

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH
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FAO NO. 8443 of 2014

Date of decision: February 03, 2016

Keshav Oil and Cotton Ginning Industries Pvt. Ltd.

...APPELLANT

Versus

Bansal Cotton and Oil Mills

....RESPONDENT

CORAM: HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH

Present: Mr. M.K.Miglani, Advocate,
and Mr. Pankaj Gupta, Advocate,
for the appellant.

Mr. Rahul Deswal, Advocate,
for the respondent.

AUGUSTINE GEORGE MASIH, J.

Challenge in this appeal is to the order dated 11.04.2014 passed by the Additional District Judge, Hisar, whereby the application under Order 39 Rules 1 and 2 read with Section 151 CPC filed by the appellant praying for interim injunction restraining the defendant from passing their goods under the trade mark 'Do Gay Chhap' and “Do Gay Chhap (KACOM Device of Cow)” either directly or through its servants, agents and dealers and from manufacturing, selling, offering for sale or otherwise directly or indirectly in the name and style of the applicant bearing trade mark 'Do Gay Chhap'.

2. It is the contention of the learned counsel for the appellant that the order denying the interim injunction to the appellant is without any justification and is contrary to the facts. He contends that the basic

principle of law regarding grant of temporary injunction particularly when the trade marks are held to be almost similar and the goods are also the same has been overlooked. The documents, which have been produced on record by the appellant i.e. the invoices mention the trade mark 'Do Gay Chhap' and the cash memos for the period 1984-1997 have print of Two Cows depicted in the monogram, which is in use whereas, the respondent, admittedly, had started using the monogram since the year 1987 and, therefore, the appellant has been able to prima facie establish itself to be the prior adopter and user of the given trade mark. He submits that mere presence of the mark on the register does not prove its user unless it is actually used. As a matter of fact, the Court below has failed to appreciate that the user claimed is different from the user proved especially when the user had to be proved by the respondent. The respondent has not produced any document on record proving the use of the trade mark by it. As per the findings returned by the Court below, it is an admitted case that the appellant and the respondent are in the same trade and the labels are similar and appellant is prior in business, therefore, the presumption is that respondent must have copied the label of the appellant otherwise, there could not be any similarity than by imitation or copying. As the appellant has been able to prove a prima facie case in its favour, the interim injunction, as prayed for, should have been granted and the Court has failed to appreciate that irreparable harm and injury would be caused to the appellant if the respondent was not restrained from using the impugned trade mark during the pendency of the suit. Not only that the impugned order would prejudice the consumers and customers on the large scale as the confusion and deception would be inevitable because of similarity of trade

mark and goods. He, thus, contends that the impugned order be set aside and the application preferred by the appellant be allowed by granting interim injunction restraining the respondent, as prayed for.

3. On the other hand, counsel for the respondent submits that a well-reasoned and detailed order has been passed by the Court below where each and every aspect has been dealt with including the documents. The cash memos, as have been produced by the respondent from the year 1973-1984, depict handwritten 'Two Cows' mentioned in Column No. 2 but the cash memos with effect from the year 1984-1997 are issued by M/s Madan Lal Hans Raj where the Two Cows were depicted and these too are different from the monogram which is now being disputed. He contends that the appellant was initially running the firm in the name of M/s Madan Lal Hans Raj and its purpose was for selling food grain articles as wholeseller as well as retailer and commission agent. M/s Keshav Oil and Cotton Ginning Industries firm came into existence w.e.f. 15.12.1997 and the license was given for one year and the certificate was issued by the District Marketing Enforcement Officer, Hisar in this regard. The trade mark of Two Cows was not their at that stage as well. No proof has been shown that it had been running the business of manufacturing, processing, marketing and selling cattle seeds, oil cakes, seeds etc. since the year 1973 as claimed rather it entered into this business in the year 1997. He contends that the appellant filed the application in the year 2013 whereby the formalities for registration of the trade mark of Two Cows was initiated. He, thus, contends that the assertion of the counsel for the appellant that the appellant had been using this trade mark much prior to the respondent, who admittedly started business with effect from 1987 and got the monogram of Two Cows and the

trade mark registered on 18.11.2009 and the proof thereof has also been produced that the said trade mark is being used since the said year, cannot be accepted. He, thus, contends that the finding, as recorded by the Courts below in the impugned order is fully justified and in accordance with law.

4. I have considered the submissions made by the learned counsel for the parties and with their able assistance, have gone through the impugned order and the documents produced by the parties have also been perused.

5. On 13.01.2016 when the case was taken up for hearing, counsel for the appellant has asserted that the respondent has not been using the pictorial monogram of two cows 'Do Gay Chhap' prior to the use of the appellant, on which the counsel for the respondent had sought an adjournment to produce documents. On 21.01.2016, original receipts and some carbon copies were produced by the counsel for the respondent indicating the use of the pictorial monogram of two cows 'Do Gay Chhap'. Copies of the said documents were handed over to the counsel for the appellant, who sought a short adjournment to verify the same. Today when the case was taken up for hearing, the counsel could not dispute the said documents which establishes the use of the pictorial monogram of 'Do Gay Chhap' at least since 30.11.1994. These documents are 22 in number.

6. The facts, which primarily relate to and as have been argued by the counsel for the parties, are that the monogram and the trade mark 'Do Gay Chhap' label and "Do Gay Chhap (KACOM Device of Cow)" was asserted to be used by the appellant since the year 1973 and it is being used prior in time by the appellant to the respondent, as per the settled preposition in law that if the applicant succeeds in proving the fact that he

has been using the trade mark prior to the respondent, then he is entitled to the relief of injunction, as prayed for, the same has to be accepted. The documents, which have been placed on record and have been referred to in detail by the learned Lower Appellate Court and as admitted by the counsel at the time of arguments, are the photocopies of the cash memos from the year 1973 to 1983 which mentioned two cows handwritten in column No. 2. In the cash memos issued w.e.f. 05.10.1984 to 25.12.1997, which are issued by M/s Madan Lal Hans Raj, two cows were depicted but the monogram thereof is quite different from the monogram which is now in dispute, for which an injunction is prayed for.

7. It would not be out of way to mention here that initially the firm was in the name of M/s Madan Lal Hans Raj and its purpose was for selling food grain articles as wholeseller as well as retailer and commission agent. No documentary evidence has been produced that they were doing the business prior to the issuance of the license in the nature of manufacturing, processing, marketing and selling cattle seeds, oil cakes, seeds etc. nor in the form of income tax returns the business they were indulging in prior thereto was only selling food grain articles as wholeseller as well as retailer and commission agents. This status continued till 15.12.1997 when Form-B was issued under Rule 17 Clause-C when the name and style of the appellant was changed as Keshav Oil and Cotton Ginning Industries and license was given for one year and certificate issued by the District Marketing Enforcement Officer, Hisar. At this stage also, trade mark of two cows was not there. The documents, which have been produced on record, show that in the year 2013, an application was moved for the first time initiating the registration formalities under the trade mark

of two cows by the appellant. All this leads to a conclusion that the appellant at the earliest started using the monogram of two cows w.e.f. 25.12.1997 for the purpose of cattle feed etc. and not prior thereto.

8. On the other hand, the respondent had been using the monogram since the start of its business i.e. 01.09.1987 and has even got it registered on 18.11.2009. The documents, which have been produced in this Court copies of which have been supplied to the appellant for verification, clearly establish the use of monogram of two cows much prior to the use of the monogram, if any, by the respondent i.e. according to the documents at least w.e.f. 30.11.1994 in the case of the respondent. This establishes that the respondent has been using the trade mark of 'two cows' prior to the applicant including the monogram. Admittedly, the respondent is in the business of manufacturing, processing, marketing and selling cattle seeds, oil cakes, seeds etc. w.e.f. 1.09.1987 and going by the license, which was obtained by the appellant, it stepped into the same business from 15.12.1997, the balance of equity is in favour of the respondent. The findings, thus, recorded by the Court below in the impugned order being based upon proper appreciation of the facts and the pleadings do not call for any interference by this Court.

9. Finding no merit in the present appeal, the same stands dismissed.

10. Any observations made herein above in this order shall have no bearing on the merits of the case and are for the purpose of deciding this appeal alone.

February 03, 2016

**(AUGUSTINE GEORGE MASIH)
JUDGE**