

HIGH COURT OF CHHATTISGARH, BILASPUR

FA No.110 of 2014

Mohan Mittal S/o Late Banarsidas Mittal Aged About 42 Years Jhawar
Gudakhu Factory, Main Road, Lailunga, Tah. Lailunga, Distt. Raigarh
C.G. **---- Appellant**

Versus

1. Anand Agrawal, S/o Late Gajanand Agrawal, Aged About 40 Years
Occupation-Business, Agrawal Gudakhu Factory, Kharsia, Tah.
Kharsia, Distt. Raigarh C.G.
2. Murlidhar Agrawal S/o Late Gajanand Agrawal Aged About 50 Years,
Occupation-Business, Agrawal Gudakhu Factory, Kharsia, Tah.
Kharsia, Distt. Raigarh C.G.
3. Har Prasad Rathore, S/o Ramratan Singh Rathore, Aged About 56
Years, Occupation Agrawal Gudakhu Factory/partner, R/o Purani Basti,
Kharsia, Distt. Raigarh C.G.
4. The Registrar Of Trade Mark, Trade Mark Registry, Trade Mark
Division, Intellectual Property Bhawan, Beside Antop Hill, P.O. S.M.
Road, Antop Hill, Mumbai- 400037 M.H.
5. State Of Chhattisgarh, Thru- Collector, Raigarh, Distt. Raigarh C.G.
--- Respondents

For Appellant	:	Mr. Manoj Kumar Sinha, Advocate
For Respondents No.1 to 3	:	Mr. B.P. Sharma and Mr. Ashutosh Shukla, Advocates
For State/respondent No.5	:	Mr. Sanjay Kumar Agrawal, G.A.

DB : Hon'ble Shri Justice Manindra Mohan Shrivastava

Hon'ble Smt. Justice Vimla Singh Kapoor

Order on Board by Manindra Mohan Shrivastava, J.

05/08/2019

1. This appeal is directed against impugned order dated 05.05.2014 (deemed to be decree), by which, the appellant's/plaintiff suit has been dismissed as barred by law.
2. The appellant/plaintiff filed a suit seeking relief of injunction against the defendants on the pleadings that the plaintiff having applied for grant of

registration of particular trade mark, the trade mark applied for, shall be deemed to have been provisionally granted and therefore, by virtue of such provisional registration of trade mark, the plaintiff is entitled to exclusive use of particular trade mark but the defendants are using that particular trade mark in carrying out their trade and business, therefore, the defendants be restrained.

3. The defendants/respondents filed an application under Order 7 Rule 11 CPC raising objection to the very maintainability of the suit only on the ground that the plaintiff had applied for registration of a particular trade mark, he could not claim exclusive use of the trademark applied for and the protection under Section 28 of the Trade Marks Act, 1999 (for short 'the Act of 1999') could not be availed by the plaintiff unless the trademark applied for was actually registered under the law.

4. The objection with regard to the maintainability of the suit found favour and the learned Trial Court rejected the plaint on the ground that the suit was barred by law as the trade mark of which infringement was alleged, was not registered in the name of the plaintiff.

5. Learned counsel for the appellant would argue that even though the formal registration of trade mark applied for by the appellant/plaintiff was not issued, the very fact that the plaintiff had applied, would result in provisional registration which could be treated as included within the ambit of Section 28 of the Act of 1999 and clothe the appellant with the protection against any infringement of the said trade mark by any other person.

6. On the other hand, learned counsel for the respondents opposes and submits that under the statutory scheme of the Act of 1999 and Rules made thereunder, on mere application, the trade mark cannot be deemed to have been registered in favour of the appellant. According to him, right to file suit against infringement is available only to those, who have registered trade mark in their favour and not to those, who have merely applied for.

7. On the face of provision contained in Section 28 of the Act of 1999, we have no doubt that the suit against infringement of trade mark could be brought only by one, who has registered trade mark in his favour. Merely because a party had applied, that by itself, is not sufficient to confer him the right to sue against infringement of trade mark and obtain injunction against any party using that particular trade mark. This is clear from plain language of

provision contained in Section 28 of the Act of 1999, relevant part of which reads as under :

“28. Rights conferred by registration— (1) Subject to the other provisions of this Act, the registration of a trade mark shall, if valid, give to the registered proprietor of the trade mark the exclusive right to the use of the trade mark in relation to the goods or services in respect of which the trade mark is registered and to obtain relief in respect of infringement of the trade mark in the manner provided by this Act.

(2) The exclusive right to the use of a trade mark given under sub-section (1) shall be subject to any conditions and limitations to which the registration is subject.

(3) Where two or more persons are registered proprietors of trade marks, which are identical with or nearly resemble each other, the exclusive right to the use of any of those trade marks shall not (except so far as their respective rights are subject to any conditions or limitations entered on the register) be deemed to have been acquired by any one of those persons as against any other of those persons merely by registration of the trade marks but each of those persons has otherwise the same rights as against other persons (not being registered users using by way of permitted use) as he would have if he were the sole registered proprietor.”

8. The Law seeks to protect and confer right of exclusive use of trade mark only when it is registered in favour of the party. He is then entitled to seek relief in respect of infringement of trade mark in the manner provided under the Act of 1999.

9. Therefore, in our opinion, the learned Trial Court did not commit any illegality in rejecting the plaint on the finding that the suit of the plaintiff on the date when it was filed was barred by law.

10. The appeal is, therefore, dismissed.

Sd/-
(Manindra Mohan Shrivastava)
Judge

Sd/-
(Vimla Singh Kapoor)
Judge