

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 18th July, 2011
% **Judgment pronounced on: 19th September, 2011**

+ **LPA No.588/2011**

Champagne Moet & Chandon Appellant
Through: Mr.N. Mahabir, Adv.

versus

Union of India & Ors. Respondents
Through: Ms.Preeti Dalal with Ms.Mithu
Jain, Advs. for Resp. No.1 and 2.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

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| 1. | Whether reporters of the local papers be allowed to see the judgment? | Yes |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

DIPAK MISRA, CJ

In this intra-Court appeal, the assail is to the legal pregnability and substantiality of the order dated 19th May, 2011 passed by the learned Single Judge in WP (C) No. 9778/2006.

2. Bereft of unnecessary details, the facts which are necessitous to be stated are that the appellant is a registered company established under the laws of France and is a well-known manufacturer of wine which it is selling under the trademark 'MOET', 'MOET & CHANDON' and other brands in more than 150 countries of the world. The appellant has stated about the foundation of the company, on the trademark it has attached to it and how eventually it came to be known as 'MOET & CHANDON'. The appellant as early as 1906 brought champagne bearing the mark 'MOET' and since then the said brand of champagne has been sold in India. The appellant holds registration of the trademark 'MOET' in class 33 of the Trade and Merchandise Marks Act, 1958 (for short 'the 1958 Act') under No. 396612 with effect from 15th October, 1982 and for the trademark 'MOET & CHANDON' under Registration No. 439835B with effect from 5th July, 1985.

3. The third respondent, namely, M/s Moet's, a partnership firm operating from 50, Defence Colony, New Delhi. The trademark 'MOET'S' was first coined and adopted by the said respondent in 1967. It is claimed that the said name was adopted from Hindi word 'MOHIT', which was the name of one of the partners. The said trade name, as

claimed by the third respondent, by virtue of its long, continuous, extensive and exclusive use, has acquired goodwill and reputation among the public and the trade and is associated and identified by the purchasing public with the name of the said firm. It applied for registration of the trade mark 'MOET'S' in Class 29 on 28th July, 1986 and its application was advertised in the Trade Marks Journal No. 965 dated 16th August, 1989. The appellant filed its opposition to the said registration. Certain documents were brought on record by the appellant with regard to its prior registration correspondence, etc.

4. The opposition put forth by the appellant was rejected by an order dated 12th June, 1995 by the Registering Authority and directed the trade mark application No. 457636 in Class 29 of the third respondent to proceed to registration.

5. As is evident from the material brought on record, the DR while allowing the application of the third respondent and rejecting the opposition of the appellant opined that though the rival marks are identical but the goods being respectively manufactured and marketed by the parties were not the same or of the same description; that the

appellant's specification of goods pertain to 'quality wines, spirits and liquors' in Class 33 whereas the goods of the third respondent were 'meat, fish, poultry and game and meat extracts', which are included in Class 29; that the appellant had failed to establish its user since 1947 and its registration was only from 15th October, 1982 and further the annual sales figures for the year 1980-1990 were given in French Francs and not in Indian currency; that the bills furnished by the appellant do not bear the signatures of the issuing authorities or the trademark of the appellant in the text; that the bills produced were for the year 1980 onwards; that the mark applied for by the third respondent was a significant part of its trading style since 1967 and, therefore, it could not be said that adoption and user of the mark of the third respondent was dishonest; that the third respondent has shown sales figures from 1968 and hence, the appellant's objection with reference to Sections 11(a) and 11(e) of the 1958 Act was unsustainable; that the third respondent had used the mark for a substantial period and, therefore, it qualified for registration under Section 9 of the 1958 Act; and that the application of the third respondent was registerable within the meaning of Section 12(3) and 33 of the 1958 Act.

6. Being dissatisfied with the aforesaid order, the appellant preferred an appeal before this Court forming the subject matter of CM (M) No. 487 of 1995 and after coming into force of the Trademarks Act, 1999 (hereinafter referred to as 'the 1999 Act') the appeal stood transferred to the Intellectual Property Appellate Board (IPAB). The IPAB by order dated 27th October, 2004 dismissed the appeal holding, inter alia, that the documents produced by the appellant before the DR and before the IPAB did not show anything relevant to identify its trade in India; that the invoices of sales figures to embassies produced by the appellant proved exclusive use of the goods by the embassies and there is no evidence that the goods were available openly in India; that the appellant had furnished invoices and sales tax statistics in relation to the sale of the goods by it in India only for 1988-91 and none of the documents referred to the trademark 'MOET' alone; that the invoices as well as the advertisements consisted of the composite mark 'MOET & CHANDON'; that the appellant did not produce any evidence to show that it had attained reputation and established goodwill in respect of its products in India with the mark 'MOET'; that it failed to establish the plea of prior user; that the goods in Class 29 for which the respondent No.3 was seeking

registration were of a different description and different kind from the goods in Class 33; that the distributing channel for the goods of the third respondent was totally different; that the third respondent had established the use of the impugned mark at least from 1979 whereas the appellant has failed to establish that it had attained the reputation and goodwill in India on the date the third respondent applied for registration of the trademark. Being of this view, the IPAB dismissed the appeal preferred by the present appellant.

7. At this juncture, it is appropriate to note that the third respondent also applied for registration of the mark 'MOET'S' in Class 16 in respect of paper and paper products in application No. 457637. The appellant filed opposition to the said application under Class 16 but the same was dismissed by an order dated 8th December, 1999 by the competent authority. The appellant chose not to assail the said order as a consequence of which it attained finality.

8. Before the learned Single Judge, it was contended that adoption of the mark 'MOET' by the third respondent as its trading style or as a trademark was fraudulent and dishonest particularly since it had used two

dots on the letter 'E'; that the third respondent had copied the essential feature of the appellant's trademark; that even if the third respondent had removed the two dots over the letter 'E' then also the mark presently used by it is different from what it had been granted registration for and this is another reason why the application ought to have been rejected; that the product of the appellant, that is, wine and the product of the third respondent, that is, food are both served in hotels and eating houses and the channels of trade are the same; that there is a valid nexus between food and drink and that the non-assail of grant of registration of trademark in favour of the third respondent in Class 16 did not make any difference since no product in Class 16, at any point of time, was commercially sold by the third respondent and did not infringe trademark 'MOET'; that there was no acquiescence on the part of the appellant at any point of time and it opposed the application of the third respondent when it became aware of the application; that the respondent No.3 has not been able to establish that it has been acting in ignorance of the appellant's title; that when the plea of the appellant was that the respondent had dishonestly adopted the trademark, the question of acquiescence does not arise. To buttress the aforesaid submissions,

learned counsel for the appellant placed reliance on ***Power Control Appliances v. Sumeet Machines Pvt. Ltd, 1995 PTC 165*** and ***Hindustan Pencils Pvt. Ltd. v. India Stationery Products, 1989 PTC 61.***

9. The aforesaid stand of the appellant was resisted by the third respondent on the foundation that the appellant had not produced any document to show prior user and there was acquiescence on the part of the appellant to the use of the trademark 'MOET' by the third respondent; that the appellant had not initiated any infringement action against the said respondent at any point of time; that the appellant accepted the verdict of the DR rejecting its opposition to the grant of registration in favour of the third respondent in Class 16; that the mark 'MOET'S' is used by the respondent No.3 in the paper packaging for 'take-away' food and, therefore, the mark was not confined to catering services; that there is a gulf of difference in the goods being traded by the appellant and the third respondent and hence there is no question of any deception or confusion; that the third respondent has been able to made out a case for registration on the foundation of honest and concurrent user as well as the special circumstances existing in his favour; that the third respondent has built up its own reputation as the provider of catering services for several

years in Delhi; that letters had been issued by the embassies appreciating the catering services provided by the third respondent since 1967; and that the trademark 'MOET'S' has been associated with the trading style, trade name and goods and services of the third respondent since long and, therefore, the order passed by the IPAB really cannot be flawed. To bolster the said submission, the decisions in *London Rubber Co. Ltd. v. Durex Products*, 1964 (2) SCR 211; *Osram Gesellschaft Mit Beschränkter Haftung v. Shyam Sunder*, 2002 (25) PTC 198 (Del) (DB) and *Winthrop Products Inc. v. Eupharma Laboratories Ltd.*, 1998 PTC (18) 213 were commended to the learned Single Judge.

10. The learned Single Judge referred to the order passed by the DR and that of the IPAB and came to hold that there was absolutely no evidence or material on record to establish that the appellant's products are openly available in the market in India which alone would establish the goodwill and reputation of the appellant in the trade; that the registration sought by the third respondent pertain to 'meat, fish, poultry and game and meat extracts preserved brought and cut foods' whereas the appellant's registration was for 'wines, spirits and liquors' and hence there is a clear cut distinction as the goods and the distribution channels

are different; that the stand that there exists a vital nexus between the food and drink, though is an attractive submission but does not deserve acceptance; that the submission of the third respondent that the use of the two dots over an alphabet is not entirely unknown to Indian languages and that this reflected the way 'Mohit Bindra' called himself when he was a child; that the issue that whether respondent No.3 was a prior user or earnest and concurrent user in relation to the goods was not required to be examined; that the appellant having conceded to the order dated 8th December, 1999 passed by the DR in respect of the same mark in Class 16, which was for the sister concern, namely, 'MOET'S SIZZLER, MOET'S CATERING SERVICES AND MOETS' goes a long way to show that the appellant had really acquiesced and there is no question of dishonest use; and that the concurrent findings recorded by the DR and IPAB are based on material facts on record and such concurrent determination did not warrant interference under Article 226 of the Constitution.

11. Be it noted, the learned Single Judge placed reliance on ***Ramdev Food Products Pvt. Ltd. v. Arvinbhai Rambhai Patel, AIR 2006 SC 3304*** and eventually came to hold as follows: -

“The contention that a dishonest adoption of a mark would not entitle Respondent No.3 to raise the defence of acquiescence is not tenable in view of the finding that the user of the mark by Respondent No.3 cannot be said to be dishonest. Further, the fact remains that the adoption of ‘MOET’S’ as part of its trading name by Respondent No.3 has not been sought to be prevented by the Petitioner at any point of time. Also, the Petitioner did not challenge the DR’s order dated 8th December, 1999 rejecting the opposition by the Petitioner to the grant of registration of the mark in relation to Class 16 in favour of Respondent No.3. The plea of acquiescence merits acceptance.”

12. We have heard Mr.N. Mahabir, learned counsel for the appellant and Ms.Preeti Dalal with Ms.Mithu Jain, learned counsel for the respondents No.1 and 2.

13. On a scrutiny of the orders passed by the DR and IPAB, it is clearly evincible that they have accepted that the third respondent’s initial adoption of the mark ‘MOET’S’ has not been fraudulent. It is worth noting that Mohit Bindra is one of the partners of the respondent No.3, a partnership firm and he used to spell his name as ‘MOET’. True it is, use of two dots over the letter ‘E’ may give rise to suspicion but it is well-known that such individuals spell their names in a different way to give it a different visual look and make it attractive. It has come in evidence that

the said Mohit Bindra has been spelling his name in the same manner. The said evidence has gone unassailed and nothing has been brought on record that it was far from the truth. Quite apart from the above, another aspect can be taken into consideration. There is a phonetic similarity between two words 'Mohit' and 'Moet'. The similitude is discernible and apparent. In this context, we may note that in certain Indian languages the vernacular term for 'eyes' is 'Aakhi' and in some parts of Italy it is said 'Akhi'. Another example can be given in this regard. In Sanskrit, the father is called 'Pita' and in Latin, it is called 'Pitar'. We have only referred to the same to appreciate that once the initial adoption is explained and is not fraudulent, the delay and laches on the part of the appellant have impact on the challenge to the registration. We are disposed to think so that the use of the name by the third respondent or to put it differently the cause or the use by the third party has not affected the appellant.

14. The situation can be viewed from another spectrum. As has been held by the IPAB, the products are different. It is common knowledge that the appellant's products did not have the mass market in India in 1950's and 1960's. As some of the materials would reveal, it

manufactures and sale wine and has subsequently expanded its business portfolio to include hotels, cookery events and perfumes. The clients of the appellant are elitists, educated and well read. The products that are manufactured by the appellant are not such products which are meant for mass consumption. It was even not recognized in the Indian market in the early 1950's and 1960's. Needless to emphasise, trans-border reputation has been recognized but the conception of reputation in this regard is dependent upon nature of the products associated with the reputation, popularity and goodwill associated with the market in India. That apart, the type and number of people in India who have knowledge, awareness of the market are to be taken into consideration.

15. Regard being had to the same, the question of deception and confusion has to be associated and examined. It is trite law that the said facets are to be considered on goods to goods basis. It is totally fact oriented. As we have noted hereinbefore, the third respondent had filed the trademark application in 1986 in Class 29 for 'meat, fish, poultry and game and meat extracts'. It was stated that the third respondent had been using the said mark since 1967. Once there is a distinguishable species of goods catering to educated and discernible consumers and the difference

is clearly demonstrable, it is well nigh impossible to stamp that the adoption and user by the third respondent was dishonest. The issue of dilution of mark, as is evincible from the orders passed by the authorities, was not specifically raised. As has been taken note of by the learned Single Judge, the third respondent's registration in Class 16 remained unassailed. Nothing had been brought on record to show that the third respondent intended to claim benefit and advantage of the appellant's mark and goodwill. In fact, we are inclined to think that the opposition by the appellant to the registration of the third respondent is not within the acceptable parameters and has been rightly dismissed by the DR, IPAB and correctly not interfered with by the learned Single Judge.

16. It is worth noting, while exercising the power of judicial review under Article 226 of the Constitution of India it cannot be converted into an appeal. The judicial review is directed not against the decision but is confined to the examination of the decision making process. If the reasons ascribed by the authorities or the IPAB are manifestly unreasonable that no reasonable authority entrusted with the power in question would reasonably made such a decision, the concept of judicial review gets attracted. If there is perversity of approach,

interference is warranted. If there is non-examination of relevant factors and conclusion has been arrived at, it comes within the scope of judicial review. If a plausible view has been expressed on the basis of the material on record and there is no perversity of approach and the application of law to the facts is not incorrect, the concept of judicial review is not attracted. To put it in a different way, we do not perceive any error in the decision making process.

17. In view of the aforesaid analysis, we do not perceive any merit in this appeal and, accordingly, the same stands dismissed without any order as to costs.

CHIEF JUSTICE

SEPTEMBER 19, 2011
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SANJIV KHANNA, J.