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Johann A. Wulfing Vs Chemical Industrial and Pharmaceutical Laboratories Limited and Another

Appeal No. 185 of 1979 in Miscellaneous Petition No. 121 of 1975

Court: Bombay High Court

Date of Decision: Dec. 6, 1983

Acts Referred:
Trade and Merchandise Marks Act, 1958 â€" Section 12

Citation: AIR 1984 Bom 281

Hon'ble Judges: Sawant, J; Lentin, J

Bench: Division Bench

Advocate: V.V. Tulzapurkar, for the Appellant; T.N. Daruwalla, J.G. Dingal and B.H. Bakshani, for the Respondent

Judgement

Lentin, J.
Is the word CIPLAMINA deceptively similar to COMPLAMINA? Such is the essential nature of the controversy before us.

2. The appellants carry on preparations. On of their trade marks is COMPLAMINA registered on 5th May 1960 for a medicinal and

pharmaceutical preparation which according to the appellant''s sold in India since 1966 in the form of ampoules (under doctors'' prescription) and

tablets (across the counter) for the treatment of vascular disorders. The registration is subsisting. On 17th July 1972, the 1st respondent-Company

(referred to hereafter as ""the respondents"") who carry on like business, filed an application for registration in their name the mark CIPLAMINA

proposed to be used by them in Part A Class 5 in respect of pharmaceutical and medicinal preparation. The appellants filed their notice of

opposition inter alia on the ground that the respondents proposed mark was deceptively similar to their registered mark. The respondents filed their

counter-statement. Evidence by way of affidavits was filed by both parties. However, before us neither party relied on them and rightly so because

nothings really turns on them. By a speaking order, the Joint registrar held inter alia that the respondents'' proposed mark was deceptively similar to

their registered mark. The respondents filed their counter-statement. Evidence by way of affidavits was filed by both parties. However, before us

neither party relied on them and rightly so because nothing really turns on them. By a speaking order, the Joint Registrar held inter alia that the

respondents" proposed mark was deceptively similar to the appellant"s registered mark. This finding was reversed by the learned single Judge.

However, on Counsel"s statement made before him, the learned single Judge limited the registration of the respondents" proposed mark to Part A

Class 5 in respect of pharmaceutical and medicinal preparations covered by Schedules ""H"" and ""L"" of the Drugs and Cosmetics Rules, 1945.

Hence the present appeal.

3. In inviting us to hold that the respondents" mark CIPLAMINA is deceptively similar to the appellants" mark COMPLAMINA, it was urged by

the appellants" learned Counsel Mr. Tulzapurkar that the reversal of the joint Registrar"s finding by the learned single Judge was totally

unwarranted. Accounting to Mr. Tuzapurkar, the learned single Judge had adopted a microscopic method of approach instead of considering the

totality of marks and thereby did not apply the correct principles of comarison. Reliance was placed on Re; Bailey (1935) 52 RPC 136, where it

was held that before disturbing the Registrar"s decision, the Court must be satisfied that he acted on some wrong principle or took into

consideration something which he ought not to have done or omitted to take into consideration ther held that it was not permissible to divide and

split up the words to ascertain similarity or to take part of the word and compare it with a part of the other word each word must be considered as

a whole and compared with the other word as a whole; it is wrong to take a portion of the word and say because that portion differs from the

corresponding portion of the other word, there is no sufficient similarity to cause confusion. According to Mr. Tulxapurkar, the learned single Judge

had committed the very errors cautioned against in Re; Balicy. He also relied on the observations in Eno v. Dunn (1890) 15 AC 252, quoted with

approved by the House of Lords in Aristoc v. Rysta (1945) 62 RPC 65 as under :-

Little assistance, therefore, is to be obtained from a meticulous comparison of the two words letter by letter and syllable by syllable, pronounced

with the clarity to be expected from a teacher of elocution.

4. Reliance was also placed on Corn Products Refining Co. Vs. Shangrila Food Products Ltd., , where holding that ""Glucovita"" and ""Gluvita"" were

deceptively similar, it was observed that overall structural and phonetic similarity in the 2 marks must be considered, the matter being one of first

impression from the point of view of a person of average intelligence and imperfect recollection.

5. We are in respectful agreement with the principle laid down by these decisions. But we do not subscribe to Mr. Tulllzapurkar"s criticism of the

principles applied by the learned single Judge. On the phonetic aspect this is what the learned single Judge says:-

In my view, CIPLAMINA is not phonetically similar to COMPLAMINA. In the pronunciation of the word COMPLAMINA two aspects

assume significance; first, the ""C"" in COMPLAMINA is pronounced as is a ""K"" and secondly, the ""MP"" is where the emphasis lies. The ""C"" in

CIPLAMINA is pronounced ""cee"" and ""I"" sound is soft; the probabilities are that the ""I"" sound would not be misheard as on ""om"" sound.

6. The learned single Judge has thus endeavoured to emphasis that the two words ae in the normal way, spoken and pronounced differently. The

pronunciation of the prefix ""COM"" in COMPLAMINA is absolutely different from the pronunciation of the prefix ""CIP"" in CIPLAMINA,

eradicating likelihood of deception for COMPLAMINA would in normal manner and without conscious effort emphasise the prefix ""COM"".

Whereas an average person asking for CIPLAMINA would likewise emphasise the prefix ""CIP"". The totally different manner in which these 2

words are pronounced in normal and natural way of speech, must necessarily eliminate any phonetic similarity between the two. More on this a

little later when we come to the reasoning of the Joint Registrar.

7. Regarding the visual aspect, this is what the learned single Judge says:

... the visual impression COMPLAMINA is materially different from that of CIPLAMINA. The fact that the two words start with the letter ""C

and end with the letters ""C"" and end with the letters ""MINA"" does not make any substantial difference to the fact that the dominant impression of

the would ""COMPLAMINA"" is the distinctive ""m"" of the first syllable which is missing in the word CIPLAMINA.

8. We add a rider. The visual impression is totally different. No person, be he a layman of average intelligence and imperfect recollection or a

medical practitioner. Is likely to confuse one for the other or be put in a state of wonderment. The visual impression of the 2 words is not

conducive to any such confusion. We say so not by placing the 2 words side by side or by a microscopic examination of the 2 words but from

purely a visual test of the 2 words seen as a whole on first impression. The salient feature is the distinctive ""COM"" and the distinctive ""CIP"" and not

the words following them.

9. We do not agree with the Joint Registrar when he says (a) that the two words have a strong visual resemblance as they both begin with the

identical letter ""C"" and have the identical dominant 7 lettered suffix ""PLAMINA"" and differ only in a minor respect, viz, that in the place of the

letters ""OM"" in COMPLAMINA the letter ""I"" is in CIPLAMINA, (b) that the cumulative effect is that these 2 words produce the same optical

and mental impression, (c) that even phonetically the 2 words are closely similar as the long suffix ""PLAMINA"" which is common to them controls

the sound of both of them and (d) people district manner.

10. This method of approach is to start with the microscopic method of comparison with the marks placed side by side. Such approach has

repeatedly been condemned in various decisions, F. Hoffmann-la Roche and Co. Ltd. Vs. Geoffrey Manner and Co. Pvt. Ltd., , being one, where

the Supreme Court rejected the contention that ""Dropovit"" and ""Protovit"" were likely to deceive or cause confusion. In the present matter, the Joint

Registrar'' s emphasis on the starling letter ""C"" in both the words, does not take into account the total phonetic dissimilarity between the 2 words,

namely that the very same ""C"" is pronounced entirely differently in both the words, it is not the suffix that is the controlling sound. It is the disparate

COM"" and the other as written) that is the controlling sound and it is that which makes all the difference. ""The first syllable of a word mark is

generally the most important"". As there is a ""tendency of person using the English language to slur the termination of words"". (Kerly''s Law of

Trade Marks, 11th ED. Page 416). In Re; Bayer Products, (1947) 64 RPC 125 , it was held that ""Diasil"" and ""Alasil"" were not deceptively similar

or likely to cause confusion. Where the first two syllables are different, there is little likelihood of confusion. So was it observed by the Division

Bench of the Madras High Court in Mount Mettur Pharmaceuticals Ltd. Vs. Ortha Pharmaceuticals Corporation, , while holding that

UTOGYNOL and ORTHOGYNOL were not deceptively similar.

11. The Court is not concerned with hypothetical possibilities but with the ordinary practical business probabilities having regard to the

circumstances of the case. F. Hoffman La Roche and Company Limited Vs. The Sanitex Chemical Industries Limited, . In the present case, all

things considered, (visually and phonetically). We do not see any real tangible danger of ""confusion in the mind of the public which will lead to

confusion in the goods"". (Pianotist case (1906) 23 RPC 774.

12. Mr. Tulzapurkar urged that even if the marks are held not to be deceptively marks are held not to be deceptively similar, discretion must u/s

18(4) be exercised against the respondents as they have not disclosed for what purpose they will use the mark. On behalf of the respondents a

statement was made by their learned Counsel that the mark will be used for pharmaceutical and medicinal anti-leprosy preparations in any form

covered by Schedule h of the Drugs and cosmetics Rules, 1945. To that, Mr. Tulzapurkar raises a query. What happens, he asks, if the

respondents market their anti-leprosy preparation in capsule form and confusion is caused with the appellants'' tablets which are sold across the

counter or the appellants, ampoules which are sold on doctors, prescription? Would not, he ask, the respondents'' anti-leprosy preparations be

confused for the appellants'' preparations for vascular disorders? To that end reliance was placed by Mr. Tulzapurkar on The Himalaya Drug Co.

Vs. Warner-Lambert Pharmaceutical Co., , and Sterwin v. Brocades Ltd. (1979) RPC 481.

13. The apprehensions voiced by Mr. Tulzapurkar are somewhat strained and his reliance on those cases misplaced. In Himalaya Drug case, in the

peculiar circumstances of that case, discretion u/s 18 was exercised because the 2 pharmaceutical preparations were an antitheses of each other,

one being a depressant and the other a stimulant resulting in possibility of confusion to the public mind. In the Sterwin case while there was no

actual or likelihood of confusion in relation to the 2 products as presently marketed, viz. DANOL (for suppression of menstrual cycle in capsule

form) and DE-NOL (for ulcers in liquid form), there was on the defendant''s own admission a likelihood of confusion and deception resulting from

misreading or misspelling the 2 words DANOL and DENOL when the latter product was marketed in solid form. There was also evidence that if

the wrong prescription was supplied to the patient the effect on him might be extremely serious.

14. In the present case, firstly there is no deceptive similarity between the 2 marks. And the statement made by the respondents''learned counsel

must surely place any apprehension, real or fancied, beyond the pale of controversy.

15. It is alleged that doctors are notoriously lax in their calligrahy. Perhaps Mr. Tulzapurkar might care to attribute greater sense of responsibility

that what he is instructed to give them credit for.

16. In the result the appeal is dismissed with costs.

17. The respondents shall use their mark CIPLAMINA for pharmaceutical and medicinal anti-leprosy preparations in any form covered by

Schedule H of the Drugs and Cosmetics Rules, 1945. The registration of the resondents'' proposed mark shall be limited to Part A Class 5 in

respect of pharmaceutical and medicinal anti-leprosy preparations in any form covered by Schedule H of the Drugs and Cosmetics Rules, 1945.

18. The Prothonotary and Senior Master is requested to send a copy of this judgment to the Registrar for requisite action.

19. On Mr. Tulzapurkar''s application operation of the order stayed for a period of 6 weeks from today.

20. Appeal dismissed.