

(2013) 03 RAJ CK 0041

Rajasthan High Court

Case No: Civil Miscellaneous Appeal No. 527 of 2012

M/s. Nushar Engineering Works

APPELLANT

Vs

M/s. Santosh Traders

RESPONDENT

Date of Decision: March 5, 2013**Acts Referred:**

- Central Excises and Salt Act, 1944 - Section 11A
- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 1, Order 39 Rule 2, Order 43 Rule 1(r)
- Constitution of India, 1950 - Article 136, 226, 32
- Trade Marks Act, 1999 - Section 39, 40, 41

Citation: (2013) 3 CDR 1502 : (2013) 2 WLN 181**Hon'ble Judges:** Arun Bhansali, J**Bench:** Single Bench**Advocate:** G.D. Bansal, for the Appellant; Ashok Soni, for the Respondent**Final Decision:** Dismissed

Judgement

Arun Bhansali, J.

This appeal under Order XLIII, Rule 1(r) CPC is directed against order dt. 12.01.2012 passed by the District Judge, Jodhpur Metropolitan, whereby, the application filed by appellant-plaintiff seeking temporary injunction against the respondent-defendant from manufacturing and selling Wax Polishes, Diamond Abrasive, Super Glosser Liquid, Diamond Tools, F.F. Floor Polishing Machine, Stone and Floor Abrasive, Stone Dye, Master Coat, Mother Coat, Water proofing, Heat resistance chemical, Polish being used on Stone, Tiles and Glass ("the Business") in the name of trade name of "NUSHAR" during the pendency of the suit was rejected. The appeal was admitted on 11.02.2013 and, when it was taken up for consideration of stay application, with the consent of counsel appearing for the parties, the appeal itself has been finally heard.

2. The facts in brief are that M/s. Nushar Engineering Works, through its Proprietor Narendra Kumar Joshi ("the NEW") filed a suit against M/s Santosh Traders, inter alia, with the averments that the NEW is a proprietorship firm and its proprietor is Narendra Kumar Joshi, who is involved in the Business for last many years with the trade mark/firm name of NUSHAR; the plaintiff alongwith its family firms is using the said trade mark/firm name for the Business since 01.01.1992, the family firms, inter alia, includes one Nushar India Future Tech Pvt. Ltd. ("the NIFTPL") M/s Suraj Trading Corporation was first started by the proprietor in the year 1991 and ever since 01.04.1992 the trade mark/firm name NUSHAR was being used by the plaintiff-proprietor through family firms and for family and business requirements. The said proprietor had applied for registration of the trade mark NUSHAR on 22.04.1997 and its Trade Mark Application number is 760104 and in the application it was claimed that the said trade mark was being used since 01.04.1992 and the process of registration is still pending. It was then claimed in the plaint that the products with the trade mark/firm name NUSHAR are of high quality and very popular in the market and no one else is entitled to use the said trade mark. It was alleged that defendant M/s Santosh Traders was involved in manufacturing and selling of similar products with a similar trade mark NUSHAR, which is absolutely illegal and violation of plaintiff's trade mark rights.

3. Allegations were made regarding "passing off" of the goods by the defendant M/s. Santosh Traders in the name of plaintiff's trade mark NUSHAR. It was claimed that the plaintiff was entitled to mandatory injunction for production of accounts and thereafter damages from the defendant; permanent injunction was claimed against the defendant from using the trade mark/firm name NUSHAR for manufacture, sale etc., of the goods similar to goods being manufactured by the plaintiff. It was stated that the cause of action for filing suit arose on 20.09.2011 when the plaintiff came to know that the goods are being sold in the trade name NUSHAR by the defendant in various cities including Jodhpur and, therefore, the cause of action has arisen at Jodhpur.

4. Based on the averments as noted hereinbefore, relief of permanent injunction was sought against the defendant not to manufacture and sell goods in the name of NUSHAR and mandatory injunction for recovery of goods from the possession of defendant and appointment of Receiver/Commissioners for calculating the profit earned by the defendant.

5. Alongwith the suit, an application seeking temporary injunction under Order XXXIX, Rule 1 and 2 CPC was filed seeking restraint against the defendant from manufacturing and selling goods in the trade name of NUSHAR during the pendency of the suit. Notices of the suit as well as application for temporary injunction were issued by the trial Court and, when the application for temporary injunction came up before the Court, time was sought by the defendant for filling reply to the application.

6. The trial Court by order dt. 22.10.2011 passed the following order:-

7. Thereafter, a reply to the application seeking temporary injunction and written statement to the suit along with several documents were filed before the trial Court by the defendant. It was, inter alia, contended that the plaintiff-applicant was guilty of suppression of material facts, inasmuch as, it has failed to disclose that the defendant had filed a suit against NIFTPL on 05.07.2011 before the District Court, Jaipur for infringement of its (defendant's) trade mark NUSHAR, which was duly registered as Trade Mark No. 1928259 dt. 26.02.2010 by the Registrar of Trade Mark under the Trade Mark Act, 1999; in the written statement in the suit pending at Jaipur, which is presently pending before the Court of Additional District Judge No. 6, Jaipur; the defendant NIFTPL has claimed that NIFTPL was applicant for the NUSHAR Trade Mark and its application number is 760104, which was made in the year 1997 and that NIFTPL has filed application for rectification before the Registrar of Trade Mark seeking cancellation of the trade mark registered in favour of the defendant; the claims of plaintiff and NIFTPL are mutually contradictory and are in contravention of provisions of Sections 39, 40 and 41 of the Trade Mark Act, 1999. The rest of the averment made in the plaint and application seeking temporary injunction were denied and prior user by the defendant was claimed. It was prayed that the application seeking temporary injunction be dismissed.

8. The trial Court after hearing the parties and after noting the contentions raised by them, came to the conclusion that the plaintiff-applicant has suppressed facts and prima facie it is clear that it has not approached the Court with clean hands and relying on judgments in [Eveready Industries India Ltd. Vs. Sanjay Chadha and Another](#), [Vee Excel Drugs and Pharmaceuticals Ltd. Vs. Hab Pharmaceuticals and Research Lim.](#), [Micolube India Ltd. Vs. Maggon Auto Centre and Another](#), and [Wheels India Vs. S. Nirmal Singh and Another](#), whereby, the issue relating to suppression of facts was considered by the Courts came to the conclusion that the plaintiff-applicant had no prima facie case in this favour. The issues relating to balance of convenience and irreparable injury were also not found in favour of the plaintiff-applicant. The application seeking temporary injunction was, therefore, dismissed.

9. It was contended by learned counsel for the appellant that the trial Court has proceeded on a wholly wrong premise and without considering the merits of the case has dismissed the application seeking temporary injunction on alleged suppression of facts relating to pending suit at Jaipur. It was submitted that there was no suppression at all, inasmuch as, the plaintiff at Jaipur was "Shri Santosh Traders" and the defendant at Jodhpur was "Santosh Traders". The registration dt. 26.02.2010 by the Registrar of Trade Marks has also been issued in favour of "Shri Santosh Traders" and one Gajendra Pareek is its proprietor, whereas, the proprietor of the defendant firm was Sanjay Pareek and in fact at best the same may be called an omission but the same cannot be called suppression on part of the plaintiff. It

was submitted that the defendant having essentially no answer to the passing off action, is merely relying on technicalities and has failed to point out as to how the facts relating to pendency of the suit at Jaipur were material, so as to call the omission "material suppression", which is a basic requirement for the purpose of disentitling a applicant from getting injunction. It was prayed the order impugned may be set aside and trial Court be directed to decide the application afresh on merits.

10. Reliance was placed on judgment of Hon"ble Supreme Court in [Pushpam Pharmaceuticals Company Vs. Collector of Central Excise, Bombay](#), and [Continental Foundation Joint Venture Sholding, Nathpa H.P. Vs. Commissioner of Central Excise, Chandigarh-I](#), for interpretation of the word suppression.

11. On the other hand, learned counsel for the respondent opposed the submission made on behalf of the appellant. It was reiterated that the plaintiff-applicant has deliberately suppressed material facts from the Court when it failed to disclose the facts relating to pending suit filed by the defendant at Jaipur; Registration of trade mark NUSHAR by the Registrar of Trade Mark and pendency of application by NIFTPL seeking rectification was pending before the Registrar of Trade Marks. When these facts by way of preliminary objections were raised before the trial Court, the plaintiff has failed to even file replication to the said reply and, therefore, the suppression on its face has been admitted.

12. It was submitted that the plea raised by the plaintiff before this Court regarding difference in the name of the plaintiff at Jaipur being Shri Santosh Traders and the defendant at Jodhpur as Santosh Traders is in fact a further suppression, inasmuch as, the defendant at Jaipur NIFTPL has specifically in its written statement relied on the passing of ad interim injunction dt. 22.10.2011 by the Jodhpur Court and not only this a issue has been framed regarding passing of such an ad interim injunction by the Jodhpur Court in the said Jaipur suit, therefore, the plea raised in this regard is absolutely baseless and incorrect. The plaintiff at Jaipur and the defendant at Jodhpur are essentially one and the same.

13. The counsel for the respondent relied on the judgment of Hon"ble Supreme Court in [Ramjas Foundation and Another Vs. Union of India \(UOI\) and Others](#), and [K.D. Sharma Vs. Steel Authority of India Ltd. and Others](#), in support of his contentions that a person, who does not come to the Court with clean hands is not entitled to be heard on the merits of the grievance.

14. It was further submitted that it was claimed in the plaint that cause of action arose to the plaintiff on 20.09.2011 when it came to know about the use/misuse of the trade mark NUSHAR, which fact also is belied from the fact that already plaintiff was served in the suit filed by the defendant at Jaipur and, therefore, to claim the cause of action on 20.09.2011 is on its face incorrect. It was also submitted that there is no reason for grant of injunction in such cases and at best the suit can be

tried expeditiously. Reliance was placed on [Uniply Industries Ltd. Vs. Unicorn Plywood Pvt. Ltd. and Others](#), It was prayed that the appellant is not entitled to any relief and the appeal be dismissed.

15. Learned counsel for the appellant in rejoinder submitted that cause of action was rightly pointed out in the suit as the defendant "Santosh Traders" published advertisements in newspapers dt. 19.09.2011 and 20.09.2011 relying on the registration by the Registrar of Trade Marks and, therefore, the appellant was justified in claiming the said cause of action.

16. Learned counsel for the respondent has stated that the said newspapers were published and circulated at Jaipur and that cannot give a cause of action for seeking injunction in Jodhpur.

17. I have considered the rival submissions made at the Bar.

18. At the outset, it needs to be noticed that the trial Court has not dealt with any of the contentions raised by the parties on the merits and/or demerits on the allegation of "passing off" by the defendant of the goods in the trade name of NUSHAR, regarding which, the appellant-plaintiff claimed prior user and pendency of its application for registration before the Registrar of Trade Marks. The trial Court having agreed with the preliminary objections raised by the defendant-non-applicant about suppression of material facts from the Court has found that on account of such suppression the plaintiff has failed to make out a prima facie case in its favour and, consequently, also found that there was no question of balance of convenience and irreparable injury in its favour and dismissed the application for temporary injunction.

19. In the present appeal, the issue is whether there is suppression by the plaintiff and if there is suppression, whether such suppression is material suppression, if these are material suppression, then the appeal is liable to be dismissed and, if it is held otherwise, then the matter needs to be remanded back to the trial Court for decision on application for temporary injunction on merits.

20. From the material placed by both the parties, it is an admitted fact that the plaint at Jaipur contained specific averment regarding existence of a registered trade mark NUSHAR in favour of Shri Santosh Traders and the above fact also cannot be denied in view of application for rectification filed by NIFTPL seeking cancellation of registered trade mark against Shri Santosh Traders before the Registrar of Trade Marks on 11.05.2011. The fact that NIFTPL is a "family firm" of the plaintiff (NEW) has been specifically averred in the plaint by the appellant, therefore, the facts relating to a registered trade mark existing in the name of Shri Santosh Traders and pendency of rectification application were certainly material facts for the present suit, which fact is fortified from the fact that when the ad interim injunction was granted by the trial Court on 22.10.2011 (supra), the reason prevailed with the Court was that the registration certificate has not been filed by the defendant. Had the

plaintiff made these averments in the plaint, probably such an observation in the ad interim order would not have come.

21. So far as the plea raised by the appellant that the suit at Jaipur was filed by Shri Santosh Traders and the suit at Jodhpur was filed against Santosh Traders also appears to be an attempt in mere juggling of words by the plaintiff. The plaintiff always treated both the plaintiff at Jaipur and defendant at Jodhpur as one and the same entity, inasmuch as, in the written statement filed to the Jaipur suit, it has been specifically mentioned that ad interim injunction has been granted has been granted against the plaintiff by the trial Court at Jodhpur. The said averment reads as under:-

22. Based on the said pleadings, issue has also been framed by the said Court which reads as under:-

23. The above facts clearly show that the plaintiff always treated the plaintiff at Jaipur and the defendant at Jodhpur as one and the same entity. The crucial fact in this regard is that the appellant has made out the advertisements on 19.09.2011 and 20.09.2011 published in the name of the defendant as the cause of action and the said advertisements have been filed in the application for temporary injunction. The said advertisements do not indicate either the proprietor or the address of the said Santosh Traders. However, in the plaint, the plaintiff has given out the address as "A-102, Ganesh Colony, Pariwahan Nagar, Jaipur (Raj.)". The said address is identical to the address indicated in the plaint filed by the defendant at Jaipur and, therefore, the entire plea raised by the appellants falls to the ground and as noticed above is merely an attempt in juggling of words.

24. As to whether the facts relating to pending suit at Jaipur, registration of trade mark in favour of the defendant and pendency of rectification application before the Registrar of Trade Marks are "material facts" or not, suffice it to observe that the non-mentioning of those fact has primarily resulted in passing of ad interim injunction by the trial Court on 22.10.2011 the mentioning of the said facts would have resulted in a issue regarding the ownership of the trade marks as to whether the same was with NEW or with NIFTPL and would have also given rise to issue of multiplicity of proceedings before various Courts and, therefore, it cannot be said that the above facts were not material,

25. The Hon''ble Supreme Court in [Power Control Appliances and Others Vs. Sumeet Machines Pvt. Ltd.](#), has held thus:-

41. It is a settled principle of law relating to trade mark that there can be only one mark, One source and one proprietor. It cannot have two origins. Where, therefore, the first defendant-respondent has proclaimed himself as a rival of the plaintiffs and as joint owner it is impermissible in law. Even then, the joint proprietors must use the trade mark jointly for the benefit of all. It cannot be used in rivalry and in competition with each other.

26. The facts about both NEW and NIFTPL being co-owners of the trade mark have not been averred in either of the suit and merely because the proprietor of NEW is also a share holder in NIFTPL cannot be of any implication, inasmuch as, it is well settled that a company incorporated under the provisions of Companies Act, 1956 is an independent legal entity separate from its share holders.

27. From what has been observed hereinbefore, it is ex facie clear that the appellant-plaintiff has deliberately not disclosed material facts, which were well within its knowledge and, therefore, has indulged in suppression of material facts from the Court.

28. The Hon"ble Supreme Court in case in Ramjas Foundation (supra) has held thus:-

21. The principle that a person who does not come to the Court with clean hands is not entitled to be heard on the merits of his grievance and, in any case, such person is not entitled to any relief is applicable not only to the petitions filed under Arts. 32, 226 and 136 of the Constitution but also to the cases instituted in others Courts and judicial forums. The object underlying the principle is that every Court is not only entitled but is duty bound to protect itself from unscrupulous litigants who do not have any respect for truth and who try to pollute the stream of justice by resorting to falsehood or by making misstatement or by suppressing facts which have a bearing on adjudication of the issue (s) arising in the case.

29. The judgments cited by learned counsel for the respondent on the issue of suppression of material facts in Pushpam Pharmaceutical Company (supra) and Continental Foundation Joint Venture Holding (supra) are judgments in the context of Section 11-A of the Central Excise Act, 1944, which provides for extended period of limitation in case of suppression of facts. The Hon"ble Supreme Court observed that mere omission to give correct information is not suppression of facts unless it was deliberate to evade the payment of duty, suppression means failure to disclose full information with the intent to evade payment of duty, when the facts are known to both the parties, omission of one party to do what he might have done would not render it suppression.

30. The Said Judgments have no application to the present case as the facts which have been suppressed by the appellant from the trial Court were suppressed with an intention to obtain injunction and merely because the facts are in knowledge of the defendant, does not water down the said suppression.

31. In view of what has been observed by Hon"ble Supreme Court in case of Ramjas Foundation (supra) and in view of the fact that the appellant-plaintiff is guilty of suppression of material facts, the trial Court was justified in coming to the conclusion that on account of such suppression the plaintiff has failed to make out a prima facie case in its favour and was, therefore, further justified in dismissing the application seeking temporary injunction. Consequently, the appeal has no substance and the same therefore, dismissed with costs of Rs. 5000/-