
(1990) 12 GUJ CK 0015
In the Gujarat High Court

Rajai Tirathdas Rupchand and Co.

APPELLANT

Vs

Laxmanbhai Vensimal Rajai

RESPONDENT

Date of Decision : 06-12-1990

Acts Referred:

Trade and Merchandise Marks Act, 1958 — Section 41, 44
Trade Marks Act, 1999 — Section 129

Citation : (1991) 2 GLR 1204

Hon'ble Judges : N.J. Pandya, J

Bench : Single Bench

Judgement

N.J. Pandya, J.—The Appeal arises out of an order passed below Exh. 5 of Regular Civil Suit No. 2 of 1990 of the Court of District Judge, Bhavnagar. The suit was filed in connection with a registered mark and as such, as the Court of first instance, it was entertained by the District Court at Bhavnagar and the learned District Judge himself dealt with the matter. In plaint Exh. 1 prayers were to the effect that the registered mark No. 255198 may not be made use of by the defendant-respondent and they may be restrained from doing so and a declaration in that regard was sought to the effect that the defendant had no right title or interest whatsoever over the said trade mark. Though the plaint is in Gujarati in the prayer clause "without jurisdiction" words are used about the alleged action on the part of the defendant-respondent to use the said trade mark.

2. Along with the plaint, application for ad-interim injunction was given at Exh. 5. The suit was filed on 11-10-1990. On account of filing of caveat the defendant of the said suit was represented by learned Advocate Shri Dave for the trial Court and promptly he made an endorsement of Exh. 5 itself in its margin on the first page that the defendant would like to file a reply and would like to produce certain documents. He had also filed an application at Exh. 9 in the same line and on the date of filing of it, it was rejected because as noted in the order the hearing of application Exh. 5 was over.

3. The order against which the present appeal has been filed came to be given by the learned District Judge on 12-10-199, i.e., on the next day of filing of the suit.

4. Now, when we go through the plaint Ex. 1 as well as the application for ad-interim injunction Exh. 5, the averments are more or less similar as generally is the case in matter like this and therefore the striking feature of the entire litigation as initiated by the aforesaid pleading by the plaintiff is that in so many words or in clear categorical terms he has not come forward with an action of infringement of a registered mark. At the same time, it does refer to the trade mark having been registered and alleging that the defendant being the agent of the plaintiff in the bidi business they were in contract with each other and as relations developed there was mutual faith and trust and in the course thereof, at the instance of the defendant, a partnership arrangement between the plaintiff and the defendant was to be entered into and taking advantage of this situation he got certain documents prepared and got signature thereon of the plaintiff. The plaintiff has further averred that his signatures were obtained on blank papers as well and as such whatever that could have been incorporated in the said paper were written down subsequently and he would not know about it and on top of that, it is his further grievance that he does not know English language and the document that he might have signed or the blank papers where his signatures were obtained subsequently came to be inscribed and written down in English and it was beyond his power to understand or to read and all the while he was made to understand that these papers pertained to the proposed partnership arrangement, he has relied on this representation implicitly and was not much worried about the consequences thereof. However, on 20-9-1990 in a local newspaper in advertisement appeared indication that the aforesaid trade promptly therefore, he made enquiries with the Registrar of Trademarks at Bombay and moved in the matter and that is how the aforesaid suit came to be filed.

5. The learned trial Judge has considered the usual three points, namely, that of the prima facie case, balance of convenience and irreparable loss and has held against the plaintiff in all respects. The grievance made on behalf of the appellant is that the learned trial Judge has not fully applied his mind as while declaring that he will not enter into the merits of the case particularly with the aforesaid fraud and misrepresentation had never entered into this controversy and at the same time has not at all considered the statutory provision of the Trade and Merchandise Marks Act, 1958 more particularly the provisions required to be considered are Sections 41 and 44 of the said Act.

6. The matter when came up before this Court there was also the aforesaid Civil Application where interim orders were sought from this Court and at that time, it was felt looking to the nature of controversy between the parties, the Appeal from Order itself be decided finally and that is how this Appeal is being dealt with alongwith the said application by this Court.

7. The learned Advocate Shri N.N. Gandhi has very skillfully all the while

adverting to the aforesaid factual position maintained that he does not invite any decision from this Court about the aforesaid factual position, but would rather request the Court to consider the effect of the statutory provision mentioned hereinabove. The factual disputes as raised in the plaint and as could be seen from the documents filed by the other side relate to the documents referred to in the trial Court as agreement to assign the trade mark and deed of assignment. Xerox copy of this agreement is produced at mark 4/2 by the plaintiff himself, while xerox copy of the deed of assignment is produced at mark 7/14 by the defendant Mark 4/2 is dated 7-7-1990, while mark 7/14 is dated 13-7-1990.

8. If we do not enter into the controversy of fraud or misrepresentation according to aforesaid statutory provision contained in Section 41 and Section 44, the transaction of assignment calls for certain statutory formalities before it could be completed and made legally effective. Now, Section 41 says that the assignee has to approach the Registrar of Trade Mark for a direction about the advertisement to be issued in connection with the proposed assignment, and Section 44 says that the assignment is not effective till the Registrar scrutinises this proposal and satisfied himself as to the proof title of the trade mark and enters the necessary particulars in the register.

9. Now, there is a proviso to Section 44 which is material for our purpose and it is to the effect that where the validity of assignment or transmission is in dispute between the parties, the Registrar may refuse to register the assignment or transmission until the rights of the parties have been determined by a competent Court.

10. Per se it would appear that even if we take the aforesaid documents mark 4/2 and 7/14 at their face value and do not enter into the aforesaid factual controversy, when the aforesaid statutory requirements are not fulfilled, the assignment cannot be said to be effective and therefore, the defendant-respondent cannot claim under that deed of assignment any proprietary right or any other interest in the disputed trade mark. However, the position as could be gathered from the record is such as would require further scrutiny.

11. The assignee is required to approach the Registrar of Trademarks u/s 41 and has to seek direction as to the nature of advertisement to be given from the Registrar. So his tasks would be to approach the Registrar and seek direction. Necessarily therefore, he cannot advertise till the direction is issued by the Registrar and for want of direction if no advertisement is issued, he cannot be held responsible non-appearance of the advertisement. This is how the learned Advocate Shri Oza appearing for the respondent has split up the said Section 41 and described the section to be in two parts. There appears to be considerable substance in this submission of learned Advocate Shri Oza. In this situation naturally when there is a dispute as to the validity of the transfer or assignment which admittedly is raised by the plaintiff before the Registrar of Trade-marks, obviously, the assignment will never be registered and effectively therefore, the assignee will never be able to get the benefit of the disputed transaction.

12. For this limited purpose when we turn to the aforesaid factual disputes without expressing any opinion as to the controversy of misrepresentation, fraud or any other act on the part of the respondent-defendant, which would ultimately have the effect of making the disputed contract voidable we may mention that inspite of the said statutory provision, it will not be possible for the Court to grant ad interim relief as prayed for by the appellant-plaintiff.

13. Firstly, it is not correct for the plaintiff to say that he could have come to know about the true nature of the transaction only on 29-9-1990 because the son of the plaintiff has already filed a Regular Civil Suit No. 561 of 1990 in the Court of Civil Judge (J.D.) at Bhavnagar and a notice of the order obtained by the son of the plaintiff-appellant in that Regular Suit had appeared in the local newspapers on 27-9-1990. Then, the Registrar of Trade-marks has already been approached by the plaintiff-appellant and the dispute has already been raised with regard to the aforesaid disputed transaction.

14. On top of that we have on record payment of Rs. 30,000/- as evidenced by voucher marks 7/9 dated 7-7-1990, while deed of assignment mark 7/14 is dated 13-7-1990. Precisely for this reason, learned Advocate Shri Gandhi appearing for the plaintiff-appellant had strongly urged that when the agreement mark 4/2 is silent about the amount of consideration, though the word "consideration" does appear in the internal page No. 2 of the said agreement and mark 7/14 specifically refers to Rs. 30,000/- without, at the same time, referring to either cheque or voucher. It is difficult to believe that the transaction now put forth by the defendant-respondent can at all be genuine.

15. However, so far as the document mark 4/2 is concerned, the signature appearing at the foot of that agreement is admitted by the plaintiff and certainly not the writing appearing above it or any part thereof. So far as mark 7/14 is concerned, the plaintiff-appellant does not admit his signature and likewise so far as voucher marks 7/9 is concerned without admitting or disputing the signature the case tried to be put forth is that the amount was received for some other transaction and not pertaining to the aforesaid disputed assignment. For this purpose, the plaintiff, of course, is relying on the aforesaid relationship of principal and agent between the plaintiff and the defendant pertaining to Bidi business and in that relationship, according to the plaintiff, he had to receive certain amount from the defendant-respondent.

16. Now, when we turn to the aforesaid marks 4/2 and 7/14 and other related papers prepared during that period, only we find that a trade mark Attorney has dealt with the matter for and on behalf of the parties.

17. Mark 4/2 where the signature part is admitted dispute has been not arisen and the parties put their signatures to the document are also identified by an Advocate. In the same way there is mark 7/10, an affidavit in Form No. 18 of the Trade marks Act which against is not raised because it was sworn in before a notary and again it bears signature of an Advocate identifying the dependent.

There is another Form TM-20 at mark 7/11 which is, of course, signed only by the Attorney of the applicant, but it refers to this very disputed transaction. Then at mark 7/12 there is Form TM-23 dated 7-7-1990 signed by both the parties. Mark 7/14 is against an affidavit sworn in on 7-7-1990 by the dependent as per the document before a Notary identified by an Advocate. Then follows the said document mark 7/14 bearing the signature of the plaintiff duly identified by an Advocate, there being attestation by the Notary. Now by referring to these documents it is not intended to convey that signatures of the plaintiff wherever they appear are admitted by him. Not only he disputes his signatures but he has come out with a case that the Notary happens to be father-in-law of the Advocate who identified the signatories to the aforesaid various documents and that entire transaction of drawing up of the agreement, assignment deed and filling up of various forms has been carried out in one and the same office. The Advocate happens to be one Smt. Priti S. Dave and the father-in-law happens to be Advocate Shri A.V. Dave. Therefore, the suggestion seems to be that these documents, if at all they are not genuine, may bring about by their very existence an argument that there has been large-scale operation, beyond that I will not make any other observation. Now, the learned Advocate who has identified the various signatories has herself filed an affidavit in the trial Court and it is at Exh. 8. Now, when we go through this affidavit, we find that there is ample material in connection with the aforesaid dispute and the learned Judge had, therefore, every reason to draw upon this source for arriving at the conclusion that he did.

18. Needless to say that said Advocate Smt. P.S. Dave, has categorically met with all the averments in the plaint about the transaction which is disputed now pertaining to the said assignment of the registered trade mark. At a prima facie stage when there are documents the signatures below which may or may not have been admitted and when an Advocate is involved in drawing up of the documents and the Advocate also in an affidavit comes out in a particular way pertaining to that transaction and if relying on this affidavit the learned Judge comes to a particular conclusion, to my mind, sitting in Appeal against an order below application for interim injunction, it will not be proper for me to interfere with the conclusion arrived at by him.

19. In the aforesaid background and when I am not required to deal with the factual aspect of the controversy between the parties leaving it as it is, as rightly submitted by learned Advocate Shri Oza, a situation does emerge that even if the assignee wanted to proceed according to Sections 41 and 44 of the Trade-marks Act and complete the requirements thereof, he will be prevented from doing so. This is a situation created by one else but the plaintiff himself. Now, if the plaintiff were to be permitted to rum round and say that requirements of Sections 41 and 44 are not fulfilled and therefore, the defendant be restrained as prayed for, it would amount to giving him the benefit of his own action.

20. Thus, so far as the statutory requirements of Sections 41 and 44 are concerned, if this is the situation that we find that too the situation of making of

the plaintiff-appellant coupled with the fact that if we see the aforesaid documents marks 4/2, 7/9 and 7/14 along with other documents referred to above, a situation does appear that there was a transaction in the nature of assignment between the parties and it is now in dispute. We do not even for a moment say that the amount of Rs. 30,000/- said to have been paid as per voucher mark 7/9 pertains only to this disputed transaction, but the reading of the voucher prima facie does make it to be a case. Now, the totality of the circumstances appearing from these various factors as considered by the learned trial Judge on one hand juxtapose with the submissions pertaining to statutory requirements as described above and discussed would ultimately bring about a situation where the discretion exercised by the learned trial Judge does not seem to be in any way wrong and much less therefore, would call for any interference on the part of this Court.

21. In the course of submission a reference was made to Section 129 of Trade-marks Act which is about requirement as to registration. I am just referring to it because it was urged on behalf of the plaintiff-appellant in the course of the arguments. This was so done particularly with reference to Section 44 and Sub-section (2) of Section 44 where there is embargo on receiving that document in evidence. For the present we are not concerned with these statutory requirements because that question will arise only at the time of trial, but for our limited purpose, as considered above, the controversy centres round the aforesaid factual document and keeping that in mind, when the learned Sessions Judge has taken a particular view which appears to be quite reasonable and warranted, according to the material on record, there is no need to go into these different aspects. So far as the fact of non-compliance of Sections 41 and 44 is concerned, it has been discussed and for the reasons stated above, I do not think that it can come in the way of the Court in exercising its discretion in the manner that the learned trial Judge has done.

22. I have already referred to the fact that infringement of trade mark is not referred to in so many words at the same time, implication is definitely to that effect so far as the suit is concerned. Nor is there any prayer for getting the documents now sought to be disputed cancelled or for declaration with regard to them and when the prayer is only to the effect as stated above, and that more or less would be an interim prayer for ad interim injunction and for the reasons and circumstances narrated above I come to the conclusion that the order of the learned trial Judge is in no way wrong, nor does it require any interference by this Court and hence the Appeal is dismissed.

23. Before parting with this matter I may mention that any observation made by the learned trial Judge or by this Court with regard to the disputed facts or with regard to the material placed on record and any opinion expressed with regard to those documents or the facts in controversy, will not in any way come in the way of the parties and shall not weigh with the trial Court when it deal with the matter on merits and decides the same in accordance with the evidence

produced by the rival will at that stage be decided in accordance with law. There shall be no order as to costs.

24. In view of this order Civil Application No. 3239 of 1990 does not survive and disposed of accordingly.