

Order below Exh.5

This application is filed under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure, 1908 r/w section 135 of the Trade Marks Act, 1999 for grant of temporary injunction.

2. In a suit filed under section 134 r/w 28 and 29 of the Trade Marks Act, 1999, claiming himself to be the proprietor of Ajan-Vruksh, plaintiff has contended that he is the registered proprietor of trade mark “Khandu Chakka” which is pain relief oil. He is continuously and extensively using this trade mark on its products since 2019. On 2.11.2018 plaintiff had applied for the registration of his trade mark with goods relating to pharmaceuticals, medical and veterinary preparations, dietetic food and substances adapted for medical or veterinary use, dietary supplements for humans and animals and other related products w.e.f. 2.11.2018. The plaintiff's trade mark was advertised under the application No. 3990363 in Class 5 in the Trade Marks Journal No. 1879 dt. 10.12.2018 at page 1608. The plaintiff has a tie up with M/s. Nature Boon, Chindwada (M.P.) who applied to the licensing authority Bhopal for inclusion of certain drugs in their already existing license for the production and manufacture of “Khandu Chakka” and “Ajan Vruksh Oil” etc. Accordingly, on 31.12.2018 permission was granted. On 14.7.2020 the plaintiff entered into a third party agreement with M/s. Nature Boon who agreed to manufacture the products. The agreement further stipulates the exclusive right of the plaintiff over its trade mark “Khandu Chakka”.

3. On 3.5.2019, the registrar, Trade Marks Mumbai issued certificate of registration registering the plaintiff's trade mark "Khandu Chakka" bearing No. 3990363 in Class-5 w.e.f. 2.11.2018. The plaintiff has been continuously producing and manufacturing its products via third party since 2019 and also invested huge amount in his products. The plaintiff's turn over for the financial year 2020-21 was Rs.3,16,670/- and it was Rs.9,27,100/- for the financial year 2021-22 which is duly certified by the Chartered Accountant. The plaintiff's trade mark has been given wide publicity and it become associated by the members of the trade and public in Maharashtra and Telngana State. The plaintiff has created enormous goodwill and reputation in the market towards its product quality and standard by spending huge amount in the advertisements etc.

4. On 11.2.2020 one of the associate of the plaintiff namely Pratik Gadkari wrote a complaint to the Assistant Commissioner Food and Drugs Administration Amravati against the defendant informing that the defendant is selling pain relief oil in the trade name "Nilesh Ayurvedic Khandu Chakka + Malish Tel" in various shops without obtaining prior approval of competent authority requesting the said authority to take appropriate action against defendant. The plaintiff thereafter, become aware of the defendant's impugned trade mark when defendant had published advertisement on 24.2.2020 of his trade mark in the Trade Mark Journal 1942-0 at page 1208 under application No. 4327088 in Class 5 for registration. On 17.4.2020 the plaintiff filed opposition proceedings against the

defendant under section 21 before the Sub-Registrar which is pending.

5. It is further contended that the impugned trade mark of the defendant comprises letters 'Nilesh Ayurvadic' in small font, while the words 'Khandu Chakka' is in large font. The '+' sign and 'malish-tel' is in small font. The arrangement and focus on the words in the impugned trade mark "Khandu Chakka" is identical and/or deceptively similar to the registered trade mark of the plaintiff. The choice and manner of depicting and focusing upon words Khandu Chakka are deceptively identical to the registered trade mark of the plaintiff. Due to Lock-down and pandemic, the plaintiff was unable to follow action against the defendant. On getting knowledge, the plaintiff issued notice on 31.7.2021 calling upon the defendant to 'Cease and Desist' from infringing the plaintiff's registered trade mark and from passing off its trade mark. However, the defendant refused to comply with the directions by sending the reply dt. 12.8.2021. The unauthorized use of plaintiff's trade mark by the defendant is phonetically, visually and structurally identical and/or deceptively similar to the plaintiff's trade mark which is clear infringement. The plaintiff, therefore, prayed for restraining the defendant, his servants, representatives, assigns, stockists, dealers, agents etc. or any other person claiming through him by way of temporary injunction from using in relations to his goods under the impugned trade mark which is identical or deceptively similar to the registered mark of the plaintiff and from manufacturing, selling, advertising etc. either directly or

indirectly and to pass off or likely to pass off or enable others to pass off the defendant's goods as and for those of the plaintiff's and for directing to deliver up for destruction of his impugned products/goods etc. under his impugned trade mark infringing a registered trade mark of the plaintiff.

6. The defendant appeared and resisted the application by filing his written statement cum reply Exh.15. Averments which are adverse against this defendant are denied in toto. It is contended that defendant is permanent resident of Badnera within Amravati District. He is doing the business of manufacturing and selling Ayurvedic Drugs and Medicines under the name and style "Nilesh Ayurvedic Pharmaceutical Company" and obtained license from the office of Drug Controller bearing No.25D/47/05 and he is permitted to manufacture and sale Khandu Chakka + Malish Tel. The said Khandu Chakka is a common medicine for pain and fracture which is used in villages of India from the time immemorial and Khandu Chakka is plant and it is so called in vernacular.

7. The plaintiff is producer of pain relief oil in which Khandu Chakka plant is used as content thereof. It is neither creation of the plaintiff nor the name of Khandu Chakka is peculiar in this case and this is vernacular name of the plant by the common people and hence, it cannot be a privileged of trade mark or patent. The product of the plaintiff is pain relief oil. The plaintiff himself has contended about filing of the proceeding under section 21 of the Trade Marks Act which is

pending before the Registrar. Thus, unless and until decision is given in the said matter by the Registrar, contention of the plaintiff is misconceived and prematured. Even though the plaintiff has got registration of his pain relief oil Khandu Chakka, said registration has been given to version of the trade mark pain relief oil and the defendant never concerned himself with the said name or alleged trade mark. The name of the product of the defendant is Nilesh Ayurvedic खंडू चक्का + मालीश तेल between which (+) mark sign has been mentioned. The said malish tel is extracted from the medicinal plant of common use as mentioned above and popularly known Khandu Chakka. The said label on the product of defendant is exclusively in vernacular, more particularly in Marathi language, specifically in Deonagari letters. So by any thought of imagination, there is no likelihood of similarity between the two labels.

8. It is further contended that Khandu Chakka is medicinal plant and unless it is proved and established that the plaintiff has patent right for the exclusive user of the said plant as medicine, his contention as regards the use of the name Khandu Chakka is unlawful. As the Khandu Chakka medicine is the basis of the vary product of the defendant, therefore, he is duty bound to inform the same to the purchaser and millions of people use the said plant for every day cure. The use of name of Khandu Chakka is same as using the name of castor oil for medicinal use. The plaintiff cannot claim the benefit of patent of the particular medicine by including its name in the trade mark. The onus of proving his trade mark is on the plaintiff.

9. The plaintiff got only a permission in Class-5 to use the Khandu Chakka medicine product as pharmaceuticals, veterinary preparations and sanitary preparation for medical purposes etc. and not as exclusive right to use the said medicine to preclude a third party to use the said medicine content as this product. The plaintiff has filed this suit with intent to cut the competition with the defendant and thereby imposing his monopoly on the product prepared from particular medicine in the market. The suit is false and bogus and filed on imaginary grounds with malafide intention to harass the defendant and to extract money from him. It is thus, contended that the suit itself is liable to be dismissed with compensatory costs.

10. Based on the rival contentions, following points arise for my determination. My findings are recorded thereon with reasons enumerated are as under -

Sr.No.	Points	Findings
1.	Whether the plaintiff has made out a prima facie case ?	No.
2.	Whether balance of convenience lies in favour of the plaintiff?	No.
3.	Whether the plaintiff would suffer irreparable loss, if temporary injunction is not granted, as prayed for ?	No
4.	What order ?	Application is rejected as per final order.

Reasons

As to points No. 1 to 3 :-

11. At the out set, I heard the submissions of Shri R.D. Dhande learned Advocate for the plaintiff and shri J.K. Upadhyay learned Advocate for the defendant. In the light of respective submissions, I have gone through the respective pleadings and copies of documents on record. Learned Advocate for the plaintiff in support of his submissions relied upon -

Ultra Tech Cement Pvt. Ltd. Vs. Alaknanda Cement Pvt. Ltd. & Anrs. 2011 (5) Bom. C.R. 588.

Kaviraj Pandit Durga Dutt Sharma Vs. Navratna Pharmaceutical Laboratories 1965 AIR (SC) 980

Parle Product Private Vs. J.P. and Company, Mysore 1972 AIR (SC) 1359

Amritdhara Pharmacy Vs. Satya Deo Gupta 1963 AIR (SC) 449

Candila Health Care Ltd. Vs. Cadila Pharmaceuticals Ltd. 2001 AIR (SC) 1952.

Ruston and Hornby Vs. Zamindrara Engineering Company 1970 AIR (SC) 1649.

Corn Product Refining Company Vs. Shangrilla Food Products Ltd. 1960 AIR (SC) 142.

On the other hand learned Advocate for the defendant

relied upon -

Lupin Ltd. and another Vs. Johnson & Johnsons 2015(1) All M.R. 836

Ranbaxy Laboratories Pvt. Ltd. Vs. Indohemine Health Specialties 2002(3) Bom. CR 186.

12. While claiming the equitable relief of temporary injunction, it is the specific contention of the plaintiff that “Khandu Chakka” is his registered trade mark which is distinctively and exclusively associated with the plaintiff. The plaintiff has its own website bearing the domain name “Khanduchakka.com” which provides various details of its herbal pain relief oil. Said website is accessible by and open to the public. The plaintiff claimed this trade mark has been continuously and extensively used on his products since the years 2019. On 2.11.2018 he filed application before the Trade Marks Registrar Mumbai for registration of his trade mark “Khandu Chakka” in Class 5. The specification of goods pertain to medical and veterinary impression, dietetic food and substances adapted for medical or veterinary use, dietary supplement for humans and animals and other related products falling in Class 5. The plaintiff’s mark was advertised under application No.1879 dt. 10.12.2018 at page 1608. The plaintiff has tie up with M/s. Nature Boon. On 31.12.2018, office of the Drug Controller (Ayush) Bhopal (M.P.) granted permission to M/s.Nature Boon to include 34 proprietary Ayurvedic medicines in its products manufacturing license No. MP25D/07/018 and said manufacturing license is valid till 2.8.2023. On 14.7.2020

plaintiff through its proprietary firm “Ajan Vruksh” entered into agreement with M/s. Nature Boon to manufacture its products under the trade name “Khandu Chakka” via third party and thus, M/s. Nature Boon had agreed to manufacture products. On 3.5.2019 Registrar, Trade-Marks Mumbai issued a certificate granting registration of trade mark “Khandu Chakka” bearing No. 3990363 in Class 5 with goods relating to pharmaceuticals etc. w.e.f. 2.11.2018. In view of the certificate dt. 3.5.2019 issued by Registrar Trade Mark Mumbai the plaintiff claimed to become registered proprietor of the trade mark “Khandu Chakka”.

13. In respect of his claim of distinctive and exclusive trade mark, the plaintiff also filed copy of license issued by the office of Drug Controller (Ayush) M.P., agreement and certificate of trade mark issued by the Registrar. The plaintiff also filed certificate of Chartered Accountant to show that he has incurred huge expenses on the marketing and publicity of its products of Khandu Chakka during the preceding financial year 2019-20 and 2020-21.

14. On the other hand, it is the contention of the defendant that he is doing the business of manufacturing and selling Ayurvedic products and medicines under the name and style “Nilesh Ayurvedic Pharmaceutical Company” by obtaining license No. 25D/47/2005 from the office of Drug Controller (Ayush) M.P. by which he has permitted to manufacture and sell “खंडू चक्का + मालीश तेल”. As regards the claim of

infringement of the registered trade mark by using deceptively similar or a deceptive variation to the registered trade mark of the plaintiff, the defendant came with specific case that “Khandu Chakka” is common medicine for pain and fracture. Khandu Chakka plant is used in villages of India from the time immemorial which is commonly known by the people at large. Therefore, according to the defendant, it cannot be privileged of trade mark or patent, therefore, the contention of the plaintiff as regard the exclusive right to use of the name Khandu Chakka is unlawful. Khandu Chakka medicine is the basis of the product of the defendant, therefore, he is duty bound to inform the same to its customers.

15. It is the case of the plaintiff that his registered trade mark “Khandu Chakka” has acquired distinctiveness and it is exclusively owned by him and the impugned trade mark of the defendant “Nilesh Ayurvedic खंडु चक्का + मालीश तेल” comprises letter ‘Nilesh Ayurvedic’ is in small font, while ‘Khandu Chakka’ is in large font and ‘+’ sign and ‘malish tel’ is in small font. The arrangement and major focus on the words in the impugned trade mark as Khandu Chakka is identical and/or similar to the registered trade mark of the plaintiff. The idea and manner of depicting and focusing upon the word Khandu Chakka are deceptive and identical/similar to the registered trade mark of the plaintiff. On a perfunctory comparison of the rival marks, it can be seen that the defendant has adapted/copied/incorporated in his impugned trade mark the essential and distinctive features, get-up and layout of the registered trade

mark of the plaintiff.

16. As discussed earlier, plaintiff's "Khandu Chakka" has been registered on 3.5.2019 w.e.f. 2.11.2018. However, the plaintiff has not disputed that on 24.2.2020 the defendant had published advertisement for his impugned trade mark in the Trade Mark Journal No. 1942 at page 1208 "Nilesh Ayurvedic खंडु चक्का + मालीश तेल" bearing application No.4327088 in Class 5 for the registration. The plaintiff claimed that on 17.4.2020 he has filed opposition proceeding against the defendant trade mark under section 21 which is subjudice before the competent authority. Moreover, from the averments in the written statement Exh.15 it reveals that the defendant also obtained license bearing No.25D/47/05 from Drug Controller (Ayush), Madhya Pradesh for manufacturing and selling his products Khandu Chakka + Malish Tel.

17. After considering the aforesaid facts and circumstances, I have also gone through the case laws relied upon by the respective parties. In the light of observations and ratio laid down therein, it can safely be culled out that in order to determine whether one mark is deceptively similar to another, broad and essential features of the two are to be considered. They should not be placed side by side to find out if there are in differences in the design and if so, whether they are of such character as to prevent one design from being mistaken for the other. It would be enough if the impugned mark bears such an overall similarity to the registered trade mark as would

be likely to mislead a person usually dealing with one to accept the other if offered to him.

18. Moreover, to decide the question of deceptive similarity, factors to be taken into the consideration are the nature of the marks i.e. whether the marks are word marks or label marks or composite marks i.e. both words of label works, the degree of resemblance between the marks, phonetically similar and hence similar in idea, the nature of the goods in respect of which they are used as trade marks, the similarity in the nature, character and performance of the goods of the rival traders, the class of purchasers who are likely to buy the goods bearing the marks they require, on their education and intelligence and the degree of care. They are likely to exercise in purchasing or using the goods and other surrounding circumstances may also be relevant in the extent of dissimilarity between the competing marks.

19. It is pertinent to note that neither it is the contention of the plaintiff nor of the defendant that their respective products are required to be sold under the prescription of any recognized medical practitioners or by the licensing chemists. Therefore, while deciding interim application as to whether the plaintiffs registered trade mark has been infringed or not in relation to his products in respect of which the trade mark is registered, it is necessary to see as to whether the mark of the defendant is so nearly resembles that other mark as to be likely to be deceptive or cause confusion. In this context, the trade of

the plaintiff “Khandu Chakka” is stated to be the pain relief oil. On the other hand, defendant is selling his product in the trade name “Nilesh Ayurvedic खंडु चक्का + मालीश तेल’’. While examining both these trade marks phonetically, virtually and structurally, it can be seen that the word “Khandu Chakka” is some what identical in both marks.

20. Learned Advocate for the plaintiff emphatically submitted that the trade mark of the plaintiff “Khandu Chakka” is self made which is created by the plaintiff himself. On the other hand, learned Advocate for the defendant vehemently submitted that “Khandu Chakka” is a plant which is a common medicine used in the villages of India for pain etc. from the time immemorial. The learned Advocate for the defendant also filed a copy of World Journal Pharmaceuticals and Licenses which is supposed to be the article published by the plaintiff on his website. Though learned Advocate for the defendant strongly resisted for the production and consideration of the said article on the ground that it is not specifically pleaded in the W.S., however, it is pertinent to note that the plaintiff himself has contended in para-9 of plaint that he also sells his products through e-commerce portal/website including India market.com and also advertising the Khandu Chakka on various web-sites by creating a domain name and the plaintiff has its own website bearing the domain name khanduchakka.com which provides various details of its herbal pain relief oil.

21. Moreover, in the pamphlet of the plaintiff filed below

the list (Exh.4), he has given composition of his product “Khandu Chakka” in which Charmavruksh raw has been referred as (Ehretia Laevis Roxb). On the other hand, in the pamphlet of the defendant filed below the list (Exh.4), in the composition of the product of defendant, Khandu Chakka Powder is also referred as (Ehretia Laevis Roxb). As stated earlier, in the World Journal of Pharmaceuticals and Licenses which is supposed to be the article published by the plaintiff on his website of which copy is filed below the list (Exh.21), it is mentioned that ANTI MICROBIAL ACTIVITY OF Ehretia Laevis Roxb. is a Khandu Chakka plant. Thus, having regard to the common component “Ehretia Laevis Roxb” in the respective products of the plaintiff and defendant, in my view, there is substance in the contentions of the plaintiff that “Khandu Chakka” is a plant which is the medicine used in the villages of India. On the contrary, there nothing on record to ascertain that the word “Khandu Chakka” is self generated name and it is self created by the plaintiff. After considering the observations and ratio laid down in the case laws cited supra, I am of the view that the the word Khandu Chakka is descriptive and having generic expression. In fact, situation would have been different, if the defendant was selling his products by using the sole word “Khandu Chakka”. However, the trade name of the product of the defendant is “Nilesh Ayurvedic खंडु चक्का (+) मालीश तेल’’. Therefore, having regard to the entire facts and circumstances, in my view, no prima facie case is made over by the plaintiff to prove that the use of mark by the defendant on his product is

deceptive and it creates confusion or deception in the mind of ordinary purchasers. The plaintiff also failed to prove that balance of convenience also lies in his favour. Thus, in the light of aforesaid facts and circumstances, no question arise of any irreparable loss to the plaintiff, if temporary injunction is not granted, as prayed for. Thus, points No. 1 to 3 are answered in the negative.

As to Point No. 4 :-

22. In view of aforesaid findings on the points No. 1 to 3, application for temporary injunction deserved to be rejected. In the result, following order is passed.

Order

i) Application (Exh.5) under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure, 1908 r/w section 135 of the Trade Marks Act, 1999 is hereby rejected.

ii) Costs in cause.

Dt.13.04.2022

(R.M.Mishra)
District Judge-3
Wardha.

C E R T I F I C A T E

I affirm that the contents of this P.D.F. file are same word to word, as per the assigned order.

*Anil N. Nakhate,
Stenographer (Grade-1)*