

(2003) 06 KL CK 0040
In the High Court Of Kerala
Case No : CMA No. 65 of 2003

Three-N-Products Pvt. Ltd.

APPELLANT

Vs

Amrutha Trading Corporation and Others

RESPONDENT

Date of Decision : 03-06-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2
Trade and Merchandise Marks Act, 1958 — Section 27, 28

Citation : (2003) 27 PTC 213

Hon'ble Judges : K.S. Radhakrishnan, J;K. Padmanabhan Nair, J

Bench : Division Bench

Advocate : A. Aramasundaram, S.C. Chadha, K.P. Dandapani, Abraham P. George, Mohan Vidhani and Dileep Pillai, for the Appellant; P.K. Kurien (SR), Antony Dominic and A.M. Shaffique for Respondent Nos. 2 and 3 and H.W. Kaul, for the Respondent

Final Decision : Dismissed

Judgement

K.S. Radhakrishnan, J.—Plaintiff is the appellant. This appeal has been preferred against the order in I.A. No. 121 of 2003 in O.S. No. 2 of 2003 of the Court of the District Judge, Ernakulam.

2. Suit was instituted by the plaintiff alleging that the defendant had infringed their trade mark registered under the provisions of the Trade and Merchandise Marks Act, 1956 and also that the defendants passed off their goods which are deceptively similar to those of the plaintiffs and caused damages. Application for temporary injunction was also filed restraining the defendants and their representatives from infringing the trade mark "AYUR" of the plaintiff and/or from using the business trade mark "AYUSH" or any other trade name which is identical with or deceptively similar to the plaintiff's trade mark AYUR and also for other consequential reliefs. The court below refused injunction holding that the plaintiff has not made out a prima facie case of infringement of the trade mark. It was also found that the plaintiff had not made out a case that

defendants are trying to pass off the goods deceptively similar to that of the plaintiff's products. The court held if injunction is granted it will cause irreparable injury to the defendants and the balance of convenience is also in favour of the defendants. Consequently application for temporary injunction was dismissed. Aggrieved by the same this appeal has been preferred.

3. Before we deal with the rival contentions we may deal with the facts of this case in brief. Appellant is a private limited company carrying on business in cosmetic products including skin cream, lotions, shampoo, hair care materials and face pack kit for skin treatment etc. They had got its trade mark "AYUR" from 1.4.1984. According to the appellant, on account of the extensive advertisements in various printed and audio/visual media, the trade mark AYUR has acquired vast reputation and goodwill which is not only restricted to the goods in respect of which trademark is used by the appellant, but extends to whole range of goods including medicine. Appellant while participating in an exhibition conducted at Ernakulam in connection with the World Ayurvedic Congress found that respondents are manufacturing, selling and offering for sale dandruff rakshak shampoo, body rakshak shampoo, hair poshak oil etc. under the trade mark AYUSH. According to the appellant, the attempt of the respondents is to confuse the general public by misusing the trade mark of the appellant. Respondents are also passing off their goods and they would continue to do so unless they are restrained by a temporary injunction. Hence the suit was instituted.

4. First respondent filed written statement in the court below. It is stated that products under the trade mark AYUSH are marketed by Hindustan Lever Limited. According to the first respondent if injunction is granted that will cause irreparable injury and loss to it. Respondents 2 and 3 filed counter affidavit before the court below. They have narrated in detail the standing and reputation of the company by name Hindustan Lever Limited. Respondents have been carrying on the business in the manufacture, processing, sale or distribution of wide range of consumer or other products. The word "LEVER" is also the essential and prominent feature of their corporate name, business name, trade name and trading style and a logo or device comprising of two leaves. Consumers, traders, bankers and shareholders all recognise the logo and identify the same with H.L.L. activities. Respondents stated that in the year 2000 they adopted the trade mark AYUSH as part of the project millennium for the manufacture, sale and distribution of ayurvedic products. The trade mark AYUSH has been conceived by the respondents keeping in view one of the ancient blessings in Hindu mythology namely "Ayushman Bhava". Respondents caused a search to be conducted in the records of the Trade Marks Registry and it was revealed that there was a registered trade mark AYUSH in Class 3 and an application pending registration for the trade mark in class 5. Respondents purchased and acquired two trade marks together with goodwill for valuable consideration and made applications to record themselves as the subsequent proprietors of trade mark. The assignments or transfer took place on or about

30th April 2002 and 15th May, 2002 from both the persons respectively. The respondents also stated that even though the application made for the registration of the trademark AYUSH/AYUS were proposed to be used on the date of the application, the same were used by their predecessors in title and evidence of the same would be submitted. Respondents have also made an application for registration of the trade mark AYUSH in about 22 countries. The same has already been registered and is pending in U.A.E., Saudi Arabia. Yemen. Thailand etc. The turnover of the products bearing trade mark, Lever Ayush marketed under the unique containers, cartons/wrappers is approximately Rs. 27 crores. Respondents also stated that trade mark AYUSH and AYUR are phonetically, structurally and visually different and the colour schemes, get up, shapes and artistic features of both the products are different and distinct. Respondents stated that if injunction is granted that will adversely affect their business in India.

5. We heard counsel on either side at length.

6. Before the court below on the side of the appellant Exts. P-1 to P-106 were produced and marked and M.Os 1 to 6 were marked. On the side of the respondents, Exts. R1 to R-27 were marked. M.Os 7 to 15 were also marked. Counsel on either side reiterated their contentions raised before the court below. Counsel also took us through the various provisions of the Trade and Merchandise Marks Act, 1958. Counsel for the appellant submitted that on account of the continuous, open and extensive use of the; trade mark AYUR in respect of diversified goods by the appellant, coupled with huge sale and tremendous publicity, the word "AYUR" has become the household name. Counsel submitted that if any person uses the trade mark "AYUR" or for that matter any other word "or" mark which may be identical or deceptively similar to that it would lead to confusion in the minds of general public. Counsel submitted that the respondents are trying to appropriate the reputation and goodwill of the appellant. Counsel took us through the definition of trade mark. Section 2(d) emphasises "deceptively similar" as a "mark shall be deemed to be deceptively similar to another mark if it so nearly resembles that other mark as to be likely to deceive or cause confusion". Counsel submitted that the trade mark "AYUR" is an invented word and the said mark has been advertised on television and other media. Counsel also made reference to the decision of the Delhi High Court in Three-N-Products (P) Ltd. v. Pardesi General Store, 2000 (20) PTC 489 (sc) as well as the decision in Three-N-Products Pvt. Ltd. v. Yashwant and Ors., 2002 (24).PTC 518 (sc). Counsel also submitted that appellant had no notice of the registration of the trade mark. Counsel also submitted that Exts. RIO, R11 and R13 are concocted documents. Conditions provided under Sections 37 and 38 of the Act have not been complied with by the respondents.

7. Counsel appearing for the respondents took us through the various provisions of the Act and Rules as well as various judicial pronouncements to support his case. Counsel submitted that the respondent purchased registered trade mark

AYUSH in Class 3 and an application is pending for registration of the trade mark in class 5. M/s. Jocil had the registration of trade mark AYUSH in class 3, which was registered on 11.5.1907. In class 5, an application filed by Shovei Pharmaceuticals was pending. It is submitted that respondents purchased and acquired the above two marks together with goodwill for valuable consideration. Counsel also submitted that the respondents adopted the trade mark AYUSH after conducting a search in the Trade Mark Registry, Mumbai. Counsel also submitted that since the respondents had acquired registration certificate in respect of the trade mark "AYUSH" no infringement could be committed.

8. We find during the course of hearing various documents have been produced before the court below and cited various judicial pronouncements to stay the proceedings. We will not be justified in expressing any opinion at this stage lest it would ultimately affect the proceedings pending before the civil court. The Apex Court in Colgate Palmolive (India) Ltd. Vs. Hindustan Lever Ltd., has dealt with the consideration which would weigh with the court hearing the application or petition for grant of injunction. The criteria laid down by the Apex Court has been rightly applied by the court below while passing the impugned order.

9. We may first examine the grievance raised by the appellant with regard to infringement of trade mark. Exts. P57 to P67 are the documents produced to show the registration of trade mark of the appellant under various classes. Ext. P62 is the registration certificate of trade mark of the appellant in Class 3. Ext. P63 is the same in class 5. It is the specific case of the respondent that the trade mark AYUSH has been conceived by them keeping in view one of the ancient blessings in Hindu mythology viz., "Ayushman Bhava" before purchasing the said right we find a bona fide effort was made by the respondents and it is after completing the formalities that the respondents purchased the right. Exts. R10, R11 and R14 are the deeds of assignment of trade mark. We also find that after purchasing the rights respondents have used the same in India and abroad in their products. If injunction is granted against using the trade mark AYUSH at this stage, that will cause irreparable injury and loss to the respondents. On the other hand if ultimately suit is decreed, appellant-plaintiff can also be compensated by way of damages. We are of the view, court below is justified in holding that no prima facie case has been made out by the appellants for granting injunction. Prima facie we are of the view that the trade marks AYUR and AYUSH are not phonetically, structurally and visually similar. After examining the products of both parties we find that the trading features of both items are distinct and different. Both AYUR and AYUSH are written in English. In the case of AYUSH it is written in small letters only and on the top of the word LEVER is written in capital letters. In the case of word AYUR, A is written in capital and the other three letters are in small letters. Shapes of the bottles are also differ. Colour schemes of the label, lettering style and the get up of the two products are totally different. Blessing Ayushman Bhava, is also written on the reverse side of the packing of AYUSH. An umbrella shaped drawing could be seen above the words AYUSH and LEVER. Prima facie we are of the view there is no similarity

between the products of the appellant and respondents. Meanwhile appellant has produced an order of the Madras High Court in O.A. No. 231 of 2003 in O.P. No. 135 of 2003, by which the court has passed an order of injunction restraining the Registrar of Trade Marks from registering M/s Hindustan Lever Limited as the proprietor or as the subsequent proprietor of the trade mark "AYUSH" under No. 47203B in class 3. Since prima facie we found no similarity between the products, the order of injunction granted by the Madras High Court is not of much consequence so far as this case is concerned. We are of the view, if an injunction is granted at this stage it would cause considerable injury and hardship to the respondents. Considering the facts and circumstances of the case, we feel that it is only just and proper that a direction be given to the court below to dispose of the suit expeditiously. The appeal is dismissed, however, dismissal of the appeal would not in any way affect the final disposal of the suit. Reasons stated by the court below in the impugned order or in our judgment will have no bearing on the disposal of the suit since suit has to be disposed of in the light of evidence, oral and documentary adduced by the parties.