

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

TMA/1/2023

GIRNAR FOOD AND BEVERAGES PVT. LTD.
VS
THE REGISTRAR OF TRADE MARKS AND ANR.

BEFORE:

The Hon'ble JUSTICE RAVI KRISHAN KAPUR

Date : 25th April, 2023

Appearance:

Mr. S. Dasgupta, Adv.

Mr. S. Prasad, Adv.

Mr. P. Bose, Adv.

Mr. N. Banerjee, Adv.

Mr. Nandlal Singhania, Adv.

Ms. Rini Bhattacharya, Adv.

The Court:-

1. Despite repeated service, the respondent no.2 remains unrepresented.
2. The appellant assails an order dated 15th November, 2022 passed by the Deputy Registrar of Trade Marks, granting registration in favour of the respondent no.2 in respect of the mark "LEONE" with the device of a lion and thereby rejecting the opposition filed by the appellant.
3. Both the appellant and the respondent no.2 are engaged in similar business i.e. manufacture, sale and distribution of tea.

4. In or about 2006, the respondent no.2 had filed an application for registration of a mark comprising of the word “LEONE” with the device of a lion.
5. Pursuant to publication of the proposed mark in the Trade Mark Journal, the appellant filed its opposition to the said application, *inter alia*, alleging that the appellant has been using its registered mark consisting of the words “LION HEAD” having a device of a lion in India since 31st December, 1996. In this connection, the appellant had also relied on various photographs, invoices, bills which conclusively demonstrate that the appellant is a prior user of its mark since 31st December, 1996. The appellant is also the registered proprietor of the mark “LION HEAD” with the device of ‘Lion’. Such registration had been granted to the appellant on 11th February, 2004. Incidentally, the appellant is also the registered proprietor and user of another mark consisting of the word “KESARI” having a pictorial depiction of the face of a lion since 2004. The appellant also relies on impressive sales and advertising figures for both its products.
6. It is contended that, no document has been filed by the respondent no.2 to demonstrate that the respondent no.2 has been using the impugned mark since August, 1994. The invoices disclosed by the respondent no.2 all pertain to the year 2006 and not prior thereto. There is no other evidence adduced by the respondent no.2. In such circumstances, the appellant

seeks setting aside of the impugned order granting registration of the impugned mark in favour of the respondent no.2.

7. Admittedly, both the appellant and the respondent no.2 are engaged in the same trade. The use of the essential and dominant feature of the appellant's mark Lion Head by the respondent no.2 would inevitably lead to deception and confusion in the mind of the public. The likelihood of customers being confused by words with similar meanings or the same import necessitates careful scrutiny of marks with similar words. Ordinarily, there are cues or even pervasive psychological imagery in the mind associated with brands. As a result, similarity of meanings in brand names serves to outweigh the minor visual or phonetic dissimilarities which may be present. Hence, similarity in meanings or significance alone is sufficient to indicate a likelihood of confusion. (*The Gillette Company LLC vs. Tigaksha Metallica Private Ltd.*, 2018 SCC OnLine Del 9749).
8. Moreover, if traders attempt to deceive by misspelling or distorting any word in any shape or form, it being obvious what word they are in fact intending to imitate, such marks are liable to be rejected. The test is to see to what extent the mark was calculated to deceive. Use of words, in any other language which may be a colourable imitation of words in the language from which they were in fact taken would also have to be examined to see if the use of the words in a foreign language was with an intention to deceive. (*J.C. Eno. Ltd. vs. Vishnu Chemical Co.*, 1940 SCC OnLine Bom 130).

9. In the facts of this case, there is a strong possibility of any customer being deceived into buying the product of the respondent no.2 instead of the appellant. A mark is deemed to be deceptively similar to another mark if it so nearly resembles the other mark as to be likely to deceive or cause confusion. No man is entitled to represent his goods as being the goods of another man. In the facts of this case, there is every likelihood of the customers and the dealers being given the product of the respondent no.2 when the customers really intend to buy the product of the appellant. There is also phonetic similarity in the two marks as also depiction of a lion on both the marks which are likely to confuse and deceive the ultimate purchaser.
10. In light of the above, it is clear that the respondent no.1 ought to have considered the mark of the respondent no.2 in the context of such mark being a mere lifting of the broad and essential features of the appellant's mark. While ordinary people may not know the meaning of the word "LEONE", the phonetic similarity as also the depiction of a lion in both the marks is likely to deceive purchasers who are more likely to be careless than otherwise and may not scrutinize every detail on the mark to distinguish the appellant's product from that of the respondent no.2. Indisputably, there is sufficient evidence which the appellant has been able to adduce to show that the appellant is a prior user.
11. On a perusal of the impugned order, it is apparent that the respondent authorities have also failed to give any reasons to justify the grant of

registration of the impugned mark in favour of the respondent no.2. The impugned order has been passed without considering the evidence in support of the claim of the respondent no.2. The claim of the respondent no.2 that it was claiming user since 30 August, 1994 is unsubstantiated and bereft of any evidence. There is nothing on record to demonstrate that the respondent no.2 had been using the impugned mark since 31 August, 1994. Moreover, the finding that there is no similarity between the appellant's mark and the mark of the respondent no.2, is also incorrect. On the contrary, the dominant and essential features of both the marks would inevitably lead to confusion and deception.

12. In view of the aforesaid, the impugned order is unsustainable and is set aside. There shall be an order in terms of prayer (c) of the Notice of Motion. With the aforesaid directions, TMA/1/2023 stands allowed.

(RAVI KRISHAN KAPUR, J.)