

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 07.12.2018

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

C.S.No.719 of 2016andA.No.4537 of 2018

Texmo Industries,
Registered Partnership firm,
Represented by its Constituted Attorney Mr.Palaniappan,
P.B.No.5303, Mettupalayam Road,
Coimbatore - 641 029.

.. Plaintiff

Vs.

Mr.Kantilal Solanki
Solanki Machinery Store,
Station Road,
Sumerpur, Pali,
Rajasthan - 306 902

.. Defendant

This Civil Suit is preferred, under Order VII Rule - 1 of Civil Procedure Code, 1908 Read with Order IV Rule 1 of the Original Side Rules of the Madras High Court, and Section 11, 27, 29, 134, 135 Trade Marks Act, 1999, Praying to

a) For a permanent injunction restraining the defendant, his employees, officers, servants, agents and all others acting for and on his behalf from making, selling, distributing, advertising, exporting, offering for sale, and in any other manner, directly or indirectly, dealing in any product in the name of TEXMO or any other similar mark amounting to an

infringement of the plaintiff's registered trademarks Nos. 315049 and 315050, both in Class 07;

b) For a permanent injunction restraining the Defendant, his officers, employees, servants and agents and all others acting for and on his behalf from manufacturing, selling, offering for sale, advertising and directly or indirectly dealing in any product or service under the trademark TEXMO or any other similar marks amounting to passing off of the products and services of the Defendants as and for that of the plaintiff's mark TEXMO;

c) To declare the Plaintiff's trademark TEXMO as a well known Trade Mark;

d) To grant order of delivery up of all brochures/printed material and/or any material which infringes of Plaintiffs' registered trademarks TEXMO;

e) To direct the Defendant for rendition of accounts in respect of their alleged activities especially sale and promotion of products bearing the mark TEXMO for their goods and business;

f) Costs and such other relief as this Court may deem fit, in the circumstances of the case, in the interests of justice and equity.

For Plaintiff : Mr.M.S.Bharath of M/s.Anand and Anand

For Defendant : Set Ex-parte

JUDGMENT

There is a sole plaintiff and a lone defendant in the instant suit.

2. Plaintiff has registered trademarks in its favour. Sheet anchor trademark in favour of plaintiff is 'TEXMO' in class 7 for agricultural pumps

(hereinafter be referred to as 'suit TM' for the sake of convenience and clarity). It is plaintiff's case that it is commenced business from 1956 and has earned huge reputation and goodwill for its products i.e., agricultural pumps with suit TM.

3. It is the case of the plaintiff that some time in June 2016, they conducted an enquiry, got a private investigation report made and gained knowledge that the defendant is actively conducting business by selling same/identical products i.e., agricultural pumps with the same/identical trademark TEXMO.

4. Complaining that this is infringement of plaintiff's suit TM and passing off, instant suit was presented in this Court on 26.09.2016, with prayers *inter alia* for injunctive reliefs qua infringement of suit TM and passing off qua suit TM.

5. It may be necessary to briefly trace the trajectory of this suit. As mentioned supra, suit was presented on 26.09.2016. It is submitted by learned counsel for plaintiff that suit summons was refused by the defendant and therefore service was effected on the sole defendant by substituted service i.e., paper publication. Be that as it may, this Commercial Division is informed by the Registry that suit summons were

served on the defendant on 22.09.2017. Therefore, as per records of this Court suit summon has been served on the defendant.

6. After service of suit summons, defendant has not chosen to either come before this Court in person or entered appearance through a counsel. Obviously, defendant has not filed written statement. In the interregnum, to be noted, prior to the suit, a leave to sue application in A.No.4764 of 2016 was taken out and the same has been allowed by this Court on 20.09.2016. Post leave, this suit was numbered and along with the suit two interlocutory applications being O.A.Nos. 869 & 870 of 2016 for interim injunction reliefs qua suit TM and passing off qua suit TM were taken out. Interim orders were granted on 29.09.2016 and the same are operating.

7. In the light of the trajectory of suit thus far, set out supra, sole defendant is set *ex-parte*.

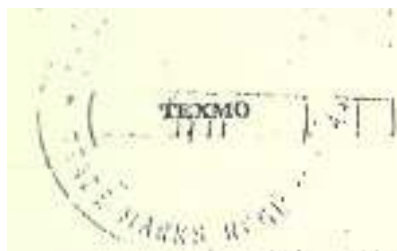
8. Be that as it may, under such circumstances aforesaid application being A.No.4537 of 2018 has been taken out by the plaintiff *inter alia* under Order XIII-A of 'The Code of Civil Procedure, 1908' ('CPC' for brevity) as amended by 'The Commercial Courts Act, 2015' ('said Act' for brevity) with a prayer for summary judgment. To be noted, this Commercial Division is informed that notice was ordered in this summary judgment application,

notice was taken out and the same has also been returned with postal endorsement 'refused'.

9. Though the plaintiff has filed as many as 14 trademark registration certificates in different classes (to be noted, all 14 are Legal Use Certificates). Learned counsel submits that two certificates pertaining to trademark registration Nos. 315049 and 315050 both in class 7 are most relevant and it would suffice to look into the same for the purpose of deciding the instant case. Trademark registration No.315049 in class 7 is for a label and the same is as follows:



10. Trademark registration vide trademark registration No.315050 is a word mark and the word is as follows:



11. As mentioned supra, both are in class 7 and the products are agricultural pumps.

12. This takes us to the offending product and the mark of the defendant. Photographs of the offending mark, as affixed on the defendant's product, have been filed as plaint document No.49 and the same are as follows:





13. Plaintiff Document No.50 is a Justdial telephone directory listing of defendant's business and the same are as follows:





14. Comparison of the two marks by applying the litmus test laid down in the celebrated Parle Judgment reported in ***Parle Products (P) Ltd. Vs. J.P. and Co., [(1972) 1 SCC 618]*** may not be imperative in this case as the suit TM and the offending TM are not just similar or identical, but same. Likewise, products are also same. Therefore, even without applying the time honoured litmus test for comparison, it emerges very clearly that the use of the offending mark i.e., same mark by the defendant on the same product is clear case of infringement and passing off.

15. This takes us to the question as to whether the suit can be decreed by way of a summary judgment under Order XIII-A of amended CPC as amended by said Act.

16. Before I embark upon the exercise of examining this position qua summary judgment, as mentioned supra, leave to sue has already been

granted on 20.09.2016 vide A.No.4764 of 2016. To be noted, proposed plaint contained prayers for injunctive relief qua infringement of suit TM and injunctive relief for passing off qua suit TM. This leave (granted), remains undisturbed. Therefore, this Court has already expressed its intention to exercise jurisdiction over the entire suit i.e., with regard to infringement of suit TM as well as passing off. This position remains undisturbed.

17. With regard to the summary judgment, Mr.M.S.Bharath of M/s.Anand and Anand (Law Firm) learned counsel on record for sole plaintiff, referred to as many as five judgments of Delhi High Court where summary judgment have been passed in identical circumstances. Those are (1) Satya Infrastructure Ltd & Ors Vs.Satya Infra & Estates Pvt Ltd, dated 07.02.2013; (2) Bharathi Bhawan & Anr Vs. M/s.Shree Jee Prakashan & Ors, dated 24.08.2017; (3) Tata Sons Limited & Ors Vs. M/s. Mayuri Beverages, dated 09.11.2017, (4) The Proctor & Gamble Company Vs. Midas Healthcare Limited and Ors., dated 14.05.2018; and (5) Sanofi & Anr Vs. Faisal Mushtaq & Ors. dated 6.11.2018.

18. Taking me through the aforesaid five judgments of Delhi High Court, Mr.M.S.Bharath, learned counsel for plaintiff submitted that the Delhi High Court has taken the view that no useful purpose would be served in recording ex parte evidence when the defendant has not chosen to come

before this Court, as such an exercise would merely amount to giving exhibit numbers to plaint documents and the plaintiff witness repeating the plaint averments. Specific reference in this regard was made to **Satya Infrastructure Ltd.** case decided by a learned Single Judge of Delhi High Court on 07.02.2013 and relevant paragraphs are paragraphs 4 and 5, which read as follows :

'4.The next question which arises is whether this Court should consider the application for interim relief and direct the plaintiffs to lead ex parte evidence. The counsel for the plaintiffs states that the plaintiffs are willing to give up the reliefs of delivery, of rendition of accounts and of recovery of damages, if the suit for the relief of injunction alone were to be heard today.

5.I am of the opinion that no purpose will be served in such cases by directing the plaintiffs to lead ex parte evidence in the form of affidavit by way of examination-in-chief and which invariably is a repetition of the contents of the plaint. The plaint otherwise, as per amended CPC, besides being verified, is also supported by affidavits of the plaintiffs. I fail to fathom any reason for according any additional sanctity to the affidavit by way of examination-in-chief than to the affidavit in support of the plaint or to any exhibit marks being put on the documents which have been filed by the plaintiffs and are already on record. I have therefore heard the counsel for the plaintiffs on merits qua the relief of injunction.

19. The question as to whether plaintiff will be entitled to a summary judgment under Order XIII-A of amended CPC as amended by said Act in all cases where the defendant remains *ex-parte* is a question, which is left open. This Commercial Division is of the view that the instant suit and the prayer for summary judgment can be answered without going into that question. Therefore, this Commercial Division leaves this question open to be decided in another matter whether it becomes imperative to do so.

20. As mentioned supra, as the instant case can be decided without going into the question as to whether the plaintiff would be entitled to summary judgment in all cases where the defendant remains *ex parte* in the light of the amendment to CPC, particularly introduction of Order XIII-A of CPC, this Commercial Division does not express any opinion whatsoever on the view taken by learned Single Judge of Delhi High Court. To be noted, as it is another High Court, it is not a coordinate Bench. However, for the purpose of abundant clarity, it is set out that this Commercial Division, in the instant case, neither agrees nor disagrees with the view of Delhi High Court as that question is left open for the present.

21. The reason, why it may not be necessary to go into that question is, learned counsel for plaintiff draws my attention to as many as seven different orders and judgments of this Court where decrees have been

passed in favour of plaintiff with regard to suit TM against use of marks such as Super Texmo, TaxmoAqua, Texmor, Techmo, Texco and Dekmo. The details of the orders are as follows:

<i>Sl.No</i>	<i>Date</i>	<i>Particulars</i>
1	23.09.2016	Order dated 23.09.2016 passed in C.S.No.593 of 2016
2	11.12.2017	Judgment & Decree dated 11.12.2017 passed in C.S.No.50 of 2017 declaring 'Texmo' as a well-known trademark
3	07.07.2017	Judgment dated 07.07.2017 passed in C.S.No.348
4	21.07.2017	Judgment dated 21.07.2017 passed in C.S.No.355 of 2017
5	07.07.2017	Judgment dated 07.07.2017 passed in C.S.No.356 of 2017
6	29.08.2017	Judgment dated 29.08.2017 passed in C.S.No.358 of 2017
7	27.07.2018	Judgment dated 29.08.2017 passed in C.S.No.357 of 2017

22. In the light of the mark being the same and product also being the same, in the considered opinion of this Commercial Division, the defendant has no real prospect of successfully defending the claim and there is no other compelling reason as to why the claim should not be disposed of before recording of oral evidence. This is the first point that weighs in the mind of this Commercial Division in favour of a summary judgment. The second point that weighs in the mind of this Commercial Division with regard to summary judgment is, the aforesaid seven different orders and judgments made by this Court and other Hon'ble Judges of this

Court pertain to suit TM. To be noted, even the minor variations in those cases is absent in the instant case. The third factor that weighs in the mind of this Commercial Division, in favour of a summary judgment is, learned counsel for plaintiff submits that he would restrict the suit claim only to the two injunctive reliefs and would give up all the other reliefs in the prayer paragraph.

23. For this purpose, it is necessary to extract the prayer paragraphs in the plaint. Prayer paragraph in the plaint is paragraph No.57 and the same reads as follows:

'57. The plaintiff therefore humbly prays that this Hon'ble Court may be pleased to pass a judgment and decree on the following terms:

A) A permanent injunction restraining the defendant, his employees, officers, servants, agents and all others acting for and on his behalf from making, selling, distributing, advertising, exporting, offering for sale, and in any other manner, directly or indirectly, dealing in any product in the name of TEXMO or any other similar mark amounting to an infringement of the plaintiff's registered trademarks Nos. 315049 and 315050, both in Class 07;

B) A permanent injunction restraining the Defendant, his officers, employees, servants and agents and all others acting for and on his behalf from manufacturing, selling, offering for sale, advertising and directly or indirectly dealing in any product or service under the trademark TEXMO or any other similar marks amounting to passing off of the products

and services of the Defendants as and for that of the plaintiff's mark TEXMO;

C) To declare the Plaintiff's trademark TEXMO as a well known Trade Mark;

D) To grant order of delivery up of all brochures/printed material and/or any material which infringes of Plaintiffs' registered trademarks TEXMO;

E) To direct the Defendant for rendition of accounts in respect of their alleged activities especially sale and promotion of products bearing the mark TEXMO for their goods and business;

F) Costs and such other relief as this Court may deem fit, in the circumstances of the case, in the interests of justice and equity.'

24. A perusal of the prayer paragraph would reveal that there are 6 sub paragraphs i.e., (A) to (F) in the prayer paragraph. To be precise, learned counsel for plaintiff submits that he gives up prayer sub-paragraphs (C), (D), (E) and (F). Learned counsel submits that plaintiff restricts its request for a summary judgment with regard to prayer sub-paragraphs (A) & (B) injunctive reliefs alone. This is a third factor that is weighed in the mind of this Commercial Division in favour of a summary judgment.

25. Most importantly, with regard to giving up prayer for declaration of well-known trademark, which has been sought for in prayer sub-paragraph (C) supra, learned counsel for plaintiff Mr.M.S.Bharath, very

fairly brings to the notice of this Commercial Division that this aspect has been referred to a Larger Bench by another learned single Judge of this Court vide Order and Judgment dated 27.07.2018 made in C.S.No.375 of 2017 and A.No. 3874 of 2018 therein. To be noted, that is a case where a declaration was granted and the question as to whether well-known trademark declaration can be granted by the Court and as to whether the declaration should be granted by trademark Registry was the moot question, which had prompted the learned Judge to refer the matter to Hon'ble Chief Justice for being placed before a Division Bench. However, this has been recorded here only for the purpose of capturing facts as comprehensively as possible. To be noted, it is not of any significance in the instant case, as learned counsel very fairly submits that he has given up prayer sub-paragraph (C).

26. In the light of the narrative supra and owing to all that have been set out supra, application for summary judgment being A.No.4537 of 2018 is allowed.

27. As prayer for summary judgment in A.No.4537 of 2018 is acceded to, in the light of the narrative supra, it follows that there shall be a decree in the main suit i.e., C.S.719 of 2016 with regard to injunctive reliefs contained in sub-paragraphs (A) & (B) of the prayer paragraph viz., paragraph 57. To be noted, other sub-paragraphs and other limbs of the

prayer paragraphs have been given up.

28. Application for summary judgment is allowed and suit is decreed on above terms, i.e., with regard to two injunctive reliefs alone.

07.12.2018

Speaking Order/Non Speaking Order

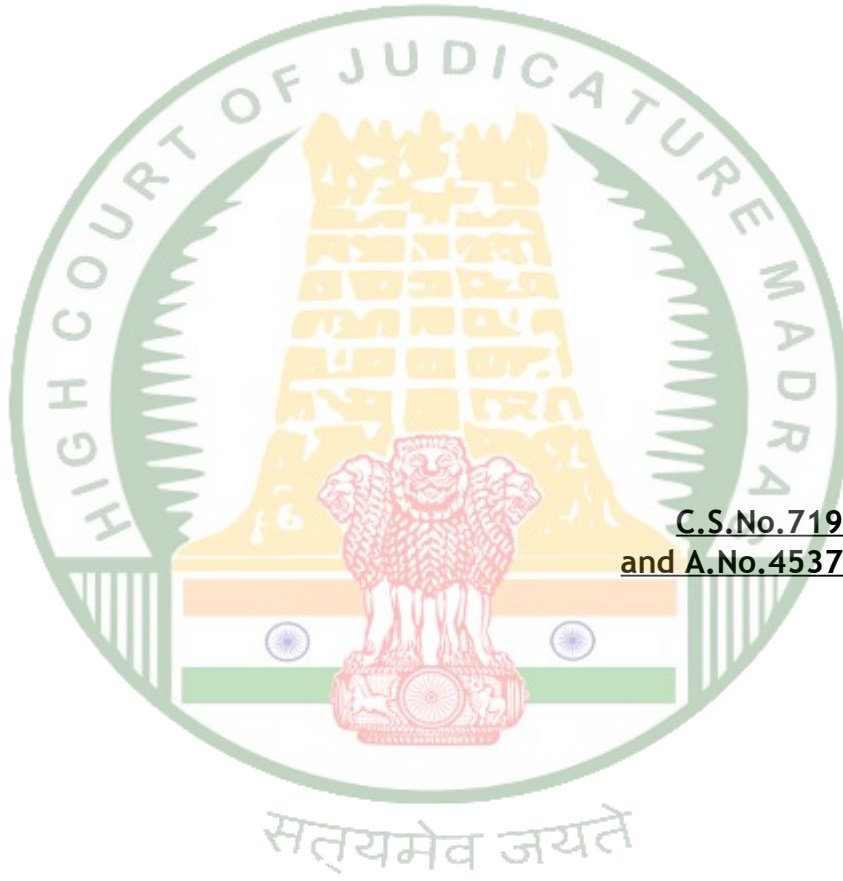
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