
(2014) 08 DEL CK 0351
In the Delhi High Court
Case No : CS(OS) 2385/2012

Mankind Pharma Ltd.

APPELLANT

Vs

Mankind Food & Beverage Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 13-08-2014

Acts Referred:

Citation : (2014) 08 DEL CK 0351

Hon'ble Judges : G.S. Sistani, J

Bench : Single Bench

Advocate : Miloy Dasgupta, Advocates for the Appellant

Judgement

G.S. Sistani, J.—Present suit has been filed by the plaintiff for permanent injunction restraining infringement of trademarks, delivery up and damages. Summons were issued in the suit on 08.08.2012. Defendants entered appearance on 18.10.2012. An ad interim injunction was granted in favour of plaintiff vide order dated 12.11.2013.

2. During the pendency of the suit, plaintiff filed an application under Order XXVI Rule 9 for appointment of a Local Commissioner as the defendants, despite the order of injunction, continued to sell impugned products with deceptively similar registered trade mark as that of the plaintiff. Vide order dated 24.01.2014 a Local Commissioner was appointed. After service of summons defendants entered appearance through counsel, however, despite opportunity having been granted, no written statement has been filed. None appeared for the defendants on 15.04.2014, 04.07.2014 and 11.07.2014, consequently defendants were proceeded ex parte vide order dated 11.07.2014.

3. Plaintiff has filed affidavit by way of evidence of DGM (Legal) and Company Secretary of plaintiff company, Mr. Sanjeev Kumar Singh (P.W. 1). Evidence of P.W. 1 has been exhibited as Ex. P.W. 1/A. Copy of the Board of Resolution along with the Memorandum of Association of the plaintiff company have been exhibited as Ex. PW 1/1 (Colly). P.W. 1 has deposed that the plaintiff is a

company duly incorporated under the Companies Act, 1956. Plaintiff is one of the largest and reputed manufacturer and merchant of a wide range of pharmaceutical, nutraceutical, veterinary and cosmetics preparations in India sold under its various well-known distinctive trademarks.

4. He has also deposed that in due course of time the plaintiff was incorporated as a Private Limited Company on July 3, 1991, with the trading style Mankind Pharma Private Limited under the provisions of the Companies Act, 1956 against which the Registrar of Companies, New Delhi, issued Certificate of Incorporation bearing corporate identification number (CIN) U74899DL1991PTC044843. Subsequently, the plaintiff converted itself into a Public Limited Company by passing a Special Resolution on July 14, 2005 and consequently obtained a Fresh Certificate of Incorporation from the Registrar of Companies as Mankind Pharma Limited by deleting the word "Private" from its name.

5. He has further deposed that the Plaintiff is one of the largest pharmaceutical companies in India, engaged in the business of manufacturing and trading of wide range of pharmaceuticals and medicinal preparations, cosmetics, food supplements, beverages and other products (hereinafter referred to as "said goods") in India as well as other countries under its well known and distinctive trade mark/house mark/brand name "MANKIND" since the last several years.

6. P.W. 1 has also deposed that the Plaintiff's trade name and trade mark consisting of the word "MANKIND" have got secondary meaning as the public identifies and associate the said name and trade mark exclusively with the Plaintiff irrespective of goods/services due to the long association of the public with the said trade name and trade mark on account of continuous, open, extensive and exclusive use thereof for more than 20 years, wide publicity thereof through print and electronic media and massive marketing and sales, promotional works of the goods under the trade name and the trade mark consisting of the word MANKIND at various places in India. Copies of sale invoices of the plaintiff evidencing extensive use of the mark MANKIND have been exhibited as Ex. PW 1/2 (Colly). Newspaper clippings showing the wide publicity of the Plaintiffs have been exhibited as Ex. PW 1/3 (Colly). A carton of the Plaintiff's drink ELECTROKIND has been exhibited as Ex. PW 1/4. Annual Sales figure of the Plaintiff's drink ELECTROKIND has been exhibited as Ex. PW 1/5.

7. Further, use of the said trade name and trade mark consisting of the word MANKIND in respect of any business by any third person would always give the impression in the mind of the public that the Plaintiffs have extended their business activities under the trade name and trade mark consisting of the word MANKIND.

8. He has also deposed that the plaintiff has large work forces engaged in manufacturing and marketing of plaintiff's said goods and various chemists, Carrying & Forwarding Agents (C & F agents), stockists are involved in selling

and/or marketing of the plaintiff's products under the trade name and trade mark consisting of the word MANKIND. A list of C & F Agents of the plaintiff has been exhibited as Ex. PW 1/6.

9. He has further deposed that apart from the common law right on account of open, continuous and prior use, the plaintiff has also got statutory protection of the trade mark MANKIND by virtue of registration under the Trade Marks Act, 1999. Some of the registrations are as hereunder:

Copies of registration certificates of the above-mentioned marks have been exhibited as Ex. PW 1/7.

10. P.W. 1, Mr. Sanjeev, has also deposed that in the last week of October 2011, it came to the plaintiff's notice that the defendant company was using the trade name and/or trade mark containing the word MANKIND in respect of packaged drinking water and then the plaintiff immediately issued a legal notice dated November 1, 2011 through its advocates whereby inter alia it called upon the defendant company to desist from using the trade name and/or trade mark consisting of the word MANKIND and also filed an opposition with the Trade Marks Registry, against the application of defendants for registration of the mark Mankind Food & Beverages Pvt. Ltd. Copy of the legal notice dated November 1, 2011 has been exhibited as Ex. PW 1/8. However no reply of the aforesaid legal notice was given by the defendants. Then M/s. Laxmi Narayan Taparia & Associates, practicing Company Secretary on behalf of the plaintiff's company issued another legal notice dated December 30, 2011 whereby they called upon the defendants to desist forthwith from using the company name Mankind Food & Beverages Pvt. Ltd. and to change the company name. Copy of the legal notice dated December 30, 2011 has been has been exhibited as Ex. PW 1/9.

11. He has further deposed that the defendant No. 2 sent an email dated January 19, 2012 to M/s. Laxmi Narayan Taparia & Associates showing its intentions to resolve the issue with the plaintiff. Thereafter negotiation talks proceeded with defendants but the defendants finally refused in June 2012 to desist from using the trade name and/or trade mark consisting of the word MANKIND. Copy of email dated January 19, 2012 sent by the defendants has been exhibited as Ex. PW 1/10.

12. He has also deposed that the Defendant's act of using the trade name and/or trade mark consisting of the word MANKIND in the course of trade has caused and will further cause confusion or deception among the public and the members of trade. The impugned trade name and/or trade mark consisting of the word MANKIND has been adopted and used by the Defendants with mala fide intentions to show some business association/connection with the Plaintiff and to mislead the public and the members of trade about their business activities and make illegal profits and as such the Defendant has played and is still playing fraud with the members of public and trade and will perpetuate the said fraud with the public at large unless the Defendants are restrained from using the

trade name and/or trade mark consisting of the word MANKIND.

13. Pursuant to order dated 24.01.2014, Local Commissioner visited the premises of the defendants on 20.02.2014. On checking the premises, 77 boxes containing 24 bottles each and 33 boxes containing 12 bottles each, making a total of 2244 bottles bearing impugned trademark "MANKIND", were found. The goods were sealed and released on Superdari. It was also informed to the Local Commissioner that the main manufacturing unit was located at Burdwan and it has a production capacity of 10,000 litres.

14. I have heard counsel for the plaintiff and carefully perused the documents which have been placed on record along with the affidavit by way of evidence which has been filed. Evidence of the plaintiff has gone unchallenged and un-rebutted. Copies of registration certificates of plaintiff's trademark "MANKIND" have been exhibited as Ex. PW 1/7. Copies of sale invoices, Newspaper clippings of the plaintiff's goods under the trademark MANKIND have been exhibited as Ex. PW 1/2 (Colly) and Ex. PW 1/3 (Colly), respectively. Annual Sales figure of the Plaintiff's drink ELECTROKIND has been exhibited as Ex. PW 1/5.

15. On the basis of the documents placed on record, the plaintiff has established that it is the owner of the trade mark/house mark/brand name "MANKIND" and the plaintiff has the exclusive right to use the same. Plaintiff has also established that the trademark and trade name consisting of the word "MANKIND" have got a secondary meaning as the public identify and associate the said name and trade mark exclusively with the Plaintiff. Plaintiff has further established that on account of continuous, open, extensive and exclusive use for many years, wide publicity through print and electronic media and massive marketing and sales promotional works of the goods under the trade name and the trade mark consisting of the word MANKIND, plaintiff has been able to built an unparallel reputation and goodwill with respect to its trademark MANKIND. Plaintiff has also established that the defendants by using the trademark or trade name consisting of the word MANKIND, which is identical to plaintiff's mark, in respect of packaged drinking water, are causing infringement of rights in the trademark of plaintiff.

16. In a very recent judgment delivered by another bench of this court, The Indian Hotels Company Ltd. v. Ashwajeet Garg and Ors. CS(OS) 394/2012, decided on 01.05.2014, following observations were made:

"23.

39. In Kaviraj Pandit Durga Dutt Sharma Vs. Navaratna Pharmaceutical Laboratories, , the Hon''ble Apex Court in the following paras held as under: "In an action for infringement, the Plaintiff must, no doubt, make out that the use of the Defendant's mark is likely to deceive, but where the similarity between the Plaintiffs and the Defendant's mark is so close either visually, phonetically or otherwise and the court reaches the conclusion that there is an imitation, no further evidence is required to establish that the Plaintiffs rights are violated.

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;..... When once the use by the Defendant of the mark which is claimed to infringe the Plaintiffs mark is shown to be "in the course of trade", the question whether there has been an infringement is to be decided by comparison of the two marks. Where the two marks are identical no further questions arise; for then the infringement is made out...."

17. In another case, Atlas Cycle Industries Ltd. Vs. Hind Cycles Limited, , it was observed as under:

"(21) The principles which emerge from the above decisions may be stated as follows:

"In an action for an alleged infringement of a registered trade mark, it has first to be seen whether the impugned mark of the defendant is identical with the registered mark of the plaintiff. If the mark is found to be identical, no further question arises, and it has to be held that there was infringement. If the mark of the defendant is not identical, it has to be seen whether the mark of the defendant is deceptively similar in the sense that it is likely to deceive or cause confusion in relation to goods in respect of which the plaintiff got his mark registered. For that purpose, the two marks have to be compared, "not by placing them side by side, but by asking itself whether having due regard to relevant surrounding circumstances, the defendant's mark as used is similar to the plaintiffs mark as it would be remembered by persons possessed of an average memory with its usual imperfections", and it has then to be determined whether the defendant's mark is likely to deceive or cause confusion. For such determination, the distinguishing or essential features (and not every detail) of the two marks and the main idea, if any, underlying the two marks which a purchaser of average intelligence and imperfect memory would retain in his mind after seeing the marks, have to be noticed. It has then to be seen whether they are broadly the same or there is an overall similarity or resemblance, and whether the resemblance or similarity is such that there is a reasonable probability of deception or confusion. In doing so, the approach has to be from the point of view of purchaser of average intelligence and imperfect memory or recollection, and not an ignorant, thoughtless and incautious purchaser....."

18. In the case of Laxmikant V. Patel Vs. Chetanbhat Shah and Another, , Apex court made following observation:

".....The law does not permit any one to carry on his business in such a way as would persuade the customers or clients in believing that his goods or services belonging to someone else are his or are associated therewith. It does not matter whether the latter person does so fraudulently or otherwise. The

reasons are two. Firstly, honesty and fair play are, and ought to be, the basic policies in the world of business. Secondly, when a person adopts or intends to adopt a name in connection with his business or services which already belongs to someone else it results in confusion and has propensity of diverting the customers and clients of someone else to himself and thereby resulting in injury."

19. In view of the above, the plaintiff is entitled to a decree of perpetual injunction against the defendants from dealing with the goods, in any manner, having infringing mark or trade name containing the word MANKIND and/or any other deceptively similar mark or trade name, in terms of prayer (i) of paragraph 28 of the plaint.

20. The plaintiff has also claimed damages on account of illegal activities of the defendants along with delivery up of the defendant's brochures, pamphlets, letter pads, signboards, blocks, dies, stamps, printing materials, advertisement materials etc. under the impugned trade mark/trade name of the plaintiff.

21. In Microsoft Corporation Vs. Deepak Raval, this Court observed that in our country the Courts are becoming sensitive to the growing menace of piracy and have started granting punitive damages even in cases where due to absence of Defendant, the exact figures of sale made by them under the infringing copyright and/or trademark, exact damages are not available. The justification given by the Court for award of compulsory damages was to make up for the loss suffered by the plaintiff and deter a wrong doer and like-minded from indulging in such unlawful activities.

22. In Larsen and Toubro Limited Vs. Chagan Bhai Patel, this Court has observed that it would be encouraging the violators of intellectual property, if the Defendants notwithstanding having not contested the suit are not burdened with punitive damages.

23. In case of Time Incorporated Vs. Lokesh Srivastava and Another, the court has recognized third type of damages as punitive damages apart from compensatory and nominal damages. The court has held that:

"The award of compensatory damages are aimed at deterring a wrong doer and the like minded from indulging in such unlawful activities."

"This Court has no hesitation in saying that the time has come when the Courts dealing actions infringement of trademark, copy rights, patents etc. should not only grant compensatory damages but award punitive damages also with a view to discourage and dishearten law breakers who indulge in violations with impunity out of lust for money so that they realize that in case they are caught, they would be liable not only to reimburse the aggrieved party but would be liable to pay punitive damages also, which may spell financial disaster for them."

24. For the reasons stated above, the plaintiff has made out a case for grant of decree as prayed in the plaint. Accordingly, the order dated 12.11.2013 is confirmed and the suit is decreed in favour of the plaintiff and against the

defendants. Plaintiff is also entitled to damages to the tune of Rs. 2.0 lacs.

25. Decree sheet be drawn up accordingly.