

(2016) 09 RAJ CK 0021

In the Rajasthan High Court

Case No : Civil Misc. Appeal No. 263 of 2016

M/s. Perry Beverages India Private Limited

APPELLANT

Vs

Mr. Bharat Chandiramani

RESPONDENT

Date of Decision : 29-09-2016

Acts Referred:

Trade Marks Act, 1999 — Section 134

Citation : (2016) 09 RAJ CK 0021

Hon'ble Judges : Arun Bhansali, J.

Bench : Single Bench

Advocate : Dr. Ashok Soni, Advocate, for the Appellant; Mr. J.P. Joshi, Sr.Advocate assisted by Mr. Khet Singh, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Arun Bhansali, J.—This appeal under Order 43, Rule 1 (r) CPC is directed against the order dated 11.1.2016 passed by the Addl. District Judge No.6, Jodhpur Metropolitan, whereby, the trial court has disposed of the application filed by the respondent under Order 39, Rule 1 and 2 CPC with the direction that till the disposal of the suit, the appellants would not use the word "Perry" on the bottles similar to the respondent's product.

2. The suit was filed by Bharat Chandiramani ("Bharat") against Perry Beverages India Pvt. Limited ("Perry Beverages") and Hemant Chandiramani ("Hemant") as Director of Perry Beverages under Section 134 of the Trade Marks Act, 1999 ("the Act") for permanent injunction. It was inter alia claimed in the suit that Perry Beverages is a company registered under the provisions of the Companies Act, which had three Directors Bhojraj Chandiramani ("Bhojraj"), Hemant and Bharat; the company was a family company whose head was Bhojraj, the two sons Hemant & Bharat used to mainly look after the business of the company; the arrangement continued till 2014; on intention being expressed by members of the family to start independent business, Bhojraj proposed that a family settlement be executed wherein every member of the family would get his share

and arrangement regarding the brand developed by Bhojraj be also made in the said settlement. As per the family settlement, the plaintiff relinquished his share holding in Perry Beverages resulting in two share holders Bhojraj & Hemant remaining in the company, Bhojraj is the Managing Director and Hemant is Director. Before execution of family settlement it was decided that the entire business of Perry Beverages would be looked after by Bhojraj and Hemant and Perry Beverages would have right to manufacture all the drinks except "Fruit Beer" it was decided that Perry Beverages would not have any right to manufacture "Fruit Beer" or any drink having flavour similar to "Fruit Beer" and all the rights with regard to "Fruit Beer" would be with the plaintiff. Hemant accepted the said arrangement; when the issue regarding executing the said arrangement in writing came up, Hemant proposed that he would get the document prepared, in the meanwhile Bhojraj fell ill and was required to be hospitalized, Hemant brought the document for signatures, after reading the document Bhojraj told Hemant that oral conditions agreed in relation to "Fruit Beer" have not been incorporated in the document and, therefore, amended document be got prepared, however, Hemant told that whatever has been decided orally would be followed and if the document was not signed by all the parties, he would take steps. It is claimed that on account of family circumstances, the agreement was signed.

3. It was then alleged that as per the agreement, Perry Beverages could not have manufactured any product similar to "Fruit Beer", despite that it was doing the same which was not legal and the same amounts to passing-off and the plaintiff was entitled to injunction. It was then claimed that as per the family arrangement, the trade mark "Fruit Beer" would be transferred to Bharat and in future the same would be owned by him and in consideration Hemant/Perry Beverages would have right to produce "Black Horse", "Perry Drink", "Dr. Masala", "India King Soda" and "India King Water". It was indicated that trade mark "Perry's Fruit Beer" is a registered trade mark, which was got registered by Bhojraj under the then Trade Marks Act, 1958, which has been renewed from time to time and last renewal is up to 2020. It was further claimed that Hemant by Assignment Deed transferred the said trade mark in favour of Bharat and Rs.50,000/- was paid vide cheque dated 30.12.2014. It was clarified in the Assignment Deed that in future the defendants would not use the trade mark "Fruit Beer" in any form and would not sell the said product in a similar bottle. Copy Right of the label pertaining to product "Fruit Beer" was also got registered by Bhojraj, which was also transferred to Bharat by way of Assignment Deed dated 1.2.2015 and since then under the Trade Mark Assignment Deed and Copyright Assignment Deed, the product "Fruit Beer" is being held by the plaintiff and no one else is entitled to use the trade mark or copy the label. It was alleged that recently it came to the notice of the plaintiff that after the family arrangement, the bottles which were left out in the factory, the defendants were filling product similar to the plaintiff's product and were deceiving the consumers by claiming the same as "Perry's Fruit Beer" and on account of

deception the consumers are purchasing the same resulting in loss of business to the plaintiff. A legal notice dated 26.5.2015 was sent to the defendants, to which an incorrect reply dated 26.6.2015 was given by Hemant, wherein, it was claimed that defendants were not using the trade mark "Fruit Beer" and was using "Fruit Scotch" on its product and the same was not violation of trade mark. It was alleged that the bottles in which the defendants were selling the product "Fruit Scotch" is similar to the bottles being used by the plaintiff and by use of words "Fruit Scotch" the defendants were deceiving the consumers and the same are being purchased by them by treating it as "Perry's Fruit Beer", which amounts to passing-off and is in violation of plaintiff's trade mark and, therefore, the plaintiff was entitled to permanent injunction against the defendants. It was claimed that the cause of action arose on 20.5.2015.

4. Based on the above averments, relief of permanent injunction was claimed against the defendants not to violate the registered trade mark and not to pass-off the goods produced by the defendants by filling them in similar bottles to the plaintiff's product. Along with the suit, an application seeking temporary injunction was filed. It was prayed in the application as under:-

"vr% izkFkZuki= vUrxZr vkns"k 39 fu;e 1 o 2 lifBr /kkjk 151 lh0ih0lh0 is"k dj fuosnu gS fd izkFkhZ dk izkFkZuki= vizkFkhZ ds fo:) Lohdkj fd;k tkdj bl vk"k; dh vLFkbbZ fu"ks/kkKk tkjh dh tkos fd vizkFkhZ izkFkhZ ds iathd`r V~sM ekdZ dk fdLh Hkh izdkj ls mYya?ku ugha djsa rFkk mlds }kjk fufeZr fd;s x;s mRikn dks cktkj esa izkFkhZ ds mRikn ls feyrh tqyrh cksry esa Hkj dj ikflax vkWQ u Lo;a djsa vkSj u gh vius fdLh ukSdj] ,tsUV] uqekbZUnksa] QeZ bR;kfn ls djkosA lkFk gh vizkFkhZ dks tfj;s vLFkbbZ fu"ks/kkKk ls ikcUn fd;k tkos fd vizkFkhZ fdLh Hkh rjg ls vius mRikn dks fodzsrkvksa dks ;g Hkzfer djrs gq, fodz; ugha djsa fd ;g izkFkhZ }kjk fufeZr QzqV ch;j gS rFkk cktkj esa vizkFkhZ }kjk tks Hkh izkFkhZ ds V~sM ekdZ dk mYya?ku dj cuk;k x;k is; inkFkZ rqjUr okfil eaxok;sa ,oa mls u"V djsaA vU; dksbZ vuqrks"k tks izkFkhZ ds i{k esa gks] izkFkhZ dks fnyok;k tkosaA "

5. A reply to the application seeking temporary injunction was filed by Perry Beverages and Hemant raising preliminary objections indicating that by way of family arrangement or Assignment Deed executed in personal capacity by the Director, the trade mark/copyright cannot be assigned. It was claimed that there is no reference in the suit pertaining to the important part "Perry" which cannot be diluted and the plaintiff cannot claim any right on the said mark. The plaintiff has no cause of action. In parawise reply, it was reiterated that the trade mark and copyright were properties of the company and without the company transferring the said rights, the plaintiff has no basis. With reference to the family arrangement dated 5.9.2014 it was claimed that the defendants have right to fill similar flavor with different trade mark. It was claimed that on 21.1.2015 amended family arrangement was executed, original of which is with the plaintiff, the said family arrangement is being faithfully complied with by Hemant. It was denied that the defendant no.1 has no right to manufacture and

sell products in the name of "Perry Beverages". Rest of the averments made in the application were denied and it was prayed that application be dismissed.

6. Though, no separate reply to the temporary injunction application has been filed, one more written statement to the suit was filed on behalf of Perry Beverages signed by Bhojraj inter alia referring to the transaction of assigning trade mark "Fruit Beer" to Bharat and that defendant Hemant has right to use "Perry Beverages" trade mark. It was indicated that the defendants did not have information about the violation of the terms of family arrangement. It was prayed that if the suit for the reliefs claimed by the plaintiff is accepted, the defendant company has no objection. The trial court after hearing the parties passed the impugned order by indicating as under:-

"7- tgka rd izFke n`"V;k izdj.k dk iz"u gS] bl IEcU/k esa vizkFkh dh vksj ls ;s vkifRr;kWa dh xbZ fd ,slkbZuesav MhM vujftLVMZ gS] nkok fizesP;ksj gS] Vs~M ekdZ jftLV~MZ ugha gS] ,slkbZuesav MhM leqfpr LVkEi ij ugha gS ,oa ,slkbZuesav MhM osfyM ugha gSA

8- bl IEcU/k esa U;k;ky; }kjk ,slkbZuesav MhM dk voyksdu fd;k x;kA izLrqr izkFkhZ dk nkok ckcr ikflax vkWQ gS tks /kkjk 27(2) o /kkjk 134 ds vuqlkj lgh gSA mDr ,lkbZuesav lgh gS ;k ugha] bldk fuLrkj.k ewyokn ds fuLrkj.k ds nkSjku fd;k tk ldrk gSA

9- U;k;ky; dk ;g er gS fd ,lkbZuesav MhM }kjk izfrQy vizkFkhZ }kjk izkIr fd;k tk pqdk gS blfy;s ;g dguk fd dEiuh }kjk mDr Vs~M ekdZ izkFkhZ dks ,lkbZu ugha fd;k x;k gS] ;g izFke n`"V;k Lohdkj fd;s tkus ;ksX; ugha gSA

10- U;k;ky; dk ;g er gS fd izFke n`"V;k izdj.k izkFkhZ ds i{k esa gSA bl ckcr nkSjkus cgl vizkFkhZ ds }kjk fd;s x;s mRikn ,oa izkFkhZ ds }kjk fd;s x;s mRikn cksryksa dk voyksdu fd;k x;kA mDr cksry esa fy[kk x;k iSjh "kCn rFkk cksry dh fMtk;u izkFkhZ ds mRikn ls feyrh tqyrh gS ftlls xzkgdksa dks ;g Hkzfer gksrk gS fd ;s mRikn izkFkhZ ds gh gS D;ksafd ml mRikn ij fdlh izdkj dk dksbZ uke flok; iSjh ds dqN ugha fy[kk x;k gSA ,slh fLFkfr esa izFke n`"V;k izdj.k izkFkhZ ds i{k esa gS] vr% ;g fcUnq izkFkhZ ds i{k esa vizkFkhZx.k ds fo:) r; fd;k tkrk gSA

11- tgka rd lqfo/kk ds larqyu dk iz"u gS] bl IEcU/k esa U;k;ky; dk er gS fd viw.khZ; {kfr izkFkhZ ds i{k esa gS D;ksafd ;fn vizkFkhZ dks bl izdkj ds mRikn dks cspus ;k mRikn djus dh vuqefr nh tkrh gS rks fuf"pr :i ls izkFkhZ dks viw.khZ; {kfr gksxh ftldh iwfrZ ugha dh tk ldrhA vr% viw.khZ; {kfr o lqfo/kk dk larqyu izkFkhZ ds i{k esa fu.khZr dh tkrh gSA

12- vizkFkhZ }kjk izLrqr fu.khZr fof/k;ksa dk voyksdu fd;k x;kA mDr fu.khZr fof/k;kWa gLrxr izdj.k esa vizkFkhZ dks fdlh izdkj ls ykHk ugha igqapkrh gS D;ksafd izLrqr fof/k;kWa Vs~M ekdZ jftLV~MZ ls IEcU/kr gS bl dkj.k ls mDr fu.khZr fof/k;kWa vizkFkhZ dks dksbZ ykHk ugha igqWapkrh gSA

13- vr% mDr izkFkZuk i= dk fuLrkj.k bl funsZ"k ds lkFk fd;k tkrk gS fd vizkFkhZx.k }kjk mDr rkQSlyk izkFkhZ ds mRikn ls feyrh tqyrh cksry ds :i esa iSjh "kCn dk mi;ksx ugha fd;k tk;sa bl izdkj izkFkZuk i= dk fuLrkj.k fd;k tkrk

gSA"

7. A perusal of the above determination would reveal that the trial court came to the conclusion that whether the Assignment Deed was valid or not would be decided at the time of final disposal of the suit. As the consideration indicated in the Assignment Deed has been received by the defendants, the contention that trade mark was not assigned cannot be accepted prima facie. It was then indicated by the Court that the bottles of plaintiff's and defendants' product were perused, the word "Perry" indicated on the bottles and design of the bottles are similar to the plaintiff's product by which consumers are confused that the product is that of the plaintiff as on the product except for the word "Perry" nothing is indicated, in those circumstances prima facie case is in favour of the plaintiff, issues pertaining to balance of convenience and irreparable injury was also held in favour of the plaintiff and order, as noticed hereinbefore, injunction the defendants was passed.

8. It is submitted by the learned counsel for the appellants that the trial court committed an error in passing the order impugned, which is beyond the pleadings and case set up by the plaintiff. It was submitted that in the entire plaint the dispute pertain to alleged selling of product in the name of "Perry Fruit Scotch". It was submitted that nowhere in the plaint there was any objection or issue raised regarding use of word "Perry" on the bottle and, therefore, the nature of injunction which is granted is ex facie baseless. It was submitted that the trial court went beyond the record by observing in the order that the product of the plaintiff and defendants were perused as neither the same was produced by the parties nor the same was got produced and does not form part of the record. It was further submitted that the provisions of Trade Mark Act do not apply to the design and flavour and rather confined to the mark only. The bottle, which is termed as package, as defined under Section 2(q) of the Act, is neither registered nor any averment about the nature of the design was made in the pleadings for the court to adjudicate the alleged deceptive similarity and, therefore, the order impugned deserves to be set aside. It was submitted that the findings and order impugned are perverse and capricious and, therefore, same deserves to be set aside.

9. Reliance was placed on *M/s Amritdhara Pharmacy v. Satya Deo Gupta*, AIR 1963 SC 449.

10. The submissions made by the counsel for the appellants were opposed by the counsel for the respondent. It was submitted that the Deeds of Assignment of trade mark and copyright regarding the product "Fruit Beer" is not in dispute and the appellant was taking refuse under the technicality regarding the Assignment having not been done by the company, which has no basis. It was submitted that the appellant was manufacturing and selling deceptively similar product and the definition of "deceptively similar" as contained in Section 2(h) of the Act requires the mark to be so nearly resembling that other mark is likely to deceive or cause confusion, which is writ large on the record. It was submitted that the

applications filed by the appellants under Order 7, Rule 11 CPC were rejected twice by the trial court and once the trial court has exercised its jurisdiction, the same is not required to be tinkered with. Chapter V of the Act deals with assignment and transmission of Trade Mark and, therefore, to claim that the Assignment is not in accordance with the law is baseless.

11. Reliance was placed on S.M. Dyechem Ltd. v. Cadbury (India) Ltd. : (2000) 5 SCC 573, M/s Perry bottling Company v. M/s S.S.Soda & Soft Drinks Company & Ors. : 2002 (1) CDR 686 (Raj.), Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd. : (2001) 5 SCC 73 and Wander Ltd. & anr. v. Antox India P.Ltd. : 1990 (supp) SCC 727.

12. I have considered the submissions made by learned counsel for the parties and have perused the material available on record.

13. A bare perusal of the plaint as well as the application seeking temporary injunction reveals that the plaintiff-applicant Bharat, based on the two Assignment Deeds, filed the suit claiming exclusive right and alleged passing-off by the defendants by manufacturing and selling deceptively similar product. A look at the Deed of Assignment reveals that by the Deed of Assignment dated 30.12.2014, the trade mark of "Fruit Beer" was assigned to the plaintiff by Hemant Chandiramani as the Director of Perry Beverages and by the Deed of Assignment of Copyright dated 1.2.2015 Mr. Bhojraj transferred the "Perry's Fruit Beer" label to Bharat. A bare reading of the two Assignment Deeds reveals that the same pertain to the trade mark "Fruit Beer" and the label "Perry's Fruit Beer" and nothing beyond it.

14. So far as the use of word "Perry" is concerned, a look at the names of plaintiff's firm and respondent Company would reveal that the said word is being used by one and all in the family. A look at the memorandum of partition dated 5.9.2014 read with amended memorandum of partition dated 21.1.2015 relied on by the plaintiff reveal that the product "Perry's Fruit Beer" was to be owned and utilised by the plaintiff and rest of the products including Perry Drink were to be owned & utilised by the defendants. The relevant part of the family arrangement dated 5.9.2014, which was not altered by the amendment dated 21.1.2015, reads as under:-

"11- blh izdkj ls CySd gkWIZ V~sM ekdZ isjh fM~ad Vs~M ekdZ MkWDVj thjk iqnhuk Vs~M ekdZ] bf.M;k fdax lksMk Vs~M ekdZ] bf.M;kfdax fM~fdax okVj Vs~M ekdZ eSIIZ isjh csojst (bf.M;k) izk0fy0 tks/kiqj ds jgsaxsA bls IEcfU/kr tks Hkh esVsfj;y dkVwZu [kkyh cksrys] ,e0Vh0 cksVy IykfLVd dSjsV gseUr pUnhjkekuh ds jgsaxsA

12- isjh QzwV ch;j Q~ysoj gseUr pUnhjkekuh vius vU; fdLh Hkh mRikn vU; Vs~M ekdZ esa Hkj ldrs gSA Hkjr pUnhjkekuh Hkh blh rjhds ls dksyk yseu] vksjsUt o elkyk lksMk] iSdsftax fM~fdax okVj czk.M Hkh vius vU; mRiknksa esa Hkj ldrs gSA gseUr pUnhjkekuh] Hkjr pUnhjkekuh ds V~sM ekdZ dk mi;ksx miHkksx ugha dj ldsaxs rFkk Hkjr pUnhjkekuh] gseUr pUnhjkekuh ds Vs~M ekdZ dk

mi;ksx miHkksx ugha dj ldsaxsA"

15. A perusal of the above reveals that the word "Perry" was permitted to be used by the respondents on its drinks and it was also indicated that the flavour of "Perry's Fruit Beer" may be filled in any other trade mark. Nowhere in the plaint or the application seeking temporary injunction, the plaintiff has made out a case regarding the respondents passing-off the goods by using the word "Perry".

16. Para 13 of the plaint, indicating the cause for filing the suit, reads as under:-

"13- ;g gS fd izfroknH ftl cksry esa vius mRikn QzqV LdkWp dk fodz; dj jgk gS og fn[kus esa oknh }kjk bLrseky dh tk jgh cksry ls fcYdqy feyrh tqyrh gSA bl izdkj vius mRikn ij "kCn QzqV LdkWp dk iz;ksx djds Hkh izfroknH fodzsrkvksa dks Hkzfer dj jgk gS ;g mRikn QzqV ch;j gh gS rFkk fodzsrkx.k gh bldk iSjh dk QzqV ch;j le>rs gq, gh dz; dj jgs gSA bl izdkj izfroknH dk ;g d`R; ikflax vkWQ dh Js.kh ea vkrk gS rFkk Li"V :i ls oknh ds V~sM ekdZ dk mYya?ku gS rFkk oknh] izfroknH ds fo:) bl vk"K; dh LFkkbZ fu"ks/kkKk izkIr djus dk vf/kdkjh gS fd og vius mRikn dks fdLH Hkh izdkj ls ikflax vkWQ djrs gq, fd ;g oknh }kjk fufeZr QzqV ch;j gSA bl izdkj ls cktkj esa fodz; ugha djsa rFkk bl izdkj ikflax vkWQ djrs gq, oknh ds Vs~M ekdZ dk mYya?ku ugha djsaA"

17. The above averment clearly indicates that the cause indicated was sale of the product "Fruit Scotch" in the bottles similar to the plaintiff's bottles. In view thereof, in the absence of any challenge to the use of word "Perry" by the defendants, the direction given by the trial court restraining the use of word "Perry" is beyond the pleadings and/or the case set up by the plaintiff as the allegation pertained to manufacturing and selling of the product "Fruit Scotch" and not the use of word "Perry".

18. So far as the grievance and the direction regarding use of similar bottles is concerned, besides the fact that it is not the case of the plaintiff that design of its bottle is registered, in the entire plaint there is no description of the design of the bottle and from the record it is also apparent that no material has been placed on record to indicate the design of the bottle, neither its picture nor a sample thereof is on record to identify the design of the bottle regarding which the allegation as contained in para 13 of the plaint (quoted hereinbefore) has been made. The trial court, by merely looking at the bottles, without there being any material available on record, during the course of submissions, has observed that the design is similar to the plaintiff's bottle and passed the injunction regarding use of similar bottles.

19. In view of the fact that no material whatsoever is available on record regarding claim of the plaintiff about design of his bottle, grant of an injunction based on the allegation of passing-off by using similarly designed bottles by the defendants, is likely to result in mischief/undesired results, as there is no basis available on record to grant injunction/enforce it/examine any allegation of violation thereof. In view thereof, in absence of any material available on record,

the trial court committed serious error in passing the nature of injunction which has been passed by it.

20. So far as the submissions made by counsel for the respondent regarding non-interference in the injunction granted by the trial court, based on the observations made by Hon''ble Supreme Court in the case of Wander Ltd. (supra) are concerned, therein it was held that the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion and the interference would not be justified on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. The principle is well settled, however similarly, it is also well settled that the appellate court could substitute the discretion exercised by the trial court if it finds that the discretion has been exercised arbitrarily, capriciously or perversely or where the court has ignored the settled principles of law regulating the grant or refusal of interlocutory injunction. The said principle was reiterated by Hon''ble Supreme Court in the case of Ramdev Food Products (P) Ltd. v. Arvindbhai Rambhai Patel & Ors. : (2006) 8 SCC 726, wherein, the judgment in the case of Wander (Ltd.) was also considered.

21. In the present case, as has been indicated hereinbefore, the use of word "Perry" was nowhere under challenge in the suit and the design of the bottle being not on record, the nature of direction issued by the trial court was clearly perverse and could not be sustained.

22. The reliance placed by the counsel for the respondents on the judgment of this Court in the case of Perry Bottling (supra) is misplaced, as in the said case the defendant was seeking to sell the product "Fruit Beer", and it was held that the use of word "Fruit Beer" even without the word "Perry"s" was not permissible, as the same was likely to deceive the consumers. The facts and contentions raised in the said judgment being totally different, the same has no application to the facts of the present case.

23. Though the principles laid down in the case of S.M. Dyechem and Cadila Health Care Ltd. (supra) are well settled, however, the same have no application to the facts of the present case in view of the findings recorded hereinbefore.

24. In view of the fact that the trial court has dealt with the matter de hors the record and in a cursory manner, it would be appropriate that the matter be remanded back to the trial court for reconsidering the application afresh.

25. In view of the above discussion, the appeal filed by the appellant is allowed, the order dated 11.1.2016 passed by the trial court is set aside. The matter is remanded back to the trial to rehear and re-decide the application filed by the respondent in view of the observations made hereinbefore and confining itself to the record of the case.