

(1998) 02 MP CK 0009
In the Madhya Pradesh High Court
Case No : M (F) A. No. 994 of 1996

Samrat Bidi Works and Others

APPELLANT

Vs

Dayalal Meghji and Co.

RESPONDENT

Date of Decision : 24-02-1998

Acts Referred:

Trade and Merchandise Marks Act, 1958 — Section 29

Citation : AIR 1999 MP 10 : (1999) ILR (MP) 961 : (2000) 1 JLJ 54 : (1998) 2 MPLJ 384

Hon'ble Judges : R.P. Gupta, J

Bench : Single Bench

Advocate : L.S. Singh, for the Appellant; Y.K. Munshi, for the Respondent

Final Decision : Dismissed

Judgement

R.P. Gupta, J.

This appeal is directed against the order dated 9-7-96 passed by the Distt. Judge, Raipur in Civil Suit No. 13-A/95 directing the applicants/defendants by ad interim order, not to manufacture any labels bearing No. 645 or bearing deceptively similar makes as used by the respondents/plaintiffs for their Badshari Pharmaishi special bidi No. 345. The wrappers of the plaintiffs bidi on their Kattas and Pudas bear the following markings, figures and pictures. The pictures and figures of the plaintiffs are registered since 1958 registered regarding trademark of yellow patti with trademark No. 185955, round label/tikli as trademark No. 186529 and trademark yellow patti plus Jhilli registered together as trade mark No. 187667 and finally trademark of one composite wrapper including yellow, patti, tikli and Jhilli printed on a single composite wrapper registered together as trademark No. 305848 since 28-5-75. The figures marking and pictures used by the defendants on the Samrat Bidi Katta and Pudas are also depicted for comparison :-

Plaintiffs wrapper Defendants wrapper 1. Badshai Phar- Samrat special bidi

maishi special bidi 2. Dayalal Meghji Khairagarh, Distt. Raj- Raipur, C. P. nandgaon 3. Registered Nos. None 185955, 187667 4. Dayalal Meghji Samrat Bidi Works, Raipur, C. P. Khairagarh. Badshai Bidi 5. Superior quality Nil 185956, 187667 6. Picture of turbaned Moustache youngman moustached Maharaj and a chain in the neck

The trial Court observed that on seeing the 2 wrappers of the 2 parties the differences between them can only be noticed on a very close scrutiny and close comparison by putting them side by side otherwise on a cursory look the differences do not look perceptible. He noticed that the pictorial impressions conveyed by them are merely similar. So the trial Court was of the opinion that the wrappers prepared by the appellant were deceptively similar to the wrappers of the respondent. The trial Court had observed that a man of common intelligence would be misled in purchasing the bidis of the defendant as bidis of the plaintiffs. So the balance of convenience was found to be in favour of the plaintiff. It was noticed that the defendant was not using its wrappers for long period and has not obtained any registration about his marks. With these observations interim injunction order was passed in favour of the plaintiff against the defendant.

In the present appeal the contention of the appellant is that the wrappers used by them are distinctly dissimilar to those used by the respondent in their colour scheme, design, size, number, photographs and also the monogram used therein. So there could be no chance of mistaken identity regarding bidis of the appellant not being mistakenly considered as bidis manufactured by the respondent. So there is no prima facie case in favour of the plaintiff nor balance of convenience in their favour and they suffered no damage whatsoever by manufacturing or sale of bidis by the appellant. It is also urged that the appellant sales are confined to District Rajnandgaon and Durg and not to district Raipur where the plaintiffs are having their sales of bidis. Defendants manufacture and sale is continued since the year 1987.

During the arguments the counsel for the Parties have mostly relied upon the pictorial impression effect created by the wrappers on the two bidis. According to the appellants assertion these are totally different impressions while according to the respondent's counsel if a person of ordinary intelligence looks at Pudas and Kattas of the defendant with their wrappers he would certainly be misled considering that they might be those of the plaintiffs. So according to them there is similarity between the two.

In this case there is no dispute about the fact that the plaintiffs have their trademarks about the wrappers, colour, design and the numbers registered since 1958 and a composite wrapper trade mark registered since 1975 and renewed up to date. This composite wrapper trademark is the final effect of individual registered trademark earlier registered in 1958. The defendant does not have registration of its trademark about the wrappers of their bidis or about their colour, design or pictorial effect. The defendants had been using their wrappers

since 1987 while the present suit was filed by the plaintiffs on 11-3-95 on knowledge of infringement by the defendants.

The counsel for the appellant has relied upon the observations of the Supreme Court in the case of J. R. Kapoor v. M/s. Micronix India 1994 (2) MPWN 147. It was observed by the Supreme Court that when trade names are not deceptive for consumers and are also written in different ink and style, injunction cannot be issued. In that case both the parties were manufacturing and selling various electrical and electronic goods including aerial boosters, solid state boosters and cable TV etc. The appellant had registered trademark "Micronix" with logo "IM", "I" being shown in the well of M and both letters being in black and white. The trademark was also in black and white colour. The appellants were partnership firm and the firm was dissolved in February, '92 and the trademark was allotted to one of the partners (respondent-plaintiff). Thereafter the appellant-defendant started his business of manufacturing more or less the same product in the name and style of M/s. Micfotelmatix with trade name Microtel. He used Mas his logo with letter and background designed completely different. His logo and trademark (microtel) were in colours of blue and red respectively. The High Court has granted injunction in favour of, the plaintiff against the defendant against use of the trade mark name Microtel with logo M. The Supreme Court observed that the defendant was manufacturing and selling 2 types of boosters. The Supreme Court observed that the defendant was manufacturing and selling two types of boosters viz., transistorised boosters and integrated circuit boosters, whereas the respondent-plaintiff manufactures aerial boosters only of the first type. Thus microchip technology being the base of many of the products, the word "micro" has much relevance in describing the products. Further the word "micro" being descriptive of the micro technology used for production of many electronic goods which daily come to the market, no one can claim monopoly over the use of the said word. Anyone producing any product with the use of micro chip technology would be justified in using the said word as a prefix to his trade name. What is further, those who are familiar with the use of electronic goods know fully well and are not likely to be misguided or confused merely by, the prefix "micro" in the trade name. Once, therefore, it is held that the word "micro" is a common or general name descriptive of the products which are sold or of the technology by which the products are manufactured, the users of such products are, not likely to be misguided or confused by the said word, the only question which has to be prima facie decided at this stage is whether the words "tel" and "nix" in the trade names of the appellant and the respondent are deceptive for the buyers and users and are likely to misguide or confuse them in purchasing one for the other. According to us phonetically the words being totally dissimilar are not going to create any such confusion in the mind of the users. Secondly, even the visual impression of the said two trade names is different. In the first instance the respondent's trade name "micronix" is in black and white in slimmer letters and they are ensconced in designs of elongated triangles both above and below the same name. On the other hand the appellants trade name

"microtel" is in thick bold letters in red colour without any design around. As regards the logo these are found to be totally of different design and colours and different visual effects. The Court said that they are unable to see how the visual effect of both the logos will be the same on the mind of the buyers. So there was not remotest chance of the buyers and users being misguided or confused by the two trade names and the logos. The Court found that even the carton of the two articles of both the parties could not be said to be similar in design and pictorial effect and the minor similarity, was of no consequence. So the injunction order was reversed on prima facie basis.

The best way to decide this appeal is keeping in mind the various principles of possibility of similarity of effect created by the two wrappers, to compare them after keeping them side by side. These have been produced before this Court also. There can be no doubt that the colour combination on the wrappers of the plaintiff and the defendant are similar. The colour combination used by the defendant are yellow safron with white or brown with off white. Similar are the colour combination of the plaintiff. The figures 645 in Hindi have been used by the defendant in white triangles whereas the plaintiff had used figures 345 in white triangles. Of course in the defendants wrappers there is a picture of young man with hair within a circle whereas in the wrappers of plaintiff there is picture of youngman with turban within circle. The pictorial effect of this circle and the figures is similar in two. The details of writing are different. For example in the plaintiffs' wrappers there are names of Badshahi Pharmaishi special bidi. Dayalal Meghji, while in the wrappers of the defendants the names of Samrat special bidi, Khairagarh, Rajnandgaon. But the writings are around the figures 645 in defendants' wrappers. In the plaintiffs' wrappers there are also around the figure 345. When it comes to Hindi figures, 345 and 645 give similar impression when they are placed in similar design and colour combination.

When such scrutiny of these wrappers shows so much similar to a critical mind and the differences arise only on reading the material in between or in the existence of turban or absence of turban in the figures on the wrappers, it can be easily concluded that the pictorial effect conveyed to the mind of innocent purchaser, would be that the bidi with wrappers of Samrat special may be the same, if he goes to buy the bidis of Badshahi Pharmaishi special bidi. At the time of purchase he is not likely to have the packets of the two for comparison before him so as to distinguish. He is likely to be easily misled, into purchasing the Samrat bidi as Badshahi special bidi. Finding differences in the two pictorial effects is like a pictorial quiz, which requires brain strain to find out total dissimilarities in two similar pictures.

The reasonings of the Supreme Court in the case cited by the appellant is on the facts and circumstances of that particular case and on appreciating the pictorial effects of the two articles which were subject-matter of decision, whether infringement has been made or not.

In a case cited in Parle Products (P) Ltd. Vs. J.P. and Co., Mysore, , the Apex

Court observed as under (at page 1362):-

"It is therefore clear that in order to come to the conclusion whether one mark is deceptively similar to another, the broad and essential features of the two are to be considered. They should not be placed side by side to find out if there are any differences in the design and if so, whether they are of such character as to prevent one design from being mistaken for the other. It would be enough if the impugned mark bears such an overall similarity to the registered mark as would be likely to mislead a person usually dealing with one to accept the other, if offered to him. In this case we find that the packets are practically of the same size, the colour scheme of the two wrappers is almost the same; the design on both though not identical bears such a close resemblance that one can easily be mistaken for the other. The essential features of both are that there is a girl with one arm raised and carrying something in the other with a cow or cows near hens and hens or chickens in the foreground. In the background there is a farm house with a fence. The words "Gluko Biscuits" in one and "Glucose Biscuits" on the other occupy a prominent place at the top with a good deal of similarity between the two writings. Anyone in our opinion who has a look at one of the packets today may easily mistake the other if shown on another day as being the same article which he had seen before. If one was not careful enough to note the peculiar features of the wrapper on the plaintiffs' goods, he might easily mistake the defendant's wrapper for the plaintiffs if shown to him some time after he had seen the plaintiffs. After all, an ordinary purchaser is not gifted with the powers of observation of a Sherlock Holmes. We have therefore no doubt that the defendant's wrapper is deceptively similar to plaintiffs which was registered. We do not think it necessary to refer to the decisions referred to at the Bar as in our view each case will have to be judged on its own features and it would be of no use to note on how many points there was similarity and in how many others there was absence of it."

A perusal of these principles and the application as made by the Apex Court in the above case clearly shows that it is in no way contradictory to the appraisal made by the Apex Court in the case of J. R. Kapoor (Supra) earlier referred.

Taking into account the colour scheme, and design of the two wrappers it becomes clear "that there is great likelihood of purchasers being misled about the one being the other in his day to day purchasing of the bidis. The bidi customers are generally people of economically weaker status of society and majority of them even may not be literate. It is not expected at the time of purchase that they should purchase after reading the labels. If reading the labels is the criterion then certainly there is vast difference. But the deciding factor is not content of the label but the design and colour scheme and the effect created by them on an unsuspecting mind. In this case the result follows when we compare the colour scheme and the design of the two wrappers.

If the colour scheme were different, for example, if green and blue had been used and if the figure 645 had not been used which nearly resembles 345, e.g. a

figure "9" or "50" or any other dissimilar figure had been used with different colour, the effect would have been different and the impression would be different. Then perhaps the plaintiff can hardly make a grievance but on the present design of wrapper and colour scheme of the defendant wrappers, the plaintiff appears to be justifiably aggrieved by a feeling that the defendant is trying to sell something as if it is the same as manufactured by the plaintiff.

In view of the above discussion the conclusions by the trial Court do not appear legally or factually faulty. The appeal had no substance and is dismissed with costs. The fee of the counsel for respondents is fixed at Rs. 1,0000/-.