
(2014) 05 DEL CK 0161

In the Delhi High Court

Case No : I.A. No. 10946/2014 in CS(OS) No. 1720/2014

M/s. GM Modular Pvt. Ltd.

APPELLANT

Vs

M/s. Havells India Ltd.

RESPONDENT

Date of Decision : 29-05-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 149, 151
Trade Marks Act, 1999 — Section 2(1)(zg)

Citation : (2014) 59 PTC 628

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : Amit Sibal, Sr. Adv., Mr. S.K. Bansal, Mr. Ajay Amitabh Suman and Mr. Vikas Khera, Advocate for the Appellant; Prathiba M. Singh, Sr. Adv., Mr. Sudeep Chatterjee, Ms. Bitika Sharma and Ms. Deepthi Mary Alexander, Advocate for the Respondent

Judgement

Manmohan Singh, J.

I.A. No. 10947/2014 (exemption)

Exemption allowed, subject to just exceptions.

The application is disposed of.

I.A. No. 10948/2014 (u/s. 149 r/w Sec. 151 CPC)

Learned counsel for the plaintiff states that the Court fee would be filed within one week. In view of the statement made by the learned counsel for the plaintiff, the application is disposed of.

CS(OS) No. 1720/2014 & I.A. No. 10946/2014 (u/o XXXIX R. 1 & 2 CPC)

1. Let the plaint be registered as a suit.

2. Issue summons in the suit and notice in the application to the defendant. Mr. Sudeep Chatterjee, Advocate appearing on behalf of the defendant accepts

summons and notice. Let the written statement and reply be filed within two weeks, with advance copies thereof to the learned counsel for the plaintiff who may file the replication and rejoinder within two weeks thereafter.

The parties shall also file the documents along with the pleadings and shall complete the admission/denial of each other's documents by way of affidavits which may be filed on or before the next date.

List this matter on 1st July, 2014 for framing of issues and consideration on injunction application as well as for directions for trial.

3. Learned counsel for the plaintiff is pressing for an interim order, in the meanwhile. I have heard the learned counsel for the parties for some time.

4. The brief facts of the case are that the plaintiff has filed the abovementioned suit for permanent injunction and damages for disparagement and unfair trade practices. Mr. Amit Sibal, learned Senior counsel appearing on behalf of the plaintiff is pressing for interim orders in view of the urgency involved. Though, there is no caveat, still the defendant appeared through counsel who after obtaining instructions has no objection if the matter is heard by this Court.

5. At this stage, only a prima facie view is to be taken as to whether the plaintiff is entitled for injunction or not. It is not denied by the defendant that the impugned advertisement is shown on Sony TV during IPL Cricket Matches which is at the stage of finals.

6. It is not in dispute that the plaintiff is engaged in the business of manufacture and trade of wide range of electrical goods, electrical switches, accessories, appliances, electronic components. In the year, 1999, the plaintiff in the course of trade adopted the trade mark GM (word per se), the trade mark/label GM. The said trade mark/label/trade name is represented herein below:

7. It is alleged in the plaint that with the advent of e-commerce and the internet the plaintiff has been using the word/mark GM as a material part of its domain name and E-mail ID viz. www.gmmodular.com/, E-mail: [info@gmmodular.com/](mailto:info@gmmodular.com) respectively. The screen shot of the plaintiff's said domain name has been given as herein below:-

The screen shot of plaintiff's said domain name namely www.gmmodular.com displaying the plaintiff's electric switches under the trademark/label/design GM

7.1. In the year 2011, the plaintiff has created one such novel and original design in relation to its said product namely electrical switches. The design of the plaintiff is unique, original and aesthetic in nature. The said unique design of the electrical switches has been applied by the plaintiff in relation to GM electrical switches. The said unique design of the electrical switches does appeals to eye and has great aesthetic credentials (referred to as the said design). Since the year 2011, the plaintiff has been applying the said novel and original design in relation to its said electrical switches continuously and openly and is distinctive

indicium of the plaintiff only. The true representation of the plaintiff's said GM electrical switches under the said unique design has been given as herein below:

The plaintiff's said electric switches under the GM trademark/design/label

7.2. The plaintiff's said goods and business are known recognized, demanded, sold and traded with reference to its said GM Trademark/label/trade name/design. The members of the trade, industry, the consumers and general public at large are well aware of the plaintiff's said goods and business there under. The plaintiff's said GM Trademark/label/trade name/design is a well known trade mark within the meaning of Section 2(1)(zg) of the Trade Mark Act.

7.3. The plaintiff has its customer all around the world including Walmart, Tata, Chroma, Spencer's, Xcite Reliance-Retail, Spencer's, Future Group, Metro, Cash & Carry, Hyper City, Total Group and many more.

8. The defendant namely M/s. Havells India Limited is also engaged in the business activity of manufacturing and marketing of electrical devices, appliances, accessories and allied and cognate products.

9. It is stated in the plaint that in the 3rd week of May, 2014, the plaintiff became aware of the impugned advertisement Havells Shock Laga which was being aired/broadcasted during the IPL Cricket Matches display on the Television. The impugned Havells Shock Laga Advertisement intentionally and deliberately disparages the plaintiff's said GM electric Switches and the unique distinctive design of the plaintiff's switches. The impugned advertisement of the defendant relates to the defendant's electric product namely Havells RCCB and MCB.

10. It is averred that the impugned Havells Shock Laga Advertisement of the defendant is solely meant for damaging the tremendous goodwill and reputation of the plaintiff's said GM electric switches. In the impugned advertisement of the defendant, the plaintiff's said GM electrical switches have been shown in bad light. The plaintiff is filing the impugned advertisement of the defendant downloaded in compact disc. The still representation of impugned advertisement has been given as herein below:-

11. It is argued by the plaintiff that shots marked as "A" & "B" give an impression to the common public at large that the Plaintiff's said GM electrical switches are of extremely inferior quality. The impugned advertisement disparages the plaintiff's said product by showing the plaintiff's said GM switches in bad light.

The details of the defendant's impugned Havells Shock Laga advertisement have been given as here in below:

(a) The impugned Havells Shock Laga Advertisement begins with one security and safety check measure regarding Peace Summit, India, wherein one person is enquiring about the safety and security measure at the mentioned place.

(b) The next frame of the impugned advertisement the person is shown the

magnetic fields, fish eye camera and the bullet proof machardani.

(c) In the next frame of the impugned advertisement, the person wishes to use the washroom.

(d) The advertisement further depicts that when the person went to washroom and try to switch on the bathroom lights by touching the switch, he gets electric shock.

(e) The next frame of the advertisement person's face reflects the shock and in the background the sound is being displayed "Shock Laga, Shock Laga".

(f) The electric switches under the Trade Mark GM are being displayed in the impugned advertisement from which the person allegedly got the electric shock.

(g) In the last frame of the advertisement it is displayed that the all the safety measure has been taken but since the Havells RCCB & MCB is not used that's why the Shock was caused. The said wording is being displayed in Hindi language, the said has been given as herein below:

Sab Kuch Lagaya Lekin Havells RCC & MCB Nahi Lagaya Isliye Shock Laga

(everything has been done but since Havells RCCB & MCB is not used, that's why the shock is being caused to the mentioned person).

12. It is also submitted that the impugned advertisement is nothing but is a clandestine attempt by the Defendant to increase the market share by disparaging the tremendous goodwill and reputation of the Plaintiff's said Switches under the Plaintiff's said Trade Mark/Design GM. All the indicia described in the impugned advertisement as well as the surrounding circumstances shown therein points towards the singular fact without leaving any room for doubt towards the defendant's impugned malafide intention.

13. The impugned advertisement is viewed/broadcasted on various television serials which are also viewed by many people at large in India and outside India also. It is submitted by the plaintiff that the impugned advertisement far outreaches the limit of allowed competitive advertisement and blatantly disparages the reputation and goodwill of the Plaintiff's said product namely switches under the said Trade Mark/Design GM. The impugned Havells Shock Laga advertisement not only shows that the defendant's impugned product is good but also very clear the electric switch of the plaintiff under the said Trade Mark/Design GM of the plaintiff is inferior. The impugned advertisement amounts to disparaging and defaming the product of a competitor i.e. plaintiff by the defendant or promoting its own products.

14. Mr. Amit Sibal, learned Senior counsel appearing on behalf of the plaintiff submits that the defendant is not denying that the switch shown in the advertisement is of the plaintiff whose trade mark GM is also shown in a blurred condition. There is no justification on behalf of the defendant to show the plaintiff's product in bad faith when admittedly the defendant itself is

manufacturing the electric switches. The defendant ought to have been shown its own switch if the defendant is making any impression being given that "Sab Kuch Lagaya Lekin Havells RCC & MCB Nahi Lagaya Isliye Shock Laga". He argues that it is a clear case of product disparagement and it is deliberately done by the defendant in order to disparage the product of the plaintiff and to promote its product otherwise there is no justification why the defendant is doing this and what is the fault of the plaintiff and why they should suffer at the hand of the defendant who is the competitor of the plaintiff and why they have not used the switches in the advertisement or any other product which is not the product of the plaintiff and its trade mark. It is argued that it is a clear case of malafide where the thing speaks for itself. It is argued that in case, the interim orders are not passed, the plaintiff would suffer an irreparable loss and injury as the plaintiff has already received various complaints from their dealers and distributors about the said advertisement.

15. Mrs. Prathiba M. Singh, learned Senior counsel appearing on behalf of the defendant, on the other hand, has argued that no case of grant of interim order is made out. There is no disparagement of the plaintiff's product. The trade mark of the plaintiff GM is not feasible if the advertisement is seen. No one can read mark GM from the said advertisement. The defendant is only promoting its product Havells' RCCB and MCB. The main purpose of advertisement is that if MCB is not used, it may cause electric shock, thus it was imperative to show the electric switch in the advertisement.

16. It is also argued that in the impugned advertisement, no untrue, falsehood or malicious statement is made. It is the case of trade label. The plaintiff has failed to make out any case that the statement made in the advertisement is untrue or thus have suffered any damages by such an action of the defendant. Their claim is unsubstantiated. They should not be hypersensitive. It is wrong perception of the plaintiff. She referred the following three decisions of this Court in support of her submissions:-

(i) Dabur India Ltd. Vs. Colortek Meghalaya Pvt. Ltd. and Godrej Sara - Lee, .

(ii) M/s. Eureka Forbes Limited vs. Kent RO Systems, I.A. No. 4600/2010 in CS(OS) No. 664/2010, decided on 17th May, 2010.

(iii) Marico Limited Vs. Adani Wilmar Ltd.,

17. While arguing the case, she has not specifically denied that the product shown in the advertisement is not of the plaintiff, except it was submitted that many manufacturing of using switches with the similar design. The following principles have been discussed and approved by many Courts while dealing with the cases of disparagement from time to time. The said fact is not denied by the defendant:-

(a) For the purpose of saying that his goods are the best in the world or his goods are better than his competitors, he can even compare the advantages of

his goods over the goods of others.

(b) He, however, cannot while saying that his goods are better than his competitors, say that his competitors' goods are bad. If he says so, he really slanders the goods of his competitors. In other words, he defames his competitors and their goods, which is not permissible.

(c) If there is no defamation to the goods or to the manufacturer of such goods no action lies, but if there is such defamation an action lies and if an action lies for recovery of damages for defamation, then the Court is also competent to grant an order of injunction restraining repetition of such defamation.

18. In the very recent judgment delivered by the Division Bench of this Court on 31st January, 2014 in the case of Hindustan Unilever Limited Vs. Reckitt Benckiser India Limited, , the learned Division Bench has confirmed the judgment and decree of learned Single Bench rendered by my esteemed brother Shri Badar Durrez Ahmed, J. who after trial has decreed the suit as well as granted damages to the tune of Rs. 5 lacs. The Division Bench after upholding the decision of the Single Bench not only dismissed the appeal filed by the defendant but also enhanced the damages to Rs.20 lacs and quantified the cost at Rs. 55,000/-. The relevant facts and discussion of the judgment of the learned Single Judge are reproduced as below:-

22.....Although, the brand name, logo or the sword device does not appear in the orange bar of soap shown in the advertisement (Ext. PW1/2), there can be no misgiving that the bar of soap which has been shown in the said advertisement is of a colour similar to that of the plaintiff's Dettol soap. The contours, curvature as well as the overall shape of the orange bar of soap in the advertisement itself, are virtually the same as that of the contours, curvature and overall shape of the plaintiff's Dettol Original soap. Moreover, the clear impression given in the advertisement is that the said orange bar of soap has been taken out from a green wrapper/packaging. It must also be noted that the design of the plaintiff's soap has been registered by the plaintiff as indicated by Ext. PW1/DX-1. While it is true that there may be other orange coloured soaps and other soaps sold in the pre-dominantly green packaging and other soaps which have an oval shape, it is also true that it is only the plaintiff's soap which has a combination of all the three elements, i.e., orange colour, curved oval shape and predominantly green packaging. Apart from this, it is only the plaintiff's soap which has contours in the manner indicated in the bar of soap in the said advertisement. No evidence has been produced by the defendant to show that there is any ordinary antiseptic soap with the same combination of the aforesaid elements of colour, shape, design and packaging. I have absolutely no doubt that the orange bar of soap shown in the advertisement refers to the plaintiff's Dettol Original soap.

23. x x x x x

24. It has been contended on behalf of the defendant that the plaintiff has not

produced any evidence of consumers to indicate that the orange bar of soap in the said advertisement appears to be the plaintiff's Dettol Original soap. In response the learned counsel for the plaintiff submitted that producing such evidence would be counter-productive and is not necessary. He submitted that the plaintiff could produce witnesses stating that the orange bar of soap shown in the advertisement had reference to the plaintiff's Dettol Original soap. Similarly, the defendant could also produce witnesses to state the contrary. Ultimately, it would be for the court to make a judgment from the perspective of an average person with imperfect recollection, a test which has been well established, particularly in passing off cases. Though slander of goods and disparaging advertisements stand on a slightly different footing to passing off cases, I find myself to be in agreement with the submissions made by the learned counsel for the plaintiff. For, ultimately, it is a question of perception and the perception has to be determined from the stand point of an average person man with imperfect recollection but, with a corollary, which shall stated be shortly. One could normally expect that there would be a difference in perception between two distinct classes of persons--(1) Persons who are using Dettol Original soap and (2) persons who do not use that soap. A person belonging to the latter category may not be aware of the orange coloured bar of soap of the plaintiff with its distinctive shape, curvature and contours. He may also not be aware of the packaging employed by the plaintiff. Therefore, such a person may not link the bar of soap shown in the advertisement with the plaintiff's product when he sees the advertisement or when he comes upon the plaintiff's product in a shop. Such a person, in all likelihood, would perceive the orange bar of soap shown in the advertisement as being some unbranded bar of soap. On the other hand, a person belonging to the former category, being a user of the plaintiff's Dettol Original soap, would immediately recognise the bar of soap shown in the advertisement as referring to the plaintiff's Dettol Original soap. This is because, such a person is familiar with the plaintiff's product. He is "intimately" aware of the look and feel of the soap because he uses it everyday. He knows its colour, shape, size and contours. The moment, he sees the bar of soap in the advertisement, he would immediately correlate the colour, shape, size and contours including the colour of the wrapper/packaging with that of the soap that he uses everyday, that is, the plaintiff's Dettol Original soap. Moreover, it is not as a matter of co-incidence that all these features of colour, shape, curvature and colour of the packaging have come together. It has been done deliberately so that it is obvious to users of the plaintiff's Dettol Original soap that it is the very soap that they use everyday which is shown in the advertisement.

25. x x x x x

26. The difference in approach in a passing off action and one for disparagement must also be highlighted. In a case of passing off, the question invariably is whether the trade mark or trade dress employed by A for his product is so deceptively similar to the established mark or trade dress of B's product that A's product could be confused by or passed off to consumers as B's product? Here

the comparison is of rival products having a similar trade mark, get-up or trade dress. Familiarity with the established mark, trade dress or get-up is presumed. Because, it is this familiarity that the person intending to pass off his goods as those of the famous or more popular, exploits. In the case of disparagement, the one who disparages another's product, does not seek to make his product similar to the disparaged product, but to distinguish it from the disparaged product. The object of disparagement is to make the disparaged product appear to be as near or similar to the competitor's product. The comparisons, therefore, in cases of passing off and in cases of disparagement are different. Consequently, the comparison must be from the perspective of an average person with imperfect recollection but, that person must be picked from the category of users of the product allegedly sought to be disparaged or slandered.

36. The advertisement can be viewed in two parts. One part is where the orange coloured soap is shown as being harmful and used by people who are naive and without any wisdom and who could be saved only through prayers. The other part is where the defendant's product is shown as having the qualities of providing a protective wall against dry cracked skin and as an eliminator of germs. There can be no grievance in respect of the second part of the advertisement, where the qualities of the defendant's soap are sought to be demonstrated: whether those qualities exist or not is not an issue. That part, even if untrue, would be mere puffery. However, the first part of the advertisement, where the orange bar of soap has been slighted and shown in bad light and in fact, as something which is harmful, cannot but be construed as disparagement and denigration of the orange bar of soap shown in the advertisement. It is one thing to say that a person's product is the best or that his product is better than somebody else's product, but, it is entirely a different matter to say that his product is good whereas another's product is bad and harmful. Puffing up of one's product is permissible in law but slighting or rubbing out or otherwise denigrating or disparaging another's product is not. From the standpoint of a reasonable person, the advertisement, in question, certainly disparages and denigrates the orange bar of soap shown therein which I have held, under Issue No. 1, to refer to the plaintiff's Dettol Original soap.

66. Since the findings returned by me are that the said disparaging advertisement was a deliberate act on the part of the defendant aimed at reducing the sales of the plaintiff's product and thereby increasing its own sale, through the device of slander of goods/disparaging and/or denigrating advertising, the plaintiff would be entitled to punitive damages in the same manner as was awarded in *Time Incorporated* (supra). Cases of slander of goods, malicious falsehood and disparaging advertising have to be decided on the crucible of fairness. There is no impediment to a trader employing any means possible, provided such means are fair, to increase his sales, even at the cost of its competitors. But the law does not permit any person to use unfair means or practices to gain and profit to the detriment of his competitors. Such unfair means or practices include disparaging advertisements/slander of goods. In the

fiercely competitive world that we live in, businesses compete with each other on various fronts including quality of goods. The differences in quality of the goods are sought to be made known to the public through advertising. While providing such information, the law permits a businessman to puff up his product and show it in a better light than that of his competitors. However, as we have seen above, the law does not permit a manufacturer or a trader to advertise in such a manner that it slanders the products of its competitors, virtually rubbishing the same, while promoting his own product. As the competition gets fierce, price differences get reduced and businesses tend to play for a larger market share by employing practices such as slandering of goods/disparaging advertising which are unfair business practices and ought to be curbed. Since the question is of fairness versus unfairness, when this Court has found that the defendant has been deliberately unfair in its said advertising campaign, it is reason enough for this Court to impose punitive damages so as to discourage such a sharp practice and to put to an end to this growing tendency. Consequently, I am of the view that the plaintiff is entitled to punitive damages from the defendant, which I quantify as Rs. 5,00,000/-.

19. The facts in the present case are very near and similar to the case of Hindustan Unilever Limited (*supra*). Having gone through the impugned advertisement, the decisions referred by the learned counsel for the parties, if the entire gamut of the matter is considered in a meaningful manner, it is clear to the Court that if the intent of the defendant is to damage the product itself of the other party and it is intended to gain its business by promoting its product, then a classic case of injunction is also made out. From the facts of the present case, I am of the considered view that *prima facie* the impugned advertisement of the defendant falls within the principle mentioned in para 18 of my judgment. Therefore, the plaintiff has made out a *prima facie* case for the grant of an ad-interim injunction. In case, the interim order is not passed, the plaintiff will suffer an irreparable loss and injury. The balance of convenience also lies in favour of the plaintiff and against the defendant. Till the next date of hearing, the defendant is restrained from telecasting, displaying, showing, broadcasting the impugned advertisement, in any media whatsoever including electronic media. However, it is made clear that in case, the defendant shall delete/erase the shot "A" and the contents of shot "B" from the said advertisement, then they are entitled to continue with the impugned advertisement.

20. Copies of this order be given *dasti* to the learned counsel for the parties, under the signatures of the Court Master and copies thereof be also sent to SONY Entertainment Network, Multi Screen Media Pvt. Ltd., M.G. Road, Gurgaon (Haryana) as well as to the television channel Set Max C/o Multi Screen Media Pvt. Ltd., for immediate compliance in view of the urgency involved in the matter.