

(2013) 11 GUJ CK 0022
In the Gujarat High Court

Case No : Appeal from Order No. 351 of 2013 and Civil Application No. 9317 of 2013 in Appeal From Order No. 351 of 2013

Tripada Healthcare Private Limited

APPELLANT

Vs

Tripada Bio-care

RESPONDENT

Date of Decision : 30-11-2013

Acts Referred:

Citation : (2014) 57 PTC 441

Hon'ble Judges : S.G. Shah, J

Bench : Single Bench

Final Decision : Allowed

Judgement

S.G. Shah, J.—Heard learned advocate Mr. B.D. Shukla for the appellant and learned advocate Mr. D.T. Dave for the respondent. Both the advocates have agreed to finally decide the appeal since interim relief is prayed for by separate civil application and relief in civil application as well as main appeal is practically same i.e. prayer for injunction in favour of the appellant.

2. The appellant is original plaintiff before the District Court, Ahmedabad (Rural) in Civil Suit No. 3 of 2013 wherein an application for interim stay was rejected by judgment and order dated 8.8.2013 by the 4th (Adhoc) Additional District Judge, Ahmedabad (Rural). The appellant has prayed to restrain the defendant and his associates from using the trade-name "TRIPADA" and/or other mark which is identical with and/or deceptively similar to plaintiffs registered trade-mark "TRIPADA" in any manner and at any place during the pendency of suit and thereby to restrain the defendant from committing the act of infringement and act of passing off under the impugned trademark of the plaintiff.

3. Mr. Shukla, learned advocate for the appellant has pointed out that initially Tripada Healthcare Pvt. Ltd. was used by one Navnit P. Modi in the year 1998, but the same was registered with Controller General of Patent Design and Trademarks in the year 2006 with Trademark No. 1515263 for pharmaceuticals

and medicinal preparations including herbal, bacteriological, contraceptive, disinfectants, therapeutic and biological drugs, which are included in Class 05. While registering such trademark in the name of Tripada Healthcare Pvt. Ltd. i.e. present plaintiff on 16.10.2008, the competent authority has categorically noted that trademark typed is word "TRIPADA", which is in use since 01.07.1998 and registration is valid upto 20.12.2016. For such registration, a certificate No. 759258 was issued on 16.10.2008. Mr. Shukla has also pointed out that during pendency of such registration in the name of Tripada Healthcare, the partners of such firm being family members have entered into an agreement of assignment of trademark from Navnit Punjiram Modi, being partner of Tripada Healthcare, a partnership firm to Tripada Healthcare Pvt. Ltd. through its Director Jalpesh Hasmukhbhai Modi. By such agreement of assignment of trademark, executed on 4.10.2012, trademark TRIPADA with trademark No. 1515263 which is valid upto 20.12.2016 and one another trademark TRIFLUXY with trademark No. 1067123 valid upto 14.12.2021 were assigned to Tripada Health Care Pvt. Ltd. i.e. present plaintiff-appellant. It is not disputed that previously such trademark was owned by Tripada Healthcare, a partnership firm of family members. Learned advocate Mr. Shukla has also pointed out that newly formed private limited company had already applied for necessary change in the trademark register because of such assignment before the competent authority and in turn the competent authority has by order dated 19.8.2013 entered the name of the appellant in the register as registered properly of the said trademark TRIPADA under the same registration No. 1515623, which is in existence since 2008. Certificate of such change has been issued on 21.8.2013 wherein it is categorically disclosed that pursuant to a request on form TM-23 dated 30.10.2012 and order thereon dated 19.8.2013 with affidavit of Devendra Kodarlal Modi, the name of registered user has been changed from Tripada Healthcare to Tripada Healthcare Pvt. Ltd. It is also stated in such certificate that the word TRIPADA" is being used by assignor since 1998, it is registered in the year 2006 and it is valid upto 2016. Several other factual details and aspects have been brought to the notice of the Court and argued by Mr. Shukla. Mr. Shukla, learned advocate for the appellant has also pointed out that initially the partner of the respondent -defendant, namely, Kamlesh K. Joshi was serving with Tripada Healthcare Pvt. Ltd. and, therefore, though he was aware that the word TRIPADA has been registered by the appellant, he has after leaving the appellant started the business with the same trademark in partnership with some other persons. However, at present, above material is sufficient to decide the present Appeal from Order.

4. Supporting the impugned order, learned advocate for the respondent Mr. D.T. Dave has read-over the impugned order and submitted that when plaintiff was not able to prove the registration in his name on the date of the suit or on the date of the impugned order, plaintiff is not entitled to interim relief as prayed for. However, he has no answer to the factual details that practically a partnership firm Tripada Healthcare has got a registered trademark in their name since the year 2006 and that they were using it since the year 1998 as well as to the fact

that partners of the partnership firm Tripada Healthcare had decided to assign the trademark in the newly formed private limited company, namely, Tripada Healthcare Pvt. Ltd. being managed by one of the family members only. Thereby, he was having knowledge that TRIPADA is a registered trade mark in favour of the appellant. On the contrary, respondent is trying to become smart after leaving the job by not only using the same registered trademark, but to apply for the registration of the same word for his firm, namely, Tripada Bio-care. The only defence of the respondent is to the effect that when the trial Court has categorically observed that plaintiff has failed to prove on record about registration of trademark TRIPADA in their name, the interim order cannot be granted in favour of the appellant. However, after confirmation of the trademark TRIPADA in favour of the plaintiff in August, 2013, though respondent has no answer to such registration, respondent is pressing to dismiss the appeal on the ground that this is a subsequent development and, therefore, it cannot be considered at this stage. Therefore, respondent has requested to remand back the matter before to the trial Court for fresh consideration and thereby allowing it to continue their business with the impugned trademark TRIPADA. This is nothing, but an attitude to get disadvantage of judicial process.

5. The above factual details make it clear that the impugned judgment and order needs to be interfered with for one or another reason. As already recorded herein above, the fact is very much clear that initially there was a partnership firm, namely, Tripada Healthcare which was using the word TRIPADA for their trade and business since the year 1998 and same was got registered by them w.e.f. 20.12.2006. Such fact is confirmed in the form of trademark No. 1515263 by a certificate No. 759258 issued on 16.10.2008 by the Trademark Registrar, a competent authority under law. Such certificate categorically confirms the name of product for which trademark is registered and declared it valid upto 20.12.2016. When plaintiff had disclosed such fact on record with few relevant documents and more particularly notice dated 18.2.2013 disclosing such fact to the respondent which proves that Tripada Healthcare Pvt. Ltd. has already filed an application to change the name on 30.10.2012 and documentary proof to prove that Mr. Kamlesh K. Joshi, one of the associate of the respondent was serving with appellant, with form TM-1 under the Trade Mark Act filed by said Kamlesh K. Joshi with other partner for registration of the same trademark in the name of Tripada Bio-Care on 22.2.2013, there is no reason for the trial Court to repeatedly observe and say that plaintiff has not filed any documentary proof to prove that trademark is registered in its favour, more particularly when agreement of assignment of trademark dated 4.10.2012 and partnership deed by Tripada Health Care were produced on record to prove that TRIPADA is registered mark by appellant and its assignors, which is none but the partnership firm of family members and assignment was only for transferring the manner of business from partnership firm to private limited company. Only because the trademark authority has not taken decision from 10/2012 till 08/2013 for entering the name of the appellant in the register, it cannot be said that during

that period, word TRIPADA was not registered trademark of the appellant and its assignor.

6. If we consider the above factual details, all other technical and other arguments are not of much material at present. However, learned advocate Mr. Shukla for the appellant has also relied upon one decision between Sun Pharmaceuticals Industries Limited Vs. Cipla Limited, by Delhi High Court wherein while considering the provision of Section 45 read with Order 39, Rules 1 and 2 of the Civil Procedure Code, 1908; which are also relevant in present case; the Delhi High Court has categorically held that immediately on assignment i.e. by writing, assignee acquires title to the registered trademark. When there is nothing to show that plaintiff is in any way to blame for non-decision by the Registrar on his application, then, practically, title exists in favour of assignee even before registration. Similar situation is before us. Thereby the cited case confirms that registration of trademark in favour of the plaintiff is to be considered from the date of assignment itself i.e. 4.10.2012 and when assignment date is produced on record, it cannot be said that plaintiff has failed to prove the registration of trademark in his favour. The Delhi High Court has further held that infringement of rights in a trademark can never be sufficiently compensated and there is a possibility of great injury being done if the defendant is permitted to continue to use such trademark and, therefore, balance of convenience is always in favour of registered user. Thereby, the defendant has no equity in its favour and thus plaintiff is entitled to interim order. The Delhi High Court has dealt with the subject in depth and confirmed that the plaintiff notwithstanding being not registered on a particular date is entitled to exercise rights as a registered proprietor of the trademark in question. While arriving at such conclusion, Delhi High Court has taken care of several reported cases also.

7. In the case of Midas Hygiene Industries P. Ltd. and Another Vs. Sudhir Bhatia and Others, while dealing with the issue of interim injunction for infringement and passing off action, the Apex Court has held that when plaintiff is prior and prominent user of trademark under reference, grant of injunction becomes necessary, when prima facie it appears that the adoption of the similar mark by defendant, since such adoption itself is to be considered as dishonest. However, the Apex Court has clarified that observations at such stage are prima facie and shall not be taken into consideration at the time, of trial of the suit.

8. In Shree Sainath Industries Vs. Sainath Auto Industries, , this High Court has held that ultimately on the objective scrutiny of the records and documents, the Court would have to come to a conclusion, may be based on subjective satisfaction as to whether the respondent is liable for an action of passing- off or as to whether the appellant is entitled to an interim injunction and if an answer to this question is in the affirmative, there is no reason to deny this interim injunction to the appellant. Whereas while confirming the order, the High Court has relied upon the case of Midas Hygiene (supra) regarding prior user and confirmed the injunction in favour of the original plaintiff.

9. I have gone through the record and proceeding and averments of both the sides, which makes it clear that defendant has misled the trial Court and trial Court has grossly erred in appreciating the evidence at such stage where mainly prima facie evidence is to be looked into i.e. Court is not deciding the suit finally, but deciding the rights of the parties based upon the prima facie evidence where interim injunction is sought for. Though best available material evidence would be better to be produced on record, it cannot be said that because the particular evidence is not produced on record, certain fact cannot be believed even if the same is proved by prima facie alternative evidence. In the present case, agreement for assignment of trademark and registered notice by the appellant to the respondent disclosing the factual details coupled with the fact that practically one of the partner of the defendant was ex-employee of the defendant and knowing of such fact, makes it clear that there is prima facie case in favour of the appellant. The argument of the respondent that registration is confirmed only on 19.8.2013 i.e. after the impugned order on 8.8.2013 though seems to be impressive, practically, it confirms that whatever pleaded by the plaintiff is now proved and as categorically confirmed by the Delhi High Court in the case of Sun Pharmaceuticals Industries Ltd. (supra) when registration is to be considered from the date of assignment itself, it cannot be said that plaintiff does not have a prima facie case in its favour. Balance of convenience is also in favour of the appellant and refusal of interim order would certainly result into irreparable loss to the plaintiff- appellant.

10. Therefore, the impugned order needs to be interfered with and the same is quashed and set-aside. Thereby, the appeal is allowed with effect that the interim application in original Civil Suit No. 3 of 2013 pending before the District Court, Ahmedabad (Rural) is allowed as prayed for in terms of paragraph 19(a) of such application. In view of the order passed in Appeal from Order, civil application does not survive and stands disposed of.