



IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

MONDAY, THE 27TH DAY OF JUNE 2022

THE HON'BLE MR. JUSTICE SENTHILKUMAR RAMAMOORTHY

A.No.1627 of 2022

in

C.S.No.131 of 2021

Hatsun Agro Product Ltd.,
Having registered office at
No.1/20-A, Rajiv Gandhi Salai (OMR)
Karapakkam, Chennai -600097.

And also carrying on its business at
Old No. AD-83/New No.AD13,
Anna Nagar, Opp.: IOB Towers Branch,
Chennai – 600 040.

Represented by its authorized signatory
Mr.P.Sivasakthivel.

...Plaintiff

-Vs-

1.M/s.Arogya Sukh,
a partnership firm,
represented by its partners
Mr.Ganesh Chaudhary & Mrs.Khushboo Chaudhary

2.Mr.Ganesh Chaudhary,
A Partner of
M/s.Arogya Sukh,

3.Mrs.Khushboo Chaudhary
A Partner of
M/s. Arogya Sukh,

Defendant No.1 to 3



all having office at
1-1-1/8 to 10, 11, 12, 14 & 16,
Shop No. 6, Golkonda 'X' Roads,
Hyderabad – 500 020.

...Defendants

A.No.1627 of 2022 :-

1.M/s.Arogya Sukh,
a partnership firm,
represented by its partners
Mr.Ganesh Chaudhary & Mrs.Khushboo Chaudhary

2.Mr.Ganesh Chaudhary,
A Partner of
M/s.Arogya Sukh,

3.Mrs.Khushboo Chaudhary
A Partner of
M/s.Arogya Sukh,

all having office at
3-5-784/2/8/A, Cellar, Behind SBI Bank
Opp. Parda Gate, King Koti,
Hyderabad-500029.

... Applicants

Vs.

Hatsun Agro Product Ltd.,
Having registered office at
No.1/20-A, Rajiv Gandhi Salai (OMR)
Karapakkam, Chennai -600097.

And also carrying on its business at
Old No. AD-83/New No.AD13,
Anna Nagar, Opp.: IOB Towers Branch,
Chennai – 600 040.

Represented by its authorized signatory
Mr.P.Sivasakthivel.

... Respondent

Application praying that this Hon'ble Court be pleased to pass a



holding, that a generic and a common word 'AROKYA' per se, can not constitute a mark or a trademark both in common law and also in terms of the provisions of the Trademarks Act 1999.

This Application coming on this day before this court for hearing, the court made the following order:-

The defendants in the suit have presented this application for a summary judgment dismissing the suit as not maintainable.

2. The admitted position is that both the plaintiff and the first defendant are engaged in the business of manufacturing and marketing dairy products. The first defendant is a partnership firm and the second and third defendants are its partners. The suit was filed for relief in respect of alleged trademark infringement and passing off. After the suit was filed, the defendants agreed to make changes to the marks used on their goods but did not agree to change the trade name.

3. The applicants have presented this application on four grounds. The principal ground canvassed by the applicants is that the mark “Arogya” is a generic mark because the word 'Arogya' means health or wellness. Consequently, the applicants assert that the said mark falls within



Trade Marks Act, 1999 (the Trade Marks Act). According to the applicants,

the mark 'Arogya', when used in relation to dairy products, indicates the quality or the intended purpose of the products. In support of the contention that no protection should be accorded to such a mark, the applicants rely on the judgment of the Division Bench of the Calcutta High Court in *Chandra Bhan Agarwal & Another v. Arjundas Agarwal & Others* CDJ 1979 Cal HC 137, and, in particular, paragraphs 15 to 20 thereof, wherein the Calcutta High Court concluded that no monopoly should be granted over the word 'Dora' by virtue of obtaining a registration in respect thereof. Likewise, the applicants assert that the plaintiff is not entitled to monopolize the word 'Arogya' in relation to dairy products. The second contention of the applicants is that mere registration of a mark does not constitute a bar to challenge the validity of such mark on the ground that the mark is not distinctive. In particular, the applicants assert that, except for the right to sue for infringement, no new right is conferred merely by virtue of registration. The third contention is that the applicants/defendants are not using the mark 'Arogya' as a trademark, and that they use the mark 'Being Desi' in relation to their goods. The words 'Arogya Sukh' are only used as the trade name of the applicants and not as a trademark. The fourth ground on which the application is presented is that there are several



which/who use the word 'Arogya' as part of their corporate or trade names.

As such, it is contended that the plaintiff is not entitled to the relief prayed for. For all these reasons, the applicants contend that the application for summary judgment is liable to be allowed because the plaintiff has no real prospect of succeeding on the suit claim.

4. The respondent/plaintiff refutes all the above contentions. The respondent asserts that it has used the mark 'Arogya' from the year 1994. Some time in the year 1996, the respondent obtained registrations in respect of device marks containing the element or word 'Arogya'. As regards the registration of the word mark "Arogya", it is stated that the respondent applied for such registration for the first time on 31.01.2013 on the strength of being a user of the word mark for about 19 years. The next contention of the respondent is that the use of the trade name 'Arogya Sukh' by the applicants triggers the cause of action to sue the applicants for trademark infringement in terms of Section 29 (5) of the Trade Marks Act.

5. In response to the contention that the mark 'Arogya' lacks distinctiveness and is not entitled to protection, the respondent relied on the judgments of the Delhi High Court in *Caterpillar Inc. v. Mehtab Ahmed*



14 thereof, wherein trademarks were classified into six categories. The respondent also relied, in this regard, on the judgment in *Abercrombie & Fitch Company v. Hunting World, Incorporated*: MANU/FESC/0340/1976, wherein trademarks were classified into four categories. By referring to the said categories, the respondent asserted that the mark 'Arogya', when used in relation to dairy products, is not a generic mark inasmuch as it does not refer to a product category or genus consisting of multiple species. Instead, it is contended that it qualifies either as a descriptive or suggestive mark. Even if it is treated as a descriptive mark, the respondent contends that by virtue of long use, the mark has acquired distinctiveness and a secondary meaning. With regard to the entitlement to relief in terms of Section 29 (5) of the Trade Marks Act, the respondent relied on the judgments of the Bombay High Court in *Raymond Ltd. v. Raymond Pharmaceuticals Ltd* [2010 (7) Mh.L.J.646], *Bloomberg Finance LP v. Praful Saklecha & Others* (2014) 207 DLT 35 and *Cipla Ltd. v. Cipla Industries Ltd. and Another* 2017 (69) PTC 425 (Bom).

6. In response to the last contention with regard to the use of the mark 'Arogya' by several other entities, the respondent submitted that the same is clearly a matter for trial. Without prejudice, the respondent relied



2008 SCC OnLine Del 1744 to the effect that a plaintiff is not expected to sue every infringer and that the plaintiff may choose not to litigate against those who do not have much impact on its business. The respondent also relies on the judgment in *Express Bottlers Services Private Ltd. v. Pepsico Ltd.* MANU/WB/0158/1988 with regard to the requirement of evidence to prove substantial use by third parties in order to succeed in the defence of *publici juris*. For all these reasons, the respondent submitted that this application is liable to be rejected.

7. Upon consideration of the rival contentions, at the outset, it should be noticed that the applicants for summary judgment should discharge the burden of establishing that the counter party has no real prospect of succeeding. In this case, therefore, the applicants should discharge the burden of establishing that the plaintiff has no real prospect of succeeding in the action for trademark infringement and passing off.

8. Turning to the grounds on which the application was presented, the first ground is on the basis of Section 9(1)(b) of the Trade Marks Act. Section 9 (1) is subject to the proviso thereto, which is as under:-

“Provided that a trade mark shall not

be refused registration if before the date of



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application for registration it has acquired a distinctive character as a result of the use made of it or is a well-known trade mark.”

By virtue of the proviso to section 9(1), it is possible for the intending registrant of the trademark to plead distinctiveness through use of the mark prior to its registration. In this case, the respondent/plaintiff asserts that the word mark 'Arogya' was in use from the year 1994. After using the word mark for about 19 years, an application for registration thereof was presented on 31.01.2013. Pursuant thereto, the said registration was granted. Therefore, the respondent/plaintiff has a reasonable basis to contend that the mark 'Arogya', when used in relation to dairy products, even if construed as a descriptive mark falling under the second category as per ***Abercrombie & Fitch Company***, has attained distinctiveness. Besides, Section 32 of the Trade Marks Act enables a registrant of a trademark to prove distinctiveness through use. The respondent/plaintiff has the basis to assert distinctiveness through post-registration use also. Thus, on this ground, it cannot be concluded that the respondent has no real prospect of succeeding in the suit. While on this issue, it should be borne in mind that no definitive finding is given, at this juncture, on the distinctiveness of the respondent/plaintiff's marks, and the above findings are tentative and for the limited purpose of determining whether the respondent/plaintiff has a reasonable prospect of



success in the suit.

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9. The second contention of the applicants that mere registration does not preclude the applicants from contending that the mark is not distinctive is a valid contention. However, this should be balanced against the *prima facie* validity extended to trademarks by virtue of registration. In other words, the applicant would have to effectively rebut the *prima facie* evidence of validity in order to succeed. The third ground of the applicants is that the mark 'Arogya' is not being used as a trademark by the applicants and is only used as a trade name. Section 29(5) of the Trade Marks Act enables a registered proprietor of a trademark to sue for infringement if such registered trademark is used as a trade name provided such trade name is used in relation to goods or services in respect of which registration was granted. The respondent/plaintiff has obtained registrations under various classes, including class 29, which covers dairy products, and the applicants are engaged in the manufacture and sale of ghee and other dairy products. Therefore, the requirement of Section 29 (5) is *prima facie* satisfied. The last ground on which the application was founded is the extensive use of the word 'Arogya' as part of the corporate or trade name of various entities. In response thereto, the respondent/plaintiff stated that many such entities are defunct and several others are engaged in the pharmaceutical business.



These are aspects which can be examined only in the course of trial and do not constitute a valid ground for a summary judgment.

10. In view of the above discussion and analysis, it is clear that the applicants/defendants have failed to establish that the plaintiff has no real prospect of succeeding on the suit claim. Therefore, the application is liable to be rejected. Hence, A.No.1627 of 2022 is dismissed without any order as to costs.

Sd./-SKRJ.

27/06/2022

//Certified to be true copy//

Dated at Madras this the day of 2022.

COURT OFFICER(O.S.)

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EVK 30/06/2022