

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.1092 OF 2019
a/w
CIVIL APPLICATION NO.1238 OF 2019

1. Mrs. Sharmilee Kapur,]
Age:- 35 years, Occ: Business,]
R/at: 122/1, Lane-4, North Main]
Road, Koregaon Park, Pune 411 001.]
2. M/s. Sparsh Infratech Pvt. Ltd.]
A company registered under the]
Companies Act, 1956,]
(now under Act of 2013)]
Having its registered office at Pune,]
Through its Director -]
Mr. Nikhil Kapur]
Age – 41 years, Occ: Business,]
R/at:-122/1, Lane – 4, North Main Road,]
Koregaon Park, Pune – 411 001.]
Represented by constituted power of]
Attorney holder]
Mr. Milind Suresh Takale]
Age: 48 years, Occupation : Service,]
R/at: 33/38, Erandwane, Pune – 411 004.] **Appellant**
- Vs.

Mr. Kiran Bharekar,]
 Trading as TanMan,]
 Age:- Adult, Occ:- Business,]
 R/at: Bhukum, Off. Bharat Petrol Pump,]
 Pune 412 115, Maharashtra, India.] Respondent

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Mr. Ojas Deolankar, for Appellant/Applicant.

Mr. Rohit Lanke a/w Mr. Rajesh A. More, for Respondent.

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CORAM : PRITHVIRAJ K. CHAVAN, J.
 RESERVED ON : 4TH MARCH, 2021.
 PRONOUNCED ON : 9th MARCH, 2021.

JUDGMENT:

1. Feeling aggrieved with rejection of an application-Exhibit 5 in Regular Civil Suit No.01 of 2019 for temporary injunction by the Ad-hoc District Judge-6, Pune on 19th July, 2019, the appellant has preferred this appeal under Order- XLIII, Rule-1 (r) of the Code of Civil Procedure, 1908 (for short 'C.PC').

2. Facts germane for disposal of the appeal can be summarized as follows;

Appellant No.1 is a registered proprietor and owner of the trademark "*atmantan-be transformed*". Appellant No.1 has given exclusive right to use the said trademark to appellant No.2 since 2009. Appellant No.2 is a Company incorporated under the Companies Act, 1956. Appellant No.2 is running a Luxury Wellness

Destination in Mulshi, near Pune in the name and style as “*atmantan be transformed*”. It deals in human health, hygiene, beauty care and hospitality. The appellants state that they have been providing health, medical, spa services, hygienic and beauty care since long time. They are well known for their high degree of professional management at every level and quality of unmatched services.

3. It is the contention of the appellants that as it's trade name itself suggests that it is a wellness resort in its retreat philosophy is an amalgamation of concepts of *atma* (soul), *mana* (mind) and *tan* (body). They have Doctors and experts in Ayurveda, Indian Naturopathy, Chinese Medicine, Energy Healing, fitness, Physiotherapy and cuisine. The trademark of the appellants is well known and well perceived by the public with trust and conviction.

4. The appellants had filed an application for registration of trademark for “*atmantan be transformed*” under class 44 under the Trademark Act, 1999 bearing No.3084414 on 21st October, 2015. It is a registered trademark under the Trademark Act, 1999 bearing Certificate No.1615440.

5. According to the appellants, they have been recipients of many awards due to their hard work, dedication and unmatched standards.

6. The respondent has moved an application for the trademark registered under similar brand name viz; “*TanMan*” which bears application No.3716564 under class:44. The respondent claims to be the proprietor of the said trade name. The respondent has moved an application for registration on 1st January, 2018. It is the contention

of the appellants that the name of the respondent's mark is deceptively similar and almost identical to that of the appellants. The only difference between the two marks is that the respondent's mark "**TanMan**" is a mere re-arrangement of appellants' mark '**atmantan be transformed**'. The appellants contended that the respondent has very smartly and with *mala fide* intention has adopted word "**TanMan**" as his trade name. Adoption and use of the infringing mark is direct infringement of the registered mark of the appellants. Such adoption has created and is creating confusion among the customers and the public at large.

7. A legal notice dated 22nd February, 2018 was served upon the respondent directing him to refrain from using and displaying the infringing mark and the associated name anywhere in public and not to carry out activities or render services under the infringing mark.

8. Thus, according to the appellants, the respondent has caused infringement and passing-off, of the goodwill of the trademark of the appellants by using in the course of their trade/business a mark which is identical with or deceptively similar to the appellants' mark which is likely to cause confusion among the general public.

9. The respondent, however, has denied almost all the averments of the plaint in his written statement and reply.

10. At the outset, the respondent has prayed for dismissal of the suit itself as neither it discloses a cause of action nor there is proper and correct valuation of the suit, in the sense, that though the appellants have prayed for permanent injunction as well as damages,

however, Court fees have been paid only for the relief of damages and not for the relief of temporary injunction. Be that as it may.

11. The respondent has come with a specific case that there is neither any infringement caused to the trademark of the appellants nor there is passing off, of the goodwill of the trademark of the appellants by using in the course of trade/business a mark which is identical with or deceptively similar to the appellants' mark. It is contended that the appellants are conveniently silent upon the details of the alleged infringement or alleged passing off or the alleged deception or alleged confusion being played upon the customers and general public allegedly by the appellants.

12. Merely stating the words like 'infringement', passing off', "deception" or "confusion" will not satisfy the mandate laid down by the Trademark Act, 1999 for seeking a relief. There are no details tendered by the appellants for the so-called apprehension they feel against the action of the respondent. It is the contention of the respondent that he never caused infringement of any mark/logo/brand allegedly owned by the appellants or any other person.

13. It is contended that the trademark owned by the respondent does not bear any resemblance to any mark which may be owned by the appellants by virtue of size, shape, colour, texture or any other means and thus, it is impossible for a reasonable person to be confused between the trademark owned by the appellants and any alleged mark owned by the respondent.

14. The respondent has contended that the appellants are allegedly running a wellness resort and spa centre under alleged mark; whereas the respondent is running an “*Ayurvedic Research/Treatment Centre*” and as such there is complete differentiation even between the business activities of the respective parties.

15. According to the respondent, as the name suggests it is an “*Ayurvedic Research/Treatment Centre*” owned by him which has in its philosophy paid a tribute to the great *Sage Bharadwaj* who brought *ayurveda* from the Gods to human health. *Sage Bharadwaj* seeking the knowledge of *ayurveda* with his full concentration is thus named “**TANMANA MUNI**” and hence the Ayurvedic Research/Treatment Centre owned by the respondent is named after him. As such, respondent’s mark is thus an invented mark and a coined word. Use of the mark “**TanMan**” will not cause any confusion or deception in the mind of the customers or clients in the course of trade. It is contended that even a comparative reading of the words “*atmantan be transformed*” and “*TanMan*” would make it crystal clear that there is no infringement on the part of the respondent as the words are neither similar nor identical in the light of the legal position also.

16. Heard Mr. Ojas Deolankar, learned Counsel for the appellants and Mr. Rohit Lanke, learned Counsel for the respondent.

17. Learned Counsel for the appellants contends that the registered trademark protects the appellants. There is quite similarity in the trademark of the appellants and the mark of the respondent which has caused infringement of the trademark of the appellants as

it is deceptively similar, identical and confusing. He contends that nature of the trade/business is similar to that of the appellants which is being carried out at a location which is at distance of about 30 k.m. That would definitely mislead the public. It is also the contention of the learned Counsel that there is phonetic similarity in the trade name of the appellants and that of the respondent.

18. The learned Counsel has drawn my attention to a fact that when there is a google search, trade name of the respondent also scrolls down along with that of the appellants which would definitely affect not only the reputation and business of the appellants but also it would affect the goodwill earned by the appellants by passage of time.

19. In support of his submission, learned Counsel for the appellants has placed reliance on a judgment in the case of **Parle Products (P) Ltd Vs. J.P & Co. Mysore , 1972 SCR (3) 289 and Rahul Uttam Suryawanshi Vs. Sunil Manikchand Kasliwal, 2017 (1) Mh. L.J., 315.**

20. On the other hand, learned Counsel for the respondent while supporting the impugned order of rejection of the relief of temporary injunction to the appellants, highlighted following few aspects;

- (a) the trademark is neither similar nor identical;
- (b) the appellants run a resort while the respondent run a research centre based on Ayurveda;
- (c) the mark of the appellants is “***atmantan be transformed***” whereas the mark of the respondent is “***TanMan***” which is quite different having a

different image, different phonetic with no visual similarity.

- (d) colour combination is not identical.
- (e) services provided by the respective institutions are quite different.

Lastly, it is contended that apart from an oral statement made before the Court, there is no evidence, much less, documentary evidence to show that the appellants are in fact suffering loss to their business/trade because of the mark of the respondent.

21. In support of his submission, learned Counsel for the respondent has placed reliance on a judgment of the Hon'ble Supreme Court in case of **Cadila Health Care Ltd Vs. Cadila Pharmaceuticals Ltd., 2001 (3) Supreme 1.**

22. Without going into the minute details of the merits of the case, what is required to be seen is as to whether the order impugned warrants interference in the appeal, in the sense, whether the learned District Judge has rightly exercised his discretion by refusing to grant equitable relief to the appellants?

23. At the outset, whenever there is a case of an infringement of the registered trademark, broadly speaking what is required to be considered is as to whether the person who alleged to have infringed the mark uses in his course of trade a mark which is identical with or deceptively similar to the trademark in relation to any goods in respect of which the trademark is registered. The term "deceptively similar" means a mark which so nearly resembles another mark as

likely to deceive or cause confusion. For that, broad and essential features are to be considered, meaning thereby, they should not be placed side by side to find out if there are any differences in the design, and if so, whether they are of such character as to prevent one design from being mistaken for the other. If the impugned mark bears such an overall similarity to the registered mark as would be likely to mislead a person usually dealing with one to accept the other if offered to him. These are broadly the observations of the Hon'ble Supreme Court in case of **Parle Products (P) Ltd Vs. J.P & Co. Mysore 1972 SCR (3) 289.**

24. It has also been observed in this judgment by the Hon'ble Supreme Court which reads thus;

“In this case, the packets of biscuits manufactured by the appellants and respondent were practically of the same size, the colour scheme of the two wrappers was almost the same and the designs of both, though not identical, bore such a close resemblance that one could easily be mistaken for the other. If one was not careful enough to note the peculiar features of the wrapper on the plaintiffs' goods, he might easily mistake the defendant's wrapper for the plaintiffs' if shown to him some time after he had seen the plaintiffs' wrapper. Though the trial court and the High Court had concurrently found that the defendants' wrapper was not deceptively similar to that of the plaintiffs, the finding must be set aside as it

was not arrived at on a proper consideration of the law, 1294 FH]

Durga Dutt v. Navaratna Laboratoties [1965] 1

S.C.R 737 followed.

Karly's Law of Trade Marks and Trade Names,

9th ed. Para 838, referred to".

25. In the said case, the trial Court after examining features on the two wrappers and packets of the biscuits, took a view that there were greater points of dissimilarity than of similarity between the two and as such it was unlikely that the defendants' goods could be passed off as and for the goods of the plaintiffs. The trial Court concluded that there was no chance of a seller committing fraud on a customer and an ordinary purchaser would certainly refuse to purchase the defendants' goods if he was offered them as and for the plaintiffs' goods. Thus, it is held by the trial Court that the plaintiffs had failed to establish their case.

26. After considering the matter at length, the Hon'ble Supreme Court observed that though the trial Court and the High Court had concurrently found that the defendants' wrapper is not similar to that of the plaintiffs, the findings must be set aside as they have not arrived at on appropriate consideration of law. Thus, the ratio laid down by the Hon'ble Supreme Court in the case of **Parle Products (P) Ltd** (supra) can be distinguished on facts of the case in hand. The registered trademark of the appellants and that of the respondent are quite distinct, different and dissimilar in all aspects. There is no question of a common man getting confused. The registered trademark of the appellants is "*atmantan be*

transformed’ whereas, the trademark of the respondent is “*TanMan*”. If these two trademarks are compared, one would find that the trademark owned by the appellants does not bear any resemblance to that of mark of the respondent, either in size, shape, colour, texture or any other means and, therefore, it would be too hard to infer that a reasonable person would get confused or deceived by the trademark of the respondent.

27. The trademark of the appellants is “*atmantan be transformed*” and the trademark of the respondent is “*TanMan*”. Photostat copies indicate that those two words are not at all similar or deceptively similar, in any manner, and there can be no confusion in the mind of any person. For that matter, the appellants have not quoted any incident as to how and when the customers or clients were in fact confused by the trademark of the respondent. It is submitted by the learned Counsel for the respondent that even the Website of the appellants and that of the respondent are quite different and, therefore, contention of the learned Counsel for the appellants that if one scrolls the google, an impression is gathered that the respondent’s trademark is that of the appellants’ one is without any substance.

28. As already stated, logo of the respondent’s trademark depicts a **lotus** and a **woman sitting with crossed legs**. It can be seen that both marks are spelled differently and even phonetic is also different. There is no oral, visual or any other kind of similarity between two marks owned by either of them.

29. Looking to the class of clientele of the appellants, who avail different kinds of services is altogether different from clientele of the respondent which is an Ayurvedic Research Centre, which offers Ayurvedic treatment and also carries out a research in the field of Ayurvedic science under the brand name "**TanMan**" whereas the appellants are running a resort viz; "**atmantan be transformed**" 30 kms away from the place of business of the respondent.

30. Thus, *prima facie*, no sane man would say that there is infringement on the part of the respondent in respect of words "**TanMan**" and "**atmantan be transformed**" as they are neither similar nor identical when the two are compared.

31. In case of **Parle Products (P) Ltd** (supra), the Hon'ble Supreme Court made a reference of Karly's Law of Trade Marks and Trade Names, 9th Edition. The facts before the Hon'ble Supreme Court in case of **Parle Products (P) Ltd** (supra) were quite peculiar, however, ratio can be distinguished in view of the discussion made hereinabove.

32. Learned Counsel for the appellants has also placed reliance on a judgment of this Court in case of **Rahul Uttam Suryawanshi Vs. Sunil Manikchand Kasliwal, 2017 (1) Mh. L.J., 315**. It would be apposite to reproduce paragraphs 25, 26, 29 and 35 which read thus;

"25. It is not in dispute that the trade mark of the plaintiff is not only registered but the user of the said trade mark of the plaintiff is also prior in point of time than the user thereof by the defendant.

26. *The Division Bench of this Court in case of M/s National Chemicals and Colour Co. and ors vs. Reckitt and Colman of India Limited and anr, AIR 1991 Bombay 76 has held that one cannot compare two trade marks by putting them side by side and by trying to find out similarities and differences in the two marks. It is held that what one has to see is the overall impression which the trade mark gives, because this is what members of the public carry in their minds. I am not inclined to accept the submission of the learned counsel for the defendant that the trade name "SUPER MOR CHHAP" used by the defendant is not deceptive or phonetically similar to that of the trade mark and the trade name of the plaintiff.*

29. *In my view, there is no substance in the submission of the learned counsel for the defendant that the plaintiff and the defendant are carrying on business of different kinds of products and there is no effect on the business of the plaintiff by virtue of the defendant selling his products in the name of "SUPER MOR CHHAP". It is not in dispute that the products sold by the defendant i.e. lime plaster is an essential element of the building construction. In my view, both the parties are thus carrying on similar business. There is no substance in the submission that the impugned order allowing the plaintiff to use "MOR CHHAP" trademark exclusively is contrary to sections 15, 17, 28 and 30 of the Trade*

Marks Act, 1999 or that the same is not permissible. In my view, whether the plaintiff has to apply for registration of the part of the trademark or for the entire trademark being used by the plaintiff, the choice is of the plaintiff and not the defendant.

35. In my view, the impugned trade mark of the defendant is structurally, phonetically and visually similar to the registered trade mark of the plaintiff and is likely to cause confusion in the mind of the customers with average intelligence and imperfect recollection as to the source of origin of the goods. In my view, the plaintiff as an owner of the registered trade mark, is thus entitled to protection under section 29 of the Trade Marks Act, 1999 in view of the defendant committing infringement thereof”.

Facts of the said case are quite different than that of the case in hand. In the said case, impugned trademark of the defendants was structurally, phonetically and visually similar to that of the registered trademark of the plaintiffs which is likely to cause confusion in the minds of the customers with average intelligence and imperfect recollection as to the source of origin of the goods. Here, in this case, the impugned trademark of the respondent, as already stated, is neither phonetically nor visually similar to that of the trademark of the appellants and, therefore, this ratio would not be of any assistance to the appellants.

33. On the other hand, the learned Counsel for the respondent has placed reliance on a judgment of the Hon'ble Supreme Court in case of **Cadila Health Care Ltd Vs. Cadila Pharmaceuticals Ltd., 2001 (3) Supreme 1**. Medicinal product was involved in the said case. Action was alleged regarding passing of trademark of medicinal product. A suit for injunction was filed and pending the suit, a prayer for interim injunction is made. In that case, the appellant was making "**FALCIGO**" and the respondent was making "**FALCITAB**" medicine. Both for cure of same disease. The trial Court refused temporary injunction which was upheld by the High Court. The Hon'ble Supreme Court refused to interfere in the concurrent findings of the trial Court and the High Court. It is held thus;

"Held: When the special leave came up for hearing, detailed arguments were heard and, for the reasons to be given, this Court did not interfere with the orders passed by the courts below but gave directions regarding expeditious disposal of the suit. In this judgment, we give the reason for not interfering and also set out the principles which are to be kept in mind while dealing with an action for infringement or passing off specially in the cases relating to medicinal products. The reason for not interfering with the order appealed against was that there may be possibility of evidence being required on merits of the case and directions were given for speedy trial of the suit. Expression of opinion on merits by this Court at this stage was not thought advisable".

Relevant portion of paragraphs 13 and 14 reads thus;

“As was observed by Parker, J. in Re Pianotist Co. s Application (1906) 23 RPC 774 which was also a case of the comparison of two words-

“You must take the two words. You must judge them, both by their look and by their sound. You must consider the goods to which they are to be applied. You must consider the nature and kind of customer who would be likely to buy those goods. In fact you must consider all the surrounding circumstances; and you must further consider what is likely to happen if each of those trade marks is used in a normal way as a trade mark for the goods of the respective owners of the marks” (p.777)

For deceptive resemblance two important questions are: (1)who are the persons whom the resemblance must be likely to deceive or confuse, and (2)what rules of comparison are to be adopted in judging whether such resemblance exists. As to confusion, it is perhaps an appropriate description of the state of mind of a customer who, on seeing a mark thinks that it differs from the mark on goods which he has previously bought, but is doubtful whether that impression is not due to imperfect recollection.

Paragraph 14;

Secondly, while dealing with the question of burden of proof in an action for infringement of trade mark, this Court in Durga Dutt Sharma’s case (supra) held as under:

“When once the use by the defendant of the mark which is claimed to infringe the plaintiff’s mark is shown to be “in the course of trade”, the question whether there has been an infringement is to be decided by comparison of the two marks. Where the two marks are identical no further questions arise; for then the infringement is made out. When the two marks are not identical, the plaintiff would have to establish that the mark used by the defendant so nearly resembles the plaintiffs registered trade mark as is likely to deceive or cause confusion and in relation to goods in respect of which it is registered (Vide S. 21). A point has sometimes been raised as to whether the words “or cause confusion” introduce any element which is not already covered by the words “likely to deceive” and it has some times been answered by saying that it is merely an extension of the earlier test and does not add very materially to the concept indicated by the earlier words “likely to deceive”. But this apart, as the question arises in an action for infringement the onus would be on the plaintiff to establish that the trade mark used by the defendant in the course of trade in the goods in respect of which his mark is registered, is deceptively similar. This has necessarily to be ascertained by a comparison of the two marks - the degree of resemblance which is necessary to exist to cause deception not being capable of definition by laying down objective standards”.

34. Having taken into account the decisions referred hereinabove and in view of the overall discussions, I am of the considered view that no case is made out warranting interference in the impugned order. Consequently, the appeal being devoid of merits, stands dismissed. Costs to be the costs in cause.

35. In view of dismissal of the appeal, Civil Application No.1238 of 2019 does not survive, hence stands disposed of.

[PRITHVIRAJ K. CHAVAN, J.]