

OIP-10

IN THE HIGH COURT AT CALCUTTA
ORIGINAL SIDE
(Intellectual Property Rights Division)

IP-COM/45/2024

CABCON INDIA LIMITED
VS
GODHA CABCON AND INSULATION LIMITED

BEFORE:

The Hon'ble JUSTICE RAVI KRISHAN KAPUR

Date : 5th March, 2025.

Appearance:
Mr. Shuvasish Sengupta, Adv.
Mr. Balarko Sen, Adv.
Ms. Pritha Basu, Adv.
Ms. Akansha Chopra, Adv.
Ms. Siddhi Agarwal, Adv.
..for the plaintiff/petitioner

The Court: The suit is for infringement, passing off and for consequential reliefs.

At the outset, it is submitted by the plaintiff that, the prayer for damages is not being pursued and the same stands abandoned. Despite service of the Writ of Summons, the defendant has chosen not to appear or file the Written Statement within the mandatory 120 day period from the date of receipt of the Summons.

Briefly, the plaintiff is, inter alia, engaged in the business of manufacturing, trading and selling of aluminium conductors, cables, electrical items and similar products. Originally, the plaintiff had set up a factory for manufacturing conductors in Kolkata as far back as in 1993 and a second unit in 2006 at Dhulagarh Industrial Park, Howrah also for catering to the growing demand for aluminium conductors.

The plaintiff is also a recognized and established approved vendor for supply of conductors and cables with reputed power utility companies like Power Grid Corporation of India, NTPC Limited, National Hydro Electric State Electricity Transmission and other distribution companies. The plaintiff had also in 2018 been felicitated by the Power Grid Corporation of India under the category of Micro, Small & Medium Enterprises (MSME) Vendor-Conductors. The annual turnover of the plaintiff was approximately Rs.726 crores for the period December, 2023.

In or about 1991, the plaintiff had adopted and coined the mark “CABCON” and had been using the same as its corporate name. Subsequently, the plaintiff also started using the said mark for its products. The plaintiff has also spent a considerable amount on sales and promotional expenses. The plaintiff has also adopted the domain name comprising of mark “CABCON”. The domain name as registered by the plaintiff is www.cabconindia.com. In such circumstances, the plaintiff has had a presence for more than 15 years in the industry. The plaintiff has also obtained registration of the mark “CABCON” under Classes 6 and 9 being Trade Mark application no. 1009619 and 1009618 respectively. Apart from the word mark, the plaintiff has also obtained registration of the device mark “CABCON”.

In or about October, 2023, the plaintiff was informed that the defendant had adopted the mark “CABCON” as part of its corporate name and had been carrying on identical business activities as that the plaintiff. Upon coming to learn of this fact, the plaintiff by a notice dated 30 October, 2023 requested the defendant to cease-and-desist claiming that the name “CABCON” or “GODHA CABCON” are deceptively similar and strikingly identical to the mark of the

plaintiff. Despite receipt of the above notice, the defendant has chosen not to reply to the same. It is also alleged that the defendant has been using the registered domain name of the plaintiff by replacing the same as www.godhacabcon.com.

In the above background, the plaintiff was constrained to file the instant suit. Upon filing of the suit, by an *ad interim* order dated 11 March, 2024, a Co-ordinate Bench had granted restraint orders on the defendant, inter alia, clarifying that the defendant could use the mark “GODHA” only without the use of the word “CABCON”. The *ad interim* order was confirmed on 22nd April, 2024. Despite service, the defendant remained unrepresented throughout this proceeding.

In view of the above, it is submitted on behalf of the plaintiff that in view of the provision under Order VIII Rule 10 of the Code of Civil Procedure, 1908, the plaintiff is entitled to appropriate reliefs. In support of such contentions, the plaintiff also relies on the decision in (2012) 5 SCC 265 [*C.N.Ramappa Gowda vs. C.C. Chandregowda And Anr.*], (2023) SCC OnLine Cal 3781 [*Shyam Sel And Power Limited vs. Atibir Industries Company Limited*], (2022) SCC OnLine Cal 2516 [*Kaira District Cooperative Milk Produces Union Ltd and Anr. Vs. Maa Tara Trading Co. And Others*], (2018) SCC OnLine Del 11666 [*The Christian Broadcasting Network vs. CBN News Private Limited*] and (2016) SCC OnLine Del 5957 [*Dole Food Company & Ors. Vs. Dole Foods Private Ltd. & Ors.*]

In *C.N. Ramappa Gowda vs. C.C. Chandregowda And Another* (*Supra*) it has been held as follows:

“25. We find sufficient assistance from the apt observations of this Court extracted hereinabove which has held that the effect of non-filing of the written statement and proceeding to try the suit is

clearly to expedite the disposal of the suit and is not penal in nature wherein the defendant has to be penalized for non-filing of the written statement by trying the suit in a mechanical manner by passing a decree. We wish to reiterate that in a case where written statement has not been filed, the Court should be a little more cautious in proceeding under Order 8 Rule 10 CPC and before passing a judgment, it must ensure that even if the facts set out in the plaint are treated to have been admitted, a judgment and decree could not possibly be passed without requiring him to prove the facts pleaded in the plaint.

26. It is only when the Court for recorded reasons is fully satisfied that there is no fact which needs to be proved at the instance of the plaintiff in view of the deemed admission by the defendant, the Court can conveniently pass a judgment and decree against the defendant who has not filed the written statement. But, if the plaint itself indicates that there are disputed questions of fact involved in the case arising from the plaint itself giving rise to two versions, it would not be safe for the Court to record an ex parte judgment without directing the plaintiff to prove the facts so as to settle the factual controversy. In that event, the ex parte judgment although may appear to have decided the suit expeditiously, it ultimately gives rise to several layers of appeal after appeal which ultimately compounds the delay in finally disposing of the suit giving rise to multiplicity of proceedings which hardly promotes the cause of speedy trial.”

In the *Christian Broadcasting Network, INC vs. CBN News Private Limited* (2018) SCC OnLine Del 11666, it has been held as follows:

13. The scope of Order 8 Rule 10 CPC in commercial suits particularly under the New Commercial Courts, Commercial Division and Commercial Appellate Division of the High Court Act, 2015 has been examined by this court in *Nirog Pharma Pvt. Ltd. v. Umesh Gupta*, (2016) 235 DLT 354. This Court held as follows:

“11. Order VIII Rule 10 has been inserted by the legislature to expedite the process of justice. The courts can invoke its provisions to curb dilatory tactic, often resorted to by defendants, by not filing the written statement by pronouncing judgment against it. At the same time, the courts must be cautious and judge the contents of the plaint and documents on record as being of an unimpeachable character, not requiring any evidence to be led to prove its contents.

.....

28. The present suit is also a commercial suit within the definition of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 and it was the clear intention of the legislature that such cases should be decided expeditiously and should not be allowed to linger on. Accordingly, if the defendant fails to pursue his case or does so in a lackadaisical manner by not filing his written statement, the courts should invoke the provisions of Order VIII Rule 10 to decree such cases.”

The plaintiff has also adopted the domain name of the identical word mark “CABCON” which had been registered on 26th September, 2008. The plaintiff has since been using the mark “CABCON” openly, continuously and uninterruptedly and is admittedly the prior user and adopter.

The defendant is admittedly in the same trade and field of activity as that of the plaintiff. The defendant has also sought to use the mark “CABCON” and “GODHA CABCON” which is strikingly similar and deceptively identical to the mark of the plaintiff. Despite receipt of the cease-and-desist notice dated 30th October, 2023, the defendant has chosen not reply to the same. The conduct of the defendant in not entering appearance in the suit nor defending the same nor filing any written statement demonstrates that the defendant has no defence to the claim of the plaintiff.

In Cadila Health Limited vs. Cadila Pharmeceuticals Ltd. (2001) 5 SCC

73 it has been held as follows:

35. Broadly stated, in an action for passing-off on the basis of unregistered trade mark generally for deciding the question of deceptive similarity the following factors are to be considered:

- (a) The nature of the marks i.e. whether the marks are word marks or label marks or composite marks i.e. both words and label works.
- (b) The degree of resemblance between the marks, phonetically similar and hence similar in idea.
- (c) The nature of the goods in respect of which they are used as trade marks.
- (d) The similarity in the nature, character and performance of the goods of the rival traders.

- (e) The class of purchasers who are likely to buy the goods bearing the marks they require, on their education and intelligence and a degree of care they are likely to exercise in purchasing and/or using the goods.
- (f) The mode of purchasing the goods or placing orders for the goods.
- (g) Any other surrounding circumstances which may be relevant in the extent of dissimilarity between the competing marks.

The impugned mark is deceptively similar and closely resembles the mark of the plaintiff. There is every likelihood of confusion and deception. There is also a strong case of passing off which has been made out. There is bound to be misrepresentation if the defendant is permitted to carry on its business activities using the impugned mark.

In *Laxmikant V. Patel vs. Chetanbhai Shah & Anr.* (2002) 3 SCC 65 it has been held as follows:

8. *It is common in trade and business for a trader or a businessman to adopt a name and/or mark under which he would carry on his trade or business. According to Kerly (Law of Trade Marks and Trade Names, 12th Edn., para 16.49), the name under which a business trades will almost always be a trade mark (or if the business provides services, a service mark, or both). Independently of questions of trade or service mark, however, the name of a business (a trading business or any other) will normally have attached to it a goodwill that the courts will protect. An action for passing-off will then lie wherever the defendant company's name, or its intended name, is calculated to deceive, and so to divert business from the plaintiff, or to occasion a confusion between the two businesses. If this is not made out there is no case. The ground is not to be limited to the date of the proceedings; the court will have regard to the way in which the business may be carried on in the future, and to its not being carried on precisely as carried on at the date of the proceedings. Where there is probability of confusion in business, an injunction will be granted even though the defendants adopted the name innocently.*

13. *In an action for passing-off it is usual, rather essential, to seek an injunction, temporary or ad interim. The principles for the grant of such injunction are the same as in the case of any other action against injury complained of. The plaintiff must prove a prima facie case, availability of balance of convenience in his favour and his suffering an irreparable injury in the absence of grant of injunction. According to Kerly (ibid, para 16.16) passing-off cases are often cases of deliberate and intentional misrepresentation, but it is well settled that fraud is not a necessary element of the right of action, and the absence of an intention to deceive is not a defence, though proof of fraudulent intention may materially assist a plaintiff*

in establishing probability of deception. Christopher Wadlow in *Law of Passing-Off* (1995 Edn., at p. 3.06) states that the plaintiff does not have to prove actual damage in order to succeed in an action for passing-off. Likelihood of damage is sufficient. The same learned author states that the defendant's state of mind is wholly irrelevant to the existence of the cause of action for passing-off (*ibid*, paras 4.20 and 7.15). As to how the injunction granted by the court would shape depends on the facts and circumstances of each case. Where a defendant has imitated or adopted the plaintiff's distinctive trade mark or business name, the order may be an absolute injunction that he would not use or carry on business under that name (Kerly, *ibid*, para 16.97).

In *Satyam Infoway Ltd. vs. Sifynet Solutions (P) Ltd* (2004) 6SCC 146 it has been held as follows.

13. The next question is, would the principles of trade mark law and in particular those relating to passing off apply? An action for passing off, as the phrase “passing off” itself suggests, is to restrain the defendant from passing off its goods or services to the public as that of the plaintiff's. It is an action not only to preserve the reputation of the plaintiff but also to safeguard the public. The defendant must have sold its goods or offered its services in a manner which has deceived or would be likely to deceive the public into thinking that the defendant's goods or services are the plaintiff's. The action is normally available to the owner of a distinctive trade mark and the person who, if the word or name is an invented one, invents and uses it. If two trade rivals claim to have individually invented the same mark, then the trader who is able to establish prior user will succeed. The question is, as has been aptly put, who gets these first? It is not essential for the plaintiff to prove long user to establish reputation in a passing-off action. It would depend upon the volume of sales and extent of advertisement.

14. The second element that must be established by a plaintiff in a passing-off action is misrepresentation by the defendant to the public. The word misrepresentation does not mean that the plaintiff has to prove any mala fide intention on the part of the defendant. Of course, if the misrepresentation is intentional, it might lead to an inference that the reputation of the plaintiff is such that it is worth the defendant's while to cash in on it. An innocent misrepresentation would be relevant only on the question of the ultimate relief which would be granted to the plaintiff [*Cadbury Schweppes v. Pub Squash*, 1981 RPC 429 : (1981) 1 All ER 213 : (1981) 1 WLR 193 (PC); *Erven Warnink v. Townend*, 1980 RPC 31 : (1979) 2 All ER 927 : 1979 AC 731 (HL)] . What has to be established is the likelihood of confusion in the minds of the public (the word “public” being understood to mean actual or potential customers or users) that the goods or services offered by the defendant are the goods or the services of the plaintiff. In assessing the likelihood of such confusion the courts must allow for the “imperfect recollection of a person of ordinary memory” [*Aristoc v. Rysta*, 1945 AC 68 : (1945) 1 All ER 34 (HL)] .

15. *The third element of a passing-off action is loss or the likelihood of it.*

The fact that the defendant has used the name “GODHA CABCON” as its domain name also demonstrates the dishonest intent of the defendant. Unless restrained, there is bound to be dilution of the mark of the plaintiff. The case of the plaintiff is of an unimpeachable nature and there is no factual controversy which requires proof.

In such circumstances, the plaintiff has been able to demonstrate a strong prima facie case on merits. The balance of convenience and irreparable injury is also in favour of orders being passed as prayed for in the plaint.

In view of the above, there shall be a decree in terms of prayers (a), (b) and (c) of the plaint.

With the above directions, IP-COM/45/2024 stands disposed of.

Let the decree be drawn up expeditiously.

(RAVI KRISHAN KAPUR, J.)