

* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ FAO(OS)228/2007 & CM Nos.8934-35/2007
BABU RAM DHARAM PRAKASH ...Appellant through
! Mr. Manav Kumar, Adv.

-versus-

\$ IZUK CHEMICAL WORKS ...Respondent through
^ Mr.S.K. Bansal, Adv.

% Date of Decision : 17th September, 2008

CORAM:

* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE S.L. BHAYANA

- | | |
|---|-----|
| 1. Whether reporters of local papers may be allowed to see the Order? | No |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the Order should be reported in the Digest? | Yes |

VIKRAMAJIT SEN, J. (Oral)

O R D E R

1. This Appeal assails the Order dated 11.5.2007 of the learned Single Judge granting an ex parte ad interim injunction to the Plaintiff, as prayed for in the Application under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure (CPC). Briefly stated, the Defendants have been restrained from using the Plaintiff's Trademark 'Moon Star' and/or from using the device of a star in the lap of the moon or any part thereof or any of the Defendant's products or business.

2. Indeed, the learned Single Judge has passed a very detailed Order in which various precedents, including *Atlas Cycle Industries Ltd. -vs- Hind Cycles Limited*, ILR 1973 1 Delhi 393, *Modi Sugar Mills Ltd. -vs- Tata Oil Mills Ltd.*, AIR 1943 Lahore 196, ***James Chadwick & Bros. Ltd. -vs- The National Sewing Thread Co. Ltd.***, AIR 1951 Bombay 147, *Amritdhara Pharmacy -vs- Satya Deo Gupta*, AIR 1963 SC 449, *Corn Products Refining Co. -vs- Shangrila Food Products Ltd.*, AIR 1960 SC 142, *K.R. Chinna Krishna Chettiar -vs- Sri Ambal and Company*, AIR 1970 SC 146 : 1969(2) SCC 131, *De Cordova -vs- Vick Chemical Coy*, 68 RPC 103, *Devi Pesticides Pvt. Ltd. -vs- Shiv Agro Chemicals Industries*, 2006(32) PTC 434 (Madras) (DB), *Shaw Wallace & Co. Ltd. -vs- Superior Industries Ltd.*, 2003(27) PTC 63 (Delhi), *Vrajlal Manilal & Co. -vs- M/s. N.S. Bidi Co.*, AIR 1987 Delhi 312, *William Grant & Sons Ltd. -vs- McDowell & Co. Ltd.*, 1997 PTC 17 134, *Parle Products P. Ltd. -vs- J.P. & Co.*, Mysore, (1972) 3 SCR 289, *Glaxo Operations UK Ltd. -vs- Samrat Pharmaceuticals*, AIR 1984 Delhi 265, *Metro Playing Card Co. -vs- Wazir Chand Kapoor*, AIR 1972 Delhi 248, *Hitachi Ltd. -vs- Ajay Kumar Agarwal*, 1996 PTC (16) DB (Delhi), *Hardie Trading Ltd. -vs- Addisons Paint and Chemicals Ltd.*, 2003 (11) SCC 92 and *State of Mizoram -vs- Biakchhawna*, 1999 (1) SCC 156 have been discussed. The extract from ***James***

Chadwick enunciates that the “real question is as to how a purchaser who must be looked upon as an average man of ordinary intelligence, would react to a particular trademark, what association he would form by looking at the trademark, and in what respect he would connect the trademark with the goods which he would be purchasing.”

3. The learned Single Judge has concluded that the Defendant has fraudulently copied an essential part of the trademark of the Plaintiff in using “star as well as the device of a star” as part of its trademark. It has been noted that the Plaintiff has proprietary rights over the same by user of the trademark since 1917 and registration of its trademark since 1943. The learned Single Judge has also highlighted that the legal rights of the Plaintiff are based on its registered trademark and, therefore, is entitled statutorily to protection.

4. As has been mentioned above, the Appeal is against an interlocutory Order granting the Prayers contained in an Application under Order XXXIX Rules 1 and 2 of the CPC. The approach which must be adhered to by the Appellate Court in such matters is perspicuously enunciated in the decision of the Supreme Court in **Ramdev Food Products Pvt. Ltd. -vs-**

Arvindbhai Rambhai Patel, AIR 2006 SC 3304, paragraphs 128 and 129 of which are topical:-

128.The grant of an interlocutory injunction is in exercise of discretionary power and hence, the appellate courts will usually not interfere with it. However, appellate courts will substitute their discretion if they find that discretion has been exercised arbitrarily, capriciously, perversely, or where the court has ignored settled principles of law regulating the grant or refusal of interlocutory injunctions. This principle has been stated by this court time and time again. (See for example *Wander Ltd. V. Antox India P. Ltd.*, (1990) Supp SCC 727, *Lakshmikant V. Patel v. Chetanbhai Shah*, (2002) 3 SCC 65 and *Seema Arshad Zaheer v. MC of Greater Mumbai*, (2006) 5 SCALE 263).

129.The appellate court may not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that it had considered the matter at the trial stage it would have come to a contrary conclusion.

5. Learned counsel for the Appellant had laid great emphasis on the fact that even prior to the grant of the injunction the submission of learned counsel for the Plaintiff had been noted to the effect that the complaint of the Plaintiff against the label

and packaging of the Defendant does not survive. That, however, was in respect of the use of the alphabet 'R' in a circle ® which is impermissible by the statute. It had to be removed even without the Plaintiff's objection. The challenge and complaint to the plagiarism of the Plaintiff's trademark 'Moon Star' by the Defendant's adoption of the trademark 'Super Star' together with a star along with the alphabet remained alive.

6. We are of the view that the Plaintiff had made out a *prima facie* case for the grant of an injunction against the Defendant for the use of the trademark 'Super Star'. It has been contended that the word 'star' has been freely used in the market. The precise inquiry would have to be whether the use of the word 'star' has been adopted in respect of the products manufactured and marketed by the Plaintiff, that is, Hair Dye. It is of no relevance or advantage to the Defendant that the product in question is Herbal Heena. This product is widely used as a Hair Dye, although it may also have ameliorative effect on hair. The use of the pictorial device of a 'star' compounds and demonstrates the intention of the Defendant to deceive a customer into buying its product, believing it to be that of the Plaintiff. The views and findings expressed by us herein should not affect or influence the passing of the final

judgment of the case. However, based on *Ramdev*, even if we were of a different opinion, we would be loath to interfere in this Appeal since the view taken by the learned Single Judge is a plausible one and is not perverse or illegal.

7. Appeal as well as pending applications stand dismissed. Parties to bear their respective costs.

VIKRAMAJIT SEN, J.

S.L.BHAYANA, J.

SEPTEMBER 17, 2008
tp