

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

First Appeal No. 2061 of 2013

The Kopargaon Sahakari Sakhar
Karkhana Ltd. having its office at
Gautam Nagar, Post Kolpewadi,
Taluka Kopargaon,
District Ahmednagar.

.. Appellant.

Versus

The Kolhapur Sugar Mills Ltd.
having its registered office at
Vikramnagar, Kolhapur,
District Kolhapur.

.. Respondent.

Shri. Vaibhav Joglekar, Advocate, holding for Shri.
Kishore C. Sant, Advocate, for appellant.

Shri. D.Y. Mali, Advocate, holding for Shri. V.P. Raje,
Advocate, for respondent.

With

First Appeal No. 2090 of 2013

* The Kopargaon Sahakari Sakhar
Karkhana Ltd. having its office at
Gautam Nagar, Post Kolpewadi,
Taluka Kopargaon,
District Ahmednagar.

.. Appellant.

Versus

- 1) Brihan Karan Sugar Syndicate Pvt. Ltd. having its registered office at Plot No.5/A, Behind Hotel Natraj, Nasik Pune Road, Nasik 422 101 and a factory at Gondhe, Taluka Igatpuri, District Nasik.
- 2) The Brihan Maharashtra Sugar Syndicate Ltd., having its office at 600, Sadashiv Peth, Commonwealth Building, Laxmi Road, Pune 411 030 and having its factory at Shripur, Taluka Malshiras, District Solapur - 413 112.

.. Respondents.

Shri. Vaibhav Joglekar, Advocate, holding for Shri. Kishore C. Sant, Advocate, for appellant.

Shri. D.Y. Mali, Advocate, holding for Shri. V.P. Raje, Advocate, for respondents.

CORAM: T.V. NALAWADE, J.

DATE : 22nd SEPTEMBER 2015

JUDGMENT:

- 1) Both the appeals are admitted. By consent, notice after admission made returnable forthwith and both the sides are heard for final disposal.

2) The appeals are filed against the orders made by the District Court under the provision of Order 7 Rule 11 of the Civil Procedure Code in the suits filed by the present appellant in respect of its rights under the Copyright Act 1957 and under the Trade Marks Act 1999. Respondents, defendants of both the proceedings had filed applications for rejection of the plaint and these applications are allowed.

3) The plaintiff is a cooperative sugar factory and it is in the business of distillery, manufacture and supply of country liquor etc. It is the case of the plaintiff that since the year 1979 it is manufacturing country liquor in the brand name "*Bhingari Santra*". It is the case of the plaintiff that it owns this trade mark. It is the case of the plaintiff that in the year 1986 it got prepared a design for the label for aforesaid brand from one concern, M/s Sharma Fine Arts. It is contended that on the basis of the design prepared, which is of artistic nature having different colours and things in it, a label was prepared and that label is being used by plaintiff since 1986. It is the case of the plaintiff that it has registered this label under

Trade Marks Act 1958 and that was done for the first time in the year 1996. It is contended that registration was continued and it was renewed from time to time and is registered under Trade Marks Act 1999 also. In the plaint, the particulars of the sales of the aforesaid brand since the year 1986 till the year 2010-11 are given by the plaintiff. Claim with regard to acquisition of good will of this brand is also made.

4) It is the case of the plaintiff that when some manufactures had applied for approval and registration of their trade marks which were similar to the aforesaid trade mark of the plaintiff, plaintiff had taken objections before the authority of Excise Department and it had filed suits also against many such manufacturers. In the pleading the plaintiff has given particulars of those matters.

5) It is the case of the plaintiff that in Trade Mark Suit No.5/2010 filed by the plaintiff against one manufacture Konkan Agro Marine Industries Private Limited (KAMIPL) in Nagpur Court this manufacture supplied information that this brand name and label were

being used by many other manufacturers. It is contended that in the said suit the defendants produced specimen of those labels and they are collected by the plaintiff. It is contended that said defendants had filed affidavit dated 17-2-2011 in support of this contention.

6) It is the case of the plaintiff that from information supplied in Trade Mark Suit No.5/2010 by the defendant, plaintiff realised that the defendant from present Trade Mark Suit No.3/2011 was using similar label and it was manufacturing country liquor by using trade name "Minakshi Santra". It is contended that in the said suit information was given against the defendant from Trade Mark Suit No.4/2011 also that they were using similar label and they were manufacturing country liquor under names "Militry Santra" and "Santra 5000".

7) In the two suits (Trade Mark Suit No.3/2011 and Trade Mark Suit No.4/2011) plaintiff had produced copies of labels collected by it from Trade Mark Suit No.5/2010 and plaintiff had produced label which it was using. Copy of label of plaintiff and certificate of registration under Trade Mark Act on the basis of this

label are produced by plaintiff. It is the case of the plaintiff that there is similarity in the labels of plaintiff and the labels of the defendants from the two suits and customers will be definitely deceived due to this similarity.

8) It is the case of the plaintiff that defendant No.1 from Trade Mark Suit No.4/2011 viz Brihan Karan Sugar Syndicates Pvt. Ltd. and its group of companies viz. Kolhapur Sugar Mills Ltd.(defendant from Suit No.3/2011) and Subhash Liquors Pvt. Ltd. are managed and controlled by Mr. Kanayalal K. Kalani and his family members. It is contended that the plaintiff has information that defendant No.2 from Suit No.4/2011 has transferred CL-I licence with all rights along with rights in label and trade mark to defendant No.1 from Suit No.4/2011 and the plaintiff has information that labels which are available with the plaintiff are being used by these defendants on their products - "Military Santra" and "Santra 5000". It is contended that the defendant from Suit No.3/2011 is also using similar name and similar label and it is selling the product under name "Minakshi Santra". It is contended that the labels, which are being

used by the defendants from the two suits, are intentionally made similar to labels of plaintiff to create confusion in the minds of the customers and for passing off the goods of the defendants as those of the plaintiff. It is the case of the plaintiff that by doing such act the defendants want to grab the market which is established by the plaintiff by using such label and brand name.

9) It is the case of the plaintiff that after collecting the information, it had first sent letters to the defendants and it had asked them to stop using such label. It is contended that request was also made to the authorities under the Excise Act to supply information in respect of the labels which are being used by the defendants but the Excise Department informed by letter dated 22-4-2011 that the procedure which is required to be followed for approval of the labels was followed by the defendants. It is the case of the plaintiff that prior to the receipt of such information from the competent authority there was no definite information with the plaintiff. It is contended that there is possibility that in the past the defendants had either not used the label or they had used it intermittently

and use was unsubstantial. It is contended that only after receipt of the aforesaid information in Suit No.5/2010 and from the competent authority the plaintiff realized that defendants are involved in such activities. It is the case of the plaintiff that cause of action arose for both the suit on 17-2-2011 when the plaintiff first time saw the labels in Trade Mark Suit No.5/2010 filed against another manufacture by plaintiff in Nagpur Court.

10) In the applications filed under Order 7 Rule 11 of the Civil Procedure Code the defendants of the two suits contended that plaint needs to be rejected on following grounds :

- (i) In the plaint itself plaintiff has contended that it was not aware whether labels of the defendant were approved by the Excise Department.
- (ii) In the plaint, plaintiff had contended that it had not seen use of this label in the market
- (iii) The plaintiff has contended that there is possibility that defendants had not used these labels in the past.

11) In the applications filed for rejecting the plaint the defendants contended that the plaints do not show

cause of action. In Suit No.4/2011 the defendants further contended that the plaintiff has admitted that the brand "Santra 5000" was already withdrawn by the manufacturer and so there was no cause of action in respect of label which was probably used for "Santra 5000". The defendants of this suit have further contended that they do not own the label "Santra 5000" and they are not manufacturing country liquor of this brand.

12) At present there are only aforesaid contentions made in the two applications by the defendants to show their defences. They have not specifically contended that the defendants have not got approval for the labels of Brands "Minakshi Santra" and "Military Santra". Their contentions do not show that they have no intention to use such labels and trade mark.

13) In Suit No.3/2011 there is copy of label of the brand of the plaintiff and there is also copy of brand "Minakshi Santra". In the second suit also for comparison, the label of the plaintiff and the label of the defendants are produced. In support of the aforesaid contentions

made in the plaint, there is affidavit of the plaintiff. Even if it is presumed that defendants of Suit No.4/2011 are not using the trade mark - "Santra 5000" and similar label, there is no specific denial in respect of use of other trade mark "Minakshi Santra" and similar label for that. In the appeal, the appellant, plaintiff was allowed to produce some record with regard to the sale of country liquor made by the defendants from Suit No.3/2011 and the sale of country liquor made by the defendants from Suit No.4/2011. This record of the Excise Department shows that defendant from Suit No.3/2011 had paid excise duty of Rs.2,65,12,179/- in respect of its product "Minakshi Santra" for the period 1-4-2011 to 18-6-2013. Similarly defendant No.1 from Suit No.4/2011 had paid excise duty of Rs.1,63,93,582.- for the period 1-4-2012 to 31-3-2012 for its product "Military Santra" and it had paid excise duty of Rs.3,59,741/- for the same brand for the period 1-4-2013 to 29-4-2013. The Excise Department informed to the plaintiff that for brand Santra 5000 no excise was paid for the period 1-4-2011 to 29-4-2013.

14) Even if it is presumed that the information collected prior to the date of suit as against defendants from Suit No.4/2011 for the brand "Santra 5000" was not correct and there was no cause of action in respect of the product under this trade mark, that part of the plaint cannot be rejected as it is not possible to reject part of the plaint under provision of Order 7 Rule 11 of the CPC.

15) The plaints are rejected only on one ground viz the plaint did not disclose cause of action as required by provision of Order 7 Rule 11 (a) of the CPC. This provision is based on the requirement of plaint given in Order 7 Rule 1 of the CPC. Relevant portion of Order 7 Rule 1(e) of the CPC is as follows :

"1. Particulars to be contained in plaint.-- The plaint shall contain the following particulars "

(e) the facts constituting the cause of action and when it arose."

16) The aforesaid provision has two parts as under:-

- (i) the facts constituting cause of action; and,
- (ii) when it arose.

17) In Legal Glossary prepared by Government of India, Edition 1988 the meaning of "cause of action" for the purpose of section 20 and Order 7 Rule 1(e) of CPC is given as "the fact or combination of facts which gives rise to a right to sue".

18) The first part of Order 7 Rule 1(e) of the CPC and the meaning given to the cause of action, which is quoted above, show that the plaintiff must state the facts with such particulars on the basis of which the Court and also the defendant will be able to know rights of the plaintiff and also as to why the plaintiff is feeling that there is infringement of the rights of the plaintiff. Provision of Order 7 Rule 1(g) of the CPC shows that the relief which plaintiff wants needs to have the base and the cause of action.

19) The provision of Order 7 Rule 1(e) and Order 7 Rule 11(a) of CPC refer only to the "plaint". In the case reported as **Ashok Kumar Shrivastava v. National Insurance Co.Ltd. (AIR 1998 SC 2046)** the Apex Court has laid down that "maintainability of a suit can be

determined on the basis of ostensible pleadings made and relief claimed in the plaint".

20) In the cases reported as (1) **AIR 1952 SC 47 (Kedar Lal v. Hari Lal)**, (2) **AIR 1977 SC 1158 (Manjushri v B.L Gupta)** (3) **AIR 1987 SC 1242 (Ram Swarup Gupta v. B.N. College)**; and, (4) **AIR 1999 SC 3029 (Syed Dastagir v. T.R. Gopalakrishna Setty)** the Apex Court has laid down that the pleadings must be interpreted liberally with emphasis on the substance of the matter rather than on the form of pleadings and the pleadings must be read as a whole.

21) Provision of Order 6 Rule 2 of CPC shows that pleadings shall contain only material facts on which party wants to rely for his/her claim and it is not necessary to mention the evidence by which these material facts are to be proved. What are the material facts depends on the facts and circumstances of a particular case. Further whether the documents annexed to the plaint and the averment made in respect of those documents in the pleadings are factually correct or not is subject matter of

the suit and it cannot be decided at the initial stage covered by Order 7 Rule 11 of CPC.

22) Aforesaid position of procedural law needs to be kept in mind to ascertain as to what are the material facts for case filed for infringement of rights given under Copyrights Act 1957 and the Trade Marks Act 1999. In the two suits, the appellant/plaintiff has claimed relief of injunction. Provisions of Sections 36 to 38 of the Specific Relief Act 1963 govern the use of discretionary power of grant of injunction. The provisions of the CPC like Order 39 regulate temporary injunction. Thus whether or not the suit lies for injunction can be decided on the basis of provisions of the Specific Relief Act, provision of aforesaid two special Acts and also provision of CPC already quoted. As the trial Court has observed that no product of the defendants under the aforesaid brand names was actually seen by the plaintiff in the market and there was no cause of action, relevant provision of Section 38 of the Specific Relief Act needs to be seen. The relevant provision is Section 38(1) and (3) of the Specific Relief Act and it runs as under :-

“38. Perpetual injunction when granted.-- (1)

Subject to the other provisions contained in or referred to by this Chapter, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication.

(3) When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the Court may grant a perpetual injunction in the following cases, namely :-

(a) where the defendant is trustee of the property for the plaintiff;

(b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;

(c) where the invasion is such that compensation in money would not afford adequate relief;

(d) where the injunction is necessary to prevent a multiplicity of judicial proceedings. “

23) Provision of Section 55(1) of the Copyrights Act provides for civil remedies for infringement of copy right and one remedy given for infringement is injunction. The provision of Section 135 of the Trade Marks Act shows that relief of injunction is made available when there is infringement of trade mark. Thus, in the special Acts also it is specifically provided that civil remedy like injunction is available. The aforesaid provisions show that even when the defendants threaten to invade the plaintiff's right in respect of the copy right or the trade mark the

relief of injunction is available.

24) Learned counsel for the appellant placed reliance on case reported as **2012 (2) Mh.L.J. 37** Bombay High Court (**Sun Pharmaceuticals Industries Ltd. v. Emcure Pharmaceuticals Ltd.**). At para 15 it is observed by this Court that action of defendant of registration of trade mark can be said as evidence of admission of defendant that it wants to use trade mark and so plaintiff can maintain *quia timet* action to prevent passing off. In another case reported as **AIR 1985 Delhi 29 (Penguin Books Ltd., England v. M/s. India Book Distributors)** at para 31 the Delhi High Court has observed that owner of copy right can come to the Court to prevent wrong from taking place.

25) The trial Court has rejected the plaint on the basis of some observations made by Delhi High Court in the case reported as **2000 PTC 443 (Lalli Enterprises v. Dharam Chand and Sons)**. The Delhi High Court formed opinion that there was no material to show that defendant was responsible for alleged act of infringement and further the plaintiff was not disclosing the facts

which could connect the defendant with infringement. In view of the facts of this reported case, Delhi High Court held that plaint was not maintainable. Thus, it was a decision on facts of that case. Whether pleadings disclose cause of action or not depends on facts and circumstances of each and every case.

26) Learned counsel for the respondents, defendants, placed reliance on one case reported as **2012 (6) Mh.L.J. SC 738 (Church of Christ Charitable Trust v. Ponniamman Educational Trust)**. In this case the Apex Court has discussed Order 7 Rule 11 and provision of rule 14(1) of the same Order and Forms 47 and 48 of Appendix "A" of the CPC. The facts show that suit was filed for totally different relief. There cannot be dispute over the propositions made by the Apex Court in this reported case. Relevant facts of the present case are already quoted. Learned counsel for the defendants placed reliance on another case reported as **2012 (5) ALL MR 462 (S.C.) (Union of India v. Ibrahim Uddin)**. On the basis of the observations made by the Apex Court, learned counsel for the defendants submitted that at the

present stage information supplied by the Excise Department regarding sale made by the defendants cannot be considered. Here only it needs to be observed that the information is some material, evidence which could have been used during trial. The subsequent events in such cases can also be considered and they help to ascertain the intention of the defendants. If such were the subsequent acts of the defendants they can be taken as further and more steps taken by the defendants showing that the defendants had the intention to use such trade mark or label and so such development can be used to ascertain the cause of action also. In this regard the enabling provision of the CPC like provision of Order 6 Rule 17, provision regarding amendment of pleadings, also needs to be kept in mind.

27) Sufficient record is available to infer for present purpose that the plaintiff had registered the trade mark prior to the date of suit. There are specific contentions with regard to preparation of label by the plaintiff through one agency and in the suit there is material of the agency like affidavit. The plaintiff had produced the

labels used by the plaintiff and also the labels which are being used by the defendants as per the case of the plaintiff. There is record of correspondence made by the plaintiff with Excise office and the information supplied by the Excise office with regard to the approval given by the Excise office to the labels of the defendants. Now there is more record like payment of excise duty and some observations are already made in that regard. The plaintiff has given the reason as to how he got this information against the defendants (in Suit No.3/2010 filed in Nagpur Court) and this contention cannot be ignored as the defendant in such a suit can take a defence of "previous user" of trade mark. The plaintiff has given reason as to why the plaintiff thinks or feels that there is imitation of his label and the labels are exact copy and the copy constitute the infringement.

28) Whether or not the labels which are being used by the defendants from the two suits are exact copies and they constitute infringement, whether resemblance is there and it is sufficiently close to deceive the purchasers and pass off the goods of defendants as the goods of the

plaintiff, whether on the date of suit the defendant had the intention to use such labels, whether the use of such labels by the defendant amounts to infringement of copy rights and trade mark rights of the plaintiff are all the points which need to be decided during trial. The Court will be also required to decide as to whether discretion needs to be used in favour of the plaintiff for giving injunction in favour of the plaintiff.

29) In view of the aforesaid discussion, this Court has no hesitation to observe that the District Court has committed error in rejecting the plaint by holding that no cause of action is made out.

30) In the result, both the appeals are allowed. the orders of rejection of plaints made by the District Court are hereby set aside. The suits are restored to their original numbers. Applications filed under the provision of Order 7 Rule 11 of the Civil Procedure Code by the defendants stand rejected. Parties are to appear before the trial Court on 26th October 2015.

Sd/-
(T.V. NALAWADE, J.)

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