

HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

C.M.A. No.702 of 2019 and C.C.No.1205 of 2019

COMMON JUDGMENT:

These two cases arise between the same parties out of the same suit and so they are being disposed of by this common judgment.

2. C.M.A.No.702 of 2019 is filed by the appellants challenging the orders dt.25-03-2019 in I.A.No.697 of 2018 in O.S.No.137 of 2018 of the IX Additional Chief Judge, City Civil Court, Hyderabad.

3. Pending the said C.M.A., on 08-08-2019, this Court had granted interim injunction restraining the respondents in the appeal from using or starting the shop under trade mark/name 'New Andhra Hosiery Exclusive' or any mark which is identical or deceptively similar to the appellants' mark "Andhra Hosiery" as prefix or suffix, using the 'New Andhra Hosiery Exclusive' label which is a substantial/identical reproduction or a colorable imitation of the appellants' 'Andhra Hosiery' label till disposal of the main suit.

4. Alleging that the said order has been violated, C.C.No.1205 of 2019 has been filed by the appellants.

5. We shall first deal with the CMA.

6. The appellants in the CMA are plaintiffs in the above suit.

7. They filed the said suit against respondents for the following reliefs:

“(a) a decree of permanent injunction restraining the defendants, their/its family members, servants, agents, and anyone acting for and on their/its behalf from using the trade mark/name New Andhra Hosiery work per se or any other name or trade which is identical or deceptively similar to the plaintiffs trade name/mark Andhra Hosiery consisting passing off the trade mark.

(b) a decree of permanent injunction restraining the defendants, their/its family members servants, agents, and anyone acting for and on their/its behalf from using the trade mark/name New Andhra Hosiery work per se or any other name or trade mark or label which is substantial/identical reproduction or a colorable imitation of the plaintiffs name Andhra Hosiery label constituting infringement of the plaintiffs copyright.

(c) for an order of delivery of all the material bearing the impugned mark Andhra Hosiery, including moulds, dyes, bottles, name, cartons, labels, packing materials, name plates, publicity material like pamphlets, hoardings, sign boards, stationery, moulds and dies etc., for the purpose of destruction/erasure.”

The appellants’/plaintiffs’ case in the suit

8. The gist of the appellants case is that the 1st appellant is a proprietary concern started in 1982 and is doing business of wholesale and retail of Men’s readymade, undergarments and other allied businesses under the name and style of ‘Andhra Hosiery’, which is their trade name/brand name/trade mark, and that it is distinctive and associated with the appellants. It is contended that 2nd appellant is the son of 1st appellant and he also trades under the same name as a branch of the 1st respondent and he deals with Ladies readymade and undergarments and started it in 2013.

9. It is the contention of the appellants that the 1st appellant worked very hard in developing the brand ‘Andhra Hosiery’ which became

gradually famous and its trade name/trade mark received great response from the market and the name attracted illiterate customers on account of quality and their attractive colour schematics. Copies of trade/labour licenses, sale and purchase bills, sale invoices, photographs of the appellants shops along with C.Ds. of the trade name 'Andhra Hosiery' and audit certificate reflecting the turnover of the appellants were filed along with the plaint.

10. It is contended that on 22-02-2018, the appellants saw a banner written on a shop under the name 'New Andhra Hosiery' in the vicinity of the appellants' shop at Main Road, Chikkadpally at House No.1-1-213, that the appellants came to know that respondents were proposing to start a new shop by adding the word 'New' in very small letters highlighting 'Andhra Hosiery', which is identical and owned by the appellants for the same products/garments on 24-02-2018 with a fraudulent intention to encash the goodwill, reputation, quality of the appellants' trade mark/name and brand image for 'Andhra Hosiery' and its logo and to take undue advantage by making unlawful gains. Photographs showing 'New Andhra Hosiery' used by respondents were also filed.

11. It is contended that on 22-02-2018, the appellants approached the respondents and requested the latter not to start business with the name 'Andhra Hosiery' as part of their trade name, but the respondents went ahead and opened the shop on 24-02-2018 using the name 'New Andhra Hosiery'. It is contended that with the said trade name, the respondents

are spreading false rumours in the market that their products are the products/garments of the appellants and this indicates the clandestine and *mala fide* intention of the respondents.

12. It is contended that a comparison of the marks 'Andhra Hosiery' of the appellants with 'New Andhra Hosiery' of respondents would lead to the conclusion that the respondents deliberately adopted the trade mark/name of the appellants with an intention to confuse the prospective consumers and that this amounts to *passing off* the appellants trade mark 'Andhra Hosiery' by the respondents by using the name and logo 'New Andhra Hosiery'. There is also allegation that the appellants are long and prior users of the 'Andhra Hosiery' label and the respondents are taking steps to use the identical label/name with colour combination and get up which is colourable imitation/substantial reproduction of the appellants' mark 'Andhra Hosiery' and this constitutes *infringement of the appellants' copyright* in the said label.

I.A.No.411 of 2018 and its dismissal on 09.03.2018

13. Along with the suit, the appellants had filed I.A.No.411 of 2018 for an *ad interim* injunction under Order XXXIX Rules 1 and 2 of C.P.C. restraining the respondents from running shop under trade name 'New Andhra Hosiery' or use any mark which is identical or deceptively similar to the appellant's mark 'Andhra Hosiery' as prefix or suffix, using the 'New Andhra Hosiery' label in House No.1-1-252, Ground Floor, Main Road, Chikkadpally, Hyderabad or at any other place till the disposal of the suit.

14. In that application, the appellants contended that respondents were using the trade name 'New Andhra Hosiery'.

15. The respondents, however, contended that they are using the trade name 'New Andhra Hosiery Exclusive'.

16. The Court below dismissed I.A.No.411 of 2018 on 09-03-2018 observing that in the prayer portion in the I.A., the appellants had not mentioned the suffix 'Exclusive' and they had only sought an injunction against use of trade mark / trade name 'New Andhra Hosiery', and therefore relief cannot be granted to them.

Fresh application under Order XXXIX Rules 1 and 2 of C.P.C., i.e., I.A.No.697 of 2018 filed by the appellants :

17. In view of the said set back, the appellants filed I.A.No.697 of 2018 altering the prayer and seeking injunction against respondents from using or starting the shop under the trademark/name 'New Andhra Hosiery Exclusive' or any mark which is identical or deceptively same to the appellants mark 'Andhra Hosiery' as prefix or suffix, using the 'New Andhra Hosiery Exclusive' label which is a substantial and identical reproduction or a colorable imitation of the appellants 'Andhra Hosiery' label till disposal of the suit, by reiterating the contents of the plaint.

Counter filed by respondents in I.A.No.697 of 2018

18. In the counter-affidavit filed by respondents, it is contended that the appellants had no *locus* to file the I.A. since the appellants had not filed any documents that they have a registered brand 'Andhra Hosiery'; the

relief of injunction simpliciter cannot be granted in the suit without seeking the relief of declaration particularly when the appellants do not own any registered mark in their favour. It is also urged that the disposal of I.A.No.411 of 2018 on 09-03-2018 makes the said order binding on appellants and no relief can be granted to the appellants in I.A.No.697 of 2018. Other contentions on merits were also raised.

The order dt.25.03.2019 in I.A.No.697 of 2018

19. By order dt.25-03-2019, the Court below dismissed I.A.No.697 of 2018 on the ground that the appellants' mark is not proved to be a registered trade mark and that appellants cannot maintain any injunction application for infringement of its trademark.

20. The other ground given for dismissing the appellants' I.A.No.697 of 2018 by the Court below is that I.A.No.411 of 2018 had been dismissed on 09-03-2018 and the said order had not been challenged by the appellants.

The consideration by this Court :

21. The first ground mentioned in the order of the Court below cannot be sustained because the entire suit of the appellants is based *not* on a registered trade mark; they are not seeking injunction against infringement of a registered trade mark; they are basing the suit on the basis of plea of passing off; and law permits the appellants to seek injunction alleging that respondents are passing off their goods or business as that of the appellants.

22. The second ground mentioned in the order of the Court below is also unsustainable because the said I.A.No.411 of 2018 was not dismissed on merits, but it was only dismissed on the ground that prayer in the I.A. was defective. There was no adjudication in the said I.A. on merits of the contentions of the parties.

23. In this view of the matter, we are of the opinion that the impugned order cannot be sustained.

24. Accordingly, C.M.A. is allowed; the order dt.25-03-2019 in I.A.No.697 of 2018 in O.S.No.137 of 2018 of the IX Additional Chief Judge, City Civil Court, Hyderabad is set aside and the said I.A. is remitted back along with the suit and other I.A.s by way of transfer, in exercise of the power conferred on this Court under Section 24 C.P.C. read with Article 227 of the Constitution of India, to the Court of Chief Judge, City Civil Court, Hyderabad; and the Court of the Chief Judge, City Civil Court, Hyderabad shall consider the said I.A.No.697 of 2018 and decide it as well as other I.A.s and the suit O.S.No.137 of 2018 in accordance with law. The said I.A. shall be decided, after hearing both sides, within four (04) weeks. No costs.

25. In view of the above order, the interim order granted on 08-08-2019 in I.A.No.1 of 2019 in C.M.A.No.702 of 2019 is set aside, and the Contempt Case is closed. No costs.

26. Pending miscellaneous petitions, if any, shall stand closed.

M.S.RAMACHANDRA RAO, J

Date : 24-01-2020
Vsv

