
(2014) 01 DEL CK 0010
In the Delhi High Court
Case No : C.S. (O.S.) No. 635/2013

Oxygen Services India Pvt. Ltd.

APPELLANT

Vs

Oxygen24 Teleservices and Another

RESPONDENT

Date of Decision : 31-01-2014

Acts Referred:

Citation : (2014) 3 AD 587 : (2014) 58 PTC 160

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : Mukul Chandra and Mr. Pradeep Chandel, Advocate for the Appellant

Final Decision : Disposed Off

Judgement

Manmohan Singh, J.—The defendants are ex-parte. The present suit has been filed by the plaintiff for permanent injunction restraining infringement of trademark and passing off with rendition of account of profits against the defendants. It is the case of the plaintiff, M/s. Oxygen Services India Pvt. Ltd., that initially at the time of its incorporation, it was known as M/s. India Prepaid Services Pvt. Ltd. and the plaintiff changed to the present name in 2006. It has been stated that the plaintiff is a Payments Solution Provider (PSP) and handles aggregation and distribution of prepaid services viz. mobile recharge, bill payments, ticketing and subscriptions for all leading telecommunication operators in India, Direct-To-Home (DTH) TV Operators, internet broadband services providers, railway/airlines/bus/movie ticketing, bill payments, prepaid value-added services, subscription services (internet phone packs, magazines etc.), nokia music, insurance and a large bouquet of banking services on a single platform.

2. Additionally, the plaintiff is also the technology providers for India's first Full Service eWallet from State Bank of India called MobiCash, with cash-in/out, peer to peer, wallet to any Bank, Merchant payments as well and has also partnered with State Bank of India to ensure market availability of MobiCash at the

plaintiffs retail outlets. The plaintiff offers and markets these wide range of services all over India through its Retail Management Units and Super Retail Outlets (SRO). It has been stated that the plaintiff has a national footprint and proven track record of sustained growth and innovation, as a result of which today the plaintiff is recognized as an industry leader. It has also been stated that plaintiff commenced business under its trademark "Oxygen" from 21st August, 2006.

3. The plaintiff filed the present suit against the defendants for restraining them from using the trademarks "oxygen" and/or "oxizen" which forms the essential and dominant feature of plaintiffs business. It has been stated that plaintiff has various registered trademarks i.e. Oxygen (Device of label) registered under class 9 bearing registration No. 1283897, Oxizen registered under class 9 bearing registration No. 1283851, Oxizen registered under class 38 bearing registration No. 1283854 and Oxygen (label) registered under class 9 bearing registration No. 1283895, all registered in May, 2004. It is stated that plaintiff has exclusive proprietary rights and goodwill attached to their services under the said trademarks and there is a substantial public recognition of the said trademarks distinctive of plaintiffs services.

4. It has been stated that defendant No. 1 is a unit of M/s. JVC Finance Ltd. and carries on business activities/services under the name and style of "Oxygen24 Teleservices" which are identical and deceptively similar to one being offered by the plaintiff. Defendant No. 2 is stated to be controlling, managing and operating defendant No. 1 and pursuant to a written Agreement dated 28th September, 2012 entered into by the plaintiff and defendant No. 2, the defendant No. 2 had the Super Retail Outlet (SRO) of the plaintiff. It has been stated by the plaintiff that though initially the defendant No. 2 continued to discharge responsibilities assigned to him, later on his intentions became dishonest and he started working against the interest of the plaintiff. Subsequently, on 22nd January, 2013 the defendant No. 2 was suspended indefinitely due to his misconduct and behavior, apart from working against the interest of the plaintiff.

5. It has been stated that the trademarks of the plaintiff comprise a substantial part of plaintiffs distinct identity and through its continuous use, sale of their wide-range of services, under the said trademark and extensive advertisements in various media, for a long period of time, trademark "Oxygen" of the plaintiff has been established as well-known trademark and enjoy an excellent reputation. It has been further stated that plaintiff is considered to be amongst one if the seamless and secure payment solutions provider (PSP) in India which has become an integral part of their customers/consumers everyday life.

6. It has been stated that the plaintiffs services are availed extensively all over India and it records almost 30 million transactions per month. As a result of the pan India sales, there is a substantial reputation and public recognition in respect of the trademark "Oxygen", such that members of the public and trade now associate the trademark, exclusively with plaintiffs "avant-garde" services and

business alone. The details of the sales figures of the plaintiff services under the trademark "Oxygen" are given in Para. 9(d) of the plaint and out of which the sales figures for the period 2011-2012 has been stated to be Rs. 15,87,59,02,069/-.

7. The Plaintiff has made substantial investments towards advertisement and promotional activities of its products and services under the trademark "Oxygen". The details of the expenditure towards advertisement and promotional activities have been provided under Para. 9(e) of the plaint, of which the expenditures for the period 2011-2012 have been stated to be Rs. 76,06,656/-.

8. It has been stated that the plaintiffs services offered under trademark "Oxygen" enjoy spill over reputation and enviable goodwill all over India by diverse means of direct and online marketing such as banner advertisement, media publicity, advertisements on television, radio, in leading dailies, magazines and journals, which enjoy circulation and readership base in India. The plaintiff is stated to have expended tremendous time, effort and money in popularizing and publicizing its services under the said trademark. The services offered by the plaintiff are widely and readily available on account of its retail footprint of 1,00,000 outlets all over India. To facilitate public awareness and knowledge of its services, the plaintiff has promoted its wide range of services on its official website www.myoxygen.com. The plaintiff has tied up with State Bank of India for enablement of kiosk banking at its outlets and for money transfer services, promoted by Yes Bank.

9. The Plaintiff, sometime in the first week of January, 2013, was informed by some of its retailers that they had been approached by the defendants for providing their products and services to the end consumer. Defendant No. 2 told the retailers that defendant No. 1 was an affiliate/offshoot of the plaintiff and that the plaintiff has created a special website www.oxygen24.com to cater to its expanding customers in addition to the ones already functioning/operating in cyberspace.

10. The Plaintiff immediately contacted defendant No. 1 through defendant No. 2 in the second and third week of January, 2013 clearly informing the defendants about the passing on Infringement of its registered trademark and adopting a colour scheme in connection with the website of defendant No. 1 that is strikingly similar to that of plaintiffs website.

11. It has been stated that the defendant No. 2 gave assurances to the plaintiff that he will get the said website and colour scheme removed from the internet and stop cyber squatting as well as infringement of the plaintiffs trademark, but all in vain. It has been stated that the defendants have given false promises to the plaintiff just to buy time and their intention has always been to cash upon the goodwill and reputation of the plaintiff.

12. The plaintiff sent a legal notice dated 30th January, 2013 to the defendants calling upon them to immediately cease and desist from conducting business or

offering any products or services, same or similar to the plaintiff under the name and style of "Oxygen24 Teleservices". However, the defendants neither complied with the said legal notice nor sent any reply to the plaintiff, the plaintiff, therefore, filed the present suit against the defendants.

13. It is the case of the plaintiff that the defendants by its use of the registered trademark of the plaintiff in a dominant manner are infringing the registered trademarks of the plaintiff as the defendants' use is a clear and categorical deliberate attempt by the defendants to create an impression of connection with the plaintiffs well-known and widely popular registered trademark "Oxygen" and demonstrates the defendants obvious attempt to reap illegal profits by causing confusion amongst general public. It has been stated that defendants' services and positioning being that of a "Payments Solution Provider" is allied and cognate to the plaintiffs services.

14. It is further stated that the defendants' acts also constitute passing off since the plaintiff has invested crores of rupees in the promotion, protection and advertisement of its wide range of services under the trademark "Oxygen" leading to substantial reputation and goodwill so that anyone who sees the trademark, would associate the same with the plaintiff alone. The impugned use by the defendants misrepresent to the consuming public that their services owe their origin to or are licensed by the plaintiff. It has been stated that the said misrepresentation has resulted in actual damage to plaintiffs reputation and goodwill apart from amounting to garnishment and dilution of the plaintiffs trademark. It farther has the effect of diminishing the distinctiveness, effectiveness and prestigious connotations associated with the plaintiffs well-known trademark. The acts of passing off enable the defendants to create confusion in the market, the false impressions so created cannot be easily erased and the same are causing irreparable loss and damage to the plaintiff.

15. The suit as well as the interim application for injunction was listed before court on 8th April, 2013 when summons were issued to the defendant in the suit and notices were issued in the application and an ex parte ad interim injunction was passed in favour of the plaintiff and against the defendant restraining them from conducting business and/or selling their products and services under or by reference to the mark Oxygen or Oxygen 24. Plaintiff thereafter filed an application to bring on record fresh address of the defendants. Fresh summons were issued on the fresh address mentioned in the application filed by the plaintiff.

16. Since no one appeared from the defendants' side on subsequent dates despite service, the defendants were proceeded ex-parte vide order dated 11th October, 2013. The plaintiff was given four weeks time to produce the ex-parte evidence. In the evidence, the plaintiff proved the facts stated in the plaint by evidence by way of affidavit of Mr. Chander Kumar Verma, Company Secretary, of the plaintiff and also exhibited certain documents in support of its case. The same are given as follows:

- (i) The original Memorandum of Association and Articles of Association, exhibited as Exhibit-PW 1/1.
- (ii) The original Certificate of Incorporation issued by Registrar of Companies (ROC), exhibited as Exhibit-PW 1/2.
- (iii) The original written Agreement dated 28th September 2012 entered into between the plaintiff and the defendant No. 2, exhibited as Exhibit-PW 1/4.
- (iv) Original trademark registration certificates issued in the name of the plaintiff, exhibited as Exhibit-PW1/5 to Exhibit-PW 1/8.
- (v) Some sale material relating to the trademark "Oxygen", advertising material etc., exhibited as Exhibit-PW 1/9.
- (vi) Color printouts of a few downloaded pages from the plaintiffs official website www.myoxygen.com, exhibited as Exhibit-PW 1/10
- (vii) Original agreement executed between the plaintiff and State Bank of India, exhibited as Exhibit-PW 1/11.
- (viii) Original agreement executed between the plaintiff and Yes Bank, exhibited as Exhibit-PW 1/12.
- (ix) Color printouts of the webpage of the defendants' website www.oxygen24.com, exhibited as Exhibit-PW 1/13.
- (x) Office copy of the legal notice dated 30th January 2013 issued to the defendants, exhibited as Exhibit-PW 1/14.
- (xi) Original postal and courier receipts (as proof of service), exhibited as Exhibit-PW 1/15.
- (xii) Original certificate indicating having sent the legal notice by email to the defendants email address, exhibited as Exhibit-PW 1/16.

17. The evidence filed by the plaintiff has gone un-rebutted as no cross-examination of the plaintiffs witness was carried out, therefore, the statements made by the plaintiff are accepted as correct deposition. Under these facts and circumstances, the plaintiff is entitled for a decree for permanent injunction in terms of clause (i) of the Prayer Clause of the plaint. Additionally the plaintiff is also awarded costs in terms of clause (iv) of the Prayer Clause of the plaint. The decree be drawn accordingly.

18. The plaintiff has neither prayed for the relief of damages in the plaint nor proved the same. In view thereof, damages are not granted to the plaintiff. The suit as well as the pending applications are disposed of accordingly.