
(2014) 10 IPAB CK 0002

In the Intellectual Property Appellate Board

Case No : O.R.A./22/2007/TM/DEL

Matrumal Dhannalal Oil Mills

APPELLANT

Vs

Om Prakash

RESPONDENT

Date of Decision : 13-10-2014

Acts Referred:

Trade Marks Act, 1999 — Section 11, 47, 57

Citation : (2014) 10 IPAB CK 0002

Hon'ble Judges : K.N. Basha, J; Sanjeev Kumar Chaswal, Technical Member

Bench : Division Bench

Advocate : N.K. Anand, Arun Jha,, Sunil Mishra, Shivendra P. Singh

Final Decision : Dismissed

Judgement

K.N. Basha, J

1 . In this case, Mr. S.K. Bansal, learned counsel appearing for the applicants has submitted during the earlier proceedings that he has not received any instructions from his clients. It is seen that on two earlier occasions also, i.e. on 28/04/2014 and 04/08/2014, the learned counsel for the applicants submitted that there was no instructions from their clients. In view of such position, this Bench has directed the Registry of the Board to send notice directly to the party i.e. to the applicants. On earlier two occasions, the learned counsel for the respondents was ready for arguments. Today, we see that the Registry has served notice to the applicants on 22/09/2014 in respect of today's hearing. In spite of serving notice, neither the applicants nor their representative counsel is present today. Accordingly, we are constrained to proceed with the matter on merits.

2 . Mr. N.K. Anand, the learned counsel for the respondents is present today and he has submitted a note of written submission.

3 . We heard Mr. N.K. Anand and also perused the written submission put before the Bench by the learned counsel.

4 . We have also perused the application filed by the applicants seeking for relief to rectify/remove the impugned trade mark from the Register of Trade Marks. We have also perused the counter statement filed by the respondent along with respective documents enclosed as annexures.

5. The applicants have filed petition seeking for relief of cancellation of the impugned trade mark of the respondents SHRI RADHA KRISHNA along with device of RADH KRISHNA under No. 1229928 in class 31. The petitioner has claimed that they are the registered proprietors of the trade mark RADHA KRISHNA along with device of RADH KRISHNA LABEL under No. 130471 in class 29 in relation to mustard oil (edible) as on 09/08/1947. It is claimed that they are the prior and honest adopters and exclusive and continuous user of the trade mark in relation to the goods and enjoying tremendous goodwill in the said trade mark. It is further stated in the application that the impugned trade mark of the respondents i.e. SHRI RADHA KRISHNA with device o RADHA KRISHNA is identical with/deceptively similar to the trade mark of the petitioner i.e. RADHA KRISHNA with device of RADHA KRISHNA. The goods of th respondent i.e. oil cake is same and similar nature of goods of the petitioner i.e. edible oil, oil cake etc. Therefore, it is contented that the impugned trade mark in relation to the impugned goods would deceive and cause confusion among the public. Accordingly, the impugned trade mark may be barred by virtue of Section 11 of the Trade Marks Act, 1999 (hereinafter referred to as the Act). The applicants are also contented in respect of non-use of the trade mark for more than fifteen years by virtue of section 47 of the Act. Therefore, applicants seek relief of cancellation or rectification of the impugned trade mark SHRI RADHA KRISHNA with device of RADHA KRISHN under No. 1229928 in class 31.

6 . The applicants in respect of their claim has submitted various documents namely, copy of the trade mark/label of the petitioner; copy of the registered trade mark/renewal certificates of the petitioner under No. 130471 in class 31; copy of the impugned trade mark/label of the respondents; copy of the impugned registration certificate of respondents under No. 1229928 in class 31; copy of registered copyright of petitioner under No. A-66428/04 and A-67728/04; copy of pending trade mark applications of the petitioner in class 29 and 31; copy of sales figure of the petitioner; copies of invoices, bills etc., in support of rights of said trade mark of the petitioner.

7. The respondents have filed their counter statement specifically mentioning that the goods of the petitioner comes under class 29, which is entirely different from the goods mentioned in the impugned trade mark under No. 1229928 in class 31 confined to specific item i.e. oil cake (Khal) and the said item is not meant for human consumption. It is stated in the counter statement that the respondents composite trade mark SHRI RADHA KRISHNA MURALI BRAND with device depicting Lord S Krishna and Radha with cow device is distinctive itself and registrable . In support of the same, the respondents produced copy of advertisement in the Trade Marks Journal No. 1328 dated 30th March 2005 along

with a copy of the registration certificate as annexure R1 and R2.

8 . It is specifically stated in the counter statement that the registered trade mark of the petitioner is under No. 130471 in class 29, which is confined to edible mustard oil which is an article for human consumption, unlike the item in relation to which the respondents trade mark No. 1229928 stands registered. It is contented that neither the marks nor the goods are similar in nature and description and therefore there is no valid objection raised by the petitioner. The respondents specifically denied the objections and allegations claimed by the applicants stating that yet another false claim is made by alleging that the respondents are not using their own trade mark or that the respondents have no intention to use the same or any other mark. None of the provisions under section 47 or section 57 hits the valid ground of the registration of the respondents trade mark under No. 1229928. The respondents mark is in actual use from the year 1998 and the petitioner has deliberately not disclosed the use of the same by the respondents for the past nearly ten years. Accordingly, it is stated that the application filed by the petitioner is liable to be dismissed.

9 . The respondents in support of their claim in the counter statement produced a number of documents as Annexures R-1 to R-11 consisting of the impugned trade mark; copy of Registration Certificate of impugned trade mark; attested copies of civil proceedings; advertisements; copy of criminal complaint; invoices containing sales figures etc.

10. Mr. N.K. Anand, the learned counsel for the respondent would mainly contend that the impugned trade mark is registered under the name SHRI RADHA KRISHNA MURAL BRAND (Label mark) in class 31 in respect of oil cake (Khal) popularly described as cattle feed. It is not meant for human consumption. The learned counsel would point out that the applicants trade mark is only in respect of logo and not in respect of word mark i.e. either RADHA KRISHNA or MURALI BRAND and as such, it is not deceptive similar to that of the trade mark of the applicants. It is also pointed out that there is difference in respect of logo, as in the trade mark of the logo of the petitioner there is only RADHA KRISHNA whereas in the impugned trade mark it has both the device of a cow with Radha Krishna and as such there is so much difference between the two. The learned counsel would also contend that the impugned trade mark is used by the respondents continuously right from the year 1998 and as such the opposition's contention that "no use more than five years" is not correct and the same is contrary to the facts. The learned counsel also placed reliance on the invoices and sales figures in order to establish their long and continuous use from the year 1998.

11. We have carefully considered the contentions raised by the learned counsel for the respondents. We also thoroughly scrutinized and perused the documents filed by both sides.

12. At the outset, we are constrained to state that our perusal of the impugned

trade mark and the trade mark of the applicants would make it crystal clear that both of them are entirely different and distinct and it cannot be stated that the impugned trade mark is deceptively similar to that of the trade mark of the applicants. It is pertinent to note that the trade mark of the applicants makes it crystal clear that it is the logo and not the word RADHA KRISHNA or MURALI BRAND whereas the perusal of the impugned trade mark contains both the words namely SHRI RADHA KRISHNA MURALI BRAND and the logo with cow device. We are constrained to state that there is not only missing of word mark viz., RADHA KRISHNA MURALI BRAND in the applicants trade mark but also the perusal of the two logos viz., applicants logo and the impugned logo makes it crystal clear that both of them are entirely different. Added to the above said factors, it is also pertinent to note that the applicants trade mark was registered in class 29 in respect of mustard oil which is exclusively meant for human consumption whereas the respondents trade mark was registered under class 31 in respect of oil cakes (Khal), which is exclusively meant for cattle consumption. Therefore, it is crystal clear that even the nature of goods and purpose of consumption are also not similar and instead, they are entirely different and for different consumption purposes.

13. Yet another ground raised by the applicants is that the respondent is not using the trade mark continuously for a period of five years. The said allegation is falsified by production of voluminous documents in the form of invoices and sales figures right from the year 1998 which shows that the respondents are using the impugned trade mark for more than a decade.

14. In view of the above said reasons, we have no hesitation to hold that the applicants have miserably failed to prove their case under section 47 of the Act. Accordingly, the application is hereby dismissed as devoid of merits. No order as to costs.