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Delhi High Court

Case No: OCJA No. 1 of 2003

Kewal Krishan Kumar	APPELLANT
Vs	
Rudi Roller Flour Mills (P) Ltd. and Another	RESPONDENT

Date of Decision: Sept. 27, 2007

Citation: (2007) 35 PTC 848

Hon'ble Judges: Dr. M.K. Sharma, C.J; Sanjiv Khanna, J

Bench: Division Bench

Advocate: Sandeep Sethi, M.K. Miglani, Sandeep Miglani and Kapil K. Giri, for the Appellant; Sanjeev Sachdeva, for the Respondent

Judgement

Mukundakam Sharma, C.J.
In this appeal, challenge is made to the order dated 21st November, 2002 passed by the learned Single Judge dismissing the petition filed by the appellant herein. The appellant contends that he is trading in atta etc with the trade mark/name "Shakti Bhog" registered in the name of the appellant effective from 16th June, 1982 and that registration of the trade mark "Shiv Shakti" with a device of "Trishul" and "Damru" in favor of the respondent No.1 by respondent No.2 - Assistant Registrar Trade Mark and upholding of the said order by the learned Single Judge was uncalled for and unjustified.

2. On 30th October, 1990 respondent No.1 herein filed an application for registration of the trade mark "Shiv Shakti" with a device of "Trishul" and "Damru" in Class-30 in respect of atta, maida and suji. The said application was in Class 30. It was also claimed that the respondent No.1 had been using the said mark effective from 6th March, 1990. The said application was duly advertised whereupon, the appellant herein gave notice of their intention to oppose registration of the said trade mark on the ground that the respondent No.1-applicant"s trade mark/label is deceptively similar to that of the appellant.

3. The Assistant Registrar of Trade Mark considered the said objections and contentions of the parties. However, on going through the records he observed that the use of the

mark applied for by the respondent No.1 had been substantial and that sales of the respondent No.1 ran into crores of rupees per month. It was also held by the learned Assistant Registrar of Trade Marks that the respondent No.1 applicant was using the mark applied for from the year 1990 continuously without any interruption and there has been no complaint or any confusion and deception till the aforesaid application for registration was filed. After considering various aspects and earlier precedences, the learned Assistant Registrar of Trade Mark held that the mark consisting of the words "Shiv Shakti" with a device of "Trishul" and "Damru", applied for by the respondent No.1-applicant would and could convey a different meaning than that of the mark "Shakti Bhog" of the appellant. It was also held that the device of "Trishul" and "Damru" pertain to Hindu God Shiva only and, Therefore, the words "Shiv Shakti" with the aforesaid device are definitely distinguishable from the trade mark of the appellant, "Shakti Bhog".

4. Being aggrieved by the aforesaid findings and conclusions arrived at by the Assistant Registrar of Trade Mark, the appellant filed a Civil Miscellaneous (Main) petition before the High Court which was considered by the learned Single Judge, who by order dated 21st November, 2002, dismissed the same holding that there is a lot of phonetic difference between the words "Shakti Bhog" and "Shiv Shakti" and that there could not be any confusion between the two trade marks of the appellant and the respondent No.1. The learned Single Judge also held that "Shiv Shakti" with the device of "Trishul" and "Damru" certainly makes a difference for there is phonetic and ocular difference with the mark "Shakti Bhog".

5. Being aggrieved by the aforesaid orders, the present appeal has been filed by the appellant on which we have heard the learned Counsel appearing for the parties. We have also perused the various documents placed on record and to which our attention was drawn by the learned Counsel appearing for the parties.

6. One of the main submissions of the counsel for the appellant was that "Shakti Bhog" being the trade mark of the appellant and "Shakti" being essential feature of the said trade mark, there is intention of copying the essential feature of the appellant"s mark "Shakti" by the respondent No.1 and that being the position, the impugned orders are required to be set aside and quashed. It was also submitted that even assuming that the appellant"s mark "Shakti" is descriptive, the same cannot be separated from the registered trade mark of the appellant for the purpose of comparison with the respondent No.1"s mark "Shiv Shakti", which is deceptively similar to the trade mark of the appellant. It was urged that merely adding a prefix to the appellant"s registered trade mark would not absolve the respondent No.1 of its liability and that the marks are deceptively similar despite the prefix being added, in view of the fact that the essential feature has been imitated. It was also submitted that where the essential features of a trade mark have been appropriated, the fact that get up, packaging and other writing on the marks or the goods show marked difference, would be irrelevant.

7. All the aforesaid submissions of the counsel appearing for the appellant were refuted by the counsel appearing for the respondent No.1. He has shown us a copy of the trade mark/label of the appellant as also of the respondent No.1 in respect of which registration is granted and by making comparison of the same it was submitted that not only the trade marks of the two parties are different but the registered labels itself are also distinctively different and that there is no identity at all. He has also brought to our notice the fact that there is no similarity, visual or phonetical, at all between the two competing marks and the labels and that in view of the said position, the orders passed by the Assistant Registrar of Trade Marks and by the learned Single Judge do not call for any interference.

8. On the basis of the aforesaid submissions, we may now proceed to deal with the various contentions raised before us. The trade mark of the appellant is registered as "Shakti Bhog Atta" as is depicted in the registration certificate dated 15th May, 1987. The said registration certificate indicates that the trade mark "Shakti Bhog Atta" representation of which is shown in the said certificate, was registered in respect of the goods included in Class-30. The said registration was extended from time to time. The respondent No.1 applied for registration of their trade mark "Shiv Shakti" with the device of "Trishul" and "Damru" in respect of the same and similar goods stating inter alias that they have been using the aforesaid trade mark and label from 1990. Seventeen years have gone by since the date from which the respondent No.1 had been using the aforesaid trade mark with device of "Trishul" and "Damru". The issue that arises for our consideration is whether the impugned trade mark and label "Shiv Shakti" by the respondent is deceptively similar to the registered trade mark "Shakti Bhog" of the appellant. In the aforesaid two competing trade marks the word/expression "Shakti" is common. The said word is otherwise a descriptive word denoting "strength" and "power". What is registered in favor of the appellant is not "Shakti" but "Shakti Bhog" whereas what is registered in favor of the respondent No.1 is the word "Shiv Shakti" with the device of "Trishul" and "Damru". A comparative look of the labels of the appellant and the respondent No.1 would make it crystal clear that the aforesaid two competing labels are distinctly different and that there is no identity at all. Therefore, there is no visual similarity of the two labels as are being used by the appellant and the respondent No.1 in their products.

9. The next question which needs consideration is whether there is any phonetical similarity phonetic between the two trade marks. In our considered opinion the two competing marks cannot be said to be phonetically similar also for there is a vast difference between the two marks namely, "Shiv Shakti" and "Shakti Bhog Atta". The prefix used by the respondent No.1 before the word "Shakti" with the device of "Trishul" and "Damru" is descriptive of Lord Shiva, the Hindu God. The said words have no connection or relevance with the word "Shakti Bhog Atta" which is the trade mark of the appellant. In various decisions the Supreme Court and the different High Courts held that it is the syllable of a trade mark which is generally considered as the most important part, especially in case of short words. It was also held that it is on the letters which precede the termination of the letters upon which an intending purchaser must always rely and on

which he must direct his attention. In American Home Products Corporation Vs. Mac Laboratories Pvt. Ltd. and Another, the Supreme Court held that the marks are different and not similar considering the prefix. In Fox & Company reported in 1920 37 RPC 37 trade marks "Motrate" and "Filtrate" were held to be not similar. "Rece Master" was not held to be similar to "Master" although both the trade marks related to the same go" Race ods namely, diesel oil engines, as held by the Bombay High Court in In Re: R.T. Engineering and Electronics Co., In AIR 1942 40 (Privy Council) , the Privy Council held that Pepsi Cola is not similar to Coca Cola for beverages as the distinctive feature in both the words was the first part i.e. "Coca" and "Pepsi" and that cola was the word only used as a part of the marks for beverages. In that case in respect of the stand as to whether the word "cola" is descriptive and only adopted in naming of beverages, it was held that actually the word was descriptive.

10. In our considered opinion the same is the position and situation in the present case, for "Shakti" which is common in both the trade marks is only descriptive whereas "Shiv" and "Bhog" are completely distinctive features of the two marks and Therefore there is no likelihood that any one would confuse with the word "Shiv" with "Bhog". "Shiv Shakti" is phonetically miles away from the word " S.M. Chopra and Sons Vs. Rajendra Prosad Srivastava, the concerned words were "Raja" and "Maharaja" and it was held that they are not deceptively similar.

11. The mark applied for by the respondent No.1 consists of the device "Trishul" and "Damru" and the phrase "Shiv Shakti" is descriptive of the goods of the respondent No.1. The aforesaid words "Shiv Shakti" when read as a whole would be a descriptive word and is having a distinct prefix of Shiv, a God of Hindu mythology. There also cannot be a monopoly with regard to the word "Shakti" which is a descriptive word. Trade mark of the appellant is "Shakti Bhog Atta" to which the appellant can claim exclusive use but not to the word "Shakti", more so when "Shakti" is used with "Shiv" would depict the power and strength of a religious God.

12. On consideration of the totality of the circumstances, we are of the considered opinion that all the propositions of the counsel appearing for the appellant as stated herein-before are without any merit in the light of the aforesaid discussions and findings recorded by us.

13. The appeal has no merit and is dismissed.