

(2015) 06 DEL CK 0049
In the Delhi High Court
Case No : CS(OS) 96 of 2014

Walter Bushnell Pvt. Ltd. and Others

APPELLANT

Vs

Wonder Products and Others

RESPONDENT

Date of Decision : 30-06-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 5
Trade Marks Act, 1999 — Section 28, 29

Citation : (2015) 6 AD 241

Hon'ble Judges : Manmohan, J

Bench : Single Bench

Advocate : Amarjit Singh, for the Appellant

Final Decision : Allowed

Judgement

Manmohan, J—Present suit has been filed for infringement of registered trade mark, passing off and other ancillary relief(s). It is stated that as of 3rd February, 1997 the plaintiff No. 1 is the registered proprietor of trade mark DROTIN under number 732349 in Clause 5 in respect of medicinal and pharmaceutical preparation.

2. In the plaint it is averred that the plaintiffs have adopted and used the trade mark DROTIN since 1997.

3. The medicinal preparation under the trade mark DROTIN are being manufactured by plaintiff No. 2 and plaintiff No. 3 under a licence from plaintiff No. 1. It is stated in the plaint that the trade mark DROTIN has extensively been used in the course of trade and has acquired enviable goodwill and reputation.

4. It is further stated that on account of priority in adoption, use and registration, the plaintiffs have acquired common law rights to the exclusive use of the trade mark DROTIN. The said rights are duly protected under the provisions of Trade Marks Act, 1999 (for short "Act, 1999").

5. Learned counsel for the plaintiffs stated that the defendants had dishonestly adopted a deceptively similar trade mark DRORTT in respect of medicinal and pharmaceutical preparation. Plaintiff found an application No. 2269687 in Class 5 for the trade mark DRORTT was advertised in Journal dated 2nd September, 2013. The plaintiffs filed opposition to the said application and also filed the present suit.

6. By order dated 15th January, 2014, this Court restrained the defendants, by way of ex parte interim injunction, from manufacturing, selling, advertising directly or indirectly the pharmaceutical preparation under the impugned trade mark DRORIT.

7. The defendants were duly served. The suit was decreed against defendant No. 4 by the order dated 18th March, 2014. Though the defendant Nos. 1, 2, 3 sought time to file the written statement, yet they did not file the same. Accordingly, the said defendants were proceeded ex parte by order 15th April, 2014.

8. The plaintiffs have filed their evidence by way of affidavit of Mr. Surender Kumar Jangir as PW 1 and Mr. Bharat Bhushan as PW 2. The plaintiffs have proved the documents establishing their common law as well as statutory rights in the trade mark DROTIN in particular the drug licences, sale invoices, manufacturing licence, registration certificate etc. The statement of sales is contained in the certificate, issued by the Chartered Accountant, a copy of which is Ex. PW 1/8. Specimen of the plaintiffs' product and defendants' infringing product is Ex. PW 1/9.

9. In addition, the plaintiffs have relied upon various orders in which the plaintiffs' rights in the trade mark DROTIN have duly been protected by the courts. Ex. PW 1/10 is the order passed by the Intellectual Property Appellant Board (IPAB) whereby the plaintiffs succeeded in getting the registration of trade mark DROT rectified. Ex. PW 1/11 is the order passed by Bombay High Court dismissing the writ petition challenging the order of IPAB. Other ex parte orders or the decrees passed in favour of the plaintiffs are Ex. PW 1/13 (trade mark DROTIS), PW 1/14 (trade mark DROTOVIN), PW 1/15 (trade mark DROTON), PW 1/16 (trade mark DROTIS) and PW 1/17 (trade mark DROTEE).

10. In the opinion of this Court, the use of the trade mark DRORIT constitutes an act of infringement as well as passing off. The trade mark DRORIT is deceptively similar to the trade mark DROTIN and is used in respect of same goods, i.e., pharmaceutical preparations. Under Section 28 of the Act, 1999 the plaintiffs have exclusive statutory right to the trade mark DROTIN and restrain the use of any identical or deceptively similar mark in respect of the same or similar goods constituting an act of infringement under Section 29 of the Act, 1999.

11. The plaintiffs have proved themselves to be the prior adopters and users of the trade mark DROTIN. The defendants have neither denied the averments made in the plaint nor filed any written statement. Accordingly, the averments

made in the plaint are deemed to have been admitted under Order 8 Rule 5 of the CPC.

12. On the question of deceptive similarity of competing marks, a Coordinate Bench of this Court in *Walter Bushnell Pvt. Ltd. Vs. Miracle Life Sciences*, (2014) 213 DLT 119 : (2014) 59 PTC 339 passed a detailed interim order in I.A. 1871/2013 wherein after taking into consideration the law on the subject, the defendants were restrained from using the trade mark DROTAMOL.

13. Furthermore, the Supreme Court in *Cadila Health Care Ltd. Vs. Cadila Pharmaceuticals Ltd.*, AIR 2001 SC 1952 : (2001) 4 JT 243 : (2001) 3 SCALE 98 : (2001) 3 SCALE 392 : (2001) 5 SCC 73 : (2001) 2 SCR 743 : (2001) 1 UJ 669 : (2001) AIRSCW 4805 : (2001) AIRSCW 1411 : (2001) 3 Supreme 1 : (2001) 8 Supreme 279 , after considering large number of judgments laid down the principles for deciding the question of deceptive similarity of competing marks. The test laid down by the Supreme Court is fulfilled in the present case. Consequently, present suit is decreed in terms of the prayers made in paragraph 32(i) & (ii) of the plaint along with costs. Registry is directed to prepare a decree sheet accordingly.