

Veegee Products Vs Sou. Nayan Bharat Davda

Court: Bombay High Court

Date of Decision: Dec. 6, 2005

Citation: (2006) 32 PTC 232

Hon'ble Judges: D.Y. Chandrachud, J

Bench: Single Bench

Advocate: T.N. Daruwalla and Shailendra Bhandare and Sumeet Basu, instructed by J.V. Deshpande, for the Appellant; Rajiv Patil and A.S. Kulkarni, for the Respondent

Final Decision: Allowed

Judgement

D.Y. Chandrachud, J.

Admit. Learned Counsel for the respondent waives service. By consent of Counsel and at their request taken up for hearing and final disposal.

2. The Additional District Judge at Solapur, while allowing an interlocutory application in a suit for infringement of a trademark restrained the

appellant by an order of injunction from manufacturing, marketing or stocking a disinfectant powder under the trademark ""Carbo-dust"" during the

pendency of the suit.

3. On 21st December 2000 the Respondent applied for the registration of its product ""Herbo-dust"", bearing No. 978702-B. Herbo-dust is a

disinfectant powder used for spraying in ditches, nullahs, urinals and stagnant water. In the meantime, on 28th March 2003 a Drug Licence came

to be issued to the Appellant under the Drugs and Cosmetics Act, 1940. for the manufacture of a disinfectant carbolic powder bearing the mark

Carbo-dust"". In the Trademarks Journal dated 14th November 2003, the trademark of the Respondent, ""Herbo-dust"" was advertised,

specifically with a disclaimer to the effect that ""registration of this trademark shall give no right to the exclusive use of the words ""Dust"". The

trademark ""Herbo-dust"" of the Respondent was placed on the Register on 2nd March 2005. On 19th August 2005, the Respondent instituted as

suit for infringement and an ex-parte order was passed on 24th August 2005 which has been confirmed by the impugned order dated 30th

September 2005. correctness of the order the dated 30th September 2005 has been impugned in this proceeding.

4. Now, the approach which the Court must adopt in determining whether the mark of the Defendant bears a deceptive similarity to the mark of

the plaintiff is governed by well settled tests, inter alia, laid down in decisions of the Supreme Court. The Court must have regard to the overall

impression created by the mark of the Defendant and consider whether the use of words, the logo and the colour scheme associated with the use

of the mark is such a would convey to a purchaser in the class of trade in which the mark is used a distinct impression that the mark of the

Defendant is associated with the product of the plaintiff. No individual test can in such matters be regarded as being of overriding importance. In

comparing the marks, the Court would undoubtedly have regard to phonetic similarity, if any, the nature of the goods, the nature of the customers

and to all other surrounding circumstances having a bearing on the issue.

5. In the present case, undoubtedly, the mark of the Appellant also contains the word "dust" but that by itself is not dispositive of the question of

deceptive similarity. Indeed, when the mark of the Respondent was advertised in the issue of the Trademarks Journal dated 14th November 2003,

the publication contained the disclaimer that the registration of the mark of the Respondent shall not give any right to the exclusive use of the word

"dust". That was because "dust" is a word of common usage and particularly when used in the context of a disinfecting product, it seeks to convey

the general meaning that the powder is "dusted" to be effective.

6. This Court has had the benefit of comparing the mark and the manner in which the two products in question are packed and marketed. The

Court does not, it is settled, use a fine tooth comb to detect dissimilarities, particularly where none exist. The product of the Respondent is sold in

plastic bags with a yellow coloured background and a green border, within which the logo "Herbo-dust Powder" appears. Below that it is stated

that the product is "ideal for spraying on ditches, garbage, stagnant water, urinals, etc." The product of the Appellant has a logo which is distinctive.

Apart from the use of the logo and the mark, "Carbo-dust", the package containing the product of the Appellant contains a statement that it is a

disinfecting carbolic powder. The list of ingredients is specified together with the use of the product. Before the Court packages of both the

products were produced. The package of the Appellant is of 25 Kgs, whereas that of the Respondent is of 10 Kgs. That is, however, not a matter

of overriding importance. For the grant of interim relief the Court must consider whether the overall impression conveyed by the mark of the

Appellant will lead a purchaser to believe that the mark of the Appellant is associated with the product of the Respondent. Prima facie, the nature

of marks, the logos, the colour scheme and packaging would not be susceptible of an inference of a deceptive similarity. The use of the word

Carbo"" by the Appellant, it has been submitted, is because the product contains carbolic powder which has disinfecting properties. On the other

hand, it is contended that the use of the word ""Herbo"" by the Respondent, would seem to convey the existence of a herbal substance.

7. At this stage, it cannot be said that there is any ground for the grant of interim relief. The mark of the Appellant is not of a nature that will lead a

customer to confuse the product of the Appellant with that of the Respondent. The learned trial Judge has noted, and this is a matter of some

significance, that many of the purchasers of the products in question are local governmental authorities to whom supplies are made for disinfecting

operations. The product is, therefore, not a household product available to an unwary purchaser buying the product off the shelf. Obviously, these

products are purchased in large quantities by local authorities who follow norms, including the invitation of tenders and a process of selection

involving a consideration of the price, quality and efficacy of the rival products. In fact, it was the case of the Respondent, which found acceptance

by the Trial Court that the Respondent had received inquiries in regard to the product ""Carbo-dust"" of the Appellant. One of those enquiries was

from the Chief Officer, Kankavali Nagarparishad. Similarly, the Appellant addressed a letter to the Chief Officer of the Mangalwedha

Nagarparishad, in the district of Solapur, It would in my view be unsafe for the Court to proceed at this interlocutory stage on the assumption that

the Nagarparishad would be confused by the two products. That would be conjecture.

8. The order of the learned trial Judge has placed a great deal of importance on the phonetic similarity between the two products. At this stage

without embarking upon a detailed or conclusive consideration of the merits, it would be necessary to observe that the words ""Carbo"" would not

convey the same impression as the word ""Herbo."" That Carbo conveys an association with carbolic powder is a defence which cannot be brushed

aside as frivolous, at this stage. The learned Trial Judge has not had regard to the well settled tests which have been laid down in the law for the

grant of interlocutory injunctions in such cases. There has been no comparison of the overall impression created by the marks, the logos, the colour

schemes and the class of purchasers. The interference of this Court is in the circumstances warranted.

9. The impugned order of the Additional District Judge, Solapur dated 30th September 2005 is quashed and set aside and the application for the

grant of an interim injunction shall stand rejected. However, since the suit still awaits trial it would be appropriate to direct that the Appellant shall

maintain accounts in regard to the manufacture of its product ""Carbo-dust"" so that in the event it becomes necessary for the Trial Judge at the

conclusion of the trial to pass appropriate orders, accounts would be available before the Court. The Appellant shall file accounts of its business in

relation to the user of the mark ""Carbo dust"" in the Trial Court at quarterly intervals, commencing with the date of the institution of the suit. Fairly,

the issuance of a direction in regard to the filing of accounts is not opposed by the appellant. The appeal from order stands allowed in these terms.

The trial is expedited. The learned Trial Judge is requested to dispose of the suit expeditiously, preferably within a period of six months from the

date of receipt of a certified copy of this order.