IN THE HIGH COURT OF KARNATAKA AT BENGALURU

THE HON'BLE MR. JUSTICE RAGHVENDRA S CHAUHAN

REGULAR FIRST APPEAL NO.610/2017 DATED:17-07-2017

MICRO HITECH INDUSTRIES A SOLE PROPRIETARY CONCERN OF COUTAM KUMAR BABULAL (HUF) VS. UTTAM GAUTAM APPLIANCES A SOLE PROPRIETARY CONCERN

ORDER

The appellant, Micro Hitech Industries, has challenged the legality of the judgment and decree dated 31.01.2017, passed by the XVIII Addl.City Civil Judge, Bengaluru City (CCH-10), whereby the learned Judge has dismissed the suit filed by the appellant against the respondent, M/ s Uttam Goutam Appliances.

2. Briefly the facts of the case are that in the year 1993, the appellant-plaintiff had registered the trade mark " Nandi " in Class-21 (Cooker and allied goods).The said registration is valid till 19.10.2017.Further, on 29.06.2009 the appellant had also filed registration of its label mark as " Nandi " in Class 21. The label mark was registered; the registration is valid till 29.06.2019. Furthermore, on 26.12.2013 the appellant had applied for registration of the mark " Nandi " under Class 21 for LPG Gas Stove. The said registration is valid till 23.11.2021.

3. To the utter surprise of the appellant, in 2014, the appellant discovered that the respondent, M/ s Uttam Goutam Appliances, was also engaged in the business of manufacturing and selling pressure cookers, and allied goods under the trade mark " Nandini ".On 17.03.2014, the respondent had also applied for the registration of said trade mark in Class 21. On 18.03.2015, the appellant realized that the pressure cooker, being sold by the respondent, contains deceptively similar trade mark as the one used by the appellant. Thus, while the appellant uses the trade mark " Nandi ", the respondent, the trade mark " Nandani ".

4. Therefore, on 25.03.2015, the appellant filed a civil suit, namely O.S.No.2835/2015, before the learned trial court. Initially, on 30.03.2015, the learned trial Judge granted ad-interim order in favour of the appellant. But by order dated 17.02.2016, the learned trial Judge vacated the interim order.

5. After hearing and assessing the evidence produced by both the parties during the trial, by judgment and decree dated 31.01.2017, the learned Judge dismissed the civil suit filed by the appellant. Hence, this appeal, before this Court.

6. Mr. Harshit Tolia, the learned counsel for the appellant, has raised the following contentions before this Court:

Firstly, while dealing with a case of infringement of a trade mark, or with a case of ' passing off, the learned trial Judge is expected to consider " the overall similarity " and not " differences " in the trade marks.In order to buttress this contention, the learned counsel has relied on the cases of Parle Products (P) Ltd Vs. J.P. and

Co., Mysore (AIR 1972 SC 1359) and Bihar Tubes Ltd Vs. Garg Ispat Ltd [2009 (41) PTC 741] (Delhi). Therefore, the learned trial Judge should have examined and discussed the " overall similarities ", rather than " the differences " between the two trademarks " Nandi " and " Nandini ".

Secondly, both the trademarks have a similar phonetic sound. Therefore, the phonetic similarity would cause confusion in the mind of the common consumer.

Thirdly, if the two images used by the appellant and the respondent were compared, it would reveal that there are large number of similarities. The similarities are deceptive enough to confuse the consumer.

Lastly since one of the objects of the trade mark law is to protect the consumer from being taken out for a ride, the learned Judge should have examined the evidence to see if a consumer would be confused due to the " deceptive similarity " between the images. Thus, the learned Judge has misapplied the law. Hence, the learned Judge has erred in dismissing the suit filed by the appellant.

7. On the other hand, Mr. K. N. Rakshit, the learned counsel for the respondent, has raised the following counter arguments:

Firstly, the moment the respondent realized that its trade mark is similar to the trade mark used by the appellant, it added the suffix " Diamond " to the word " Nandini ".Hence, there is a phonetic difference between " Nandi " and " Nandini Diamond ".Hence, no confusion can be caused in the mind of the consumers.

Secondly, there is a difference in the meaning of the word " Nandi " and " Nandini ":while the former refers to a bull, the latter to a cow. The consumers are aware of the gender difference between to two. Thus, the deceptive similarity between the two trade mark is a figment of appellant's imagination.

Thirdly, there are certain differences even in the images used by the respondent. In the background of the image used by the respondent, there is a picture of modular kitchen. But no such image of a modular kitchen exists in the picture used by the appellant. Thus, even visually, there is ample difference so as to distinguish the trade mark and the products. Hence the learned Judge was justified in dismissing the suit filed by the appellant. Therefore, the learned counsel has supported the impugned order.

8. There are well settled principles of law which need to be followed by the Courts of law. Since the consumer protection is essential for the smooth functioning of the commercial world, and for the society at large, the common law considered ' passing off as a civil wrong. Under the concept of ' passing off ', a person was not permitted to pass of his products as the products produced by another person. With the enactment of the Trade Mark Act, the concept of infringement was introduced. While dealing with both passing off and infringement, the Court has to deal with " the deceptive similarity " between the two trademarks. It is not only that the images are similar, but the phonetic similarity between the words used in the trade marks are also fundamental to see if there is a " deceptive similarity " between the two trade marks.

9. Surprisingly, the learned Judge has noticed the principle annunciated by the Hon'ble Supreme Court in the case of Parle Products (supra), but when it came to applying the said principle, the learned Judge has conveniently forgotten it. Thus, instead of examining the overall similarities between the two trademarks, the learned Judge has proceeded to discuss the differences between the trademarks. Therefore, the very approach of the learned Judge is legally unsustainable.

10. The question before the learned Judge was whether the two trademarks are so deceptively similar as to cause a confusion in the minds of the consumers or not? Secondly whether the similarities lead to infringement of the appellant's trade mark or not? For answering the said issues, the learned Judge should have examined the similarities between the two trademarks, rather than dealing with the differences between them.

11. There have been plenty of studies in the United States of America where the psychological impact of confusion in trademarks have been studied. For, as Justice Felix Frankfurter observed in Mishawaka Rubber and Woolen Mfg. Co. v SS. Kresge Co. [316 US 203] " the protection to trade mark is the law's recognition of the psychological functions of the symbols ".Mr. Jacob Jacoby in his article, " The Psychological Foundations of Trade mark Law:Secondary Meaning, Generism, Fame, Confusion, Dilution. states that " The brand names serve as information ' chunks '.They represent core nodes in the memory around which other ' associated information is connected and organized '.Given, only a familiar brand name, a host of relevant and important information can be efficiently called into consciousness. " The brand names serve as the ' information chunks ' " enabling the consumer to efficiently organize, store, and retrieve information from the memory. Indeed, when consumers engage in pre purchase decision making, brand name information turns out to be the most frequently accessed type of information. "According to the author, " incoming information is interpreted in terms of prior knowledge. Moreover, the process of retrieving information stored in memory to interpret new stimuli is not done with conscious deliberateness, but unconsciously and virtually instantaneously, generally within the first two hundred milliseconds after apprehending the incoming information. "The author concludes that " In sum, we do not need to pay attention to every single aspect of an external object (i.e. product, advertisement or store) before using what we have in our memory to interpret and identify that object. Instead, in interpreting the outside world, we generally rely in a process called ' pattern recognition '.When sufficient number of features represented in the incoming information match the pattern of features of a pre-existing cognitive network, we tend to fill in the details and interpret the object as an exemplar of that network. The greater the similarity between the pattern of information extracted from the outside object and the pattern of information stored in a cognitive network, the greater the likelihood that one will be confused into thinking that the latter is an exemplar of the former. "[The Trade mark Reporter, Vol. 91 No. 5 September-October, 2000].

This scientific data should be kept in mind by the Courts while dealing with cases of trade mark infringement and/or passing off.

12. Considering the similarity, it is obvious that both the words " Nandi " and " Nandini " are phonetically similar to each other. The linguistic distinction between the two may not be well known to the consumer at large. The consumer would only be aware of the fact that even the word " Nandini " does not contain the word " Nandi " in it. Thus, phonetic similarity does exist a similarity which may confuse the innocent consumer.

13. Moreover, the label images of both the companies are also similar. In the image used by the appellant, a pressure cooker sits in the very centre and in front of the pressure cooker, different vegetables are spread out. Similarly in the label image used by the respondent, the pressure cooker sits in the centre, and different vegetables are spread out. Of course, the learned counsel for the respondent has pleaded that the vegetables are different, hence no confusion would be caused to the consumer. But a consumer does not go to the market with the discerning eyes of Sherlock Holmes. Since the recognition of trade mark is instantaneous, the consumer is not expected to analyze the differences in the vegetables used in the image. The impression that a consumer would carry is that a few vegetables of different colours have been spread out in front of the pressure cooker manufactured by the appellant. Therefore, while looking at a similar spread of vegetables in the respondent's image, the consumer is most likely to confuse the respondent's product for the appellant's product.

14. Even the other images used by the appellant, such as the image dealing with the words ' 5 years warrantee ' is nearly duplicated by the respondent while it uses an image containing the words " 7 years warrantee '.In fact, the placement of the words ' 7 years warrantee ' is similar to the placement of the words ' 5 years warrantee '.Thus, there is an uncanny resemblance between the two trademarks.

15. Since the words " Nandi " and " Nandini " are phonetically similar, even the use of the word ' Diamond ' is likely to confuse the consumer. For the consumer may believe that the word ' Diamond ' reflects the quality of the product, and does not necessarily refer to a new product launched in the market by the respondent.

16. Moreover, even if the respondent has used the image of a modular kitchen, it would help the consumer in distinguishing the trademarks and the products. For as quoted above, a consumer mentally relies on " patter recognition ", and retrieves the information from previous memory within " the two hundred milliseconds after apprehending the incoming information " Thus, a grave possibility does exist for confusing the Consumer.

17. Thus, there is, indeed, an overall similarity in both the products-phonetic and visual similarities. Hence, the respondent would be able to pass of its product as the product of the appellant. Since admittedly the appellant entered the market at an earlier point of time, and had created a goodwill for its product, the appellant has succeeded in establishing its case of infringement and passing off by the defendant.

18. For the reasons stated above, the appeal is hereby allowed. The impugned order dated 31.01.2017 is set aside. The respondents are restrained from manufacturing and marketing impugned goods i.e., Pressure Cooker under trade mark " Nandini " and/or label mark " Nandini " and/or any other trade mark which may be

identical and/or deceptively similar to the appellant's registered trade mark " Nandi " and/or label mark “ Nandi ” from committing an act of infringement of the appellant's registered trade mark “ Nandi ” and label mark “ Nandi ".

The decree shall be prepared in accordance with the above mentioned terms.