

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

+ **RFA 86/2008**

RAJ KUMAR SARAF, PROPRIETOR M/S. BINDAL
FOOD PRODUCTS

..... Appellant

Through: Mr. S.K. Bansal, Mr. Ajay Amitabh
Suman, Mr. Vikas Khera and
Mr. Santosh Kumar, Advocates

Versus

M/S. VAIDYA NANDRAM GIGRAJ CHAMARIA Respondent

Through: Mr. A.K. Behera, Advocate

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Date of Decision : July 19, 2013

CORAM:

HON'BLE MS. JUSTICE REVA KHETRAPAL

HON'BLE MS. JUSTICE PRATIBHA RANI

J U D G M E N T

: REVA KHETRAPAL, J.

1. By way of this appeal, the Appellant - Raj Kumar Saraf seeks to assail the order dated 19.9.2007 passed by the Copyright Board rectifying the Register of Copyrights by expunging the entry bearing No.A-66496/04 relating to the art work of the Appellant.

2. The facts leading to the passing of the impugned order by the Copyright Board may be briefly delineated as follows.

3. The Respondent - Vaidya Nandram Gigranj Chamaria had filed an application under Section 50 of the Copyright Act, 1957 before the Copyright Board for expunging/deleting the registration of the artistic work of the Appellant registered as Registration No.66496/04 dated 26.2.2004 from the Register of Copyright. As per the averments made in the rectification petition, the Respondent firm had been in the business of manufacturing and marketing of Pansarat and Ayurvedic medicines ever since the year 1958 and had been issued Ayurvedic Drug License way back in the year 1983 vide License No.174 (A & U) dated 19.1.1983. Besides, the Respondent had also applied for sales tax registration number for carrying on the aforesaid business in the territory of Delhi in the year 1979 and had been issued Sales Tax Registration No.LC/03/019829 dated 17.2.1979. The Respondent had earned tremendous goodwill in the market in relation to manufacturing and marketing of several Ayurvedic and Pansarat products including “Vijay Hingoli”. The Respondent was holding various registered trademarks and an application for registration of “Vijay Hingoli” was pending consideration before the Trademarks Registry. The said product, viz., “Vijay Hingoli” had been launched in 1981 and was being marketed in bottles and plastic packs ever since 1981 and from the year 1991 in pouches. The Respondent in paragraph 5 of the petition has set out its sales figures for the year 1994-95 till 2003-04 and submitted that ever since 1981 it had been marketing its product “Vijay Hingoli” using the artistic work and get up enclosed with the petition. During the course of marketing of the said product, the Respondent had issued several advertisements in newspapers, audio-

video cassettes, magazines, glow signs, banners, advertisements on the body of DTC buses, wall painting and other ancillary modes of advertisements, portraying and advertising the said artistic work and get up, samples whereof were enclosed for the perusal of the Copyright Board. It was alleged that the Appellant – Shri Raj Kumar Saraf (the Respondent before the Copyright Board) was fully aware of the existence of the Respondent in the market in relation to the manufacturing and marketing of Pansarat and Ayurvedic products and specifically the product “Vijay Hingoli”. It was asserted that the father of the Respondent, namely, Shri Shiv Kumar Saraf is a blood relation/cousin of the members of the Respondent firm and hailed from the same village in the State of Rajasthan. The said Shri Raj Kumar Saraf surreptitiously and with malafide intention made an application before the Registrar of Copyrights on 26.7.2003 to register the aforementioned artistic work and get up in his name by making some cosmetic changes therein in relation to the same product titled “Vijay Hingoli”. In the said application, the Appellant represented before the Registrar of Copyrights that he had been using the said artistic work and get up as well as name since 1995. The Registrar accordingly issued registration No.A-66496/04 on 26.2.2004. The Respondent came to know about the fact through an advertisement given by the Appellant in a local newspaper, namely, Sandhya Times on 24.11.2004, thus compelling the Respondent to file the rectification petition before the Copyright Board.

4. The Copyright Board on consideration of the rival submissions of the parties and after appreciating the documents filed by both the

parties passed the impugned order cancelling the registration of the Appellant by expunging the entry bearing No.A-66496/04 made in favour of the Appellant in the Copyright Register.

5. We have heard the respective submissions of the learned counsel for the parties and scrutinized the documentary evidence on record. The Appellant has assailed the order of the Copyright Board principally on the ground that in the year 1995 the Appellant as the sole proprietor of Bindal Food Products had conceived, coined and authored the artistic label comprising of a human bust, having small moustache on the face, bearing spectacles on eyes and wearing a cap on the head (hereinafter referred to as “ the human bust”) and the words ANMOL-G VIJAYA & HING GOLI known as ANMOL-G VIJAYA HING GOLI. On 10.6.2003, the Appellant had applied for registration of its copyright before the Registrar of Copyright, which was granted by the Registrar on 26.2.2004 under No.A-66496/04. The said art work was duly made public by the Appellant by different modes of media through advertising, letter pads, bills/invoices, distribution of trade literature, hoardings, etc. The Appellant had also been very prompt in safeguarding his right in the said art work/label against violation thereof by various infringers and in this behalf had filed a suit bearing CS(OS) No.1233/04, titled as ***Shri Raj Kumar Saraf vs. M/s. G.K. Products*** before the Delhi High Court, which was later compromised and decreed in favour of the Appellant. Further, in order to obtain statutory rights over the trademark VIJAYA and ANMOL-G, trademark applications on behalf of the Appellant’s firm, M/s. Bindal Food Products were filed on 5.11.2002 in Class 5, on

6.12.2001 in Class 30 and on 6.12.2001 in Class 05 and in Class 30. Out of the aforementioned trade applications, the earlier three trademarks now stand registered in favour of the Appellant firm, i.e., M/s. Bindal Food Products. On or about 25th day of December, 2004, the Respondent filed the rectification petition under Section 50 of the Copyright Act, 1957 falsely alleging to be the owner and author of the impugned art work. On or about 26.3.2007, the Appellant filed his written statement along with supporting documents before the Copyright Board. The learned Board, however, ordered rectification of the Copyright Register by expunging the registration made in favour of the Appellant.

6. The learned counsel for the Appellant in support of his submission that the order of the Copyright Board is not sustainable raised the following contentions:-

- (i) In the rectification petition, the Respondent nowhere alleged itself to be a person aggrieved, which is a *sine qua non* for maintainability of rectification petition and hence the same ought to have been dismissed.
- (ii) In rectification proceedings, the onus was on the Petitioner (the Respondent herein) to establish that the publication of his art work was prior in point of time to the publication of the art work of the Appellant in terms of Section 3 of the Copyright Act, 1957. Not a single document was filed by the Respondent pertaining to the publication of the impugned art work prior to the art work of the Appellant.

- (iii) The Appellant, on the other hand, had placed on record the letter head of M/s. M.M. Marketing Company to establish the prior publication of his art work which bore the date 15.5.1993. The said letter was carrying the human bust, which is the most essential feature of the said art work. The Appellant had also placed on record the affidavit of his brother Shri Manoj Kumar Aggarwal (then trading as M/s. M.M. Marketing Company, B-154, Suraj Mal Vihar, Delhi-92) to show that the Appellant had allowed him to use the said bust on the letterhead and promotional material of M/s. M.M. Marketing Company but the learned Board had erroneously ignored the same.
- (iv) The learned Board was wrong in not giving any benefit of the registered trademarks VIJAYA and ANMOL-G to the Appellant and in not considering the fact that the same form part of the art work of the Appellant.
- (v) The Respondent had relied upon the impugned trademark/label application under No.70384 in Class 05, allegedly filed on 27.3.1996, claiming the user since the year 1981. However, in the impugned label, telephone No.2925206 (seven digit telephone number) is printed, and in the year 1981 seven digit telephone number was not in existence, leading to the inference that the Respondent is wrongly alleging the user of the impugned art work since the year 1981.
- (vi) The learned Board ought to have dismissed the petition on the sole ground that the Registrar of Copyrights had not been made a party therein. The Board in this context erred in not following

the precedent laid down by it in its earlier judgment titled as ***Shree Sawaram Agarbatti Bhandar vs. Ghanshyam Perfumery & Co., 2007 (35) PTC 1001 (CB)***.

7. Learned counsel for the Respondent rebutted the aforesaid contentions raised on behalf of the Appellant and relied upon the submissions made by it before the Copyright Board and the findings of the Copyright Board thereon.

8. Adverting in the first instance to the contention of the Appellant that in the rectification petition, the Respondent nowhere alleged itself to be a person aggrieved, which is a *sine qua non* for the maintainability of a rectification petition and hence the same ought to have been dismissed, we find the aforesaid contention to be factually incorrect. The impugned order in fact specifically records that the Respondent (the Petitioner before the Copyright Board) was a person aggrieved in terms of Section 50 of the Act in the following terms:

“7. At the outset, it is necessary for us to determine as to whether it was obligatory upon the respondent to give a notice to the petitioner in terms of rule 16(3) of the Copyright Rules, 1958 while making an application to the Registrar for registration. Petitioner has claimed that the proprietors on both the sides are related and hail from the same village in Rajasthan. Further, both the parties deal in similar goods and thus possibly having the same network of dealers whereby knowing each other’s presence in the market. We feel that these grounds by themselves are not sufficient to conclude for us that the respondent had knowledge about the petitioner being an interested person in the matter. With a view to proceed further in the instant matter relating to rectification of the registration, it is essential to determine as to the petitioner being person

aggrieved in terms of section 50 of the Act. Both the petitioner and the respondent deal in similar goods and the impugned artistic work bears similarity to the artistic work and trade mark of the petitioner. We feel this is enough for us to infer that the petitioner is an aggrieved person in the matter.”

9. As regards the contention of the Appellant with regard to publication of his art work being prior in point of time to the art work of the Respondent, we deem it expedient to refer to the definition of publication as set out in the Copyright Act, 1957. Section 3 of the said Act defines publication as follows:

“3. Meaning of publication. – For the purposes of this Act, “publication” means making a work available to the public by issue of copies or by communicating the work to the public.”

10. It is beyond cavil that “publication” in any part of the Copyright Act, 1957 is to be understood in terms of its definition given in Section 3 of the Act as set out above. It also cannot be disputed that the word “publication” in Column 9 of the Statement of Particulars of Form 4, which is required to be submitted for registration of Copyright, is to be understood as defined in Section 3 of the Act. Section 3 of the Act, as noted above, stipulates that for the purposes of the Copyright Act, “publication” means making a work available to the public by issue of copies or by communicating the work to the public. Thus, the work can be made available to the public either by issuance of copies or by communicating the work to the public. Section 2(ff) provides a definition for “communication to the public” as under:

“2. Interpretation. -In this Act, unless the context otherwise requires,-

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(ff) "communication to the public" means making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing copies of such work regardless of whether any member of the public actually sees, hears or otherwise enjoys the work so made available.

Explanation.— For the purposes of this clause, communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication to the public.”

11. The submission of the Respondent before the Copyright Board was that the Appellant had made false averments before the Registrar as to the “publication” of the work being that of 1995. It was also submitted that the Appellant was in violation of the proviso to Sub-Section (1) of Section 45 of the Act having not made the necessary declaration and not having obtained the certificate from the Registrar of Trademarks. For the sake of ready reference, Section 45 of the Act is reproduced as under:

“45. Entries in register of Copyrights.— (1) The author or publisher of, or the owner of or other person interested in the copyright in, any work may make an application in the prescribed form accompanied by the prescribed fee to the Registrar of Copyrights for entering particulars of the work in the Register of Copyrights :

[Provided that in respect of an artistic work which is used or is capable of being used in relation to any

goods, the application shall include a statement to that effect and shall be accompanied by a certificate from the Registrar of Trade Marks referred to in section 4 of the Trade and Merchandise Marks Act, 1958, to the effect that no trade mark identical with or deceptively similar to such artistic work has been registered under that Act in the name of, or that no application has been made under that Act for such registration by, any person other than the applicant.]”

12. A look at the documentary evidence on record shows that in the instant case the Appellant in the application filed by it for registration of its art work, under Column 9, has claimed the year of first publication as 1995. In the written statement filed by it, the Appellant has submitted that he had authored/conceived portrait of bust of human being having small moustache on the face, bearing spectacles on eyes and wearing cap on the head in the year 1993 and had allowed his brother Shri Manoj Kumar Aggarwal, then trading as M/s. M.M. Marketing Company to use the said bust on the letterhead and promotional materials of M/s. M.M. Marketing Company. He has also placed on record the affidavit of Shri Manoj Kumar Aggarwal in this regard. As rightly observed by the Copyright Board, however, there is no primary evidence placed on record by the Appellant to substantiate his authorship of this art work. The earliest document adduced in evidence relates to the year 1993 being the aforesaid letter dated 15.5.1993 written by the proprietor of M/s. M.M. Marketing Company on the printed letter pad of the firm to the Sales Tax Officer, Ward No.083, Bikrikar Bhawan requesting for an extension of period to complete the requirements of some registration. The original of this

letter has not been produced and only a photocopy has been placed on record. A cursory look at the bust on the said photocopy shows that the said art work/bust is not the same as the art work/bust appended to the application for registration on 28.7.2003. Further, the said art work has the word “Rajasthani” appearing behind it whereas in the art work appended to the application the words ANMOL-G HING GOLI appear at the top with several other inscriptions on the said art work on all sides which are conspicuously absent on the letterhead of M.M. Marketing Company. Further, the Appellant himself has submitted in paragraph 3 of his written statement that he conceived, coined and authored the art work in 1995 and in view of his said statement it is not understandable as to how the art work appears in a letterhead of M/s. M.M. Marketing Company dated 15.5.1993. In such circumstances, the Board has rightly observed that *inscription of some mark which bears no similarity to the impugned artistic work on the letter pad of a third person indicating no authorship of the work is no publication in terms of the provisions of the Act.*

13. Other documents cited by and relied upon by the Appellant also do not substantiate the case of the Appellant of prior publication of his art work. As regards the reliance placed by the Appellant on the filing of CS (OS) No.1233/2004, the said suit was filed in the High Court of Delhi by the Appellant against M/s. G.K. Product, in the year 2004 which resulted in a settlement in the same year. The filing of this suit, therefore, does not substantiate the case of the Appellant in any manner. Reliance placed by Appellant on trademark registrations is also wholly misplaced. The Appellant filed an application for

registration of the word **VIJAYA** *per se* as trademark on 5.11.2002, which application was advertised in the Trademarks Journal on 25.11.2003. Trademark No.1148151 effective from 5.11.2002 was issued on 5.3.2005. Therefore, this too does not further the case of the Appellant with regard to prior publication of his art work. The only other documents are copies of bills relatable to the years 2002 to 2004 evidencing the sale of the products of the Appellant, including ANMOL-G VIJAYA HING GOLI. Needless to state that these bills are of no help to the Appellant in proving the fact of publication of the artistic work in 1995 as they do not carry the art work on them. In the affidavit of the brother of the Appellant Shri Manoj Kumar Aggarwal, reference is made to “promotional material” which allegedly carries the art work of the Appellant, but no such promotional material has seen the light of the day either before the Copyright Board or before this Court. Indubitably, the newspaper advertisements carrying the art work of the Appellant are there on record, but these advertisements relate to the year 2004 and can provide no benefit to the Appellant.

14. The Respondent, on the other hand, has proved through overwhelming evidence that his art work was published as far back as in the year 1996, that he was manufacturing and marketing Ayurvedic medicines including “Vijay Hingoli” ever since 1981 and started marketing the said product in pouches in 1991. Petitioner in evidence submitted as Ex.P1 and P2 his applications for necessary Ayurvedic licensing and Sales Tax registrations, P3 is the copy of the label of his mark, P4 are the copies of the vouchers and bills for advertisement expenditures. He has also placed on record the acknowledgments

dated 27.3.1996 issued by the Registrar of Trademarks Office in favour of Ram Awatar Chamaria trading as Vaidya Nandram Gigranj Chamaria, Tilak Bazar, Delhi. This document which carries the acknowledgment of the Registrar of Trademarks contains the art work of the Respondent and is dated 22nd March, 1996 and in the column “User Claimed” specifically states “Since the year 1981”.

15. We also find no merit in the contention of the Appellant that the Copyright Board erred in not giving any benefit of the registered trademarks VIJAYA and ANMOL-G to the Appellant and in not considering the fact that the same form part of the art work of the Appellant. The Copyright Board, in our opinion, has rightly observed that the underlying principles in relation to copyright law are different from those relating to trademark law, except that proviso to Section 45(1) provides that if the work is an artistic work which is used or is capable of being used in relation to any goods, the application shall include a certificate from the Registrar of Trademarks to the effect that no trademark identical with or deceptively similar to such artistic work has been registered under that Act in the name of any person other than the applicant or that no application has been made under that Act for such registration by any person other than the applicant. There is no provision in the Copyright Act for any premium to be accorded in respect of an artistic work in respect of which the trademark has been registered under the Trademark Act, 1999. Publication is a *sine qua non* under the Act for claiming authorship of an artistic work. A perusal of Rule 16 of the Copyright Rules, 1958 read with Form 4 shows that an applicant for registration of a copyright is required to

mandatorily file statement of particulars setting out whether the work is published or not and the year of publication, etc. In the instant case, the dealers profile of the Appellant Bindal Food Products placed on record shows that the Appellant commenced business on 18th October, 2002. Thus, quite clearly the year of commencement of business set out in the application for registration of copyright, i.e., 1995 is a false declaration. The falsity of the case of the Appellant is also borne out from the affidavits of the brother of the Appellant Mr. Manoj Kumar and the Appellant himself, which if taken on their face value show that the age of the brother of the Appellant was 33 years and the age of the Appellant was 35 years on the date on which the affidavit was sworn, thereby leading to the inference that Manoj Kumar was 19 years in the year 1993, and the Appellant himself as per his own affidavit was 17 years in the year 1993 when allegedly the Appellant assigned the artistic work created by him to his brother Manoj Kumar for the purposes of his firm M.M. Marketing Company. Even otherwise, no Assignment Deed has been placed on record by the Appellant and by virtue of the provisions of Section 19 of the Copyright Act, 1957, no assignment of copyright in any work shall be valid unless it is in writing, signed by the assignor or by its duly authorized agent. Sub-Section (5) of Section 19 further provides that in case the period of assignment is not specified in the Assignment Deed, it shall be deemed to be 5 years from the date of assignment, meaning thereby that the assignment in any event even assuming there was an Assignment Deed (which is not even asserted by the Appellant), lapsed in the year 1998.

16. As regards the contention of the Appellant that the Respondent's advertisements carry a telephone number with seven digits, it has been explained by the Respondent that he had given the telephone number as existed in the year 1996 as part of his application which was submitted on 27th March, 1996.

17. As regards the non-impleadment of the Registrar of Copyrights as a necessary party to the petition under Section 50 of the Copyright Act, no such objection appears to have been raised by the Appellant before the Copyright Board as is evident from a perusal of the written statement of the Appellant filed before the Copyright Board and such objection must, therefore, be deemed to be waived. In any event, no specific provision in the Copyright Act or the Rules framed thereunder has been pointed out to us for putting the Registrar on notice in a petition for rectification of the Register. This being so, we are not inclined to interfere with the order of the Copyright Board on this objection belatedly taken by the Appellant to defeat the legitimate rights of the Respondent.

18. For all the aforesaid reasons, the Appeal fails and is dismissed.

**REVA KHETRAPAL
JUDGE**

**PRATIBHA RANI
JUDGE**

July 19, 2013
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