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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment Reserved on: 22.02.2021
Judgment Pronounced on: 17.03.2021

+ CS (COMM) 569/2020

JAGMOHAN RATRA

... Plaintiff

Through Ms.Diva Arora and Ms.Devyani Nath,
Advs.

Versus

AMPA CYCLES PVT. LTD.
& ANR.

... Defendants

Through Ms.Kaadambari, Adv. for D-1.
Mr.Farman Ali, Adv. for Mr.Hari Dutt
Sharma
Mr.Hari Dutt Sharm-in-person.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

I.A. Nos. 12625/2020 (u/O 39 R 1 & 2 CPC) & 1394/2021 (u/O 39 R 4 CPC)

1. I.A. 12625/2020 is filed by the plaintiff to restrain defendant No.1, its proprietors, directors, etc. from manufacturing, marketing, offering for sale, selling, advertising, etc. the impugned goods and services bearing the impugned

marks AMPA and  or any other mark which is deceptively similar to the

Plaintiff's trademark AMPA and logo  **AMPA** so as to result in an act of passing off its goods and services as those of the plaintiff.

2. On 23.12.2020, this court had passed an interim order stating that defendant No.1, its proprietors, servants, directors, agents etc. are restrained

from using the mark AMPA and the logo  or any other mark which is

deceptively similar to the plaintiff's mark AMPA with logo  **AMPA** amounting to passing off its goods as that of the plaintiff. Defendant No.2 was restrained from using the domain name www.ampacycles.com till the next date of hearing.

3. I.A. 1394/2021 is filed by defendant No.1 seeking vacation of the said order dated 23.12.2020.

4. As per the accompanying suit, the plaintiff-Sh.Jagmohan Ratra is the sole proprietor of the firm concern-M/s Four Diamonds engaged in manufacturing and selling of bicycles, tricycles, prams, baby rider bicycles, etc. under several brands, one of which is AMPA. The plaintiff's proprietorship concern M/s. Four Diamonds was initially established as a partnership firm in 1983 having two partners, namely, the plaintiff-Sh.Jagmohan Ratra and one Sh.Hari Dutt Sharma.



The plaintiff's trademark AMPA and the logo **AMP**A was coined by Sh.Jagmohan Ratra, the plaintiff and was adopted by the partnership firm in the year 1991 in respect of bicycles and tricycles. On 30.03.1992, Ampa Bikes Private Limited was incorporated having the plaintiff and the then partnership firm-M/s Four Diamonds as shareholders in the said company. A trademark application in Class 12 for the word mark AMPA was filed on 21.06.1995 by the company with the user claimed from 01.04.1992 in the name of Ampa Bikes. However, the said trademark application was abandoned in 2002.

5. The partnership firm M/s Four Diamonds was dissolved vide a Deed of Dissolution dated 01.08.2003. The other partner, namely, Sh. Hari Dutt Sharma exited the partnership and the plaintiff continued the business under the trading name and style M/s Four Diamonds as his sole proprietorship concern. As a part of the settlement dues, the plaintiff transferred his shares in the company Ampa Bikes Private Limited to Sh. Hari Dutt Sharma. It is the case of the plaintiff that it was specifically agreed that the plaintiff would continue to use the trademark AMPA and all the assets and goodwill would be transferred to the plaintiff. It is pleaded that as per the Deed of Dissolution, AMPA trademark could be used by two entities, namely, the plaintiff could use the trademark for cycles upto 14" and the Company-Ampa Bikes Private Limited was allowed to use the said trademark for all the cycle models of more than 14 inches. In 2013, the Company-Ampa Bikes Private Limited was struck off from the Register of

Companies and hence, ceased to exist. However, the plaintiff continued to use the trademark AMPA in respect of the cycles.

6. It is the case of the plaintiff that he has continued to use the trademark AMPA uninterruptedly and continuously since its adoption in 1991 in respect of his products i.e. initially through the partnership firm-M/s Four Diamonds and thereafter, through the Plaintiff's sole proprietorship concern-M/s Four Diamonds.

7. It is also the case of the plaintiff that in March 2019, he filed a trademark



application seeking registration of a unique logo **AMPA** consisting of the plaintiff's trademark AMPA in black colour and letter 'A' in red colour written in a unique and distinctive manner. The application is pending registration. The plaintiff has stated the user from 2011. It is stated that in any case, for the last nine years, the plaintiff is the sole entity who is manufacturing and selling cycles and other products under the mark AMPA and hence, the plaintiff has acquired tremendous goodwill and reputation amongst the purchasing public and members of trade because of extensive use, sales, marketing, etc.

8. Regarding defendant No.1, it is stated that the said defendant No.1-M/s Ampa Cycles Private Limited is a company established in 2018 and in around November 2020, the plaintiff became aware that defendant No.1 has commenced manufacturing and marketing cycles and related products under an identical

mark AMPA and logo  . Defendant No.1 has filed an opposition

against the plaintiff's trademark application for the device mark  **AMPA** in Class 12. The plaintiff has filed his counter-statement to the notice of opposition on 19.12.2020.

9. It is also stated that one of the Directors of defendant No.1 Company, namely, Mr.Ajay Kumar had been a buyer through his concern M/s Bawa Cycle Store of the plaintiff and M/s Ampa Bikes Private Limited in which the plaintiff was a director. Due to the said commercial relationship, defendant No.1 was fully aware of the prior use of the trademark AMPA by the plaintiff.

10. Further, it is stated that defendant No.1 has also filed trademark registration applications for the impugned mark in Class 12 and the same have been advertised in the Trademarks Journal by the Trademarks Registry. These applications were filed on 17.09.2020 and 15.11.2018. All the above applications have been filed by defendant No.1 on a "proposed to be used basis". It is the case of the plaintiff that defendant No.1 has adopted a deceptively similar logo which is nothing but a copy of the plaintiff's prior adopted device mark/ logo thereby making defendant No.1's adoption mala fide and dishonest.

11. It is stated that it is evident that defendant No.1 has adopted the impugned mark AMPA and the logo mark  with a view to ride upon the well established goodwill and reputation of the plaintiff garnered over a course of almost three decades. The relevant trademarks of the plaintiff and defendant No.1 as depicted in the plaint are as follows:-

PLAINTIFF'S TRADEMARKS	DEFENDANT'S TRADEMARKS
AMPA	AMPA
 AMPA	

12. Hence, the present suit for injunction to restrain defendant No.1, its directors, officers, etc. from manufacturing, selling, offering for sale, advertising, etc. the goods bearing the impugned mark AMPA or logo  or any other mark which is identical or deceptively similar to the



plaintiff's trademark AMPA and logo **AMPA** so as to result in an act of passing off its goods and services as that of the plaintiff.

13. Defendant No.1 has filed its written statement. In the written statement, it is stated that the trademark/word mark "AMPA" was coined and formulated/designed by Sh.Hari Dutt Sharma himself. Ampa Bikes Private Limited was segregated into two divisions. The first division dealt with manufacturing of kid cycles and adult bikes only by the brand name 'AMPA' and the second division dealt with manufacturing of plastic tricycles and other plastic toys. It is stated that subsequently disputes arose between the parties which were settled by a mutual agreement between the parties, namely, Sh.Hari Dutt Sharma and the plaintiff herein. The settlement was recorded in the Dissolution Deed dated 01.08.2003, in terms of which Sh.Hari Dutt Sharma exited the partnership firm M/s Four Diamonds which was dissolved and left to be run under the sole proprietorship of the plaintiff. The said Sh.Hari Dutt Sharma, however, separated his business activities from the plaintiff and continued his separate business under the trademark AMPA. It is the case of the defendant No.1 that under the Deed of Dissolution dated 01.08.2003, the plaintiff was only allowed to use the trademark AMPA for manufacturing cycle models upto 14 inches only i.e. kids cycles while Sh.Hari Dutt Sharma was the owner of the trademark AMPA and he was using the same for manufacturing cycles apart from 14 inches cycles for three years. It is claimed that Sh.Hari Dutt

Sharma continued to use the trademark AMPA. However, in 2013 Sh.Hari Dutt Sharma and his wife decided to form a new company under the name of “Concept Bikes”. Ampa Bikes Private Limited through its authorised signatories, namely, Sh.Hari Dutt Sharma, Ms.Nishtha Sharma and Sh.Ajay Kumar Bawa entered into an agreement for assignment of use of the trademark AMPA for a consideration of Rs.1,00,000/-. Parties enter into a Deed of Assignment on 03.01.2013. It was mutually decided that Sh.Ajay Kumar Bawa will have all the rights to manufacture and sell under the name of the trademark and word mark AMPA. Subsequently, in 2013, the Company Ampa Bikes Private Limited was struck off from the Register of the companies as there was no business or function in the said company. In 2018, Sh.Ajay Kumar Bawa along with Sh.Anmol Bawa decided to manufacture cycles/tricycles/bikes under the brand name AMPA as being the existing and *bona fide* user of the brand name AMPA and dealing in the cycle business since many decades. On 05.06.2018, defendant No.1 Company was incorporated by both Sh.Ajay Kumar Bawa and Sh.Anmol Bawa as the directors of defendant No.1 company. Mr.Pranav Sharma, son of S Hari Dutt Sharma was also one of the directors of defendant No.1 Company.

14. As the products of defendant No.1 were doing well, defendant No.1 sought to register the trade name AMPA with the Trademark Registry in 2018. The trademark applications were filed on 15.11.2018 and 17.09.2020. The applications though filed with the user details as “proposed to be used”, it is stated that there is sufficient data to show an exclusive use of the trademark by defendant No.1. It is stated that the applications for proposed to be used basis

were made on an imprecise instruction given by the erstwhile consultant of defendant No.1 and is therefore not reflective of the fact that the trademark was in fact extensively being used by defendant No.1 company per se.

15. It is the case of defendant No.1 that the plaintiff with a dishonest and mala fide intention and to extort monies has filed a false and frivolous trademark application for the trademark and word mark AMPA claiming its user since 01.04.2011 which is inconsistent and self-contradictory. Even otherwise, the plaintiff was not entitled to use the said trademark for adult bikes as under the Deed of Dissolution dated 01.08.2003 the plaintiff was only allowed to manufacture and sell cycle models upto 14 inches only. The defendant has filed opposition application against the application of the plaintiff before the Trademark Registry. Further, it is stated that the invoices filed by the plaintiff appear to be forged and sham as the plaintiff was not allowed to use the trademark in question for cycles/tricycles above 14 inches.

16. I have heard learned counsel for the parties.

17. Learned counsel for the plaintiff has strongly urged that the plaintiff has been using the trademark in question since 1991, initially as a partnership firm-M/s Four Diamonds and thereafter, as the sole proprietor of the said proprietorship concern. It is also claimed under the Deed of Dissolution dated 01.08.2003 between the plaintiff and Sh.Hari Dutt Sharma, the plaintiff got rights to use the trademark AMPA which was being used by both the plaintiff and Ampa Bikes Private Limited. The Company-Ampa Bikes Private Limited was struck off in 2013 from the Register of Companies. Since 2011, the plaintiff has been exclusively using the trademark AMPA. Defendant No.1 on the other

hand was incorporated only in 2018 and it has filed for registration of the said mark in 2020 on a “proposed to be used basis”. Hence, it is stressed that the plaintiff has rights and goodwill in the said trademark AMPA having been using the same since 2011.

18. Learned counsel for defendant No. 1 has stressed that the trademark was assigned to Sh.Hari Dutt Sharma, who was under the Dissolution Deed entitled to use the trademark AMPA. Regarding filing of the registration applications for the trademark AMPA on a “proposed to be used basis”, it has been stressed that this was done on a wrong advice rendered by their advisor. It is stressed that the plaintiff was using the trademark AMPA only for cycles below 14 inches.

19. It is the admitted case of the parties that the partnership firm M/s Four Diamonds between the partners, namely, the plaintiff and Sh.Hari Dutt Sharma was using the trademark AMPA.

20. The admitted facts are that the trademark in question “AMPA” was coined by the partnership firm- M/s Four Diamonds/one of its partners in the year 1991. In 1992, Ampa Bikes Pvt. Ltd. was incorporated. Ampa Bikes Pvt. Ltd. filed a trademark application for the mark AMPA on 21.06.1995. However, the said trade mark application was abandoned in 2002.

21. By the Deed of Dissolution dated 01.08.2003, the firm-M/s.Four Diamonds was dissolved. The said firm became the sole proprietorship concern of the plaintiff. The other partner, namely, Sh. Hari Dutt Sharma existed from the partnership firm and took charge of the company Ampa Bikes Pvt. Ltd. It is also stated that the plaintiff was entitled to use the mark AMPA in relation to cycles below 14" while Ampa Bikes Pvt. Ltd. was allowed to use the mark

AMPA for models of more than 14". In 2013, the company Ampa Bikes Pvt. Ltd. was struck off from the Register of Companies and ceased to exist.

22. The controversial facts now arise at this stage as it is claimed that Ampa Bikes Pvt. Ltd. through its authorised signatory Sh. Hari Dutt Sharma assigned the trademark AMPA for a consideration of Rs. 1 lakh and executed an Assignment Deed on 03.01.2013. It was agreed that Sh. Ajay Kumar Bawa would have all rights to manufacture and sell products under the trademark AMPA. It is stated that thereafter, the company Ampa Bikes Pvt. Ltd. was struck off from the records of Registrar of Companies. In 2018, Sh. Ajay Kumar Bawa along with Sh. Anmol Kumar Bawa decided to manufacture cycles/bicycles/bikes under the brand name AMPA. On 05.06.2018, defendant No. 1 Company was incorporated and claims to be using the said trade mark based on the Assignment Deed in favour of Sh. Ajay Kumar Bawa dated 03.01.2013 allegedly executed by Sh. Hari Dutt Sharma for and on behalf of Ampa Bikes Pvt. Ltd.

23. The plaintiff has denied the Deed of Assignment dated 03.01.2013 allegedly claimed to have been executed by Sh. Hari Dutt Sharma in favour of Sh. Ajay Kumar Bawa. It is stated that this is a fraudulent document created as an afterthought to justify use of the trademark AMPA by defendant No. 1.

24. Apart from the above, I also cannot help noticing the applications for registration of the trademark AMPA have been filed by defendant No.1 which itself was incorporated in 2018. One application was filed by defendant No.1 Ampa Cycles Private Limited on 17.09.2020 for the trademark AMPA on a "proposed to be used basis" under Class 12. The application for the device mark being the capital 'A' in red colour was also filed by defendant No.1 on

17.09.2020 on a proposed to be used basis. Another application was filed on 15.11.2018 for the device mark AMPA which is also on a proposed to be used basis. Hence, defendant No.1 has filed three applications, namely, one in 2018 and two in 2020 all for registration of the trademark AMPA/ device mark but on a “proposed to be used basis”.

25. What is striking is that defendant No. 1 has itself applied for registration of the trademark AMPA in 2018 and again in 2020 on “proposed to be basis”. To now claim that this was done based on an erroneous advice and that there is prior user prima facie appears to be an afterthought. At this stage, without leading evidence, this plea of the defendants cannot be accepted. That apart, there is no explanation as to who was using the said trademark AMPA from 2013 to 2018 in the interregnum i.e. after the alleged Assignment Deed dated 03.01.2013 in favour of Sh. Ajay Kumar Bawa till defendant No. 1 was incorporated in 2018.

26. In contrast, the plaintiff has placed on record invoices showing user of the trademark AMPA since 2011. The application for registration of the trademark filed of the plaintiff also claims user since 2011.

27. In my opinion, the plaintiff has made out a prima facie case.

28. Reference in this context may be had to the judgment of the Supreme Court in the case of *Cadila Health Care Ltd. vs. Cadila Pharmaceuticals Ltd., 2001 (5) SCC 73*. That was a case in which the appellant had filed a suit seeking injunction against the respondent from using the trade mark ‘Falcitab’ as it was claimed that the same would be passed off as the appellant’s drug ‘Falcigo’ for treatment of the same disease. The Supreme Court held as follows:-

“10. Under Section 28 of the Trade and Merchandise Marks Act on the registration of a trade mark in Part A or B of the register, a registered proprietor gets an exclusive right to use the trade mark in relation to the goods in respect of which the trade mark is registered and to obtain relief in respect of infringement of the trade mark in the manner provided by the Act. In the case of an unregistered trade mark, Section 27(1) provides that no person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark. Sub-section (2) of Section 27 provides that the Act shall not be deemed to affect rights of action against any person for passing off goods as the goods of another person or the remedies in respect thereof. In other words in the case of unregistered trade marks, a passing-off action is maintainable. The passing-off action depends upon the principle that nobody has a right to represent his goods as the goods of somebody. In other words a man is not to sell his goods or services under the pretence that they are those of another person. As per Lord Diplock in *Erven Warnink BV v. J. Townend & Sons* [(1979) 2 All ER 927] the modern tort of passing off has five elements i.e. (1) a misrepresentation, (2) made by a trader in the course of trade, (3) to prospective customers of his or ultimate consumers of goods or services supplied by him, (4) which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence), and (5) which causes actual damage to a business or goodwill of the trader by whom the action is brought or (in a quia timet action) will probably do so.”

Hence, the court concluded that a passing off action depends upon the principle that nobody has a right to represent his goods as goods of somebody else. The court noted five elements of passing off, namely, (i) misrepresentations, (ii) to prospective customers, (iii)

made by a trader, (iv) which are calculated to injure the business and goodwill of another trader and (v) which causes actual damage to the business or goodwill of the trader by whom the action is brought.

29. *Prima facie*, it is clear that defendant No.1 is illegally using the trade mark AMPA and trying to pass off its goods as that of the plaintiff. *Prima facie*, a case of passing off is clearly made out.

30. Accordingly, I allow I.A. No. 12625/2020 and confirm the interim order passed by this court on 23.12.2020. I.A. No. 1394/2021 filed by defendant No.1 is dismissed.

MARCH 17, 2021
st/rb

JAYANT NATH, J.

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