

HONOURABLE SRI JUSTICE A.RAJASHEKER REDDY

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C.M.A.No.1018 of 2014

%24-03-2015

Rohini Seeds Private Limited,

Rep. by its Managing Director. Petitioner.

Versus

\$ Reshma Chemicals Private Limited,

Rep. by its Managing Director. .. Respondent.

< GIST:

> HEAD NOTE:

! Counsel for the Appellant : Smt. K.Lalitha

!Counsel for the Respondent : Sri Narasaiah Golla.

? Cases referred

2011 (4) ALT 692 (D.B)

² (2001) 5 Supreme Court Cases 73

HONOURABLE SRI JUSTICE A.RAJASHEKER REDDY

C.M.A. No. 1018 OF 2014

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JUDGMENT:

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This Civil Miscellaneous Appeal is filed by the appellant against order and decree dated 25.08.2014 in I.A.No.147 of 2013 in O.S.No.46 of 2013 passed by the I Additional District and Sessions Judge, Krishna District, partly allowing the petition granting temporary injunction restraining the appellant herein from using numbers "2222" on his seed packings till disposal of the suit and dismissed the petition in so far as the relief of restraining the respondent from conducting of "Deepika2222" paddy seeds.

2. Facts necessary for disposal of the above Civil Miscellaneous Appeal are as follows:

The respondent herein is the plaintiff in O.S.No.46 of 2013 filed the suit for (a) declaring that by manufacturing, producing, selling, offering for sale or otherwise, distribution, in wholesale or retail, and advertising, promoting, and directly or indirectly dealing with trademark 'DEEPIKA 2222" which consisting of similar or deceptively similar marks with falsifying and having falsely applying trademark and marks having the similar description, colour, writing style, pronunciation, lable, packing and/or using any other name akin to "R.S.2222" or "R.S" and "2222" in the business of agricultural seeds is an infringement and passing off and (b) permanent injunction restraining that the appellant herein, who is defendant in the above suit, from using any other name akin to "R.S.2222" or "R.S." and "2222" in the business of agricultural seeds and also a decree for the permanent injunction restraining the appellant/defendant by themselves, their servants, officers, their agents, distributors, or any and all persons claiming through them or acting for and on their behalf, from manufacturing, producing, selling, offering for sale, tenders or otherwise distribution, in wholesale or retail, or advertising, promoting and in any manner, directly or indirectly dealing with trademark 'R.S.2222" in relation to the agricultural seeds and being based on information that is proprietary to the respondent and without the express written consent of the respondent

herein in any manner whatsoever. Along with the suit, the respondent/plaintiff filed I.A.No.147 of 2013 seeking temporary injunction restraining the appellant from selling the paddy seeds “Deepika 2222” variety.

3. The respondent/plaintiff is a company registered under the name and style of Reshma Chemicals Private Limited under the Companies Act, 1956 in the year 1989, and stated to be engaged in the research, development manufacture, production and marketing of various kinds of seeds including the paddy seeds of new varieties having specific characters of short slender seeds, high pest tolerance, high yield characters of paddy and one such invented variety of paddy crop seeds with brand name “R.S.2222” and got it registered vide No.1248597, dated 10th November, 2003, Trademark Registry, Chennai, claiming the date of using of the mark from April, 2001 and that by virtue of Section 31(1) of the Trademarks Act, 1999, the registration of the trademark shall be the *prima facie* evidence for all the legal proceedings to maintain the rights of the respondent for the registration of their trademark. It is stated that the respondent/plaintiff is authorized to sell the said seed in State of Andhra Pradesh (presently Andhra Pradesh and Telangana States), Maharashtra and Karnataka.

4. It is further stated that, the appellant/defendant company also started marketing the paddy seeds with brand name “Deepika 2222” with similar characteristics of respondent’s/plaintiff’s trade marked seed of “RS2222”. It is stated that the farmers are purchasing “Deepika2222” variety under the impression that they are purchasing “RS2222” by confusing with “2222”, resulting in huge loss to the business prospects of respondent/plaintiff. It is stated that the appellant/defendant company is infringing the patent right of the respondent/plaintiff and marketing and selling “Deepika2222”, which is nothing but imitation of respondent’s/plaintiff’s brand i.e., “RS2222” variety and sought for temporary injunction restraining the respondent/defendant from manufacturing and selling ‘Deepika2222’ variety.

5. The appellant/defendant filed counter affidavit denying the averments of the affidavit filed in support of the petition stating that the appellant is having its own research wing, development etc., and it is incorporated with Registrar of Companies as Rohini Seeds Private Limited, obtained license for research

development, production, marketing of various types of seeds. It is stated that after obtaining necessary licence from the competent authorities, they started marketing "Deepika2222" from the year 2012 and that "2222" is only a generic word and that their "Deepika2222" is not similar to that of the respondent's 'RS2222'. It is stated that Morphological characters of "Deepika2222" are certified and certificate to that effect is also issued by the competent authority. It is further stated that the appellant is one of the group of companies of Crystal Crop dealing in business of invention, production and marketing of various seeds having licence, and doing seeds business in the State of Andhra Pradesh (Presently Andhra Pradesh and Telangana) Maharashtra, Tamilnadu, Gujarath, Rajasthan, Panjab, Haryana, Uttar Pradesh and other States. It is stated that their distributors are persons other than respondent/plaintiff as such, there is no confusion to the ryoths in purchasing "RS2222" and that they can differentiate "Deepika2222" from respondent's seed. Therefore, the respondent/plaintiff cannot claim exclusive rights of "RS2222" and that the same is not protected under Plant Variety and Farmers Rights Act. It is further stated that the packings are of different fonts, different style, design of packing is also completely different, as such, ryots can easily identify their respective seeds. It is further stated that there is no cause of action for the suit and cannot maintain the suit. It is stated that the appellant has not violated any of the provisions of the Trade Marks Act and that the respondent's business was not affected by appellant's selling "Deepika2222". It is stated that the respondent has not made out a *prima facie* case or irreparable loss, muchless infringement of trademark and sought for dismissal of the petition.

6. Before the Court below, the appellant and respondent did not adduce any oral evidence, but they produced documentary evidence i.e., the appellant marked Exs.R1 to R8, while the respondent marked Exs.P1 to P23. However, the Court below, having considered the rival contentions of the parties in the light of the material placed, by order dated 25.08.2014 partly allowed the petition by granting temporary injunction restraining the appellant company from using numbers "2222" on its seed packing till disposal of the suit. Aggrieved by the same, the present Appeal is filed.

7. Heard Smt. K.Lalitha, learned counsel for the appellant as well as Sri Narasaiah Golla, learned counsel appearing for the respondent.

8. Learned counsel for the appellant while reiterating the submissions made before the Court below submits that there are several public and private institutions which will research and develop units in paddy and there are several varieties for commercial cultivation in same maturity group and the grain quality, hence, the paddy is not new invention to claim any right by the respondent. She further submits that the name “2222” is a generic numerical word and since the appellant is also doing business in paddy seeds, the respondent cannot have exclusive right to use those words and there is no similarity between trade marks of appellant and respondent and that it cannot be said that the trade name used by the appellant is causing or is likely to cause deception in the minds of farmers or confusion in the customers mind and that business of respondent is adversely affected by use of the name of “Deepika2222” by the appellant. She further contends that when an action for infringement of trademark is complained, the onus would be on the respondent to establish that the trademark used by the appellant in the course of trade in the goods in respect of which his mark is registered is deceptively similar and there is likelihood of confusion or deception arising from similarity of trademark or logo or words used by the respondent. She further contended that the respondent has not made out any *prima facie* case or irreparable loss that could be caused to the respondent muchless infringement of trade mark. In support of her contention, she relied on the judgment reported in **Trinethra Super Retail Private Limited, Hyderabad rep. by its Company Secretary Mr. Vinod K.Saraf v. Mee Trinethra Trading Private Limited, Hyderabad, rep. by its Director, Mr.Pilli guru Prasad Anand and others** She thus contended that the Court below committed an error in granting temporary injunction partly allowing the petition restraining the appellants from using “2222” and hence, prayed that the order dated 25.08.2014 in I.A.No.147 of 2013 in O.S.No.46 of 2013 be set aside and the C.M.A. be allowed.

9. On the other hand, learned counsel for the respondent reiterated the contents in the counter affidavit filed in the Appeal and submitted that the appellant’s marketing “Deepika2222” is nothing but infringement of Trade Mark of their company. He would further contend that after considering the documentary evidence produced on either side, the Court below has passed a reasoned order. He further submitted that in case of trademark infringement of deceptive

similarity, statements of accounts need not be submitted showing the loss sustained by the complainant. He would contend that the statutory provisions under Trade Marks Act provide protection for the registered owners to take action against the infringers. He further submits that in deciding whether a particular trademark is likely to deceive or cause confusion that duty is not discharged by arriving at the result by merely comparing it with the trade mark which is already registered and whose proprietor is offering opposition to the registration of the mark. The real question to decide in such cases is to see as to how a purchaser, who must be looked upon as an average man of ordinary intelligence, would react to a particular trade mark, what association he would form by look at the trade mark, and in what respect he would connect the trade mark with the goods which he would be purchasing. In support of his contention he relied on the judgment reported in **Cadila Health Care Ltd., v. Cadila Pharmaceuticals Ltd.**, He would further contend that the respondent has established *prima facie* case and balance of convenience in its favour and after considering the same, the Court below partly allowed the petition for temporary injunction restraining the appellant from using numbers “2222” on his seed packing till the disposal of suit and permitted the appellant herein to use “Deepika” only. Thus, he sought for dismissal of Civil Miscellaneous Appeal.

10. After scrutinizing the facts and circumstances of the case, it is clear that there is no dispute that respondent/plaintiff trademark is registered as “RS2222” in respect of paddy and there is also no dispute that appellant/defendant is marketing their paddy by using mark “Deepika2222”. The case of the respondent/plaintiff is that it has incorporated in the year 2002 and started marketing “RS2222” paddy from the year 2002 onwards, whereas “Deepika2222” was in research and development during the year 2011 when Ex.R5 licence cum permission is given by the Central Government and State Government. Thus, appellant’s “Deepika2222” has come subsequently to “RS2222”. As per Trade Marks Certificate, Ex.R3 appellant/defendant was permitted on 20.01.2012 by which time respondent/plaintiff already invented, developed and also marketed “RS2222” variety of paddy. Ex.P6, is a seed bag discloses that it is a white colour HDPE bag. Moreover, the petitioner

company's logo is in red colour with complete red colour boarder with super print of "RESHMA & COMPANY" and in white big letters company name was mentioned as "Reshma" with blue background and that behind the respondent/plaintiff company's logo, rays type design like that of rising sun is found. Underneath the same typed big letters "RS2222" with blue colour and below the same green colour ripe paddy full photo is found and that the second side of the bag is in complete green colour boarder and logo of respondent/plaintiff's company is found. Underneath the same 'Reshma' is mentioned with big letters with phone number and underneath the same printed matter regarding paddy, manufacturing date, packing date etc., are found and that beneath the same, the respondent/plaintiff company's address and customer care number with big letters is found.

11. On the other hand, appellant company's Exs.R6 and R7 bag shows that on one side it is with complete green colour print and on the top it is noted on one side with words "Crystal" and another side two swords across each other. Beneath the same with red and yellow boarder and all lower portion kept into Lunar shape design with blue colour with yellow boarder are found. There are two photos printed right side showing standing paddy crop and the left side showing ripe paddy crop with chronicle with many paddy seeds. At the bottom in red colour 'Paddy' letters are found. Beneath the same with yellow boarder in red colour letters "Deepika2222" small letters are printed. On the reverse side top is with full green colour letters 'crystal' and swords emblem is found. In lower 2/3 portion "Deepika2222" with red colour letters are found. Underneath the same left side shown paddy, and the right side truthful label describing the manufacturing date, page number etc., and also the standards of the seed physical purity, generic purity etc., are found. There is a red colour warning on white label "treated with Poison, do not use for food, feed and oil purposes" is mentioned and side lower part, appellant's company logo and their company address are printed. At the right lower side a warning notice is also found that the seed is confirmed with minimum standards etc., with office number Email etc., and that the bag is 10 kgs. Ex.P11 is similar bag of the appellant company and the same is a carry bag which is made with nylon thread and it is a six kgs bag with similar type of print, but having the company name in brown colour emblem instead of red colour. Therefore, when the two bags i.e., the bag of the appellant/defendant and the bag of respondent/plaintiff are compared, there is a

lot of difference between the physical appearance of both the packing. The trial Court also considered the evidence and came to the conclusion that there is lot of difference between the physical appearance of both the bags. It is also to be seen that the respondent/plaintiff has not filed any third party affidavits stating that they purchased 'Deepika2222' of appellant's company instead of 'RS2222' of respondent's company mistaking the same and that they have incurred losses of crop, and that not having enough yield of their expectations. It is also to be seen that the respondent/plaintiff has not produced the marketing statement, production and sales statements of appellant company showing that respondent's sales decreased as the appellant's are using words "2222". The trial Court also found that the packings are different, logos are different, but however, the Court below partly allowed the injunction petition restraining the appellant from using the words "2222", even though packings are different.

12. The trial Court came to a conclusion that the appellant cannot use the words "2222" because the same was already used and marketed by the respondent company since the year 2002. Though the trial Court clearly held that except filing Exs.P1 to P23, respondent/plaintiff has not filed any third party affidavits showing that they have incurred loss of crops, loss in business etc., but still partly allowed the injunction petition restraining the appellant from using the words "2222". When the respondent/plaintiff has not produced any material regarding infringement of their trade mark, the Court below ought not have granted injunction restricting the appellant/defendant from using the words "2222". In **Trinethra Super Retail Private Limited, Hyderabad rep. by its Company Secretary Mr. Vinod K.Saraf v. Mee Trinethra Trading Private Limited, Hyderabad, rep. by its Director, Mr.Pilli guru Prasad Anand and others (supra)**, it is observed as follows:

"43. When an action for infringement of trademark is complained, the onus would be on the plaintiff to establish that the trademark used by the defendant in the course of trade in the goods in respect of which his mark is registered is deceptively similar and there is likelihood of confusion or deception arising from similarity of trademark or logo or words used by the plaintiff. This is *prima facie* case.

47. The courts have to take into consideration along with *prima facie* case, the other two factors i.e. balance of convenience and irreparable loss. The plaintiff can always be compensated by costs, if in case ultimately it is found that the

defendant tried to capture the market on the basis of the good will of the plaintiff.

48. A rigid invocation without contemplating elasticity in the application of rules as to the grant of injunction might sometimes result in hardship, which cannot be cured later. Cases of infringement, no doubt, do not depend on proof of actual deception. Yet the entire object of trademark law would be rendered meaningless if courts were to mechanically grant injunction relief, where no injury is shown, or shown to be a natural result of someone's use of a mark.
.....”

The decision cited by the learned counsel for the respondent in **Cadila Health Care Ltd., v. Cadila Pharmaceuticals Ltd., (supra)** is also considered by the Division Bench of this Court in the aforesaid decision and came to the conclusion that unless *prima facie* plaintiff proves that there is deceptive alleging infringement, injunction cannot be granted. A person trading with a particular mark is entitled to insist that no one else should use that mark for trading in the same and similar commodity. If there is any infringement or the mark used by the other is deceptively similar to his mark in the sense that it nearly resembles his mark that is likely to deceive or cause confusion, he undoubtedly can ask the Court to restrain the other to trade with such deceptively similar mark. However, it does not mean that a person who has a registered trademark can stop all the others, whose trademark has slightest similarity with his trademark, from doing business. The trial Court basing on the evidence, rightly came to the conclusion that only on the ground that “RS2222” is the specific trademark of the respondent/plaintiff. The trial Court merely extracted the relevant provisions of the Trade Marks Act and extracted some paragraphs of decisions, and having found that the packing and logos are different, but erroneously granted injunction restraining the appellant from using the words “2222”. The court below has also not found that the customers are likely to get confused by the use of words “Deepika2222” for making out strong *prima facie* case and it is to be made out for grant of injunction. The respondent did not produce any material to show that their business has been adversely affected by the use of the words “Deepika2222” by the appellant, much less have filed any affidavit stating that by the use of the same, a confusion is

caused in the minds of general public or customers that the outlets run by the appellant or that of the respondent and thereby their business was affected adversely. Since *prima facie* case is not established, the question of considering the balance of convenience and irreparable loss does not arise. It is open for the respondent/plaintiff to produce sufficient evidence during the course of trial for establishing his case.

For the foregoing reasons, I am of the considered view that the respondent/plaintiff failed to discharge his burden to prove the *prima facie* case that the trade mark 'DEEPIK2222' used by the appellant-defendant is deceptively similar to that of the respondent's trademark, causing confusion in the minds of average customers and that there is no balance of convenience in favour of the respondent/plaintiff for grant of interim injunction restraining the appellant from using words "2222". The respondent/plaintiff has also failed to make out irreparable injury that has been caused to it by the use of trade mark "2222" of the appellant. Therefore, the order passed by the Court below in I.A.No.147 of 2013 in O.S.No.46 of 2013 dated 25.08.2014 is set aside to the extent of restraining the appellant from using words '2222'. However, it is made clear that these observations are only *prima facie* findings for deciding this appeal filed against interlocutory order, as such, same will not be construed as an expression of this Court. The trial Court may decide the suit on the basis of evidence adduced by the respondent/plaintiff and appellant/defendant, without being influenced by the *prima facie* findings for deciding this appeal against order in interlocutory application.

Accordingly, the Civil Miscellaneous Appeal is allowed. There shall be no order as to costs. As a sequel thereto, miscellaneous petitions, if any, pending in this CMA, shall stand disposed of.

A.RAJASHEKER REDDY, J

MARCH, 2015.

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B/o. KVS

HONOURABLE SRI JUSTICE A.RAJASHEKER REDDY

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Date: 24-03-2015

