

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved on: 26th July, 2011
Judgment Pronounced on: 1st August, 2011

+ LPA No.613/2009

KUNJ ALUMINIUM PRIVATE LTD Appellant
Through: Mr.M.Dutta, Advocate.

versus

KONINKLIJKE PHILLIPS ELECTRICITY NV Respondent
Through: Mr.N.Mahabir, Advocate &
Dr.Sheetal Vohra, Advocate.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SUNIL GAUR

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

PRADEEP NANDRAJOG, J.

1. This is the 2nd round when Letters Patent Appeal No. 613/2009 is being decided.
2. At the 1st round of litigation, the appellant met with failure, when vide order dated 30.11.2009, the appeal was dismissed in

limine.

3. The reasoning of the Division Bench is to be found in paragraph 4 of the order dated 30.11.2009 wherein the findings returned by the learned Single Judge have been pithily crystallized, which para reads as under:-

“4. The learned Single Judge observed that keeping in view the nature and extent of the goodwill of the respondents, consumers of the products and the manner and mode in which the goods are marketed and sold, the order of the Appellate Board did not appear to suffer from any illegality. It was further observed that the products like pressure-cookers, electrical bulbs, transistors, etc. were sold in small towns as well as villages and invariably available in the same shop. Distinctiveness acquired by a mark could justify refusing a request for registration in respect of that mark by any person.”

4. Thereafter, the Division Bench has observed that it was of the considered view that the impugned order suffers from no legal infirmity which warrants interference by way of appeal.

5. It is apparent that the reasons given by the Division Bench were the capsule reasoning of the learned Single Judge being agreed to by the Division Bench. The crisp reasoning of the Division Bench did not find favour with the Supreme Court, inasmuch as vide order dated 4.4.2011, the Supreme Court has opined: *‘This was not the way to dispose of an appeal. The impugned order is too cryptic. There should have been at least a brief discussion of facts and some reasons’.*

6. Since we find that brief reasons are to be found in paragraph 4 of the decision of the Division Bench, we would treat said brief reasons as not measuring up to the mark of being *‘brief*

reasons' as the same have been opined by the Supreme Court to be too cryptic. But we would highlight that the direction of the Supreme Court is that the appeal should be disposed of with a brief discussion of facts and some reasons.

7. We need to highlight that the instant appeal is not to be treated as if it is the first remedy available to the aggrieved party against the decision which settled the */is* between the parties.

8. As would be noted from the facts hereinafter noted, the original */is* between the parties was settled before the Registrar of Trade Marks, when respondent's opposition to the application filed by the appellant seeking registration of the trade mark '*Philips*' for Non-Electrical Pressure Cooker under Class 21 of the Trade and Merchandise Marks Act, 1958 was rejected and registration was granted to the appellant.

9. The appellate remedy, being the statutory appellate remedy before the Intellectual Property Appellate Board was availed of by the respondent. This was the 2nd stage at which the */is* between the parties was litigated. The respondent won before the Intellectual Property Appellate Board. The decision of the Registrar of Trade Marks was set aside. Respondent's objection was allowed and appellant's application seeking registration of the trade mark '*Philips*' was rejected. The appellant litigated with the respondent at the 3rd tier i.e. before the learned Single Judge of this Court, where the writ petition filed by the appellant was considered.

10. Dealing with the contentions urged and with a detailed decision, the learned Single Judge concurred with the view taken by the Intellectual Property Appellate Board.

11. It is apparent that the */is* was not settled by the learned Single Judge for the 1st time. The learned Single Judge exercised writ review jurisdiction vested in High Court and thus, it was in this backdrop of 3 tier litigation being already fought, that the Division Bench at the 4th stage considered the matter.

12. Be that as it may, though we would have preferred to be equally brief, as was the predecessor Bench, but would be constrained to pen a lengthy order in view of the fact that the reasons given by the predecessor Bench have been opined to be no reasons at all.

13. Appellant 'M/s Kunj Aluminium Private Ltd.' applied for registration of the trade mark '*Philips*' pertaining to Non-Electrical Pressure Cooker under Class 21 of the Trade and Merchandise Marks Act, 1958. The respondent filed an opposition petition. Vide order dated 9.12.1996, the Registrar of Trade Marks granted the application filed by the appellant and rejected the opposition petition. The reasoning of the learned Registrar of Trade Marks is that the word '*Philips*' is not an invented word but is a common personal/surname, hence, cannot be allowed a particular status as a trade mark. It was held that the appellant claimed user of the mark since 1982 and there was evidence to establish the same. Notwithstanding, the Registrar of Trade Marks categorically noted the legal position that had the appellant adopted the trade mark '*Philips*' in respect of goods which have trade connection with that of the goods of the respondent, it would be a case of commercial dishonesty of trading upon others goodwill, allowed the application filed by the respondent.

14. The opposition by the respondent was on the plea that the trade mark '*Philips*' and the device with the word '*Philips*' at the

Letter Patent Appeal No.613/2009

top is the registered trade mark of the respondent and thus it had a proprietary interest in the trade mark '*Philips*'. It was pleaded that the respondent had an extensive goodwill in India and abroad with respect to its trade mark, which was stated to have attained the status of recognition by the consumers in small towns and villages as identifying the product with the respondent and that its products like transistors, electrical bulbs, electrical toasters etc. are sold at shops where kitchen utensils, including pressure cookers are sold. It relied upon two decisions, reported as AIR 1953 P & H 418 '*M/S Banga Watch Company Chandigarh vs. N.V.Philips*' and PTC (Supp) (1) 767 (Delhi) '*Jugmug Electric and Radio Company vs. Telerad Pvt. Ltd.*', wherein it was judicially recognized that the products of the respondent, with reference to the trade mark '*Philips*' have extensive goodwill all over India and that the common consumer would associate any product with the trade mark '*Philips*' with that of the respondent, particularly where the product is sold through the same trade channel.

15. As we have noted hereinabove, the learned Registrar of Trade Marks held in favour of the appellant mainly with respect to the word '*Philips*' not being an invented word and secondly, that the appellant had been using the mark since the year 1982. Though not expressly stated, meaningfully read, the Registrar of Trade Marks found it to be a case of an honest concurrent user.

16. Vide impugned order dated 25.9.2009 the learned Single Judge has noted that as per the decision reported as 1992 Suppl. 2 SCC 312 *H.B.Gandhi vs. Gopi Nath & Sons*, power of judicial review is not an appellate power and would be limited to see whether the statutory authority has not acted illegally, irrationally

or with procedural impropriety or that material evidence is not ignored or immaterial evidence not considered.

17. With respect to the 2 decisions noted in para 14 above, the learned Single Judge has found that the trademark '*Philips*' has been used by the respondent in India since 1950 and has acquired extensive goodwill with respect to electrical goods such as transistors, electric bulbs and electric toasters i.e. has attained distinctiveness. The learned Single Judge has thereafter found that the electrical goods of the respondent and the pressure cookers manufactured by the appellant, and even others, are sold through the same trade channel i.e. shops in small towns and villages and that the consumer of the goods is the same. Recognizing that honest concurrent user would be a good defence for the appellant, the learned Single Judge has found merit in the view taken by the Intellectual Property Appellate Board of the word '*Philips*' notwithstanding being not an invented word, could not be appropriated by the appellant for the reason when in the year 1982 the appellant started selling pressure-cookers with the mark '*Philips*', the same had acquired a reputation for the goods of the respondent. The shareholders and Directors of the appellant are admittedly professing Hindu religion and could give no reason why they would adopt a foreign name and in particular a name normally associated with those who profess Christianity. In other words, the learned Single Judge found that it was not a case of an honest concurrent user.

18. Learned counsel for the appellant urged before us that honest concurrent user permitted the identical mark to be registered as the trademark by 2 entities with respect to different or even the same goods and thus urged that since the appellant

was in business since 1982, even it had acquired a reputation for its goods i.e. pressure-cookers with the trademark '*Philips*' and thus urged us to return a verdict in favour of the appellant. Second contention urged was that the pressure cookers manufactured by the appellant had no electrical component and admittedly all products of the respondent were electrical goods and thus urged that notwithstanding the goods of both parties being sold through the same shop and the class of buyers being the same, counsel urged that there was no scope for any deception.

19. We refrain from discussing the 9 judgments cited by learned counsel for the appellant which hold that if there is an honest concurrent user, the same mark can be registered as the trademark of 2 different parties for the reason learned counsel for the respondent conceded to the said legal position, but would hasten to add that the question whether the concurrent user was honest or not is a question of fact to be decided in each case.

20. The word '*Philips*' is not an invented word. But, there is overwhelming evidence in favour of the respondent that since 1950 its products were being sold in India under the trademark '*Philips*' and these products were electrical bulbs, electric toaster and the like, and had attained distinctiveness. Who has not seen '*Philips*' bulbs in India? We wonder any! Thus, when the appellant adopted the same mark for its pressure-cookers in the year 1982, a finding of fact returned, that the Directors of the appellant were aware of the existence of the respondent and its association with the trademark '*Philips*' cannot be faulted with. Further, we find no reasons whatsoever given by the appellant as to wherefrom the appellant bona-fide conceived to use the word

'Philips' as its mark. The appellants have not denied that their shareholders and Directors profess Hindu religion and learned counsel for the appellants did not dispute that the name *'Philips'* is normally adopted as a name or surname by Christians. Now, electrical toasters, electrical ovens are kitchen appliances and so are pressure-cookers. All belong to the same genus and are species thereof. It is not in dispute that the goods are sold in shops selling home appliances and the class of consumers is the same. It is not in dispute that respondent's goodwill is all pervading in India and sweeps virtually every segment of the society. Thus, the common ordinary buyer with the usual imperfect memory would conceivably be misled into believing, when he sees a pressure-cooker with the trademark *'Philips'*, as being the product of the same company which sells *'Philips'* bulbs, electric toasters, electric ovens, etc.

21. We find that the correct principles of law have been extracted and applied to correct facts by the Intellectual Property Appellate Board as also the learned Single Judge. We find that the Registrar of Trade Marks did note the legal position that if the appellants adopted the trademark *'Philips'* in respect of the goods which had trade connections with that of the goods of the respondent it would be a case of commercial dishonesty: of trading upon others goodwill, but did not apply the facts correctly to the said legal principle.

22. We have independently reflected upon the reasoning of the learned Single Judge, who we note has independently reflected upon the reasoning of the Intellectual Property Appellate Board, which Board we find has correctly found fault with the application of law to the admitted facts by the Registrar of Trade Marks.

23. We agree with the reasoning of the learned Singe Judge and thus would dismiss the appeal with costs quantified at ₹22,000/- to be paid by the appellant to the respondent.

(PRADEEP NANDRAJOG)
JUDGE

(SUNIL GAUR)
JUDGE

August 1, 2011
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