side by side. Taking into account the entire get of the labels, the essential features of the two labels appear to be same. This is also clear from the fact that even the wrong spelling of "Netting" as appearing in plaintiffs label has been copied by defendant No. 1 in its. label. To determine whether in the ordinary course of things a person with reasonable apprehension would be deceived or not, the label/trade mark has to be seen in its entirety and not its parts in isolation. In my view, although there might be some difference in precise details, "LION" in defendant's trade mark is not distinctive and may easily be mistaken for plaintiff's trade mark "TIGER" by an unwary customer, particularly when the similarity between the two marks also has in common the picture of "SHER" by which both the devices are known in the vernacular languages. Except a copy of the additional representation, wherein the user of "LION" brand is claimed from 1st April, 1990, no other document has been placed on record by defendant No. 1 in support of its claim that it has been marketing its goods under the "LION" brand from the year 1990. On the contrary, the plaintiff has placed on record sufficient material to show that it has been marketing its product under the "TIGER" from the year 1967. In any case, even according to defendant No. 1 itself, it started using the trade mark "LION" since 1990, i.e., much after plaintiff started using its "TIGER" brand. The sale figures disclosed by the plaintiff, prima facie, show that it has acquired a reputation/goodwill in the use of trade mark "TIGER" in respect of wire nettings.

10. For all these reasons, in my view, the plaintiff has made out a prima facie case for grant of ad interim injunction in, its favour. ON its own showing, defendant No. 1 has come into business only in the year 1990 and as such no irreparable injury is likely to be caused to it if temporary injunction, as prayed, is granted. The balance of convenience is also in favor of the plaintiff.

11. Consequently, I grant a temporary injunction restraining the defendants from manufacturing, selling or offering for sale or otherwise dealing in wire and wire netting under the trade mark "LION BRAND" with device of LION" till the disposal of the suit.

12. Any observation made herein will not affect the merits of the case.

The is stands disposed of.

14. I.A. allowed.