

Anglo-French Drug Co., (Eastern) Ltd., Bombay v. M/s. Belco
Pharma (G. C. Mital, J.)

N.K.S.

Before S. P. Goyal and G. C. Mital, JJ.

ANGLO-FRENCH DRUG CO. (EASTERN) LTD., BOMBAY,—
Appellant.

versus

M/S BELCO PHARMA,—*Respondent.*

Regular First Appeal No. 919 of 1982.

March 22, 1984.

Trade and Merchandise Marks Act (XLIII of 1958)—Sections 2(1) (d) and 11(a)—Registered trade mark 'BEPLEX'—Goods subsequently sold by another firm under the trade mark 'BELPLEX'—The two trade marks—Whether phonetically and visually similar—Similarity in the trade marks—Whether likely to cause confusion in the minds of the purchasers of the goods.

Held. that if there is visual and phonetic resemblance or only phonetic resemblance in the two names, then the manufacturer who gets its trade mark registered first can restrain the other manufacturer from using the visually and phonetically similar name as its trade mark. The question whether the two trade marks are similar has to be decided on the facts of each case. The trade marks 'BEPLEX' and 'BELPLEX' are phonetically and visually similar and the goods manufactured by the defendant under the trade name of 'BELPLEX' are likely to be sold as the goods manufactured by the plaintiff having 'BEPLEX' as its, registered trade mark. The sellers and purchasers may also be confused and may consider the products manufactured under the trade mark of 'BELPLEX' to have been

manufactured by the plaintiff company and, therefore, the plaintiff is entitled to restrain the defendant from using a similar trade mark.

(Paras 9 and 14)

Regular First Appeal from the decree of the Court of the District Judge, Rohtak, dated the 29th day of January, 1982, dismissing the suit of the plaintiff with costs.

D. S. Nehra, Advocate, with Arun Nehra, Advocate, for the Appellant.

M. L. Mangla, Advocate, and Hemant Kumar Gupta, Advocate, for the Respondent.

JUDGMENT

Gokal Chand Mittal, J.

(1) Whether 'BEPLEX' and 'BELPLEX' can be said to be phonetically and visually similar and whether the similarity is likely to cause confusion in the minds of the purchasers, is the main point which arises for consideration in this appeal.

(2) The Anglo-French Drug Company (hereinafter called the plaintiff) got 'BEPLEX' registered as a trade mark on 18th May, 1945 and since then it has been manufacturing several medicines including Vitamin-B Complex tablets under the trade mark of 'BEPLEX'. Somewhere in the year 1974, M/S Belco Pharma (hereinafter called the defendant) started manufacturing medicines including Vitamin-B Complex tablets in the name of 'BELPLEX'. When this came to the notice of the plaintiff, they served notice on the defendant not to use 'BELPLEX' on their products as it was phonetically as also visually similar to their registered trade mark and was likely to cause confusion in the minds of the purchasers of the plaintiff's products. After exchanging some notices, the present suit was filed on 5th May, 1981 to restrain the defendant from using the name 'BELPLEX' on their products. The suit was contested and it was pleaded that there was no similarity in the two names and it was not a case in which the defendant should be restrained.

(3) On the contest of the parties, the following issues were framed:—

1. Does the suit lie against M/S Belco Pharma as alleged? OPP.

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2. In the plaintiff concern registered owner of trade mark 'BEPLEX' from 1943 onwards as alleged? OPP.
3. Is the defendant trying to pass off its manufacture of syrup 'BELPLEX' as preparation of the plaintiff manufactured and sold under its registered trade mark 'BEPLEX' aforesaid as alleged? OPP.
4. In case issues No. 3 is proved, has the defendant thereby caused loss to the plaintiff in business, good-will trade name and reputation as alleged? OPP.
5. In case issue Nos. 3 and 4 are proved, is the plaintiff concern entitled to prohibitory and mandatory injunctions, prayed for, against the defendant, its agent and servants as alleged? OPP.
6. In case issues Nos. 3 and 4 are proved, are the defendants liable to render accounts of profits earned by them through the sales aforesaid since May, 1978, as alleged? OPP.
7. Relief.

(4) After evidence was led, the trial Court by its judgment and decree, dated 29th January, 1982, came to the conclusion that 'BEPLEX' and 'BELPLEX' are in no way deceptively similar both on visual and phonetic tests and in coming to this conclusion, relied on *F. Hoffmann-ha Roche and Co. Ltd. v. Geoffrey Manners and Co. Private Ltd.*, (1). The decisions relied upon by the plaintiff were distinguished. As a consequence, the suit was dismissed. This is plaintiff's first appeal. This appeal was placed for hearing initially before me sitting singly and I considered that it was a case which should be decided by a larger Bench. That is how this appeal has been placed before us.

(5) After hearing, the learned counsel for the parties and on perusal of the record, we are of the considered view that 'BEPLEX' and 'BELPLEX' are phonetically and visually similar and thus the trade mark of the plaintiff is violated by the defendant by manufacturing goods under the trade name of 'BELPLEX'.

(6) In *Corn Products Refining Co. v. Shangrila Food Products Ltd.*, (2), the registered trade mark of the Company was 'GLUCOVITA', and it used to manufacture Glucose under that trade mark. Another concern started manufacturing biscuits in the name of 'GLUVITA'. Although the kind of products was entirely different, yet it was held that visually and phonetically the names were so similar as to cause deception in the minds of purchasers that the biscuits were manufactured by the concern which had 'GLUCOVITA' as its registered trade mark. The use of the word 'GLUVITA' was disallowed.

(7) In *K. R. Chinna Krishna Chettiar v. Sri Ambal and Co. and another*, (3) a snuff manufacturer got 'AMBAL' registered as the trade mark and later on, another snuff manufacturer wanted 'ANDAL' as the trade mark. It was held that although visually the packings, labels etc. were dissimilar, yet there was close affinity of sound. Due to phonetic resemblance, the use of name 'ANDAL' was disallowed. While deciding this case, reference was made to decision of the Privy Council in *Da Cordova and others v. Vick Chemical Coy* (4). In that case, the registered trade mark was 'Vapo Rub' and another concern started selling similar ointment in the name of 'Karsote Vapour Rub', and it was held as follows :—

"That the word 'Vapo Rub' was an essential feature of the first mark, that the words 'Vapour Rub' so closely resembled that word as to be likely to deceive and that the mark was infringed."

(8) In *Ruston and Hornby Ltd. v. Zamindara Engineering Co.* (5) the Company had 'RUSTON' as its registered trade mark. Another concern wanted to manufacture similar items under the name of 'RUSTAM'. It was held that the two names were visually and phonetically similar and, therefore, the other concern was not permitted to use 'RUSTAM' as the trade mark on its goods.

(9) A reading of the aforesaid judgments of the Supreme Court clearly goes to show that if there is visual and phonetic resemblance.

(2) A.I.R. 1960 S.C. 142.

(3) A.I.R. 1970 S.C. 146.

(4) (1951)68 Reports of Patent, Design and Trade Mark Cases 103.

(5) A.I.R. 1970 S.C. 1649.

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or only phonetic resemblance in the two names, then the manufacturer, who gets its trade mark registered first, can restrain the other manufacturer from using the visually and phonetically similar name as its trade mark. This proposition of law was not disputed by the counsel for the defendant.

(10) The argument of the learned counsel for the defendant was that visually and phonetically 'BEPLEX' and 'BELPLEX' are not similar. For this argument, he places reliance on *F. Hoffmann-ha Roche's case* (supra), and *Stadmed Private Ltd., Calcutta v. Hind Chemicals, Kanpur*, (6), and *G. D. Pharmaceuticals (P) Ltd. v. Registrar of Trade Marks and another*, (7).

(11) The facts in *F. Hoffmann-ha Roche's case* (supra) were that a medicine concern got 'PROTOVIT' registered as its trade mark, and another concern wanted to have 'DROPOVIT' as its trade mark. It was held that both the trade marks were visually and phonetically dissimilar. In the judgment, the dissimilarity has been demonstrated. It was specifically held that letters 'P' and 'T' in 'PROTOVIT' and letters 'D' and 'P' in 'DROPOVIT' and the sound which they gave to the complete word, even remotely did not show any resemblance and they were so dissimilar that there could be no confusion. An added reason was given that the medicines are prescribed by the doctors and whatever name they mention in the prescriptions, the same would be taken by the patient and, therefore, the question of any confusion or deception would not arise.

(12) In *Stadmed Private Ltd.'s case* (supra), a medicine concern got 'ENTROZYME' as a registered trade mark and later on, another medicine concern wanted to use 'ENTOZINE' on its products. A Division Bench of this Court held that the two names were not similar. After recording a definite finding that there was no similarity in the two names, an added reason was given that the medicines are sold on the prescriptions of the doctors and the patients purchase the prescribed medicines. Therefore, there is no likelihood of confusion. We are not called upon to decide whether 'ENTROZYME' and 'ENTOZINE' are phonetically and visually similar, but if we had a case like this before us, we might have taken the view that the two names are visually and phonetically similar.

(6) A.I.R. 1965 Punjab 17.

(7) 83 Calcutta Weekly Notes 302.

(13) In *G. D. Pharmaceuticals' case* (supra), one medicine concern got 'G.D.' registered as its trade mark and another company got 'JIDI' as registered trade mark. Dispute arose between the two companies and it was held by the Calcutta High Court that the trade marks were dissimilar and, therefore, there could be no confusion.

(14) On a reading of the aforesaid judgments, we are of the view that each case has to be decided on its own facts. If it is held that visually and phonetically or only phonetically the two words are similar, then the subsequent manufacturer has to be restrained from manufacturing the goods under the similar name and in case they are not similar, then the subsequent manufacturer cannot be restrained. On consideration of the facts of the present case, we are of the considered view that 'BEPLEX' and 'BELPLEX' are phonetically and visually similar and the goods manufactured by the defendant under the trade name of 'BELPLEX' are likely to be sold as the goods manufactured by the plaintiff concern having 'BEPLEX' as its registered trade mark. The sellers and purchasers may also be confused and may consider the products manufactured under the trade mark of 'BELPLEX' to have been manufactured by the plaintiff company. Since the plaintiff has a registered trade mark, it is entitled to restrain the defendant company from using a similar trade mark.

(15) It was argued on behalf of the defendant that in the case of medicines, there is no likelihood of confusion because the medicines are sold on the prescription of doctors and they would write the name of the medicine whether 'BEPLEX' or 'BELPLEX'. The prescription of the doctor prescribing 'BEPLEX' can be mistakingly read as 'BELPLEX' by the chemist. Sometimes even the chemist can sell medicine with the trade mark of 'BELPLEX' in spite of the prescription for 'BEPLEX' and the customer may not be able to know the fine distinction. Moreover, in the present case, we are more concerned with the sale of Vitamin-B Complex. Generally, after the age of 50/60 years, and after illness, doctors prescribe Vitamin-B Complex. If such a patient were to ask for 'BEPLEX', he can be given 'BELPLEX' and due to similarity, he may not be able to know the distinction.

(16) In *F. Hoffmann-ha Roche and Stadmed Private Ltd.'s cases* (supra) the matter of prescription of doctor was the added reasoning and not the main reasoning. In both the aforesaid cases, a definite finding was recorded that the two names were visually and phonetically dissimilar. If this is so, there would be no possibility of any

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confusion either with the chemist or the customer. But once it is held that the two names are phonetically and visusally similar, then the rule will apply even to the manufacturers of medicines.

(17) In *Ciba Ltd. Basle Switzerland v. M. Ramalingam and S. Subramaniam trading in the name of South Indian Manufacturing Co., Madura and another*, (8), one medicine company got 'CIBA' as a registered trade mark and another medicine manufacturing company got 'CIBOL' registered as a trade mark and on a move of Ciba people, registration of 'CIBOL' was cancelled by the Bombay High Court on the finding that phonetically and visually there was similarity between 'CIBA' and 'CIBOL'. 'CIBA' is a big medicine manufacturing concern and manufactures several medicines under the trade mark of 'CIBA'. Those medicines are generally sold on the prescription of doctors. That case very much helps the plaintiff. Therefore, once the two names are deceptively similar, whether visually or phonetically, then the matter of sale of medicines on the prescription of doctors loses its significance. The reason for the same is that the medicines prepared by 'CIBOL' can be sold as having been manufactured by 'CIBA' and similarly, medicines manufactured by the concern manufacturing 'BELPLEX' can be sold as having been manufactured by the company of 'BEPLEX'. To avoid this confusion, the registration of the trade marks is provided and the violation of the same cannot be permitted.

(18) For the reasons recorded above, we disagree with the Court below and after reversing its findings, hold that 'BEPLEX' and 'BELPLEX' are visually and phonetically similar and since the plaintiff has 'BEPLEX' as its registered trade mark, the defendant cannot manufacture medicines under the trade name of 'BELPLEX'. Accordingly, the defendant company is restrained by issue of perpetual injunction from manufacturing medicines under the trade name of 'BELPLEX'. In view of this, a decree for mandatory injunction is also issued for the destruction of dyes, printing blocks, literature, papers, vouchers, things and goods bearing the trade name 'BELPLEX'. A preliminary decree for rendition of accounts is also passed against the defendant company. Consequently, this appeal stands allowed with costs throughout.

S. P. Goyal, J.—I agree.

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(8) A.I.R. 1958 Bombay 56.