
(2009) 03 DEL CK 0003

In the Delhi High Court

Case No : IA No's. 10720 and 11669 of 2008 in CS (OS) No. 1851 of 2008

Vee Excel Drugs and Pharmaceuticals Ltd.

APPELLANT

Vs

Hab Pharmaceuticals and Research Lim.

RESPONDENT

Date of Decision : 16-03-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 4, 151

Trade Marks Act, 1999 — Section 125, 47, 57

Citation : (2009) 40 PTC 269 : (2009) 39 PTC 676

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : Anshuj Dhingra and Anubhav Mehrotra, for the Appellant; Rajiv Nayyar Pratibha M. Singh, Alankar and Deepak Gogia, for the Respondent

Final Decision : Dismissed

Judgement

Manmohan Singh, J.—The plaintiff has filed a suit for permanent injunction restraining infringement of copyright, trade mark, rendition of accounts, damages and delivery up etc.

2. By this order, I shall dispose of the two applications being IA No. 10720/2008 under Order XXXIX Rule 1 and 2 CPC filed by the plaintiff and IA No. 11669/2008 under Order XXXIX Rule 4 CPC read with Section 151 CPC filed by the defendant for vacation of ex parte ad interim order dated 5th September, 2008.

3. The brief facts, as per the plaint, are that the plaintiff is engaged in the business of research, production, marketing, and export of various pharmaceutical and medicinal products and preparations to various countries outside India and has been engaged in the present business for last several years.

4. The plaintiff has alleged that on 8th February, 2002 the plaintiff filed an application for registration of the trade name "Vega Asia" which is duly registered

trade mark under No. 1079405 in class 5 in respect of pharmaceutical and medicinal preparations included in class 5. It is also alleged that the plaintiff holds valid and subsisting drug licence issued by the Drug Licensing and Controlling Authority of the State of Uttar Pradesh for manufacture and sale of its products "Vega Asia" vide protection granted on 30th July, 2002. The plaintiff has contended that the mark "Vega Asia" is a fanciful and coined word being combination of the words "Vega" and "Asia" that was especially created by the plaintiff having no descriptive meaning. The mark "Vega Asia" including its VEGA prefix separately, is inherently distinctive both to the trademark and the consuming public of erectile dysfunction products of the plaintiff company. The plaintiff has also designed, and created various artistic works for the packaging(s) of the said medicinal product "hereinafter Blister Packaging" and has also got the same registered under the Copyright Act, 1957. The said protected artistic works in the packaging as copyright is again the proprietary right of the plaintiff under the Copyright Act, 1957 and the Common Law.

5. The plaintiff for the aforesaid registered trademark "Vega Asia" has also created and adopted another packaging which is being specifically and regularly used by the plaintiff for the instant product. The plaintiff in order to protect the same from being misused had also filed two separate applications for the registration of the said artistic work in the copyright before the Copyright Office on 11/05/2004 under the titles "Vega" and "Vega 100". The aforesaid copyright of the plaintiff for its products have been registered by the copyright office on 02.05.2005 vide registration Nos. A ? 72140/2005 and A ? 72146/2005, hereinafter referred as "Rocket Packaging" and "Blue Packaging" respectively.

6. The further contention of the plaintiff is that the trade mark "Vega Asia" has become popular and has been accepted by the international community. The defendant company along with its officers, agents and buyers in order to enjoy much laboured efforts of the plaintiff has started misusing the intellectual property of the plaintiff in the aforesaid registered copyright and trade mark by production and export of the same either by identical with or deceptively similar packaging or with the combination of both of them and exploiting the same. It is also alleged that the defendant has copied the artistic work/copyright contained in the "Blister Packaging" of the plaintiff, both "Rocket Packaging" and "Blue Packaging" bearing the titles "Vega" and "Vega 100" and has been exporting the same to various countries out of India and more particularly to the countries of the Middle East. The plaintiff has also given the comparison chart and details of the packaging in Paras 18 to 20 of the plaint.

Defendant's Case

7. The defendant has opposed the interim application filed by the plaintiff on various grounds which are mentioned in the written statement, reply to the injunction application as well as in the application filed by defendant under Order 39 Rule 4 read with Section 151 CPC being I.A. No. 11669/08. On merit, the defendant's case is as follows:

a) The defendant is the exclusive licensee to use the mark "Vega" in respect of medicinal and pharmaceutical compositions by virtue of Deed of Cross Licensing dated 07.11.2007 with Aurochem Pharmaceuticals (I) Private Limited. The said Aurochem Pharmaceuticals (I) Private Limited is owner of the Trade Mark "Vega", since 1996;

b) The mark "Vega" is being used by defendant since August, 2001 which is prior in use of plaintiff (the plaintiff is using the said mark since 2002). Hence the defendant is the prior adopter and prior user of the mark "Vega";

c) The defendant is the registered owner of Copyright in the "Vega" and "Vegah" cartons and blister packs, since 2001;

d) The defendant is the registered proprietor of the mark "Vegah" by virtue of Registration No. 1098288, since 2002.

e) The plaintiff has wrongly contended that it acquired knowledge about the defendant's use of mark "Vega" and similar cartons on or about August, 2008 since the plaintiff had issued a Cease and Desist Notice on 7th February, 2005 calling upon the defendant to cease and desist from using the mark "Vega". The defendant had replied to the said letter on 1.3.2005, through their Attorneys. The plaintiff thereafter did not do anything against the defendants for a period of about 42 months and suddenly in the month of September, 2008, concealing the aforesaid facts, filed a suit against defendant and obtained ex-parte injunction.

f) The plaintiff has suppressed material facts of the case while obtaining ex parte ad-interim relief and

g) The Suit filed by plaintiff and interim application suffers heavily from delay, acquiescence and laches.

8. The main contention of the defendant is that the plaintiff has suppressed various material facts in order to obtain ex parte ad interim injunction order from this Court. The details of the said facts are given as under:

(i) That the plaintiff has suppressed the fact that the defendant had filed an application bearing No. ORA/59/2005/TM/Mum/3033 under Sections 47, 57 and 125 of the Trade Mark Act, 1999 for rectification of the plaintiff's trade mark "Vega Asia" before the Intellectual property Appellate Board, Chennai. The Deputy Registrar of the Trade Marks vide his letter dated 31st August, 2005 had informed the plaintiff about the said application being filed before the Intellectual Property Appellate Board at Chennai by the defendant.

(ii) The plaintiff on 18th October, 2004 lodged a complaint against the defendants under the Drug and Cosmetic Act at the office of Commissioner, Drugs and Food Administration, Maharashtra State at Bandra, Mumbai on the basis of same very trademark. After hearing the parties, the Deputy Commissioner vide his order dated 10th March, 2005 informed the Commissioner of Food and Drug Administration that the defendants are the prior user of the

mark "Vega".

(iii) Prior to present suit, the defendant has filed a suit against one M/s. Saviour Biotech Pvt. Ltd. having its office at 2047/48, Second Floor, Gali No. 6, Chuna Mandi, Paharganj, Delhi complaining about the acts of infringement of trade mark "Vega" and carton in the High Court of Mumbai. The said suit was numbered as Suit No. 2426/08. The notice of motion was heard by the High Court of Mumbai on 7th August, 2008 where an ad-interim order was passed in terms of prayers (a), (b) and (c) of the notice of motion. By virtue of the said order, a Court Receiver of Mumbai High Court was appointed to take possession of the goods who visited the premises of M/s. Saviour Biotech and took possession of 2560 strips bearing the mark "Vega". The report of the Receiver is also filed on 30th August, 2008, in the said suit. The Director of Saviour Biotech Pvt. Ltd. informed the present defendant that all the goods seized at the premises of M/s. Saviour Biotech Pvt. Ltd. were being manufactured under the license from the plaintiff herein i.e. M/s. Vee Excel Drugs and Pharmaceuticals Pvt. Ltd. and in view of the said information, the defendant also lodged the chamber summons to join the present plaintiff as one of the parties to the suit at Mumbai High Court and the summons in this regard are pending. The plaintiff has not disclosed about this suit filed by the defendant.

9. I have compared the trade marks as well as copyright and packaging filed by the respective parties in the present suit. It appears to me that the trademark as well as the packaging of the parties are almost identical with and deceptively similar with each other. From the perusal of documents placed by the parties, both the parties are registered owners of the trade marks as well as copyrights for their respective packaging. However, the registration of Trade Mark and Copyrights have been obtained by the parties on different dates. The plaintiff has challenged the alleged assignment of the copyright in favour of the defendant. Infact, both the parties are claiming earlier user of the trade mark and copyright.

10. I feel that the crucial and essential question at this stage is to decide the interim application and to see whether the plaintiff has made full disclosure of the material facts while filing the present suit before this Court. On the basis of admission made by the parties during the hearing of interim application, the following facts emerged:

a) Learned Counsel for the plaintiff has not denied about the factum of pendency of the application for rectification of the plaintiff's trade mark "Vega Asia" filed by the defendant before the Intellectual Property Appellate Board, Chennai.

b) It has also been admitted by the plaintiff that in October, 2004, the plaintiff filed a complaint against the defendants under the Drug and Cosmetics Act at the office of the Commissioner, Drug and Food Administration, Mumbai and the said complaint was heard and decided in favour of the defendants.

c) The factum of filing of suit by the defendant against M/s. Saviour Biotech Pvt. Ltd. is also not denied by the plaintiff. However, the plaintiff justified his stand by

stating that he was not a party and M/s. Saviour Biotech Pvt. Ltd. was doing its business on its own for the purpose of exporting the goods on his behalf.

d) It has also been admitted that prior to the filing of the suit, there is correspondence of legal notice and its reply exchanged between the parties from the period of February, 2005 onwards and the said correspondence was not disclosed in the plaint.

11. In the present case, in Para 35 of the plaint, it is stated that the plaintiff gained knowledge about the defendants' activities in the month of August, 2008. There are admittedly various proceedings/actions pending prior to August, 2008 i.e.

(i) rectification of the plaintiff's trade mark pending from the year 2005 before the Appellate Board,

(ii) the details of disposal of the complaint filed by the plaintiff against the defendant on 10th March, 2005 before the Food and Drug Administration, Maharashtra,

(iii) the legal notice issued by the plaintiff to the defendant regarding the misuse of the trade mark on 7th February, 2005 and

(iv) the filing of the suit by the defendant before the High Court of Mumbai against one M/s. Saviour Biotech Pvt. Ltd. who later turned out to be the licensee of the plaintiff. The explanation given by the plaintiff in this regard is not satisfactory to the effect that the plaintiff did not have any knowledge about the same and in the said suit the plaintiff is not a party. The plaintiff himself has filed a copy of the license agreement between the plaintiff and M/s. Saviour Biotech Pvt. Ltd. In the said agreement, the plaintiff has allowed M/s. Saviour Biotech Pvt. Ltd. to use the trade mark "Vega Asia 50", "Vega Asia 100" and "Vega Super" and appointed him as a licensee.

12. The plaintiff has failed to assign any valid reason as to why the plaintiff has not disclosed the above mentioned facts in the plaint as well as in the application for injunction. The overall circumstances show that the plaintiff has not come before this Court with clean hands, therefore, I feel that the plaintiff is not entitled for the interim injunction prayed in the application filed by the plaintiff under Order 39 Rules 1 & 2 read with Section 151 CPC.

13. In the case of S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, it has been observed that non disclosure of relevant material documents with a view to obtain advantage amounts to fraud. A judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of the law. Such a judgment/decreed by the first court or by the highest court- has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings. Relevant portion of para 7 and 8 are reproduced below:

para 7. The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands....

Para 8. ...A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as the opposite party.

14. In the case of Vijay Syal and Another Vs. State of Punjab and Others, it was held in para 24 as under:

in order to sustain and maintain the sanctity and solemnity of the proceedings in law courts it is necessary that parties should not make false or knowingly, inaccurate statements or misrepresentation and/or should not conceal material facts with a design to gain some advantage or benefit at the hands of the court, when a court is considered as a place where truth and justice are the solemn pursuits. If any party attempts to pollute such a place by adopting recourse to make misrepresentation and is concealing material facts it does so at its risk and cost. Such party must be ready to take the consequences that follow on account of its own making. At times lenient or liberal or generous treatment by courts in dealing with such matters is either mistaken or lightly taken instead of learning a proper lesson. Hence there is a compelling need to take a serious view in such matters to ensure expected purity and grace in the administration of justice.

15. As far as the merit of the case is concerned, this Court cannot ignore the following facts and documents filed by the defendant in support of its contention:

A. The defendant vide deed of cross licensing dated 7th November, 2007 obtained the rights for use of the mark "Vega" from one Aurochem Pharma India (P) Ltd. which is the registered proprietor of the trade mark "Vega" from 23rd December, 1998.

B. The defendant is also the registered proprietor of the trade mark "Vegah" in its favour vide registration No. 1098288 in class 5 as of 24th April, 2002.

C. The defendant is holding the registration of copyright bearing No. A-71707 of 2005 granted on 30th April, 2005 under the title "Vega 100" and another copyright registration bearing No. A-73948/2005 granted on 3rd June, 2005 titled "Vega 50". The defendant is also holding the copyright of blister pack under the registered Copyright No. A-75783/2006 granted on 27th February, 2006.

A copy of the first shipment of the defendant is also placed on record which is dated 8th October, 2001. The above said documents clearly indicate that the defendant is not a new entity.

16. The documents filed by the parties, prima facie, show that both the parties have almost simultaneously used the trademark as well as the copyrights in question. The question of actual proprietorship of the mark as well as of the copyright is yet to be gone into and the conclusion in this regard will come after the trial of the suit as both the parties are holding trademark registration as well as copyright registration in their favour. Moreover, since the plaintiff has not come before this Court with clean hands as he has not disclosed the factum of rectification of trademark filed by the defendant; the decision given by the FDA, Maharashtra on the complaint made by the plaintiff; the legal notice and its reply exchanged by the parties as well as the pending suit filed by the defendant against the licensee of the plaintiff before the High Court of Mumbai, the said conduct of the plaintiff disentitle him from any injunction at this stage.

17. In view of the above discussion, I dismiss the application of the plaintiff for interim injunction under Order XXXIX Rule 1 and 2 CPC being I.A. No. 10720/08 and allow the application of the defendant under Order 39 Rule 4 CPC. The interim order granted by this Court on 5th September, 2008 is hereby vacated. The defendant is also entitled to costs which are quantified at Rs. 50,000/-.

18. The expression of opinion given above is only tentative and will not affect the merits of the case.