
(1992) 03 DEL CK 0027

In the Delhi High Court

Case No : I.A. 10526/91 in Suit No. 3049/91

Shri Gopal Engg. and Chemical Works

APPELLANT

Vs

M/s. POMX Laboratory

RESPONDENT

Date of Decision : 04-03-1992

Acts Referred:

Citation : AIR 1992 Delhi 302 : (1992) 47 DLT 490 : (1992) 22 DRJ 504

Hon'ble Judges : Jaspal Singh, J

Bench : Single Bench

Advocate : S.K. Bansal, for the Appellant; Ranjan Mukherjee, for the Respondent

Judgement

Jaspal Singh, J.—The plaintiff in this passing off action has sought, pending the judgment which will one day (God help us) be delivered, an injunction restraining the defendants from manufacturing/ processing, selling or offering for sale phenyl under the trade mark "Doctor's Phenyle" label or any other trade mark identical with or deceptively similar to the plaintiff's trade mark "Doctor BRAND".

2. The facts need not detain us for long. On December 19, 1963 the plaintiff's a firm based in Uttar Pradesh, adopted the trade mark DOCTOR BRAND with device of Bust portrait of one of the partners in relation to phenyl and since then has been carrying on extensive business throughout the country. On the other hand the defendant is a Calcutta based firm and it too has been openly selling phenyl since 1983 under its mark "Doctor's "with large sales in Eastern and Southern India and in the State of Uttar Pradesh. Both the contending parties have been advertising their goods and their sales have been progressing with the passage of each year. The plaintiff claims that when in the second week of June, 1990 it came to know that the defendant was selling its goods under the trade mark DOCTOR's phenyle it addressed a notice on June 14, calling upon it refrain from using the said mark in relation to phenyle but the defendant refused to do so by its letter of July 24, 1990. The plaintiff also, claims to have come to know in July, 1991 about an advertisement of the defendant's goods published on June 18, 1991 in the newspaper "Gandev". On September 15, 1991 was filed the present

suit under Ss. 105, 106 of. the Trade and Merchandise Marks Act, 1958 along with an application for ad interim injunction order.

3. I think that is all I need say about the history of the matter except this. We are now in March, 1992 and the defendant has been openly carrying on business since the year 1983, and at least from June, 1990 to the admitted knowledge of the plaintiff, What is of more significance is the fact - that when served with the notice, the defendant made it clear, and that was in July, 1990, that it would rather not desist from marketing its phenyl under the mark "Doctor"s .And yet the suit was instituted on September 30, 1991, that is, after a long delay of more than one year and two months. (In Century Electronics Ltd.vs. C.V.S. Enterprises Ltd., 1983 FSR 1 delay of four months was considered sufficient to deny interim relief.) It is this which has given me lot of anxiety. It is said, as has been often said before, that *vigilantibus non dormientibus sup petit lex*: if you want the law to help you must keep awake, and more especially in respect of interlocutory relief, because it is a relief which you obtain not only upon less than direct proof of facts but also on (as it is said) the balance of convenience pending the trial.

4. Now, having admittedly come to know of the activities of the defendant in June, 1990 and having also come to know in July, 1990 that the defendant would not change the mark but would continue to trade as in the past, what did the plaintiff do? It waited till the end of September, 199 1. Why did it wait till then? Well, there has been some attempt to explain. It is said:

"The plaintiff endeavored to find the said product of the defendant under the trade mark DOCTOR's phenyle level in different markets of the country but the plaintiff could not lay his hands on such impugned goods of defendant bearing the impugned trade mark despite best efforts. The plaintiff also tried to ascertain the business activities of the defendant under the impugned trade mark after the service of legal notice dated 14-6-90 and it was found that the defendant stopped using the impugned trade mark i.e. DOCTOR'sphenyle label in relation to his phenyle."

True, it is a preliminary stage calling for an interlocutory order, but It does not mean that I must keep my eyes closed, accept every word the plaintiff says as Gospel truth and lock-jaw the defendant. The Explanation offered, if at all it can be called an Explanation ,deserves to be ignored, at least for the present, and the reasons are more than one. What efforts did the plaintiff make in "finding" defendant's product "in different parts of the country"? No details are given. In any case what was it that it had not found already? plaintiff's notice of june. 14 1990 shows it knew all that was worth knowing. And, coming No the second limb of the Explanation that after the service of the notice it was "found" that the defendant had "stopped using" the impugned trademark, we are not told, how, when and from where it was so "found". On the other hand, the figures of sale placed on the record by the defendant show that its sales were rather soaring. What to tell of having stopped the user of the impugned mark the defendant was, on plaintiff's own showing, vigorously advertising its product twice a week

in one single newspaper. This is what is borne out from the plaint and so also from the letter of July 5, 1991 from an agent of the plaintiff. Incidentally that letter also shows that the defendant had in fact never "stopped" using the impugned -mark but had rather been marketing its products vigorously and relentlessly. Thus delay in bringing proceedings, which is important in an interlocutory motion, it sought to be explained in a manner, can hardly be accepted. Therefore, it does not seem to me that the plaintiff has really acted with the speed with which it ought to have acted.

5. It was argued that since delay unaccompanied by anything else, is not anymore taken as a bar to a suit for permanent injunction, it should also not cause the Court to refuse interlocutory injunction and that there is no justification. On that point, to make distinction, which the Courts have generally sought to make, between the grant of interim injunction and permanent injunction. I am afraid, I cannot agree, for there are reasons more than one to make the distinction and one of them is that since preliminary injunction is sought upon the theory that there is an urgent need for speedy action to protect the plaintiff's right, by sleeping on them it demonstrates the lack of need for speedy relief.

6. I must, however, confess to my attention having been drawn to a judgment of this Court in *Hindustan Pencils (P) Ltd. Vs. India Stationery Products Co. and Another*, . Since my attention was drawn particularly to paragraphs read the graphs 26 and 29 of the report, they are profitably extracted below:

"26. It appears difficult for me to comprehend the distinction which the courts have sought to make between the grant of interim injunction and permanent injunction. If on the facts which are clearly discernible from the record it appears that after trial a permanent injunction is likely to be granted, notwithstanding the delay on the part of the plaintiff in approaching the Court, there appears to be no reason as to why temporary injunction should be refused."

.....

"29. It would appear to be difficult to accept that relief of temporary injunction should not be granted, because of the delay on the part of the plaintiff even though the Court feels, at that point of time, the ultimately permanent injunction will have to be granted."

I must, before I venture to offer my respectful comments, and it is so well-known already, that every case, being an island unto itself, depends on its own particular facts and that consequently the value of the authorities lies not so much on the actual decision as in the tests applied for determining the disputes in the case of *Hindustan pencils* use by the defendant of the mark was fraudulent ,and on coming to know of infringement the plaintiffs had filed an application cancellation of the registration of defendants copyright followed by a suit for injunction. It was held that neither the delay was such as could be held to be fatal nor could it defeat an action for the grant of a temporary injunction

where the use by the defendant of the mark was fraudulent ".The observation made in the above noted paragraphs 26 and 29 must thus be read in that context only .In any case, as any person with a discretion eye would observe, the statement made in the said paragraphs is not unqualified .It is qualified by its own ifs and buts. In paragraphs 26 the qualification starts from "if one the facts..."and in paragraphs 29,it would be cruel, if may say so, the read the sentence: "It appears difficult for me to comprehend the distinction which the have sought to make between the grant of interim injunction and permanent injunction" shorn of what follows thereafter. Any other approach would mutilate the thought process and present a picture with its contours totally distorted. It is for these reasons that I am inclined to hold that the observed made in the judgment lead the plaintiff nowhere.

7. I must, however, hasten to add that I do not decide this motion merely on the ground of delay, though in the present case, that in itself would be sufficient. There is strong prima facie case to show that the defendant has been in open concurrent trade since the year 1983 with business spread out in the State of Uttar Pradesh, a state of which the plaintiff claims to be its center of activity.Moreover,there is nothing to show that because of the presence of the defendant, the business of the plaintiff has suffered or its sale\\s have shown decline And, I must also pause to remark that though in the present case the plaintiff does attribute to the defendant an improper and sinister motive, a consideration which Lord Simonds thought ought to be particularly called to attention (See: Office Cleaning Services Ltd. v.Westminster Window and General Cleaners It would be cruel, if I may say so, the lies not so much on Ltd. 1945 63 RPC 39 am obliged to put this consideration completely aside, because from the material on the record, I cannot possibly return any such finding in favors of the plaintiff.

8. It was argued on behalf of the defendant that during the period after the notice it had been expending its business and had been lulled into a false sense of security and for that reason too grant of such drastic. Injunction as are now sought on an interlocutory basis deserved to be refused. I must confess, I do find the argument attractive.

Balancing the matters as best as I can, it seems to me that, taking into (consideration) the drastic nature of the relief sought, the need for the plaintiff to establish an improper and sinister motive, the defense of open and honest concurrent trading since 1983, and the inordinate unexplained delay on the part of the plaintiff, it is not appropriate to grant any interlocutory relief.

9. Order accordingly.