
(2007) 05 DEL CK 0321

In the Delhi High Court

Case No : FAO 118 of 2005 and CM 6186 of 2005

Mr. Hargsh Vardhan Rastogi

APPELLANT

Vs

Champion Publications

RESPONDENT

Date of Decision : 03-05-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 151

Citation : (2007) 2 ILR Delhi 350 : (2007) 35 PTC 365

Hon'ble Judges : J.M. Malik, J

Bench : Single Bench

Advocate : R.K. Aggarwal, for the Appellant; Rajesh Harnal and Brij Bhushan, for the Respondent

Judgement

J.M. Malik, J.—This is a peculiar case where both the real brothers and their sister namely Mr. Harsh Vardhan Rastogi, appellant, Mr. Rajeev Rattan Rastogi and Smt. Ram Kali, respondents, are up in arms. The trial court vide order dated 6th April, 2005, declined the application moved by the plaintiff, appellant herein, under Order 39 Rules 1 and 2 read with Section 151 CPC with the prayer that the defendant, respondent herein, be restrained from using the trade mark "Champion" in respect of the printed publication, i.e. guides, books, etc. with or without any prefix or suffix. Adumbrated in brief, the facts of this case are these. The appellant is transacting the business of publication and marketing the books under the name and style of "M/s Forward Book Depot" since 1942. In the year 1969, the appellant adopted the trademark "Champion" in respect of books. Thereafter, in the year 1985, the appellant filed an application for registration of the trademark "Champion" before the Registrar and in this regard a certificate was issued in favor of the appellant.

2. The defendant/respondent was one of the partners of the above said firm. The said firm stood dissolved vide dissolution deed dated 31st April, 1994. As per the dissolution deed, the respondent has no right to use the word "Champion" in respect of books because the appellant became lawful and exclusive proprietor of

the trademark "Champion". In the year 1997, the defendant/respondent started using the trade mark "Champion". The appellant tried to reason with the respondent by requesting him not to use the word "Champion" but it did not ring the bell. Consequently, the suit for injunction was filed against the respondent.

3. The respondent has defended the instant case on the following grounds. The above-said dissolution deed was never acted upon in its totality. The appellant, who is the elder brother of the respondent has misused his position by excluding the respondent from yielding the fruits of trademark "Champion". Their father came from Uttar Pradesh before the independence of the country and established the name of "Champion" in the publishing sector. Consequently, both the appellant and the respondent have equal right to use the same and since the appellant did not settle the accounts and failed to act upon the dissolution deed, the respondent too, have a right to use the trade mark "Champion" albeit he is not using the said name.

4. The trial court dismissed the above-said application. The impugned judgment enumerated the following grounds. The appellant has failed to show that he holds the registration certificate with regard to the above-said trade mark. The appellant did not perform his part as per the dissolution deed. The dissolution deed was never translated into reality. Trial court also observed that the dissolution deed through which the appellant claims to have exclusive right over the trade mark "Champion" is under cloud and Therefore, the appellant cannot get mileage out of the judgments relied upon by him, which are reported in *Manohar Singh Chadha v. Sheetal sweets* 2000 PTC 320 and *Harbans Singh v. Gurbux* PTC 629 (DEL).

5. I have heard counsel for the parties. Learned Counsel for the respondent vehemently argued that the dissolution deed is dated 31st March, 1994 and that the appellant filed the present suit in the year 1997. He pointed out that he had sold/purchased books from the appellant and the appellant had issued the bills knowing well that the respondent was using the trade mark "Champion" since 1994. Counsel for the respondent produced some documents before this Court for the first time. He produced the copies of the record book which shows that on 21.7.1994, 28.7.1994, 5.8.1994, 12.8.1994, 25.4.1995 and 17.4.1995, some cheques were issued, wherein the respondent used the word "CP" as the drawer of these cheques. It was argued that words CP connote "Champion".

On the other hand, appellant has disputed that, as a matter of fact, he had sold the books to respondent under the name of "Champion" and he never purchased the books from the respondent at any time. Prima facie, the clear picture has not yet emerged. The position will begin to jell when the parties are called upon to lead evidence in this context.

6. This is an indisputable fact that after the dissolution the respondent started transacting the business under the name and style of "TOP-BOOKS". In the year 2007, respondent brought out a pamphlet, wherein, it was stated that, they are

going to start publishing a new book in the name of "Champion". It was further stated that previously they were publishing the book under the name and style of "Top-Books". The said pamphlet has been placed on record.

Prima facie, it does lift the pall of secrecy in a measure. There is no first sight evidence on record which trots out, firstly, that the respondent was using the trademark "Champion" from 1994 to 1997 and secondly, that this fact was in the knowledge of the appellant. It does not stand proved that the present suit was filed at a late stage.

7. The appellant clearly, specifically and unequivocally mentioned in para 13 of the plaint:

...a few months back the plaintiff supplied some books to the defendant under the trade mark "CHAMPION". The defendant sent few cheques (post dated) to the plaintiff against the delivery of the "CHAMPION" books. The plaintiff was surprised to notice that the said post dated cheques were issued in the name of "M/s Champion Publication"s" as drawer. Immediately plaintiff asked the defendant not to use the said name "CHAMPION" as the word "CHAMPION" is registered trade mark of the plaintiff. The defendant agreed to the same and promised not to use the said word "CHAMPION" in future. After some time the plaintiff received some more post dated cheques from the defendant for the books supplied by the plaintiff to the defendant and again noticed that the defendant was still using the said word "Champion Publications" as drawer on the cheque. The plaintiff again asked the defendant not to use the said word and the defendant again promised not to do so in future. After some time the plaintiff again received a few more cheques from the defendant for the books supplied to defendant by the plaintiff and found that the same were also in the name of "Champion Publications" as drawer. The plaintiff raised objection and made every effort to make the defendant understand with the help of relatives that the defendant should not use the word "CHAMPION" as his trading style in future but all went in vain. The defendant every time agreed to the request of the plaintiff but the plaintiff found that the defendant has been repeating the same practice again and again. The height of the thing arose when he started using the name "Champion Publications" on their printed publications/books, and on the upper portion of the cover has started writing "TOP CHAMPION". Therefore, there is no course of action available to the plaintiff except to file the present suit.

Under these circumstances, the arguments urged by counsel for the respondent must be eschewed out of consideration at this stage.

8. The second submission made by counsel for the respondent is that the dissolution deed dated 31.3.1994 was never acted upon. In this context, the attention of the court was drawn towards the second term and condition of the dissolution deed, which is reproduced as follows:

2. Smt. Ram Kali and Mr. Rajeev Rattan Rastogi, Second and Third party to the Deed respectively retire from the firm voluntarily and go out of the business for

good. Their accounts appearing in the Books of Firm as on 31st March, 1994, shall be fully and finally settled shortly and the amount standing credit in their accounts as on 31st March, 1994 on account of their profit, interest, Remuneration, and Bonus, Commission, etc. as well as Capital shall be adjusted in due course.

9. Learned Counsel for the respondent also drew my attention towards para 8 of the settlement deed, which is reproduced as under:

8. That Shri Harsh Vardhan Rastogi shall pay Rs. 45,00,000/- (Rupees Forty Five Lacs only) to Shri Rajiv Rattan Rastogi as full and final settlement of disputes regarding which a suit and F.A.O. /2005 (pending in the Hon'ble High Court of Delhi at New Delhi). Both the parties shall withdraw their cases and claims against each other pending before the Hon'ble Courts.

However, since this agreement was arrived at and recorded outside the court, Therefore vide order passed by my learned predecessor on 7th December, 2006, this Court refused to take notice of the above-said settlement deed. Learned Counsel for the respondent vehemently argued that this settlement deed gives sufficient inkling towards the fact that the accounts are yet to be settled between the parties. He submitted that it is thus clear that the learned trial court has rightly remarked that the dissolution deed is under the cloud. He also argued with vehemence that order sheets of this Court itself go to reveal that this appeal was adjourned for a number of time since negotiations for compromise were going on, the settlement deed was executed but the concerned counsel refused to identify the signature of the parties and the appellant had himself permitted this appeal to be dismissed in default by non-appearing in the Court.

10. For the following reasons, I find no force in these arguments. Deed of dissolution is already in existence. By no stretch of imagination it can be said that it has not yet been acted upon. Paragraphs 5 and 6 of the Dissolution Deed are reproduced as under:

5. And lieu of para 4 of this Deed and against full and final consideration, Mr. Rajeev Rattan Rastogi and Smt. Ram Kali have surrendered their goodwill of "Forward Book Depot", is name, trade marks "Champion" and "Forward", including copyrights of all the books published by "Forward Book Depot" and "Forward Publishing Co.". in favor of Mr. Harsh Vardhan Rastogi, who thus has become the exclusive owner of the trade marks "CHAMPION" and "FORWARD" etc., including goodwill of Forward Book Depot etc. Mr. Rajeev Rattan Rastogi and Smt. Ram Kali have agreed not to use the word "Forward" or "Champion" in their trade name in any form whatsoever from 1-4-1994 onwards.

6. Mr. Rajeev Rattan Rastogi and Smt. Ram Kali would also sign all the documents necessary and required for the legal transfer in respect of the transfer of Trade Marks "Champion" and "Forward" etc. in favor of Harsh Vardhan Rastogi without any consideration and in case Mr. Rajeev Rattan Rastogi and Smt. Ram Kali do not sign within the 30 days, Harsh Vardhan Rastogi would become the

exclusive owner automatically.

The above-cited paragraphs of the dissolution deed clearly depict that the appellant had already surrendered the shop in favor of the respondent. The respondent cannot attribute his own negligence, inaction and passivity on the part of others. If some accounts are pending, it is for the respondent to seek redress of his grievances at appropriate Forum. It is well-known that law does not help the sleeping man. I find considerable force in the argument of counsel for the appellant that since he has surrendered the shop, business premises, furniture and fixtures, etc. in favor of the respondent Therefore, he is entitled to use the trade mark "Champion" to the exclusion of the opposite party and all others who are vying to use the above-said trademark.

11. It is pertinent to mention here that in the original partnership deed dated 22nd July, 1976, it is clearly, specifically and unequivocally mentioned, in para

14. If during the continuance of the partnership or at any time afterwards, any dispute, difference or question shall arise among the said parties or any of their representatives touching the partnership accounts, or transaction thereof the dissolution on winding up thereof, the construction meaning or rights and liabilities of the parties of their representatives under this Deed, then every such dispute, difference or question shall be referred to two arbitrators, appointed by all the parties and their empire pursuant to the Indian Arbitration Act, 1940 or any Statutory modification thereof for the time being in force.

Thus it is crystal clear that remedy is available which is not utilised by the respondent. Respondent alone can invoke this remedy because he claims to be an aggrieved person.

12. The case of the appellant further finds support from an authority reported in M/s. Modi Threads Limited Vs. M/s. Som Soot Gola Factory and another, , wherein it is held,

6...It is true that the plaintiff's application for getting transferred the registered trade mark in its name in the office of the Registrar is still pending but that does not debar the plaintiff to protect the violation of the aforesaid trade mark at the hands of unscrupulous persons by filing an action in court of law for injunction. It is, prima facie, clear to me that during the interregnum period when the application of the plaintiff is kept pending for consideration by the Registrar of Trade Marks the dishonest persons cannot be allowed to make use of the said trade mark in order to get themselves illegally enriched earning upon the reputation built up qua that trade mark by the predecessor-in-interest of the plaintiff....

7. The next judgment cited by the learned Counsel for the plaintiff in this respect is Hindustan Lever Ltd. Vs. Bombay Soda Factory and Others, . In the said case also the same question arose and a Division Bench of the said High Court held that the view of the court below that as the necessary change in the name of the

registered proprietor had not been effected by the time the suit was instituted, the same should fall is wrong. Registration of the name of the proprietor does not confer title on him. It is merely an evidence of his title. It was held that merely because the trade mark in question did not stand registered in the name of the plaintiffs on the date of the suit the plaintiffs could not have been non-suited. This judgment placed reliance on the aforesaid case decided by the Madras High Court. No judgment taking any contrary view has been brought to my notice by the learned Counsel for the defendants. Hence, I hold that the plaintiff, *prima facie*, has become proprietor of the trade mark in question and thus, has *locus standi* to file this suit seeking injunction against the defendants.

13. In another case reported in *Harmohan Singh v. Gurbax Singh* 2001 PTC 629 Del, it is held,

6...Admittedly the trade mark stands applied in the name of both persons as partners of the firm. It was partnership property. When by Dissolution Deed, rights and liabilities of the parties are determined and defendant agrees to give goodwill and all other rights in the said partnership firm to the plaintiff, it will include the right in the trade mark of the partnership firm as well. Between the two partners, there may not be necessity to execute a separate assignment deed once the Dissolution Deed laying down rights and obligation of the erstwhile parties was reduced into writing. Even if there was any necessity, on the strength of such a Dissolution Deed, the plaintiff has right to compel the defendant to execute the said assignment deed also. In fact the Dissolution Deed itself would become an assignment under the law as held in the case of *Bharat Tobacco Mfg. Co. and Ors. v. Nav Bharat Tobacco Mfg. Co. etc.* 1984 PTC 76. Be as it may, merely the assignment deed is not executed is no ground for the defendant to contend that his right in the trade mark still remains. If such a contention of the defendant is accepted, it may lead to absurdities as after the dissolution of the partnership deed, the trade mark of the firm, as per the arrangement of the parties, would be used by one of the parties. If both are allowed to use the same trade mark in relation to same goods, consumer would not be able to ascertain as to goods of which person the said consumer is buying. The very purpose of the Trade Mark Act is to avoid such situation. Thus if the intention was that trade mark GP would be used by both the erstwhile partners, the stipulation to that effect would have been specifically provided in the Dissolution Deed. In the absence of any such covenant in the Dissolution Deed and on the contrary in the face of the language used in para 2 of the Dissolution Deed, one can safely infer that intention of the parties was that after-dissolution, trade mark GP belongs to the plaintiff as the defendant had surrendered his rights therein.

14. It must be mentioned here that the instant case stands on a better footing than the case cited above. In the instant case, it is clearly, specifically and unequivocally mentioned in the dissolution deed that the trade mark "Champion" is to be used by the appellant alone.

15. Similar view was taken in *Auto Pex Motor Co. v. Deepak Sethi and Anr.* 2001

PTC 816, wherein it was held that perusal of the trade marks used by the plaintiff and the defendant No. 1 indicate that not only there is a phonetic similarity between the names and labels used by the plaintiff and Super Master label being used by the defendant but the photographs also indicate positive similarity in this regard. Consequently it must be held that the plaintiff has prima facie case. The balance of convenience automatically would be in favor of the plaintiff because it is the plaintiff who is using the said trade mark much before the user by the defendants. Similar view was taken in latest judgments titled as G. Mahalingappa Vs. G.M. Savitha, Reliable International and Others Vs. Ashok Dang, and Sh. Harmohan Singh Vs. Sh. Gurbux Singh,

16. In view of the discussion above, I hereby allow the appeal. The defendant/respondent and their representatives are restrained from using the trade mark "Champion" till the pendency of the suit before the trial court. However, it is made clear that any observation touching the merits of this case is tentative only for the purpose of this appeal and shall not be construed as an expression of final opinion in the matter. The parties are directed to appear before the trial court on 21st May, 2007. A copy of this order along with the lower court record be sent to the trial court forthwith.

17. FAO 118/2005 and CM 6186/2005 are disposed of.