

RAJASTHAN HIGH COURT

(Jaipur Bench)

Before :- Atul Kumar Jain, J.

S.B. Civil Misc. Appeal No. 3895 of 2014 and S.B. Civil Revision Petition No. 94 of 2014.
D/d. 24.2.2015.

Satyanarayan Agarwal and another - Appellants

Versus

Khandelwal Food Products - Respondent

Equivalent Citation: 2015(149) AIC 870 : 2015(62) PTC 336 : 2015 WLC (Raj.)(UC) 541 : 2015(9) R.C.R.(Civil) 42

For the Appellants/Petitioners :- Ashish Sharma Upadhya, Advocate.

For the Respondent :- **G . D . Bansal** , Advocate.

Civil Procedure Code, 1908, Order 7 Rule 11 - Application - Rejection of, by lower court - Held, right - Cause of action as narrated in plaint of plaintiff - Suit preferred under law of 'Passing off' - Impugned order of lower court is perfectly justified - Revision - Dismissed - Even in case of unregistered trademark, a "passing off" is maintainable - Interim injunction - Both parties are using trademark "Khandelwal Ke Namkeen" and "Har Dil Ajj, Behad Lajij" - If plaintiff is prior user of mark then his rights are protected under the common law even against the registered proprietor - In case in hand documents submitted by respondent are sufficient to make out prima facie case of "prior user" in his favour and mark used by appellants is so deceptive and is likely to cause convincing and deceptive feeling in mind of unwary consumers - Thus, appellants were rightly restrained by the court below from using mark which is deceptively similar to respondent's mark and hence, order passed by court below does not suffer from any infirmity and so this civil misc. appeal is dismissed.

[Para 15 and 16]

Cases Referred :

[Conzerv Systems P. Ltd. v. T.K. Babu, 2009 \(40\) PTC 255 \(Del.\).](#)

[Dharival Industries Ltd. v. M.S.S. Food Products, 2005 \(30\) PTC 233 \(SC\).](#)

[Friends Overseas v. Swadi Product U.K. Ltd., 2012 \(51\) PTC 241 \(Del.\).](#)

[Goverdhan Motels & Restaurants v. I. Subramanyam, 2008 \(36\) PTC 513 \(Del.\).](#)

[K. Narayanan v. S. Murali AIR 2008 \(SC\) 1253.](#)

[Kapoor Saws Mfg. Co. v. Crown Saw Blades Mfg. Co., 2013 \(53\) PTC 506 \(Del.\).](#)

[Kedila Health Care Ltd. v. Cadila Pharmaceuticals Ltd., 2001 \(5\) SCC 73.](#)

Khandelwal Food Products v. Satyanarayan Agarwal, Civil Misc. Case No. 33 of 2014.

Khandelwal Laboratories P. Ltd. v. Macleods Pharmaceuticals Ltd., 2012 (50) PTC 108 (Mad.).

[L.G. Corporation v. Intermarket Electro Plasters \(P\) Ltd., 2006 \(32\) PTC 429 \(Del.\).](#)

[Raja Soap Factory v. S.P. Shantharaj 1965 Law Suit \(SC\) 10.](#)

[Sabko Industries v. Avon Emery Industries, 2007 \(35\) PTC 533 \(Raj.\).](#)

[Saleem Bhai v. State of Maharashtra, Civil Appeal No. 8518 of 2002. Decided on 20.9.2014.](#)

Shyam Investments v. Masti Health and Beauty Pvt. Ltd., 2013 (54) PTC 406 (MAD.).

Unilever PLC v. Vesco Laboratories, AIR 2010 Gujarat 8.

[Urooj Ahmed v. Preethi Kitchen Appliances P. Ltd., 2014 \(57\) PTC 139 \(Mad.\) \[DB\].](#)

JUDGMENT

Atul Kumar Jain, J. - By order dated 25.11.2014 Additional District Judge No. 2, Alwar in **Civil Misc. Case No. 33/2014 titled as Khandelwal Food Products v. Satyanarayan Agarwal & Anr.**, had accepted the application for temporary injunction filed by the plaintiff Khandelwal Food Products and till the disposal of the suit, defendants Satyanarayan Agarwal & Anr. were restrained to use the name of the namkeen products as "Khandelwal Ke Namkeen" and "Har Dil Ajij, Behad Lajij".

2. S.B. Civil Misc. Appeal No. 3895/2014 has been filed by the defendants Satyanarayan Agarwal & Anr. in this court against the said order passed on the application for temporary injunction.

3. By order dated 15.10.2014 Additional District Judge No. 2, Alwar in **Civil Suit No. 45/2014 titled as Khandelwal Food Products v. Satyanarayan Agarwal & Anr.** dismissed an application titled under Order 7 Rule 11 CPC read with Section 16, 20 & 151 CPC. That order has been challenged in this court in Civil Revision Petition No. 94/2014 by Satyanarayan Agarwal & Anr.

4. It was prayed by both the parties that the Civil Misc. Appeal and Civil Revision, both should be decided by a common order because that will be convenient not only for this court but also for that parties and accordingly these two matters are being hereby decided by this common order.

5. I have heard arguments and perused the documents in the file. This court will first consider the arguments raised in Civil Revision Petition against the order dated 15.10.2014 of the court below. The Lower Court has observed in its order that the defendants were

found selling its products at Alwar in the name as "Khandelwal Ke Namkeen" with slogan "Har Dil Ajij, Behad Lajij" and the applicants plaintiffs had come on the basis of their rights under the law of "Passing Off" and so the cause of action had arisen at Alwar also and so the suit filed in the court of District Judge, Alwar, was perfectly within the jurisdiction of that court and accordingly court of ADJ No. 2, Alwar was also having jurisdiction to decide the suit and so the application filed by the defendants under Order 7 Rule 11 CPC read with Section 16, 20 & 151 CPC was dismissed by the court below.

6. Against the convincing arguments of non-petitioner/respondent/plaintiff, matter has been feebly opposed by the Appellants/petitioner/defendants and the petitioners have not been able to make out any case in their favour and this court is unable to accept the arguments of the petitioners that their application under Order 7 Rule 11 CPC should not have been dismissed by the lower court. Court of District Judge, Alwar was certainly having the jurisdiction of cause of action as narrated in the plaint of the plaintiff and hence, dismissal of the application under Order 7 Rule 11 CPC read with Section 16, 20 and 151 CPC by the court below by order dated 15.10.2014 does not appear to be against facts or against law.

7. Appellants/Petitioners seek support from the following rulings in the light of arguments and documents submitted by them:-

- (1) ***Raja Soap Factory v. S.P. Shantharaj 1965 (SC) 10***
- (2) ***AIR 2010 Gujarat 8 Unilever PLC & Anr. v. Vesco Laboratories & Anr.***

8. Respondent/Non-petitioner seeks help from the following rulings:-

- (1) ***Saleem Bhai & Ors. v. State of Maharashtra & Ors. Judgment dated 20.9.2014 of the Apex Court in Civil Appeal No. 8518/2002.***
- (2) ***Urooj Ahmed v. Preethi Kitchen Appliances P. Ltd. & Anr. 2014 (57) PTC 139 (Mad.) [DB]***
- (3) ***L.G. Corporation & Anr. v. Intermarket Electro Plasters (P) Ltd. & Anr. 2006 (32) PTC 429 (Del.)***
- (4) ***Kapoor Saws Mfg. Co. & Anr. v. Crown Saw Blades Mfg. Co. & Anr. 2013 (53) PTC 506 (Del.)***
- (5) ***Conzerv Systems P. Ltd. v. T.K. Babu & Ors., 2009 (40) PTC 255 (Del.)***
- (6) ***Goverdhan Motels & Restaurants v. I. Subramanyam & Anr., 2008 (36) PTC 513 (Del.)***
- (7) ***Khandelwal Laboratories P. Ltd. v. Macleods Pharmaceuticals Ltd., 2012 (50) PTC 108 (Mad.)***

9. I have gone through these rulings.

10. The impugned order dated 15.10.2014 is perfectly justified and hence, the Revision Petition No. 94/2014 filed by Satyanarayan Agarwal & Anr. deserves no favour from this court and hence dismissed.

11. Now, we will look into the arguments raised in Civil Misc. Appeal No. 3895/2014. Appellants Satyanarayan Agarwal & Anr. have argued that the impugned order dated 25.11.2014 is ex-facie illegal and against the material available on record. It has further been argued that at the interim stage final relief has been granted by the court below to the plaintiff which should not have been done.

12. It has further been argued that the respondent is not manufacturing any product and the respondent is only packing the product and claiming the benefit of trademark though the so called trademark of the respondent has not been registered till date. It has further been argued by the appellants that they are doing the business since 1980 and they are having VAT registration also in their favour. It is also been argued by the appellants that the court below has wrongly interpreted the term "passing off". It has further been argued by the appellants that they are using the style and title for their product and there is no trademark in favour of the respondent and so looking to the fact that appellants have also applied for trademark on 1.7.2014, the impugned order dated 25.11.2014 should be quashed. Appellants have put reliance upon following rulings also:-

- (1) ***Raja Soap Factory v. S.P. Shantharaj 1965 Law Suit (SC) 10***. In this case, there was lack of jurisdiction and so the temporary injunction granted by the High Court was vacated by the Apex Court and the plaint was ordered to be returned for presentation to the proper court.
- (2) ***Kedila Health Care Ltd. v. Cadila Pharmaceuticals Ltd., 2001 (5) SCC 73*** In this case it was held that even in the case of unregistered trademark, a "passing off" is maintainable.
- (3) ***AIR 2010 Gujrat Page 8 Unilever PLC & Anr. v. Vesco Laboratories & Anr.*** In this case it was held that for "passing off" action, wherever goods are being sold which are deceptively similar to that of plaintiff, the court of the place of sale has jurisdiction to entertain the suit.
- (4) ***K. Narayanan v. S. Murali AIR 2008 (SC) 1253*** In this case it was held by the Apex Court that before the trademark is registered, there is no right in the person to assert that the trademark has been infringed and that the proposed registration which may or may not be granted, will not confer a cause of action to the plaintiff, whether the application for registration is filed by the plaintiff or the defendant. It was further held that mere filing of trademark application cannot be regarded as a cause of action to file a suit for "passing off" because filing of an application for registration does not indicate any deceptive intent on the part of respondent to injure business or goodwill of plaintiff.

13. On the other hand, it has been argued by the respondent that he had instituted the suit on the ground that he is the prior user of the trademark "Khandelwal Ke Namkeen" and therefore, the court below has rightly restrained appellants from using the said trademark. It has been argued by the respondents that the following documents, copies of which have been submitted by him for perusal of the court, will prove that he is prior user of the said products:-

- (1) Copies of Respondent/Defendant's packing material.
- (2) Copy of cash memo/sales bill by respondent plaintiff's firm bearing the impugned Trade Mark since '93.
- (3) Copies of various commercial registration certificates issued in the favor of the Respondent/plaintiff such as R.S.T., C.S.T., TIN Number Registrations issued in favour of Respondent/Plaintiff by various concerned departments.
- (4) Copies of the various orders issued by the Sales tax department for Assessment Year 1996-1997, 1997-1998 & 2001-2002 along with the Sales Tax Challan dated 30.10.1995.
- (5) Copy of Specimen Letter Head of Respondent/Plaintiff.

- (6) Copy of DIC (District Industries Centre) Certificate along with other license such as FSS, Act, Registration, Weight & Measurement Registration Certificate etc. issued in the name of Respondent/Plaintiff.
- (7) Copy of Receipt of Advertisements given in various newspapers by plaintiff/Respondent.
- (8) Copy of Trademark Registration Certificate in the name of Respondent/Plaintiff.
- (9) Copies of Documents used by Respondent/Plaintiff in conducting various Promotion Activities.
- (10) Copy of Sales Turnover of Respondent/Plaintiff since 1993-94 till 2013-14 along with the various other labels of Plaintiff/Respondent, newspaper advertisement, specimen letter head.

14. This court has perused the copies of the documents submitted by the respondent and following rulings submitted by the respondent have also been perused by me;

- (1) ***Dharival Industries Ltd. & Anr. v. M.S.S. Food Products, 2005 (30) PTC 233 (SC)***
- (2) ***Sabko Industries v. Avon Emery Industries, 2007 (35) PTC 533 (Raj.)***
- (3) ***Shyam Investments v. Masti Health and Beauty Pvt. Ltd., 2013 (54) PTC 406 (MAD.)***
- (4) ***Friends Overseas v. Swadi Product U.K. Ltd. & Ors., 2012 (51) PTC 241 (Del.)***

15. In all the aforesaid rulings it has been held that suit on the basis of "passing off" by plaintiff as prior user V will not be affected even by grant of registration of trademark favour of the defendant. It was further held in these cases that even though, sometimes suit for infringement of trademark was not maintainable but suit for "passing off" may be made out. In, 2012 (51) PTC 241 (Delhi), supra, plaintiff was admittedly prior user of the trademark and the defendant was found adopting not only the mark but also the label, logo, colour scheme and packaging of the products and so to avoid the possibility of concealment and deception, the defendant was restrained by Delhi High Court from using the mark in these cases. It has also been held that if plaintiff is the prior user of the mark then his rights are protected under the common law even against the registered proprietor. It has also been held in these cases that the registration of that mark or similar mark prior in point of time to user by the plaintiff is irrelevant in an action for "passing off" and the presence of the mark in the register maintained by the Trademark Registry does not prove its user by the persons in whose names the mark is registered and is irrelevant for the purposes of deciding the application for interim injunction.

16. In the case in hand the documents submitted by the respondent are sufficient to make out prima-facie case of "prior user" in his favour and the mark used by the appellants is so deceptive and is likely to cause convincing and deceptive feeling in the mind of unwary consumers. Thus, the appellants were rightly restrained by the court below from using the mark "Khandelwal Ke Namkeen" and ""Har Dil Ajij, Behad Lajij" which is deceptively similar to the respondent's mark and hence, the order passed by the court below does not suffer from any infirmity and so this civil misc. appeal filed by Satyanarayan Agarwal & Anr. deserves dismissal which is hereby dismissed along with the stay petition.

17. Copy of this order be sent to the court below immediately by registered post.