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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL APPELLATE DIVISION

COMMERCIAL APPEAL NO. 72 OF 2017
IN
NOTICE OF MOTION NO. 1530 OF 2015
IN
COMMERCIAL SUIT NO. 185 OF 2015

Freudenberg Gala Household Product Pvt.
Ltd. A Company incorporated in Indian under
the Companies Act, 1956, having its office at
B-902/3/4, O2 Galleria, B-Wing, Plot 23/24,
Minerva Industrial Estate, Off LBS Marg,
Near Asha Nagar, Mulund (West),
Mumbai – 400 080.

.. Appellant/
Plaintiff

Versus

GEBI Products
having their office at G4/5, Mewad Estate,
Patanwala Compound, Opp. Shreyas
Cinema, LBS Road, Ghatkopar (W),
Mumbai 400 086 and also at 392 Part 3,
Dinkar Pada, Village Kondle, Kudus,
Wada, Thane – 421 312.

.. Respondent
Defendant

Mr. Rashmin Khandekar a/w Ms. Deepa Hate i/by Gajria &
Company for appellant.

Mr. Rohan Cama a/w Mr. Amerdev J. Uniyal and Sweedal S.
Karkada for respondent.

CORAM: NARESH H. PATIL &
SMT. BHARATI H. DANGRE JJ.

RESERVED ON : JUNE 29, 2017

PRONOUNCED ON : AUGUST 01, 2017

P.C. [Per Naresh H. Patil, J.] :

1. The appellant is original plaintiff in Commercial Suit No. 185 of 2015 filed on the Original Side of this Court. The plaintiff is a Private Limited Company incorporated under the provisions of the Companies Act, 1956. It carries, inter alia, business of manufacturing and marketing of household and industrial cleaning tools and products, namely, mops, brooms, brushes etc. The plaintiff states that it offers over 85 products to consumers, which are either manufactured in house or outsourced.

2. On or about 31/12/1995, the plaintiff's predecessor Gala Brush Limited adopted the trade mark "LAXMI" and commenced used in respect of its products i.e. brooms. On or about 1/5/2003, the said Gala Brush Limited applied for and obtained registration of the trade mark "LAXMI" under No. 1195753 in Class 21 in respect of Brooms. Said Gala Brush

Limited, by an Assignment Deed dated 6/8/2009 assigned the said trade mark "LAXMI" along with its goodwill to Gala Cleanaids Private Limited. The Company has been brought on record as subsequent proprietor in respect of the said registered trade mark on 18/6/2014.

3. On or about 17/7/2010, the name of Gala Cleanaids Private Limited was changed to the present name "Freudenberg Gala Household Product Private Limited.

4. It is the plaintiff's case that on or about 13/6/2015, the plaintiff came across the defendant's brooms, which products are identical to the plaintiff's products, but bear the mark "MAHA LAXMI". The said mark of defendant is identical to the plaintiff's mark "LAXMI" with addition of the work "MAHA". The plaintiff submits that defendant's trade mark is identical with or in any case deceptively similar to the plaintiff's registered trade mark which is in respect of same goods i.e. brooms. The defendant has infringed the plaintiff's trade mark "LAXMI". The defendant was always aware of the plaintiff's product, which acquired reputation over the years. The plaintiff alleges that defendant has deliberately adopted identical and deceptively similar trade mark as that of the plaintiff. The

Suit came to be filed on 24/8/2015. A Notice of Motion No. 1530 of 2015 praying for interim relief was filed in the said Suit by the plaintiff.

5. By Judgment dated 14/7/2016, the learned Single Judge dismissed the Notice of Motion and listed the Suit for framing issues on 28/7/2016. Being aggrieved by the said order, present appeal is preferred.

6. Learned counsel appearing for the appellant – plaintiff submits that the impugned Judgment suffers from a patent illegality and a fundamental flaw. The learned Single Judge erred in going behind the registration of the plaintiff's registered trade mark "LAXMI" at an interlocutory stage. Learned Judge ought to have appreciated that the registration of the mark "LAXMI" itself was sufficient to prove that the mark as registered was "distinctive". No further material was required at the interlocutory stage. According to the learned counsel, an action in infringement is different from an action in passing off. The only factor for consideration was whether "LAXMI" was identical and/or deceptively similar to "MAHALAXMI" so as to cause confusion. The plaintiff's registered mark is a "Label". It can be used only in that form and the monopoly can be claimed in respect of the exact depiction of the label.

Merely because it is registered as a label, does not mean that the mark cannot be enforced as a word. In the present case, the mark is nothing but "LAXMI". Therefore, the counsel submitted that the only thing to be seen is whether "LAXMI" and "MAHALAXMI" are identical or deceptively similar and if found deceptively similar, an injunction should follow. It is submitted that the defendant has applied for registration of the mark "MAHALAXMI". There is no finding recorded by the learned Single Judge that that the impugned marks are not deceptively similar.

7. Learned counsel appearing for the appellant – plaintiff places reliance on the following judgments :

- (a) Unreported Judgment of the Division Bench of this Court in the case of Lupin Ltd. vs. Johnson & Johnson in **Notice of Motion (L) No.2178 of 2012 in Suit (L) No. 1842 of 2012 decided on 23/12/2014.**
- (b) Sun Pharma Lab. Ltd. vs. Madras Pharma [**2016 (68) PTC 543 (BOM).**]
- (c) Parle Products (P) Ltd. vs. J.P. & Co., Mysore [**Civil Appeal No. 1051 of 1967 decided on 28/1/1972.**]
- (d) Kaviraj Pandit Durga Dutt Sharma vs. Navratna Pharmaceutical Lab [**1965 Kerla Law Journal.**]
- (e) Jagdish Gopal Kamath and ors. vs. Lime and Chilli

Hospitality Services **[MIPR 2015 (1) 0351]**.

- (f) Indechemie Health Specialities Ltd. vs. Naxpar Labs Pvt. Ltd. and anr. **[2002 (24) PTC 341 (Bom) (DB)]**.
- (g) Parksons Cartamundi Pvt. Ltd. vs. Suresh Kumar Jasraj Burad **[2012 Vol. 114(4) Bom. L.R. 1991]**.
- (h) Goldmines Telefilms Pvt. Ltd. vs. Reliance Big Entertainment Pvt. Ltd. **[Appeal (L) No. 458 of 2014 decided on 24/9/2014]**.
- (i) Ruston and Hornby Ltd. vs. Zamindara Engineering Co. **[AIR 1970 SC 1649]**.
- (j) Corn Products Refining Co. vs. Shangrila Food Products **[PTC (Suppl) (1) 13 (SC)]**.

8. The learned counsel appearing for the respondent – defendant submits that two products i.e. “LAXMI” & “MAHALAXMI” bear no visual similarity whatsoever, apart from the fact that the two covers are for brooms. The registered mark on which trade mark protection has been sought by the plaintiff is not the word “LAXMI”. It is a label mark. A mark includes and distinguishes between a word mark and a label mark. What is protected in the present case is only the label as aforesaid and ex-facie there is no question of protecting the word “LAXMI” as a whole or of infringement whereof by the respondent's/defendant's mark

“MAHALAXMI” which is in a different colour scheme, lettering and design from the appellant's/plaintiff's product. Learned counsel submits that where the marks are not identical, but are similar, the test is the likelihood of confusion or deception arising out of similarity of the marks. The question to be asked is what would be the effect on the mind of a person of average intelligence and imperfect recollection. A comparison is to be done to see if the two marks are structurally and visually similar as well as aurally similar and easily give rise to deception and confusion. According to the learned counsel, the learned Single Judge held in para 10 that the word “LAXMI” by itself is not the leading, central or memorable feature of the plaintiff's mark. Learned Judge rightly noted that the name “LAXMI” is a very common name and has noted that there are variations distinguishing the plaintiff's mark from the defendant's mark. The names of Hindu Gods are not exclusive and such words cannot be monopolized by one party. It is one thing to protect a label mark and an entirely different thing to claim monopoly over a common word. The respondent/defendant has been using the mark “MAHALAXMI” since 2006-2007.

9. Learned counsel for the respondent-defendant places reliance on the following judgments :

- (a) Wander Ltd. and anr. vs. Antox India Pvt. Ltd. **[1990 (Supp) SCC 727]**.
- (b) Registrar of Trade Marks vs. Ashok Chandra Rakhit Ltd. **[(1995) 2 SCR 252]**.
- (c) S.M. Dychem Ltd. vs. Cadbury (India) Ltd. **[(2000) 5 SCC 573]**.
- (d) Bhole Baba Milk Food Industries Ltd. vs. Parul Food Specialities (P) Ltd. **[2011 177 DLT 109]**.

10. Both the learned counsel cited various judgments. We are referring to few of them, which we find relevant for deciding the present issue.

In the case of **Lupin Ltd. vs. Johnson and Johnson** (Supra) in para 57 of the judgment, the Full Bench of this court observed as under :

“57.Hence, at the interlocutory stage, the Civil Court is not to embark upon and evolve factual inquiry, but the Civil Court hearing the application for interim injunction to restrain the defendant from using the trade mark registered in the plaintiff's name, is only permitted to consider whether the registration is totally illegal or fraudulent or shocks the

conscience of the Court. It is not sufficient for the defendant resisting the application for interim injunction to show that the defendant has an arguable case for showing invalidity of the trade mark registered in the name of the plaintiff. Such “low threshold prima facie case” may be sufficient for the defendant to get an opportunity under Section 124(1) and (2) of the 1999 Act to get the trial of the suit stayed for the purpose of enabling the defendant to apply to the Appellate Board for rectification. Such prima facie satisfaction of the Civil Court at the lower threshold will not be sufficient to refuse interim injunction in favour of the plaintiff who has filed the suit for infringement. But if the defendant is able to show, without Civil Court being required to embark upon detailed inquiry, that the registration granted in favour of the plaintiff is totally illegal or fraudulent or such which shocks the conscience of the Court, the Civil Court will refuse to grant interim injunction.”

The Full Bench was constituted pursuant to a reference made for considering following question of law:

“Whether the Court can go into the question of the validity of the registration of the plaintiff's trade mark at an interlocutory stage when the defendant takes up the defence of invalidity of the registration of the plaintiff's trade mark in an infringement

suit?”

In the case of **Parle Products (P) Ltd. vs. J. P. and Co., Mysore** (Supra), the Supreme Court in para 9, observed as under :-

“9. It is therefore clear that in order to come to the conclusion whether one mark is deceptively similar to another, the broad and essential features of the two are to be considered. They should not be placed side by side to find out if there are any differences in the design and if so, whether they are of such character as to prevent one design from being mistaken for the other. It would be enough if the impugned mark bears such an overall similarity to the registered mark as would be likely to mislead a person usually dealing with one, to accept the other if offered to him. In this case we find that the packets are practically of the same size, the colour scheme of the two wrappers is almost the same; the design on both though not identical bears such a close resemblance that one can easily be mistaken for the other.”

In the case of **Indchemie Health Specialities Pvt. Ltd. vs. Naxpar Labs Pvt. Ltd. and anr.** (Supra), the Division Bench of this Court in para 7 observed thus,

“7. In *Amritdhara Pharmacy vs. Satya Deo Gupta*, AIR 1963 SC 449, coming to the conclusion that to an unwary purchaser of average intelligence and imperfect recollection, the overall structure and phonetic similarity between the two names “Amritdhara” and “Lakshmandhara” was likely to deceive or cause confusion, it was held that if a person is put in a state of wonderment it is sufficient to hold that the mark is likely to deceive or cause confusion. To quote the observations of the Supreme Court, “.... As we said in *Corn Products Refining Co vs. Shangrila Food Products Ltd.* (1960) I SCR 968 = AIR 1960 SC 142 the question has to be approached from the point of view of a man of average intelligence and imperfect recollection. To such a man the overall structural and phonetic similarity of the two names ‘Amridhara and Lakshmandhara’ is in our opinion likely to deceive or cause confusion. We must consider the overall similarity of the two composite words ‘Amritdhara’ and ‘Lakshmandhara’. A critical comparison of the two names may disclose some points of difference but an unwary purchaser of average intelligence and imperfect recollection would be deceived by the overall similarity of the two names having regard to the nature of the medicine he is looking for with a somewhat vague recollection that he had purchased a similar medicine on a previous occasion with a similar name.”

In the case of **Parksons Cartamundi Pvt. Ltd. vs. Suresh Kumar Jasraj Burad** (Supra), in para 14, the Division Bench of this Court observed as under :-

“14. It is thus clear that the concept of discretion is distinct from that of adjudication. What the learned Single Judge has done in the instant case is making prima facie adjudication that the Defendants' trade mark is not deceptively similar to that of the Plaintiff. Therefore, there is no question of any discretion exercised by the learned Single Judge. We have already held that the Defendant has been infringing the Plaintiff's trade marks and has been attempting to pass off its playing cards as those of the Plaintiff. This has happened in respect of the very trade mark “MERELANE”, which is registered since the year 1971 and also the label mark on the packets containing the playing cards prominently bearing the words “MERELANE NO.7”. Hence, there is no question of applying the principle enunciated in the case of Wander Limited and Anr. v. Antox India (P) Limited 1991 PTC 1.”

In the case of **Goldmines Telefilms Pvt. Ltd. vs. Reliance Big Entertainment Pvt. Ltd. and ors.** (Supra), the Division Bench of this court, in paras 28 and 29, observed as under :

“28. In *Wander Ltd. & anr. vs. Antox India P. Ltd.* - 1990 (Supp) SCC 727, the Supreme Court has held that in an appeal against an interlocutory order, the appellate Court should ordinarily not interfere with the discretion exercised by the trial court. In the facts and circumstances of the case, however, the learned trial Judge has not declined to confirm the ad-interim relief on the ground of balance of convenience or irreparable loss, but on the ground that the plaintiff has not made out a prima facie case on merits.

29. In *M/s. National Chemicals and Colour Co. & Ors. vs. Reckitt and Colman of India Limited & Anr.* - AIR 1991 Bom. 76, a Division Bench of this Court comprising Justice Sujata Manohar (as her Ladyship then was) and Justice Kenia dealt with the contention that the appellate Court should not lightly interfere with the discretion exercised by the Trial Court. The Division Bench held that even in appeal against interlocutory order, the appellate Court is required to adjudicate prima facie upon merits of the case and is entitled to take a different view upon prima facie adjudication of merits of the dispute between the parties.....”

In the case of **Cadila Health Care Ltd. vs. Cadila Pharmaceuticals Ltd.**, a three Judge Bench of the Supreme Court, in para 18, observed as under :-

“18. We are unable to agree with the aforesaid observations in Dyechem case (supra). As far as this Court is concerned, the decisions in the last four decades have clearly laid down that what has to be seen in the case of a passing-off action is the similarity between the competing marks and to determine whether there is likelihood of deception or causing confusion. This is evident from the decisions of this Court in the cases of National Sewing Thread Co. Ltd. case (Supra), Corn Products Refining Co. case, (supra), Amritdhara Pharmacy case (supra), Durga Dutt Sharma case (supra) and Hoffmann-La Roche & Co. Ltd. case (supra). Having come to the conclusion, in our opinion incorrectly, that the difference in essential features is relevant, this Court in Dyechem case (supra) sought to examine the difference in the two marks “PIKNIK” and “PICNIC”. It applied three tests, they being : (1) is there any special aspect of the common feature which has been copied? (2) mode in which the parts are put together differently i.e. whether dissimilarity of the part or part is enough to make the whole thing dissimilar, and (3) whether, when there are common elements, should one not pay more regard to the parts which are not common, while at the same time not disregarding the common parts? In examining the marks, keeping the aforesaid three tests in mind, it came to the conclusion, seeing the manner in which the two words were written and the peculiarity of the script and concluded (at SCCp.597, para 39) that “the above three dissimilarities have

to be given more importance than the phonetic similarity or the similarity in the use of the word PICNIC for PIKNIK.”

11. In the case of **Wander Ltd. and anr. vs. Antox India Pvt. Ltd.** (Supra), in para 14, a three Judge Bench of the Supreme Court, observed as under :

“14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will 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 if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the decision has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a

different view may not justify interference with the trial court's exercise of discretion.....”

In the case of **Registrar of Trade Marks vs. Ashok Chandra**

Rakhit Ltd., the Supreme Court, in para 14, observed as under :-

“14. It is true that where a distinctive label is registered as a whole, such registration cannot possibly give any exclusive statutory right to the proprietor of the trade mark to the use of any particular word or name contained therein apart from the mark as a whole. As said by Lord Esher in *Pinto v Badman*:

“The truth is that the label does not consist of each particular part of it, but consists of the combination of them all”.

12. During the course of hearing, it was submitted that the plaintiff was aware of the usage of the mark as far back as on 31/7/2014, but choose to file the present suit only on 24/8/2015. The impugned order was passed on 14/7/2016. Even thereafter the appeal was not filed until 23/1/2017 and after applying for condonation of delay, the appeal was moved for admission on 20/6/2017. It was, therefore, submitted the there is no urgency in the case of the plaintiff and there is no genuine desire for

interim relief. It was further submitted that it is the plaintiff's case that it came across the defendant's brooms only on 13/6/2015 when in fact the website printout relied upon by the plaintiff shows that the plaintiff was aware as far back as 31/7/2014 of the defendant's mark and use thereof.

13. The trade mark registration is placed on record. Trade mark type is mentioned as "device". The word "mark" is mentioned as "LAXMI" label. From the conspectus of case laws submitted before us and the submissions advanced on the principle behind appreciating the case is that it is to be seen as to whether the marks are not identical but are similar. The test is of a man of average intelligence with imperfect recollection. If the marks are found to be deceptively similar, a case is made out by the plaintiff. During the course of hearing the counsel appearing for the parties had shown to us the two labels used by both the parties to be "LAXMI" and "MAHALAXMI". Learned counsel appearing for the plaintiff submitted that the font of plaintiff's mark "LAXMI" is in elaborate 3D font, whereas the defendant's is in simple font. The colour of the plaintiff's mark "LAXMI" is written in Navy Blue, whereas the defendant's word "MAHALAXMI" is written in red. The background of plaintiff's mark is pink, whereas defendant's is yellow, green and blue

colour. The heading on the wrapper of plaintiff bears the words “GALA Grass Broom”, whereas the defendant's wrapper of the broom bears words “GEBI – Your Cleaning Partner”. This, apart from other distinguishing features, makes the mark not similar as is claimed by the plaintiff to the label used by the plaintiff. We have noticed that the appellant's/plaintiff's mark, a label is written vertically and the letters used a distinct font. The defendant pointed out that they used the mark “GEBI” and they used it in the wide range of cleaning products. The grass-broom is one of them. It is noticeable in the submissions that there are several other who used the word “LAXMI” in their grass broom products. Some examples cited are:

(1) Grah Laxmi, (2) Bhagyalaxmi and (3) Raj Laxmi.

14. Prima facie, we find substance in the submissions of the learned counsel appearing for the respondent – defendant that the names of Hindu Gods are not exclusive and such word cannot be monopolized by one party. Claiming and protecting the label mark is different than to claim monopoly over a common word. We find that the learned Single Judge has considered these basic issues emerging from the matter while considering grant of interim relief. It is a matter of record that the plaintiff registered the trade mark in the year 2003, whereas the defendant had

applied for registration in the year 2014. The defendant too claim that they have been selling the products as GEBI products, including brooms since 2006-2007 and has been selling brooms using the mark "MAHALAXMI" since 2006 – 2007. Considering this too, we are not inclined to interfere in the impugned order. In the facts of the case, we are of the view that these issues need to be settled in the suit where the parties are free to lead appropriate evidence, if any.

15. We do not find any error or perversity in the view adopted by the learned Single Judge. The learned Single Judge has taken a reasonable view in the facts of the case. There is no merit in the appeal.

16. The appeal is accordingly dismissed. No order as to costs.

(SMT. BHARATI H. DANGRE,J.)

(NARESH H. PATIL,J.)