

Telebrands (India) Pvt. Ltd. Vs. Benent Coleman & Co. Ltd. & Anr.

In the present case, Delhi High Court was of the view that there is no serious dispute about registration of the trademark "NICER DICER". However, considering the scheme and purpose of trademark, basically Sections 17, 28, 30(2) and 35 of the Trade and Merchandise Marks Act (for short, the Trade Marks Act), the concept of descriptive/ common words and the proviso so provided in the facts and circumstances of the case, it is difficult to accept the case of the Plaintiff that no one else can use even these two words, basically " KITCHEN DICER". The "KITCHEN DICER" as used, also if read together is to understand and/or to verify the respective products in question. These are household and common words. There is no question of exclusive or independent rights on all those words, as contended. The registration of trademark, even if any, in the present facts and circumstances, are not sufficient to accept the case of the Plaintiff to grant the injunction as claimed.

Defendant No.1 has been carrying on business as publisher, news provider and publishing several journals and books in and outside the country in most of the languages. As per the plaintiff, the Defendants advertised the products on internet, as well as, in the paper media, nature and the purpose of shopping online and/or doing online transactions.

The Court observed that the Plaintiff's words, "NICER DICER" even if taken note of as the registered trademark, which at present not in dispute, still as the word "KITCHEN DICER" is a descriptive and commonly used words. Any person who wants to purchase the "DICER" for the kitchen purpose would put/type the words "KITCHEN DICER" on website. It is quite natural to put the words "KITCHEN DICER" and if a number of items is reflected on the website, the customer/user whosoever wants to purchase or to do business on the website, need to click or select specific item and after browsing/verifying the product, he will place the order, either through internet or call or sms, subject to the terms and conditions as advertised. The website describes the details including the seller's name or manufacturer's name or owner's name and if the purchaser knowing this, place the order, then it is difficult to accept the case that the website owner/ Advertiser or such person are doing or dealing with the products as owner or seller. There is no force in the contention that, the website owner or Defendant Nos. 1 and 2, are using and selling the product of the Plaintiffs as the product of the Plaintiffs.

The Court held that it is not the case that the Defendants never published any description of ownership and/or as that of the seller. They never claimed and/or advertised that they are the owner and/or the manufacturer and/or seller of the product. The advertisement and/or respective website facilitate the consumer/person/user to purchase the product online. The owner of the website or the service providers can be treated as owners or manufacturers of

the products. There are various types of contracts and/or transactions which the parties may enter into while advertising or doing the business on internet.

It is not the product of the Plaintiff. The term "Seller" or "Vendor" or "affiliates" mean any person who offers for sale or puts for auction of products on the web site. It is always subject to terms and conditions and disclaimers appearing on the paper media, as well as, shopping website. The actual seller's name appeared viz. OJAS LIFESTYLES, IND MART and so of others who display their products on the website and the newspaper who have complete control over the price, shipping costs, date, period and mode of delivery, warranties related to products and services including after sale services related to products and services. As advertised on the website there are other names appeared as sellers under the respective items/ products, therefore, it is difficult to accept the case of the Plaintiff. The Defendants nowhere claimed to be the sellers and/or the proprietor of the products. The products sold under the name/ mark "KITCHEN DICER" and/ or "NICER DICER", considering the nature and purpose of website shopping, the Defendants and specially No.1 only facilitates and provides the platform or venue, where the buyers/ users of site/ reader may meet and see and verify respective products for their sell and/or purchase transaction.

The advertisements of Defendant No.1 and the various terms and conditions published along with the products clearly make the position and the role of the Defendants very clear which nowhere can be stated to be with intention to defraud and/or deceit and/or create impression and/or confusion that they are selling the product of the Defendants and/or such third person as the owner and/or proprietor. It is clear that the Defendants in no way can be treated and/or considered to be the seller of products of Plaintiff "NICER DICER" and even of "KITCHEN DICER" for the purpose of infringement and or passing off.

The submission is made referring to the paper advertisement that it provides telephone number, "to order" and also SMS numbers, the user/consumer therefore, can directly call/ place the order and they may get the trade marked product of the Plaintiff. The Plaintiff has shown and placed on record a result of such call. The transaction is denied by the Defendants. In view of above reasons, this itself cannot be the ground for interim relief.

The Court considered the whole scope and purpose of internet shopping. The person and/or party who want to purchase the items on internet, would expect to go through the product by opening the site and selecting the items. It is just like verifying the product before purchase. The person visits shops and/or market to purchase the goods/items, a known concept is "Window shopping". In internet shopping a user needs to open the Window before purchasing and after verifying the products and contents to book or place the order on that declared terms and conditions. In all, the general scrutiny and verification of any products or

contents before purchase by the purchaser is quite normal. Once verified and placed the order by accepting the terms and conditions, the transactions get executed.

In the present case, there was nothing to show that though the Defendants are advertising "KITCHEN DICER" but are selling "NICER DICER", the product of the Plaintiffs. Having advertised at appropriate site and/or their official site with the clear description of the product along with the name of the seller, the Court therefore declined to accept the plaintiff's case that the Defendants are selling the products of the Plaintiff. Merely because the customer/person/user places the order directly, without verifying the product, the Defendants cannot be blamed for that. They are not deliberately, intentionally selling the product of the registered trade mark "NICER DICER" involving the "KITCHEN" items as described. It cannot be treated as selling the products of the Defendants and thereby infringing the rights in question.

Considering above, and as the term "DICER" is highly descriptive for the goods falling in class 8 of 4th Schedule of the Trade Marks Rules, 2002 and the Trade Marks Act, 1999 and as the Plaintiff cannot monopolies the words even the "KITCHEN DICER" on the basis of registration of the words "NICER DICER", and as the same is legitimately used by the other sellers also and as the words "KITCHEN DICER" is not identical and/or deceptively similar to the plaintiffs marks "NICER DICER" and as there is no false representation and/or misrepresentation to the public and as no equity and/or balance of convenience and/or no case of any irreparable loss, harm and injury is made out under Order 39, as well as, Order XL of the Code of Civil Procedure (for short, CPC), the Plaintiff is not entitled for any interim relief as prayed.

The court dismissed the Notice of Motion with no directions as to costs.