

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.06.2019

CORAM:

The HON'BLE MR.JUSTICE KRISHNAN RAMASAMY

C.S.No. 452 of 2010

Sri Ayyappa Ghee Stores
A Partnership Firm,
Represented by its partner K.Gereesan,
153, East Periyasami Road,
R.S.Puram,
Coimbatore – 641 002. .. Plaintiff

Vs

K.R.K Son & Co.,
72/2, 5th Street,
Saibaba Colony,
Coimbatore – 641 038. .. Defendant

Prayer : Complaint under Order VII, Rule 1 & 2 of C.P.C., and Order IV Rule 1 of O.S.Rules, praying to

i) A Perpetual injunction restraining the defendant by himself/themselves, their men, servants, agents, distributors, stockists, representatives, partners, directors or any of them from in any manner infringing the plaintiff registered trade mark AYYAPPA GHEE by use of the trademark SWAMY AYYAPPA GHEE with or without the device of Ayyappa or any other mark deceptively similar to plaintiff's registered trade marks or in any other manner whatsoever;

ii) A Perpetual injunction restraining the defendant by himself/themselves, their men, servants, agents, distributors, stockists, representatives, partners, directors or any of them from in any manner infringing the plaintiff's registered design of the jar/container or in any other manner whatsoever;

iii) A perpetual injunction restraining the defendant by himself/themselves, their men, servants, agents, distributors, stockists, representatives, partners, directors or any of them from in any manner infringing copy right contained in the artistic work of the registered trade marks "Ayyappa Ghee" by use of the artistic works associated with the trade mark "SWAMY Ayyappa Ghee" or any artistic work and copy right deceptively similar to plaintiff's artistic work and copy right or in any other manner whatsoever;

iv) The defendant be ordered to surrender to the plaintiff for destruction all labels, dies, blocks, moulds, screen prints, advertisement and promotional materials, packing materials, jars, containers and any other materials bearing the trademark SWAMY Ayyappa Ghee or any other mark deceptively similar to the plaintiff's trademark or any other design which is an imitation of the plaintiff design, besides being directed to disclose the details of manufacturers of the defendants pirated jars and imitative labels

v) A preliminary decree be passed favouring the plaintiff directing the defendant to render true account of profits made by the use of trademark and design and final decree be passed in favour of the plaintiff after the defendant have rendered accounts.

vi) For cost of the suit.

For Plaintiff : Mr.K.Rajasekaran

For Defendant : Set exparte

JUDGMENT

The present suit is filed by the plaintiff for the relief, as stated in the prayer portion of this order.

2 The plaintiff is carrying on the business of manufacturing and marketing of Ghee, Butter, etc., under Mark 'Ayyappa Ghee' at 153, East Periyasami Road, R.S.Puram Coimbatore-2.

3 The defendant is carrying on business of manufacturing and trading of Ghee, Butter at 71/1, 5th Street, Saibaba Colony, Coimbatore 641 038.

4 The plaintiff is the registered proprietors of trade mark

AYYAPPA GHEE, bearing No.1321980 in Class 29. The plaintiff is also the registered owner of the trademark AYYAPPA GHEE in Class 29 under the Registered Trade Mark No.271085 and applied for another trade mark with depiction of Lord Ayyappa in the rectangle label in Application No.1084321 in Class 29. In fact, the ghee container also registered under design No. 198003 Class 9-1.

5 The expression of the words 'AYYAPPA GHEE' with the depiction of a figure of the Lord Ayyappa was honestly adopted by the plaintiff in the year 1965 itself. The trade mark so adopted is distinct and different from other manufacturers. The usage of the trade mark is continuous, extensive and bona fide since 1965.

6 The sales turnover of the plaintiff's product during the 1970-1971 was Rs.2,35,649 and the plaintiff had achieved a turnover of Rs.2,27,97,313/- during the year 2008-2009. He further submitted that they spent considerable amount further for the advertisement of their product, in the name of AYYAPPA GHEE and they spent about Rs.2,10,034/-for the financial year 2008-09.

7 The plaintiff has designed a particular shape of jar to pack their product ghee. The Patent Office Government of India has registered the design with distinctive No. 198003 in Class 09-01. The said registration is correct and valid as on date. At that point of time, the plaintiff had come to know that the defendant is also selling their ghee in the containers/jars which are exactly similar in label, design, trade dress, colour scheme, shape, get-up, as that of the plaintiff's product, and even the placement of expression are deceptively similar to that of the plaintiff's product, as the defendant had adopted the mark 'SWAMY AYYAPPA' with a depiction of Lord Ayyappa, which figure, the plaintiff's is also adopting. The plaintiff's is using the mark, AYYAPA GHEE in their labels, and the mark of the defendant is SWAMY AYYAPPA. Thus, except the prefix word "SWAMY", the mark, which the defendant is using is similar to that of the plaintiff's product. This amounts to infringement of the registered trade mark.

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8 By virtue of the prior adoption and user, the plaintiff is the original owner of copy right of their artistic work in their label and trade dress and the defendant by virtue of copying the same colour, trade dress,

commits an act of infringement of copyright over the plaintiff's trade design. The design of the container is registered by the plaintiff and imitating the same shape container, and adopting the same design, the defendant commits an act of infringement of registered design of the plaintiff.

9 The plaintiff further averred that their consumers and end users identify the packaging and label of the defendant as that of the plaintiff. The products are food products and being sold from the shelf of the retailer. In view of the deceptive similarity in packing the container and label, an unwary consumers, mostly housewives, will be led to believe that the product of the defendant are that of the plaintiff. Further, the use of the identical trademark affixed upon pirated jars by the defendant leads to confusion and deception among the trade and public and the resultant confusion is so profound that it leads to consumers and trade believing that the defendant is in some way or other connected to the plaintiffs firm, which is not the case.

10 Therefore, the plaintiff averred that the defendant knowing fully well of the reputation earned by the plaintiff in the market and despite

the same, is unjustly attempting to enrich by unauthorizedly and stealthily using the registered trade mark Ayyapa Ghee Brand and design of jar of the plaintiff, with an intention to sell of their product as that of the plaintiff product. Therefore, they filed present suit.

11 Heard the learned counsel appearing for the plaintiff and he would submit that they are not pressing the prayer No.IV and V of the plaint. As far as the defendant is concerned, it is from the order of this Court, dated 06.06.2019, that despite suit summons were served on the sole defendant and their name is printed in the cause list, none appeared on behalf of their behalf. Therefore, the sole defendant was set ex-parte.

12 On the side of the plaintiff, the plaintiff, name K.Gereesan, the Partner of the plaintiff-Firm examined himself as PW1 and marked seventeen documents as Exs.P1 to P17.

13 This Court also gone through the pleadings and documents filed along with the plaint and also the proof affidavit filed by the PW1. On perusal of Ex.P.4, photocopy of Design, Ex.P.7, photocopy of registered

trademark of the plaintiff, bearing No.1321980, and Ex.P.11, photocopy of design registered for the jar, bearing No.198003 clause 09-01, it is clear that the plaintiff is the registered owner of the trademark "AYYAPPA GHEE", design, and jar and they have the exclusive right to use the trade mark in respect of their product. **In view of the exclusive right to use the word, "AYYAPPA GHEE" by the plaintiff, the adoption of the mark, "SWAMY AYYAPPA", by the defendant is clearly amounts to infringement of trademark of the plaintiff.** Hence, the plaintiff is entitled to the decree prayed for.

14. Since the plaintiff is not pressing the suit prayer No.17 [iv] [v] and [vi] of the plaint, the suit is decreed in respect of prayer No.17 [i], [ii] and [iii], with cost of Rs.50,000/-.

19.06.2019

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Internet :Yes/No

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KRISHNAN RAMASAMY, J.
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