

National Carbon Co. (India) Ltd. vs Raj Kumar And Anr. on 21 September, 1953

Equivalent citations: AIR1954ALL218, AIR 1954 ALLAHABAD 218

JUDGMENT

Agarwala, J.

1. This is a plaintiff's appeal arising out of an order made on an application for the grant at an interim injunction. The plaintiff-appellant, a limited Company, is a manufacturer and seller of flash lights, dry cell batteries for use in flash lights and other articles. It carries on its business throughout India. It is the owner of the trade mark "Eveready" which is registered in the register of trade marks under Nos. 6727 and 6728. The "Eveready" flash lights which are in dispute in the present case have impressed on their bottom end caps the word "Eveready". The trade mark "Eveready" is in block capital letters arranged in a distinctive pyramidal form. There are five groups of distinctive parallel indentations each group comprising of three parallel lines running vertically on both sides of the trade mark. The said groups are spaced and arranged in a distinctive manner with the words "made in U. S. A." appearing underneath the lower group of indentations. The shell of flash lights has also its own scheme of colour and chromium plating.

2. The defendants are the manufacturers of flash lights with the trade mark 'Lit Ready' em-bossed upon them and have placed them on the market for sale. The plaintiff's case is that the get-up of the defendants' flash light cases bears a close resemblance to the get-up of the plaintiff's flash light cases and that the ignorant and illiterate section of the public in India is very likely to be confused and the goods of the defendants may pass off as the goods of the plaintiff causing great injury to the plaintiff. The plaintiff, therefore, sued for the grant of a permanent injunction restraining the defendants from selling the disputed flash lights in the market and for other reliefs and also applied for a temporary injunction to the same effect.

3. The defendants' case is that the defendants' flash lights do not infringe the plaintiff's trade mark and cannot be taken to pass off as the plaintiff's good.

4. The plaintiff's application for the grant of a temporary injunction has been partly allowed by the lower Court. That Court has directed the defendants either not to place the disputed flash lights on the market or if they did so, to disclose the sales thereof in detail. The defendants were further directed that they should not manufacture any more 'Litready' torch lights unless they were willing to show on an affidavit to that Court before manufacturing as to how many flash lights they propose to manufacture and when. The learned Judge in the course of his judgment observed that the petitioner could not claim any property in the shell of the flash lights as shells similar to those

manufactured by the plaintiff were manufactured by other manufacturers and were for sale in the market. Moreover, the fact that there was phonetic similarity between 'EveReady' and 'LitReady' would not invest the plaintiff with a right to claim an interim injunction. Against this order the plaintiff has come up to this Court in appeal.

5. It has been urged by the learned counsel for the plaintiff-appellant that the learned Judge of the Court below was not correct when he made observations with regard to the phonetic similarity being of no avail to the plaintiff and with regard to the plaintiff not possessing any property right in the shell of the flash lights. Learned counsel has urged that the suit was not merely for the breach of the trade mark but also for the damage caused to the plaintiff by the defendants passing off his goods as those of the plaintiff.

6. In our opinion, what we have to see in a case of this kind, when an interim injunction is sought during the pendency of the suit before the rights of the parties are finally decided, is first whether a 'prima facie' case has been made out by the plaintiff in respect of his claim, and secondly, whether the balance of convenience demands that the injunction should be issued.

7. So far as the 'prima facie' case is concerned, without committing ourselves finally in the matter, we have been impressed by the fact that the 2 flash lights in question, viz., that of the plff. & that of the defts are very much similar in appearance. Their colour design, chromium plating & the make up of the bottom end are similar. The only differences that one can see on a close examination of the two flash lights are, firstly, that while in the plaintiff's torch there is the word 'Eve-Ready'; in the defendants' torch there is the word 'LitReady'. The portion 'Ready' is impressed exactly in the same form and style in both the torches, that is to say, the difference is only in 'Eve' and 'Lit'. The indentations on the upper and the lower ends of the words 'Eveready' and 'Lit-ready' are almost the same.

The words 'Eveready' and 'Litready' are in the same pyramidal design and of the same shape and form and measurements. The only other difference on the bottom cap of the torch is in respect of the words 'made in U. S. A.' which appear in the plaintiff's torch while we find the words 'made in India' in the defendants' torch. While a literate person may not be misled because he would perhaps read whether the word was 'Eveready' or 'Litready', an illiterate person is likely to be confused and misled by the whole shape and design of the defendants' torch. Without going further into this matter, we think that this is enough so far as the making out of a 'prima facie' case is concerned and we are satisfied that the plaintiff has made out a 'prima facie' case.

8. The balance of convenience, in our opinion, weighed heavily on the side of the plaintiff. The defendants are admittedly newcomers in the field. The defendants, according to what the lower Court has found, have manufactured only about 2,000 torches of the style in dispute, of which they have sold 1,000 and 1,000 remain with them unsold. The defendants do not claim that they have already established a name for their 'Lit-ready' torches in the market. On the other hand, it has not been contested before us that the 'Eveready' torches of the plaintiff are selling throughout India and are sold in large numbers. The mere fact that the defendants have undertaken to keep an account would not be a safeguard against a possible injury to the plaintiff's trade.

In -- 'Read v. Richardson', (1881) 45 LT 54 (A), on the defendants undertaking to keep an account, Jessel, M. R., refused an interlocutory injunction, it the Court of appeal granted it because, while the defendants had only recently commenced to use their mark, and their trade mark was admittedly not dependent on it, the plaintiffs had a large trade in connection with which they used a label alleged to be infringed, and their rights would have been irremediably and incalculably injured unless the injunction were granted, if their case should be established at the trial. (See Karly on Trade Marks. 6th Edition, p. 507).

9. To the same effect are the observations of Garth C. J, in -- 'Ralli v. Fleming', 3 Cal 417 at p. 424 (B):

"In this particular case I do not think that their keeping an account of sales would be a sufficient protection to the plaintiffs, because if the defendants were allowed to use these marks in the market for several months in order to sell their cloth, they would become as well known in the market as importers and sellers of the cloth as the plaintiffs; and so the very mischief which the injunction is intended to guard against would have been effected."

We, therefore, consider that this was a fit case in which a temporary injunction should have been issued. We, therefore, allow this appeal, set aside the order of the Court below and restrain the defendants, their servants and agents from selling the torch lights in dispute or manufacturing them during the pendency of the suit. We may make it clear that the observations that we have made in this case are not intended to influence the Court below in deciding the case on the merits at the final hearing of the case.

10. The plaintiff-appellant will have the costs of this appeal from the defendants-respondents.