

MANU/CP/0016/2007

Equivalent/Neutral Citation: 2007(34)PTC695(CB)

**BEFORE THE COPYRIGHT BOARD AT NEW DELHI**

Case No. 2 of 2005

**Decided On:** 31.01.2007

Hindustan Sanitaryware & Industries Limited **Vs.** Champion Ceramic

**Hon'ble Judges/Coram:**

*Dr. Raghubir Singh, Chairman, A.K. Koul and D.R. Meena, Members*

**Counsels:**

*For Appellant/Petitioner/Plaintiff: Shravan Kumar Bansal, Advocate*

*For Respondents/Defendant: Shailen Bhatia, Advocate*

**ORDER**

1. This is an application filed under section 50 of the Copyright Act, 1957 for rectification of the Register of Copyrights by expunging the entry in relation to artistic work "Himware" label registered at No. A-58561/2001. The petitioner submits that it is engaged in the business of manufacturing and marketing of wide range of sanitary wares and bath fittings. It honestly coined, invented, adopted and started using in 1960 a highly distinctive trade mark H-VITREOUS written in an artistic manner. The word "VITREOUS" is written across the horizontal bars of the letter "H". In the year 1990, it honestly coined, invented, adopted and started using a highly distinctive trade mark HINDWARE. The letters HIND were taken from the first part of its trading style, namely, HINDUSTAN and the letters WARE were taken from the second word in the trading style, namely, the sanitaryware. The said trade mark HINDWARE has been used in conjunction with the words H-VITREOUS since 1990. The trade mark H-VITREOUS with HINDWARE is duly registered under the Trade and Merchandise Marks Act, 1958 in class 11 as of 16th May, 1990. It is also the owner and proprietor in the artistic features contained in its H-VITREOUS HINDWARE label and also the copyright therein. The respondent who is engaged in the business of manufacturing and marketing of sanitary wares, bath fittings and other allied and cognate goods has adopted the trade mark HIMWARE label in respect thereof. The said label as adopted by the respondent is not original in character. It is slavish imitation of the petitioner's trade mark HINDWARE. The respondent got the said label HIMWARE registered at No. A-58561/2001 under the Copyright Act, 1957 (wrongly written by the petitioner in the application as the Indian Companies Act, 1957). The said registration is not legal as the same is not original in character and the respondent is also not the author of the said trade mark (sic). The respondent adopted the same dishonestly and got it registered by suppressing material facts. The respondent has no business to adopt the trade mark HIMWARE label which is identical with and deceptively similar to the trade mark/label of the petitioner. The respondent mala fide obtained no objection certificate from the Trade Mark Office under section 45(1) of the Copyright Act, 1957. The petitioner is the aggrieved person in the matter.

2. The respondent in its reply controverted the pleas of the petitioner generally. It submitted that the title HIMWARE including its artistic work was adopted by the respondent in 1999. The same is different from artistic work H-VITREOUS HINDWARE

The respondent is in the business of manufacturing and marketing of goods of sanitary wares, etc. There was an ex parte injunction issued by the High Court of Delhi in matter of use of the label. However, after the transfer of the said case to the court of Additional District Judge, Delhi, it has been decided by the said court that the application for stay is not maintainable and thus the same has been declined. The respondent has regularly and extensively used the trade mark HIMWARE including its artistic work and had bona fide and honestly adopted and conceived knowing well that there was no such trade mark including its artistic work in use and in existence. The respondent is the actual adopter, user, promoter and the true and lawful proprietor of its trade mark HIMWARE including the artistic work. The respondent had acquired bona fide common law rights and moved necessary applications under the trade mark law and the copyright law to have the statutory rights. The application under the Copyright Act was moved after obtaining necessary certificate from the Registrar of Trade Marks under section 45(1) of the Copyright Act, 1957. The present petition filed by the petitioner is on the grounds of entirely different trade mark H-VITEROUS HINDWARE including its artistic work. When the respondent adopted the trade mark HIMWARE including its artistic work, there was no other deceptively similar mark including its artistic work belonging to the petitioner. H-VITEROUS and HIMWARE are neither similar nor have any resemblance. Trade mark HINDWARE has neither been adopted nor used by the petitioner in respect of any goods so that the claim of the petitioner on the trade mark HINDWARE including its artistic work is absolutely false on the face of the record. Petitioner has admitted that the trade mark HINDWARE has been used in conjunction with the words H-VITEROUS since 1990. It is entirely different from the respondent's trade mark including its artistic work. HINDWARE has been coined by the petitioner from the words HINDUSTAN and SANITARWARE - the first one is the name of the country and the other one is descriptive of goods. Thus both do not help the petitioner in asserting for the originality of the mark so coined therefrom.

**3.** The petitioner in its evidence filed by way of affidavit has submitted that the trade mark HINDWARE has been used in conjunction with the words H-VITEROUS since 1990. Again, the same mark HINDWARE in conjunction with the words H-VITEROUS has been registered as number No. 529823-B in class 11 as of 16th May, 1990. The petitioner claims its ownership and proprietorship in the artistic features contained in its H-VITEROUS HINDWARE label and thus those rights in the copyright thereof. The impugned label adopted by the respondent is not original in character and it is slavish imitation of some other prior existing artistic work of some other person like the proprietors of the marks of FINEWARE, PARRYWARE, YEARWARE, etc. Impugned work does not belong to the authorship of Shri Sanjay Kumar, as claimed. It is the work of a professional artist.

**4.** The respondent in its evidence by way of affidavit, besides reiterating assertions put forth in the reply, submitted that the petitioner has admitted that the trade mark HINDWARE has always been used in conjunction with the words H-VITEROUS since 1990. The respondent submitted that the petitioner had made application for the registration of trade mark HINDWARE under application NOs. 1270483 and 1270477 in class 11 and class 21 as proposed to be used both on 3rd March, 2004. It appended copies of the relevant Trade Mark Journals in support of the evidence. The respondent has appended copies of Trade Mark Journals relating to various other marks for which the petitioner has made applications. The respondent enclosed the copies of Trade Mark Journals wherein the applications numbering 529823 and 529824 both as of date 16th May, 1990 for registration of label mark H-Viterous HINDWARE and H-Viterous HINDWARE with words S and I put horizontally between the bigger word H respectively were published. The respondent has submitted a copy of the relevant Trade Mark Journal wherein petitioner's application No. 850416 for registration of mark HIMWARE

has been advertised claiming user since March, 1999.

**5.** Learned counsel for the petitioner at the outset drew our attention to column number 2 of the impugned certificate of registration wherein the name of the applicant has been mentioned as M/s. Champion Ceramic and the name of the author in column 7 has been mentioned as Shri Sanjay Kumar, partner and the reference relating to address has been mentioned as being the same as in column 2. He submitted that the author being an individual should have executed an assignment in favour of the applicant partnership firm based upon which the applicant firm could make an application. We see no rationale in the argument. Shri Sanjay Kumar is the partner of the firm, M/s. Champion Ceramic and he accordingly has created the artistic work for the firm which he is supposed to do for the firm being the partner besides performing other functions. Similarly, learned counsel drew our attention to Para A of the reply filed by Shri Sanjay Kumar on behalf of the respondent wherein it has been mentioned that the respondent adopted the title HIMWARE including its artistic work in 1999. We see no contradiction therein as alleged by the learned counsel. Similarly, learned counsel went on to assail the competence of Shri Sanjay Kumar to file the evidence by way of affidavit. Learned counsel took the plea that the affidavit filed is not by the respondent since Shri Sanjay Kumar in the opening paragraph does not mention that he is filing the affidavit on behalf of the respondent. There is no merit in the argument. The opening paragraph of the affidavit when read alongwith the heading of the affidavit makes it clear that Shri Sanjay Kumar has sworn that affidavit on behalf of the respondent firm. He went on to explain that the relevant similar paragraphs relating to the capacity of the person making application for rectification filed by his client, the petitioner, are clear and unambiguous. Since no one including the counsel for the respondent has disputed the capacity of the person, the petitioner, making application or the correctness of the relevant paragraphs, there is no point in pursuing this matter any more. Learned counsel took us to annexure 9 and 10 to evidence by affidavit filed by the respondent wherein the copies of Trade Marks Journal whereunder the petitioner's marks H-Viterous HINDWARE have been advertised vide application N Nos.529823 and 529824 as of 16th May, 1990 where for user has been claimed as of 10.4.1960. He drew our attention to column 9 of the impugned certificate of registration where the year of first publication of mark HIMWARE has been claimed as 1999. Learned counsel took us to the evidence filed by the petitioner wherein it has been claimed that the impugned mark, besides being the slavish copying of its mark HINDWARE, is also so of others marks like FINWARE, PARRYWARE, YERAWARE etc. He took us to the copy of Trade Mark Journal at Annexure 11 to evidence by affidavit filed by the respondent where the registration as trade mark of HIMWARE has been sought by the respondent vide No. 850416 dated 8th April, 1999. In conclusion, the counsel summed up that the evidence filed by the respondent is not in accordance with the rules of evidence, there is no assignment of mark by the author, Shri Sanjay Kumar in favour of the applicant and it is not an original work being a work of slavish imitation of his work which is prior in time.

**6.** Learned counsel for the respondent submitted that Shri Sanjay Kumar, the author of the work, being the partner of the firm and thus an agent of the firm, could do everything which the firm can do. Besides, he pointed out that such a submission on the part of the learned counsel for petitioner is beyond the averments in the pleadings since there is nothing in the application of the petitioner on this score. The petitioner being a registered company has not filed any assignment in relation to its works. The right in the nature of copyright deals with artistic style of the work and not the words as such. HIMWARE has been written in a different style and has no resemblance to HINDWARE. He argued that the letter H as mark written for Hundai, Honda and Hindustan motor vehicles is in different style in relation to all of the motor vehicles and no one can claim

monopolistic right over the letter. It is only the monopoly of an individual over the artistic work of writing the letter the way the individual has written which matters. He put reliance upon MANU/KA/0061/1991 : AIR 1991 Kant 406 and 1993 PTC 300 in this regard. Learned counsel for the respondent drew our attention to the order passed by ADJ, Delhi dated 7.2.2005 wherein prayer of the petitioner for a stay order in a case relating to infringement was denied. Learned counsel referred to para 20 of 2006 (32) PTC 441 in support of his argument that the petitioner cannot take advantage of issues relating to third parties to support his cause.

**7.** Learned counsel for the petitioner in reply re-emphasised that the assignment from the author in the instance case was needed. The ocular features of the artistic work do not support of it being an original work. He tried to draw support from section 17 of the Trade Marks, 1999 dealing with the effects of registration of parts of a mark. There is little substance in the argument of the petitioner that in the instance case an assignment of the artistic work in favour of the applicant was necessary. Here is a matter relating to a partnership concern of which the author is one of the two partners. In view of the explicit provisions of section 18 of the Partnership Act, a partner of the firm is authorized to undertake all functions of the partnership firm including to create an artistic work for the firm. The earliest registration in support of their claim put by the petitioner is of Trade Mark No. 529823 dated 16th May, 1990 wherein in the application the user has been claimed as of 1960. The mark registered is H-Viterous in conjunction with the word HINDWARE. Thus the word Vitreous written across in the middle of the letter H and the word HINDWARE super imposed thereunder all taken together form part of the artistic work claimed by the petitioner. The petitioner had filed some more applications for registration of trade marks for which we find the relevant copies of the Trade Marks Journal in the Annexures to the evidence by affidavit filed by the respondent. The petitioner has put his reliance upon the notices so published in those Journals. All the marks so published are more or less replica of the mark registered under No. 529823 having H-Viterous in conjunction with word HINDWARE as the core feature of the mark. It is only under application No. 1270483, 1270484, 1270477, 1270487 all of 3rd March, 2004 that registration for the word HINDWARE per se with no additionalities thereto has been sought. The user claimed in all the application is "Proposed to be used". The learned counsel for the petitioner thus argued that the impugned artistic work, being a word per se, bears resemblance to the said marks of the petitioner under registration for trade marks. Here the applications for registration of trade marks were filed in 2004 claiming no past use. There is no merit in the argument of the petitioner on this score. Associated Electronic and Electrical Industries P. Ltd. v. Sharp Tools, Kalapatti, MANU/KA/0061/1991 : AIR 1991 Kant 406 (412) has succinctly summed the principles of law relating to the originality of artistic work as under:-

"One of the surest test to determine whether or not there has been a violation of copyright is to see if the reader, spectator, or the viewer after having read or seen both the works would be clearly of the opinion and get an unmistakable impression that the subsequent work appears to be a copy of the first. In other words, dealing with the question of infringement of copyright of the applicant's work by the respondent's work, the court is to test on the visual appearance of the object and drawing, design, or artistic work in question and by applying the test viz., 'lay observer test' whether to persons who are not experts in relation to objects of that description, the object appears to be a reproduction. If to the 'lay observer', it would not appear to be reproduction, there is no infringement of the artistic copyright in the work."

In *Jindal (India) P. Ltd. v. Diamond Plastic Products*, MANU/CP/0001/1993 : 1993 PTC 300, this Board held that there can be no copyright in a word or words but the right can only be in artistic manner in which the same is written and accordingly the mere use of the word 'JINDAL' by the respondent in his label cannot by any test constitute the infringement of the artistic work of the petitioner.

The petitioner has put heavy reliance upon its trade mark registration under No. 529823 dated 16th May, 1990 where the word HINDWARE with its own style of writing with all capital letters in perpendicular form has one of the arms of each letter in thick texture with pores. Letter W is having two such arms. Again, it is important to note that it is not the word HINDWARE per se which is in question. Petitioner's mark H-Viterous with the word Hindware below it has its own integrated look-one cannot stand without the other. HIMWARE has been written in a typical form giving a separate look even to an uneducated person. Letter H which is in upper casing is in perpendicular form and the rest of letters are in lower casing and with a slant of 60 degree angle. All letters are in thick shape with no pores like in the HINDWARE. Four applications filed in 2004 for the registration of word HINDWARE per se in simple form with no specific special artistic feature thereof are much late in time and, notwithstanding their artistic dissimilarity to the impugned mark, cannot affect the registration of the artistic work of the respondent. Sine qua non for a remedy under section 50 of the Copyright Act, 1957 is that it is only the Registrar or a person aggrieved who can initiate the rectification proceedings under the Act. Even if it is established that there is similarity in the impugned artistic work and the works of other authors, namely, PARRYWARE, etc., it is only for the aggrieved person to move in the matter. The petitioner is incompetent to put reliance upon that.

Accordingly, we hold that the impugned work is the original artistic work of the respondent and dismiss the application for rectification. No order as to

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