

(1999) 03 KAR CK 0033

In the Karnataka High Court

Case No : Miscellaneous First Appeal No. 3708 of 1998

M/s. Mysore Saree Udyog, Bangalore and Another	APPELLANT
Vs	
M/s. Mysore Silk Udyog, Bangalore	RESPONDENT

Date of Decision : 26-03-1999

Acts Referred:

Citation : (1999) 3 KarLJ 349

Hon'ble Judges : S.R. Bannurmath, J

Bench : Single Bench

Advocate : Sri B.V. Acharya, for Sri Harikrishna S. Holla, for the Appellant; Smt. Pramila Nesargi, for the Respondent

Judgement

1. This appeal is filed challenging the order dated 1-7-1998 passed by the learned Additional City Civil Judge, Bangalore, on LA. II in O.S. No. 3720 of 1997.

2. The brief facts of this case are as follows:

As per the plaintiffs-appellants, they are dealing in sale of silk sarees and other dress materials since 1981 under the name and style "Mysore Saree Udyog". It is contended that since the date of adoption of the trading name and style, the name of the appellants has become popular and on account of such acquiring goodwill and reputation the words "Mysore Saree Udyog" are synonym with the appellants only. It is contended that the respondent is also dealing in the sale of silk sarees and dress materials initially under the trading name and style "Shakti Silks" and recently they have changed to "Mysore Silk Udyog". As the name and style adopted by the respondent "Mysore Silk Udyog" is phonetically similar and deceptive in sense, it may confuse a regular customer related to the appellants business, the present suit is filed for permanent injunction restraining the respondent-defendant from infringing the plaintiffs' well established trade mark and trade style "Mysore Saree Udyog" by using offending trade style "Mysore Silk Udyog" or any other trade mark which are deceptively similar to colourable imitation of plaintiffs' trading style and consequential reliefs.

3. Plaintiffs filed LA. II praying for an interim order of injunction restraining the defendant's agent, servant, workers or dealer infringing the trading style pending the suit. This application was resisted by the respondent-defendant inter alia contending that there is no deception or confusion at all in the two trading styles and names of the plaintiffs and defendant's. It is contended that the trading name "Mysore Saree Udyog" of the plaintiffs" is not an invented or coined words. The word "Mysore" indicates a Geographical name and "Saree" is a type of "Textile Fabric" and "Udyog" is a Mill or Manufacturing Unit or a business. Therefore, the name "Mysore Saree Udyog" is a common name especially when the words "Mysore Sarees" are synonymous to "Mysore Silk Sarees" of Karnataka especially manufactured in Mysore. It is further contended that the trade mark device of the plaintiffs and defendant's are entirely distinctive and wholly dissimilar and they are incapable of any deception or confusion. To show the distinction in fact it is contended that the respondents have put a picture of "Nandi" or a "Bull". As such if both these trading styles and names are compared, there cannot be any confusion in the mind of a customer. Hence, prayed for dismissal of the application as there is no infringement of any trade mark.

4. The Trial Court on considering the matter and relying upon the decisions in the cases of R.S.K.V. Raghavan v G.R. Gopala and Company, A.V. Rajadurai Nadar v P. Ayya Nadar , F. Hoffmann-la Roche and Co. Ltd. Vs. Geoffrey Manner and Co. Pvt. Ltd., and J.R. Kapoor Vs. Micronix India, , has held that plaintiffs have failed to make out a prima facie case of infringement and as such rejected the application LA. II. Hence, the present appeal.

5. Sri B.V. Acharya, learned Senior Counsel appearing for the appellants contended that the Trial Court committed an error in holding that the words "Mysore Silk Udyog" and "Mysore Saree Udyog" are distinct and non-deceptive; that the Trial Court analysing the names word by word like Mysore, Silk, Saree and Udyog has committed an error in holding that these words are common phenomenal words used in silk saree process especially in Karnataka and they do not cause any confusion in the mind of the customers. The learned Counsel relied upon the decision in the case of Nilgiri Dairy Farm v S.A. Rathnasabhpathy, M/s. Virendra Dresses v M/s. Varinder Garments, M/s. Kala Niketan v M/s. Kala Niketan and Mangalore R.K. Beedies Vs. Mohammed Hanif, , to support his arguments.

6. I have perused the orders passed by the Trial Court as well as the records produced by both the sides and the decisions relied upon.

7. It is undisputed that the present suit filed by the plaintiffs for injunction is basically what is called as "Passing Off suit under the Trade and Merchandise Marks Act, 1958. On going through the various pronouncements, it has to be held that the question the Court is required to determine at this stage is whether there is any similarity between the leading and essential characteristics and what is the general impression a customer (layman) is likely to have on seeing or

receiving the defendant's products. A trade mark, may consist of a name or a pictorial device or a combination of name and pictorial device. The Court will have to examine the plaintiffs' trade mark or name and identify its essential and important features and characteristics. Thereafter, without having the original, that is, the plaintiffs' mark for comparison, the Court will have to examine the trade mark of the defendant to identify its essential features and characteristics. It should then visualise, putting itself in the place of an average common man with an ordinary and imperfect memory whether the essential features and characteristics of the plaintiffs' mark are reproduced and highlighted in the defendant's mark. If it is so done and is likely to cause confusion in the minds of the public, then that will be sufficient to grant relief to the plaintiff. The various pronouncements also show that a detailed examination to find out minute distinguishing features between the two marks ignoring the essential features, will defeat the very purpose and object of finding out whether there is deceptive similarity. The question is not whether the trade mark used by the defendant is distinguishable, but whether it is deceptively similar. It is to be noted that in a Trade Marks Law the implicit principles are the consideration of bona fides of all trade name user. If the decision to adopt a trade and trade name or device is taken only to thrive on someone else's business, reputation or trade name obviously it is illegal. It is undisputed and a common knowledge that while buying the goods of a particular trade mark, one does not look to the manufacturer. In fact the practice of allowing either parties to use same trade marks as registered user etc., is on the basis that the actual manufacturer is not so important and it is only the mark which has the reputation.

8. While rejecting the case of the plaintiffs only on analysing few words namely "Mysore", "Saree", "Silk" and "Udyog" individually, the Trial Court has held that these words by themselves are common features in the trading of silk materials like saree in Karnataka. It is further stated that "Mysore Silk" or "Mysore Sarees" are commonly used to denote the silk or saree manufactured in Mysore which is undoubtedly internationally popular fabric. The reliance placed by the Trial Court in the case of R.S.K.V. Raghavan, *supra*, wherein there was dispute regarding the trade name "Thennamarakkudi" and the learned Single Judge of the Madras High Court on analysing the words used in the plaintiffs' and defendant's products has held that there is descriptive label in respect of both the products and there is no confusion created in the minds of customers. It is to be noted that the reasoning of the Trial Court that "Mysore Saree" and "Mysore Silk" is synonymous and name of the product is based on geographical descriptive and cannot be said to be amounting to "Passing off, in my opinion may not be a correct proposition. A Bench of this Court in the case of Nilgiri Dairy Farm, *supra*, considering even the words "Nilgiri and Dairy Farm" held that though the word "Nilgiri" is a geographical name i.e., that of a Nilgiri District and words "Dairy Farm" was descriptive of the business, still the words and name style "Nilgiri Dairy Farm" has become a distinctive trade name of the plaintiff therein and as such an action for passing off and unauthorised use of the name and mark is

maintainable one. It further observed that some dissimilarities in the names and marks used by the plaintiff and defendants were not of consequence. As held by the Apex Court in the case of Ruston and Hornsby Ltd. Vs. The Zamindara Engineering Co., , the gist of a passing off action is that "A" is not entitled to represent his goods as the goods of "B" if there is a probability of confusion created by the similarity of names in the minds of customers. In Kerly's "Law of Trade Marks and Trade Names", Twelfth Edition, the test for determining the rules of comparison to determine deceptive similarity are stated thus.-

"Two marks, when placed side by side, may exhibit many and various differences, yet the main idea left on the mind by both may be the same. A person acquainted with one mark and not having the two side by side for comparison, might well be deceived, if the goods were allowed to be impressed with the second mark, into a belief that he was dealing with goods which bore the same mark as that with which he was acquainted. It would be too much to expect that persons dealing with trade-marked goods, and relying, as they frequently do, upon marks, should be able to remember the exact details of the marks upon the goods with they are in the habit of dealing. Marks or names are remembered rather by general impressions or by some significant detail than by any photographic recollection of the whole. When the question arises whether a mark applied for bears such resemblance to another marks as to be likely to deceive, it should be determined by considering what is the leading characteristic of each. The one might contain many, even most, of the same elements as the other, and yet the leading, or it may be the only, impressions left on the mind might be very different. On the other hand, a critical comparison of two marks might disclose numerous points of difference, and yet the idea which would remain with any person seeing them apart at different times might be the same. Thus it is clear that a mark is infringed if the essential features, or essential particulars of it, are taken. In cases of device marks, especially, it is helpful before comparing the marks to consider what are the essentials of plaintiff's device".

9. In the present case also no doubt the words "Mysore" and "Udyog" are common names, if considered independently it is also true that the word "Mysore" denotes the significance of the geographical place and the word "Udyog" means profession or process of manufacturing. But in the present case on hand the word "Mysore Saree Udyog" of the plaintiffs has become synonym with the business carried out by the defendants for more than a decade. On the other hand the defendants who are dealing in similar material as that of plaintiffs" were though earlier carrying on their business under the name "Shakti Silks" have recently changed it to "Mysore Silk Udyog" and it is the allegation that this passing off action is only after noting the goodwill and reputation earned by the plaintiffs under the trading style and name of "Mysore Saree Udyog". Merely because saree is one of the silk fabric by itself there would not be any doubt. But when the plaintiffs" prima facie establish that the products sold by the plaintiffs under "Mysore Saree Udyog", there would be naturally confusion

in the mind of an innocent layman customer when he reads the words "Mysore Silk Udyog" that of the defendant's. On re-appreciation, I do find merits in the arguments of the learned Counsel for the appellant that the two trade names of the plaintiffs and defendant's though marginally distinctive, but they are similar for reading and phonetically heard also and the similarity would be sufficient to give rise to create risk of confusion. It would mislead the people to believe that the business of defendant's was the business of the plaintiffs". As noted earlier the plaintiffs are carrying on the business for the last more than 15 years. Whereas the defendant's who were originally carrying on the business under the name and style of "Shakti Silks" have now changed to the present nomenclature and as such in my opinion, the plaintiffs" have prima facie established that there is likely to suffer in business and reputation if the defendant was allowed to carry on business in the existing trade name. Even on reappreciation of the materials placed, I am of the opinion, that the attempt of the Trial Court in detailed examination to find out minute distinguishing features between the two marks ignoring the essential features would defeat the very purpose and object of fighting over whether there is deceptive similarity. The question is not whether the trade mark used by the defendant is distinguishable but whether it is deceptively similar one. As I am satisfied that the present name of "Mysore Silks Udyog" under which the defendant is carrying out the business is deceptively similar to the trade style of the plaintiffs" "Mysore Saree Udyog", in my opinion, this is a fit case to grant interim injunction which unfortunately has been rejected by the Trial Court.

10. In the result, the appeal is allowed and allowing I.A. II, the respondent is restrained from using the words "Mysore Silk Udyog:" pending the final disposal of the main suit. However, it is made clear that any observations made by this Court on merits of the case should not be carried as pronouncements for the purpose of final disposal of the suit. It is open for both the parties to contend before the Court below their respective cases independent of the present order on merits as well.

In the peculiar facts and circumstances of the case, there shall be no orders as to costs.