

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 21.01.2020

PRONOUNCED ON : 07.02.2020
CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Application No.2920 of 2019 in
C.S.No.33 of 2019

1.M/s.Patanjali Biscuits Pvt. Ltd.,
Continental Chambers,
5th Floor,
15A, Hemantha Basu Sarani,
Kolkatta – 700 001.

2.M/s.Patanjali Ayurved Limited,
Plot No.- 209, Bhalawa Village,
Opposite Jaiangir Puri,
G.T.Karnal Road,
Delhi – 33.

...Applicants/defendants

Vs

Hatsun Agro Product Ltd.,
Having registered office at,
No.1/20-A, Rajiv Gandhi Salai (OMR),
Karapakkam, Chennai – 600 097,
And also carrying on its business at,
Old No.AD-83/New No.AD 13,
Anna Nagar, Opp. IOB Towers Branch,
Chennai – 600 040.
Represented by its Authorised Signatory.

... Respondent/plaintiff

Prayer:- This Application is filed under Order XIII A of C.P.C., as amended by Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Act, 2015, seeking a summary judgment from this Court dismissing the suit as against the applicants/ defendants.

For Applicants

:Mr.P.Giridharan

For Respondent

:Mr.Aashish Jain Lunia for
M/s.Surana & Surana

ORDER

This application is filed by the defendants to pass summary judgment of dismissal of the suit on the ground that the plaintiff has no scope of success in the suit.

2.The brief facts necessary for considering the application:

Plaintiff's Case:-

The plaintiff has filed the suit for infringement and passing off of its registered trade mark " AROGYA" by the defendants and causing damage to the goodwill and reputation earned by the plaintiff. According to the plaint, plaintiff is India's one of the largest Private sector in the dairy products. It

has established dairies at various places in South India with state of art facilities meeting the high norms of hygiene and health. Besides milk, the plaintiff is also engaged in manufacturing other dairy products like ice creams, dairy whitener, skimmed milk powder AGMARK certified Ghee, Butter, Cooking batter, varieties of curd, panneer and butter milk. Its products are exported to 32 countries including Africa, Middle East and other East Asian countries. The said products are marketed through various brands such as ARUN, HATSUM, AROKYA, IBACO etc. The plaintiff has built up a very high and enviable reputation and goodwill for their products marketed under the trade mark, " AROKYA" by virtue of continuous uninterrupted and extensive use of the social market. It has adopted and used the trademark AROKYA in respect of milk and milk products since, 1994. The said trademark AROKYA has come to be distinctive and identified and associated with the plaintiff and has clearly acquired secondary meaning to connote and denote the products of the plaintiff. The plaintiff has very huge network of distribution and marketing. Its products are available everywhere and the trademark has acquired the status of well known mark. Hence, it vigilantly protects its rights with respect to the trade mark "AROKYA" and has filed applications for registration of the trade mark AROKYA in respect of all the classes in the nice classification and has obtained registrations for its products as below:-

<i>Number</i>	<i>Class</i>	<i>Date of filing</i>	<i>Status</i>
2871323	1	29.12.2014	Registered
2871324	2	29.12.2014	Registered
2871325	3	29.12.2014	Registered
2871326	4	29.12.2014	Registered
2871327	5	29.12.2014	Pending
2871328	6	29.12.2014	Registered
2871329	7	29.12.2014	Registered
2871330	8	29.12.2014	Registered
2871331	9	29.12.2014	Registered
2871332	10	29.12.2014	Registered
2871333	11	29.12.2014	Registered
2871334	12	29.12.2014	Registered
2871335	13	29.12.2014	Registered
2871336	14	29.12.2014	Registered
2871337	15	29.12.2014	Registered
2871338	16	29.12.2014	Registered
2871339	17	29.12.2014	Registered
2871340	18	29.12.2014	Registered
2871341	19	29.12.2014	Registered
2871342	20	29.12.2014	Registered
2871343	21	29.12.2014	Registered
2871344	22	29.12.2014	Registered
2871345	23	29.12.2014	Registered
2871346	24	29.12.2014	Registered
2871347	25	29.12.2014	Pending
2871348	26	29.12.2014	Registered
2871349	27	29.12.2014	Registered
2871350	28	29.12.2014	Registered

<i>Number</i>	<i>Class</i>	<i>Date of filing</i>	<i>Status</i>
2871351	29	29.12.2014	Registered
2871352	30	29.12.2014	Pending
2871353	31	29.12.2014	Registered
2871354	32	29.12.2014	Registered
2871355	33	29.12.2014	Registered
2871356	34	29.12.2014	Registered
2871357	35	29.12.2014	Registered
2871358	36	29.12.2014	Registered
2871359	37	29.12.2014	Registered
2871360	38	29.12.2014	Registered
2871361	39	29.12.2014	Registered
2871362	40	29.12.2014	Registered
2871363	41	29.12.2014	Pending
2871364	42	29.12.2014	Registered
2871365	43	29.12.2014	Registered
2871366	44	29.12.2014	Registered
2871367	45	29.12.2014	Registered

3.While so, the defendants filed various applications for trademark 'AAROGYA' either alone or in combination of other words. The plaintiff on coming to know about it, issued separate notice of oppositions, dated 09/10/2015 before the concerned Trademark Registry and same are pending. In the month of June 2016, the plaintiff came across the products of the first defendant, namely biscuits sold under the trademark PATANJALI

AAROGYA. To the plaintiff notice to cease and desist from using the trademark AAROGYA which amounts to infringement of its well known trade mark AROKYA, the first defendant has replied that these two marks are distinct and different. Earlier, when two other applications were made for registration of trademark under class 5 and class 29, the plaintiff filed its objections and same was abandoned by the defendants. Now under class 30, they have obtained registration for "PATANJALI AAROGYA". Hence, the plaintiff has already initiated opposition proceedings before the trade mark registry against the defendants' trademark and the same is pending.

4.The plaintiff alleges that the use of the offending trademark "PATANJALI AAROGYA" by the defendants is an act of dishonesty and solely with bad faith. It is an infringement of the plaintiff's registered trademark as the defendants are using the offending trademark with respect to the biscuits made out of milk. This is in the teeth of the fact that the defendants have obtained registration for milk and dairy products in respect of which the plaintiff's trademark AROKYA is extensively used.

5.Defendants' case:-

In the application to pass summary judgment, the defendants state that, the suit for infringement is not maintainable. The word 'AAROGYA' is a

Sanskrit word which means 'overall well being'. The second defendant is carrying on business since 2006 in natural health, food, personal care, home care and allied fields including yoga related practices. The plaintiff is engaged only in milk and milk products and marketing the same using the trademark 'AROKYA'. The plaintiff's have not diversified in manufacturing any other products apart from Milk and Dairy related products using the said trademark. The product of the plaintiff and the product of the defendants are entirely different. 'AROKYA' for milk and milk products and 'Patanjali Aarogya' for biscuit are distinct and totally different. They are non-identical and distinctive. They are phonetically and visually dis-similar. This will no way damage the goodwill or reputation of the plaintiff. Further, the defendants products also share a good reputation among consumers. The defendants products are marketed all over India and in the said effect, several crores of rupees is spent for advertising their products with the word "Patanjali".

6.The suit is filed suppressing the fact that the defendants are the registered owners of the trademark "Patanjali Aaroyga" both in English and Hindi under class 30. The plaintiff has not got the trademark registration under class 30. Under the Trade Marks Act, no suit for infringement can be instituted against a registered trademark holder. In view of sections 28 and

134 of the Trade Marks Act, the suit is not maintainable.

7. When suit for infringement itself not maintainable, the relief for passing off also not maintainable. Further, the defendants 1 and 2 are carrying on business at Kolkatta and New Delhi respectively. For relief of passing off, suit has to be filed at the defendants' place. Hence, for lack of jurisdiction and for being barred by law, the suit has to be dismissed by passing a summary judgment holding that the plaintiff has no real prospect to succeed in the suit.

8. Infringement of trademark:

Section 29 of the Trademarks Act explains when infringement of trade mark occurs. According to this section,

"29 (1) A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which is identical with, or deceptively similar to the trade mark in relation to goods or services in respect of which the trade mark is registered and in such manner as to render the use of the mark likely to be taken as being used as a trade mark: Effect of removal from register for

*failure to pay fee for renewal No action for
infringement of unregistered trade mark Rights
conferred by registration Infringement of registered
trade marks. Sec II THE GAZETTE OF INDIA
EXTRAORDINARY 15*

*(2) A registered trademark is infringed by a
person who, not being a registered proprietor or
a person using by way of permitted use, uses in the
course of trade a mark which because of --
(a) its identity with the registered trade mark and
the similarity of the goods or services covered by
such registered trade mark : or
(b) its similarity to the registered trade mark and the
identity or similarity of the goods or services covered
by such registered trade mark: or
(c) its identity with the registered trade mark and
the identity of the goods or services covered by such
registered trade mark. is likely to cause confusion on
the part of the public , or which is likely to have an
association with the registered trade mark.*

*(3) In any case falling under clause (c) of sub-
section (2), the court shall presume that it is likely
to cause confusion on the part of the public.*

(4) A registered trademark is infringed by a

person who not being a registered Proprietor or a person using by way of permitted use, uses in the course of trade, a mark which-

(a) is identical with or similar to the registered trade mark and

(b) is used in relation to goods or services which are not similar to those for which the trade mark is registered : and

(c) the registered trade mark has a reputation in India and the use of the mark without due cause takes unfair advantage of or is detrimental to, the distinctive character or repute of the registered trade mark.

(5) A registered trademark is infringed by a person if he uses such registered trade mark, as his trade name or part of his trade name, or name of his business concern or part of the name of his business concern dealing in goods or services in respect of which the trade mark is registered.

(6) For the purposes of this section, a person uses a registered mark, if in particular he---

(a) affixes it to goods or the packaging thereof:

(b) offers or exposes goods for sale puts them on the market, or stock them for those purposes under the registered trade mark, or offers or supplies services under the registered trade mark:

(c) imports or exports goods under the mark: or

(d) uses the registered trade mark on business papers or in advertising.

(7) A registered trademark is infringed by a person who applies such registered trade mark to a material intended to be used for labelling or packaging goods, as a business paper, or for advertising goods or services, provided such person, when he applied the mark, knew or had reason to believe that the application of the mark was not duly authorised by the proprietor or a licensee.

(8) A registered trade mark is infringed by any advertising of the trade mark if such advertising---

(a) takes unfair advantage of and is contrary to honest practices in industrial or commercial matters or

(b) is detrimental to its distinctive character or

(c) is against the reputation of the trade mark.

*Limits on effect of registered trade mark 16 THE
GAZETTE OF INDIA EXTRAORDINARY [PART-II*

(9) Where the distinctive elements of a registered trade mark consist of or include words, the trade mark maybe infringed by the spoken use of those words as well as by their visual representation and reference in this section to the use a mark shall be construed accordingly."

9.The plaintiff is the registered proprietor of the trademark " AROKYA" for milk and milk products falling under class 29 and few other classes but not under class 30. Its application No.2871352 dated 29/12/2014 under class 30 is pending. The defendants are the registered proprietor of the trademark "PATANJALI AAROGYA" for multigrain biscuit falling under class 30 vide registration No. 3376040 dated 30/09/2016.

10.Finding:-

The plaintiff claims that its trademark is well known and prior in point of time. Though the defendants had registered their trademark under class

30, it amounts to infringement by the principle of NICE classification.

11. Contrarily, the defendants claim that the trademark of the plaintiff namely "AROKYA" is not a well known trademark but generic in nature. The plaintiff cannot claim monopoly over that name. Further, having duly registered the trademark "Patanjali Aarogya" for goods under class 30 (biscuits), which is entirely a different product from that of the plaintiff (milk and milk products), the defendants are protected under section 28 (3) of the Trade Marks Act. Therefore, the suit for infringement lacks cause of action.

12. The plaintiff case is that, though the defendants have registered its trademark "Patanjali Aarogya", in fact the said trademark is phonetically similar to the trademark of the plaintiff. Further, the words "Patanjali Aarogya" not used collectively by the defendants. The word "Patanjali" is used as device separately and the word "Aarogya" is used below the device separately. Therefore, it cannot be construed that the defendants are registered trademark proprietor and using the registered trademark. Also, the goods of the defendants' biscuit is a product of milk. Therefore, under section 29 (2) (b) of the Trade Marks Act, the defendants had infringed their registered trademark and it has caused confusion on the part of the public.

13.It is the further case of the plaintiff that, though the defendants have registered trademark 'Patanjali Aarogya' under class 30, plaintiff's trademark " Arokya" has acquired a secondary meaning to denote and connote the products of the plaintiff alone and the public associate the said well known trademark with the plaintiff. Any use of any identical/deceptively similar name by the defendants or any other person would only lead to confusion on the part of the unwary consumers. There is every likelihood that the public would be misled to believe that the products other than the plaintiff under the trademark AROKYA also emanates from the plaintiff. Therefore, the infringement falls under section 29(4) of the Trade Marks Act.

14.Section 2 (zg) of the Trade Marks Act, defines well known trade mark and sections 11 (6) and (7) deals how to determine whether a trade mark is well known trade mark.

"2(zg) "well Known trade mark", in relation to any goods or services, means an mark which has become so to the substantial segment of the public which uses such goods or receives such services that the use of such mark in relation to other goods or

services would be likely to be taken as indicating a connection in the course of trade or rendering of services between those goods or services and a person using the mark in relation to the first-mentioned goods or services.

.....

11(6) The Registrar shall, while determining whether a trade mark is a well-known trade mark, take into account any fact which he consider relevant for determining a trade mark as a well-known trade mark including-- (i) the knowledge or recognition of that trade mark in the relevant section of the public including knowledge in India obtained as a result of promotion of the trade mark: (ii) the duration, extent and geographical area of any use of that trade mark: (iii) the duration, extent and geographical area of any promotion of the trade mark, including advertising or publicity and presentation, at fairs or exhibition of the goods or services to which the trade mark applies, (iv) the duration and geographical area of any registration of or any application for registration of that trade mark under this Act to the extent they reflect the use or recognition of the trade mark; (v) the record of successful enforcement of, the rights in that trade

mark, in particular, the extend to which the trade mark has been recognised as a well-known trade mark by any court or Registrar under that record.

(7) The Registrar shall, while determining as to whether a trade mark is known or recognised in a relevant section of the public for the purposes of sub-section (6), take into account (i) the number of actual or potential consumers of the goods or services (ii) the number of persons involved in the channels of distribution of the goods or services, (iii) the business circles dealing with the goods or services to which that trade Sec II THE GAZETTE OF INDIA EXTRAORDINARY 9 mark applies."

15.At the outset, the claim of the plaintiff that its trademark is well known mark is without any basis. Even according to the plaintiff, it has market only in south India. Well known trade mark status is not a matter for presumption and assumption. Under section 11(6) of the Trade Marks Act, it is for the Registrar to consider the facts relevant for conferring the status of well known trademark. The duration, extent and geographical area are some of the facts relevant for determining well known trademark status. The plaintiff has not so far obtained such status.

16. When we turn to section 28 (3) of the Trade Marks Act, the provision which the defendants rely upon to pass summary judgment of dismissal, we find that, where two or more persons are registered proprietors of trademarks, they have to coexist. The use of their respective trademarks for the respective products will not amount to infringement.

Section 28(3) of the Trade Marks Act, reads as follows:-

"(3) Where two or more persons are registered proprietors of trademarks, 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."

17. In this case, except phonetic similarity in part of the trademark, there is no other identity or similarity. The said phonetic similarity is in

respect of the word 'Arokya' or 'Aarogya'. The word "Arogya" as such means 'good health', which is generic in nature. The word as depicted in the plaintiff trademark alone is unique and fancy. In fact, an art in depicting the word, neither the plaintiff nor the defendants would have obtained the grant of the trademark for this generic word since section 9 (b) of the Trade Marks Act empowers the Registrar to refuse grant of registration if the trademark consist exclusively of marks or indications which may serve in trade to designate the kind or quality.

(Emphasis added)

18. The plaintiff who has obtained trademark registration for milk and milk products cannot have any cause of action to sue another registered trademark holder for different product under different classifications. More particularly, the trademark of the defendants has to be read as a whole and not in part. The trademark of the plaintiff "Arokya" being a generic word can at no point of time gain secondary meaning to denote and connote the products of the defendants. The plaintiff cannot claim monopoly over a generic name. The word Arokya is well known to public not because of the plaintiff product but even before that. Likewise, the principle of NICE classification does not apply to the present facts of the case since the product of the plaintiff is not similar or identical to that of the defendants.

The defendants on its own is a reputed company having vast network of distribution through out the country. There is no iota of reason to infer that the public will be mislead by seeing the biscuit packet of the defendants carrying the trademark " Patanjali Aarogya" as that of the plaintiff's product.

19. Section 28 (1) of the Trade Marks Act, give to the registered proprietor of a trademark, the exclusive right to the use of the trade mark in relation to the goods or services in respect of which the trademark is registered. He can also prevent others from using the trademark for other product if he satisfies the condition under sub sections (2) and (4) of section 29. This right is only against person who, not being a registered proprietor or a person using by way of permitted use, in the course of trade. This section cannot be relied to sue for infringement against a holder of identical or similar registered trademark, who is well protected under section 28(3) of the Trade Marks Act or even in case of honest concurrent user permitted by the Registrar.

20. The above view of this Court is fortified by the judgments of the Hon'ble Supreme court rendered in ***M/s.Nandini Delux -vs- Karnataka Co-operative Milk Producers Federation Ltd*** (CDJ 2018 SC 775).

Similar to the facts of the case in hand, in the case above cited, the Appellant/Defendant had registered trademark "NANDINI" under class 30 for hotel business and the Respondent/Plaintiff had registered trade mark "Nandini" under classes 29 and 30 for milk and milk products. The suit filed by the respondent was dismissed by the Hon'ble Supreme Court after a long travel from the Deputy Registrar, IPAB and High Court. For better appreciation , the facts as vividly narrated by the Hon'ble Supreme Court is extracted below:-

"We may note at this stage itself that the mark used by the appellant is objected to by the respondent on the ground that it is deceptively similar to the mark of the respondent and is likely to deceive the public or cause confusion. According to the respondent, the appellant could not use the said mark which now belongs to the respondent inasmuch as because of its long and sustained use by the respondent, the mark NANDINI is held to have acquired a distinctive character and is well-known to the public which associates NANDINI with the respondent organization. Therefore, according to the respondent, it has exclusive right to use the said mark and any imitation thereof by the appellant would lead the public to believe that the foodstuffs

sold by the appellant are in fact that of the respondent. When these objections were rejected by the Deputy Registrar and registration granted to the appellant, the respondent approached the Intellectual Property Appellate Board (for short, IPAB), Chennai by filing appeal with the prayer that the registration given by the Deputy Registrar, Trade Mark in favour of the appellant be cancelled. These appeals of the respondent were allowed by the IPAB vide common order dated 4th October, 2011 and the writ petitions filed by the appellant there against have been dismissed by the High Court vide impugned order dated 2nd December, 2014, thereby confirming the order of the IPAB and, in the process, accepting the plea of the respondent therein.

Before we proceed further, it is pertinent to mention at this stage that the milk and milk products, which are sold by the respondent under the trade mark of NANDINI, fall under Class 29 and Class 30 as per classification under Schedule IV to the Trade Marks Rules, 2002. On the other hand, various kinds of foodstuffs sold by the appellant in its restaurants also fall under Class 29 and 30 as well as other Classes."

21. After detail discussion of law and facts, the Hon'ble Supreme court

has also relied the following observation made in **Vishnudas Trading –vs- Vazir Sultan Tobacco Ltd** - 1997(4)SCC 401: -

"47. The respondent Company got registration of its brand name Charminar under the broad classification manufactured tobacco. So long such registration remains operative, the respondent Company is entitled to claim exclusive use of the said brand name in respect of articles made of tobacco coming under the said broad classification manufactured tobacco. Precisely for the said reason, when the appellant made application for registration of quiwam and zarda under the same brand name Charminar, such prayer for registration was not allowed. The appellant, therefore, made application for rectification of the registration made in favour of the respondent Company so that the said registration is limited only in respect of the articles being manufactured and marketed by the respondent Company, namely, cigarettes. In our view, if a trader or manufacturer actually trades in or manufactures only one or some of the articles coming under a broad classification and such trader or manufacturer has no bona fide intention to trade in or manufacture other goods or articles which also fall under the said broad classification, such trader or

manufacturer should not be permitted to enjoy monopoly in respect of all the articles which may come under such broad classification and by that process preclude the other traders or manufacturers from getting registration of separate and distinct goods which may also be grouped under the broad classification. If registration has been given generally in respect of all the articles coming under the broad classification and if it is established that the trader or manufacturer who got such registration had not intended to use any other article except the articles being used by such trader or manufacturer, the registration of such trader is liable to be rectified by limiting the ambit of registration and confining such registration to the specific article or articles which really concern the trader or manufacturer enjoying the registration made in his favour. In our view, if rectification in such circumstances is not allowed, the trader or manufacturer by virtue of earlier registration will be permitted to enjoy the mischief of trafficking in trade mark. Looking to the scheme of the registration of trade mark as envisaged in the Trade Marks Act and the Rules framed thereunder, it appears to us that registration of a trade mark cannot be held to be absolute, perpetual and invariable under all circumstances. Section 12 of the Trade Marks Act prohibits registration of identical or

deceptively similar trade marks in respect of goods and description of goods which is identical or deceptively similar to the trade mark already registered. For prohibiting registration under Section 12(1), goods in respect of which subsequent registration is sought for, must be (i) in respect of goods or description of goods being same or similar and covered by earlier registration and (ii) trade mark claimed for such goods must be same or deceptively similar to the trade mark already registered. It may be noted here that under sub-section (3) of Section 12 of the Trade Marks Act, in an appropriate case of honest concurrent use and/or of other special circumstances, same and deceptively similar trade marks may be permitted to another by the Registrar, subject to such conditions as may deem just and proper to the Registrar.

Then concluded :-

"31. We may mention that the aforesaid principle of law while interpreting the provisions of Trade and Merchandise Act, 1958 is equally applicable as it is unaffected by the Trade Marks Act, 1999 inasmuch as the main object underlying the said principle is that the proprietor of a trade mark

cannot enjoy monopoly over the entire class of goods and, particularly, when he is not using the said trade mark in respect of certain goods falling under the same class. In this behalf, we may usefully refer to Section 11 of the Act which prohibits the registration of the mark in respect of the similar goods or different goods but the provisions of this Section do not cover the same class of goods.

32. The aforesaid discussion leads us to hold that all the ingredients laid down in Section 11(2) of the Act, as explained by the Delhi High Court in Nestle India Ltd., have not been satisfied. We are not persuaded to hold, on the facts of this case, that the appellant has adopted the trade mark to take unfair advantage of the trade mark of the respondent. We also hold that use of NANDHINI by appellant in respect of its different goods would not be detrimental to the purported distinctive character or repute of the trade mark of the respondent.

22.The principle laid in the above cited judgment squarely applies to the case in hand. Having pointed out the law as it stand, we turn to the question 'whether summary judgment of dismissal can be passed has to be considered'.

23.Order XIII A of C.P.C., as amended in the Commercial Courts Act, 2015, lays down the procedure by which the Court may decide a claim pertaining to any Commercial Dispute without recording oral evidence. The defendants herein, after receipt of the suit summons and notice in exparte interim injunction orders in O.A 33/2019 and O.A.34/2019 , had filed Applications 2230 and 2231 of 2019 to vacate injunction and the present Application in A.No.2920 of 2019 in C.S.No.33 of 2019 to pass a summary judgment of dismissal of the suit.

24.The Commercial Division vide its common order dated 05/07/2019 vacated the injunction but dismissed the application for summary judgment. Against the order dismissing the summary judgment application, the defendants preferred appeal (O.S.A.No.264 of 2019) before Commercial Appellate Division. The plaintiff aggrieved by the order vacating the interim injunction preferred (O.S.A.Nos.284 and 285 of 2019) before the Commercial Division. All the three appeals were heard together and the Hon'ble Commercial Appellate Division upheld the decision of the Commercial Court vacating the injunction, remitted the application for summary judgment for fresh consideration and to pass order assigning cogent and strong reasons as envisaged under Order XIII A of CPC.

25.Order XIII Rule (3) C.P.C., states the grounds for summary judgment. The Court may give a summary judgement against a plaintiff or defendant on a claim if it considers that –

a) the plaintiff has no real prospect of succeeding on the claim or the defendant has no real prospect of successfully defending the claim, as the case may be; and

b) there is no other compelling reason why the claim should not be disposed of before recording of oral evidence.

26.First it has to be seen, 'whether there is any compelling reason to record oral evidence in this case'. The statements made by the plaintiff in the plaint are substantially accepted by the defendants, except the plea regarding the status of 'well known trademark' and the allegation of infringement. The defendants have not seriously controverted other facts averred in the plaint. When the plaintiff proprietorship of the trademark "Arokya" and the use of the trademark 'Patanjali Aarogya' by the defendants is not in dispute for facts admitted no proof required. Therefore, there is no compelling reason in this case for recording oral evidence.

27.Next, we have to see 'whether there is any real prospect of success for the plaintiff'. As discussed earlier, when section 12 of the Trade Marks Act give discretion to the Registrar to permit registration by more than one proprietor of the trademark which are identical or similar in case of honest concurrent use and when section 28(3) of the Trade Marks Act permits coexistence of two or more owners of identical or nearly similar trademark, the plaintiff prospect to succeed is nil even if the plaintiff averments are taken as proved in toto.

28.Apart from the statutory impediment for the plaintiff to succeed, even on facts, the case of the plaintiff has no possibility of success because, the product of the defendants is not identical or similar to that of the plaintiff. The class under which the defendants holding his trademark registration is different from the class under which the plaintiff holds trademark registration. The plaintiff has not in the trade of manufacturing biscuits and no sign of its intention to involve in biscuit manufacturing in future.

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29.As reprimanded by the Supreme Court in **Vishnudas** case (cited supra), the plaintiff cannot try to have monopoly over the trademark for all products and prevent others using the mark for the goods which the plaintiff

not producing. Further, the *litmus test* for infringement is not only the phonetic similarity or visual similarity but also to attract section 29(2) of the Trade Marks Act, the similarity or identity must likely to cause confusion on the part of the public, or 'whether is likely to have an association with the registered trademark'. To attract section 29(4) of the Trade Marks Act, the registered trademark must have reputation in India and the use of the mark without due cause takes unfair advantage or is detrimental to, the distinctive character or repute of the registered trade mark.

30.By using the word 'Aarogya' along with the word 'Patanjali' for the biscuits manufactured by the defendants can no way be detrimental to the milk or milk product of the plaintiff marketed in the name "Arokya". In fact the brand 'Patanjali' due to its vast presence in the market through various products enjoys secondary meaning and it is not the word "Arogya" a generic word which enjoys secondary meaning. The averment of the plaintiff that the defendants attempt to steal the bulwark and palladium created by the plaintiff is an shallow jargon borrowed from judicial pronouncement. The allegation against the defendants that the plaintiff's good will at stake and reputation is in peril are only an illusion but not real.

31.For the said reasons, the application is allowed and consequently,
the suit is dismissed with costs.

07.02.2020

jbm

Index: Yes

Speaking order/non speaking order



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G.JAYACHANDRAN.J.,

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