

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 573 OF 2015INSUIT NO. 309 OF 2015

Reliance Industries Ltd.

... Plaintiff

vs.

Concord Enviro Systems Pvt. Ltd.

...Defendant

Dr. V.V. Tulzapurkar, Senior Advocate, along with Mr. Ashish Kamat, instructed by M/s. A.S. Dayal & Associates, for the Plaintiff.

Mr. Rashmin Khandekar, along with Ms. Nidhi Tandon and Ms. Soniya Putta, instructed by M/s. Solomon & Co., for the Defendant.

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CORAM: S. J. KATHAWALLA, J.**Date: 30th June, 2016****JUDGMENT:**

1. The Plaintiff claims injunctive reliefs on the basis of infringement of the Plaintiff's registered trade marks, infringement of copyright and passing off, on

the ground that the logo of the Defendant,  (hereinafter referred to as "the impugned logo of the Defendant" - Exhibit-E page 52 of the Plaintiff) is deceptively similar to the Plaintiff's registered trade marks consisting of a

distinctive logo  (hereinafter referred to as "the Plaintiff's logo" -- Exhibit-A pages 42/43 of the Plaintiff).

2. On behalf of the Plaintiff, the following submissions are made:

2.1 That the Plaintiff's claim for infringement is based on the registration of the Plaintiff's trade marks described in Exhibit-B to the Plaintiff at page 44. The Plaintiff's logo is an essential feature of each of the said trade marks.

2.2 That the Defendant is using and/or is intending to use its impugned logo in respect of goods falling in Classes 7, 9 and 11 and services falling in Class 40. The Plaintiff has registration under those classes.

2.3 That the impugned logo of the Defendant is deceptively similar to the Plaintiff's logo mark. The Plaintiff's logo is a well-known trade mark within the meaning of the Trade Marks Act, 1999. Therefore the Plaintiff is entitled to the reliefs of infringement not only in respect of goods falling in Classes in which the Plaintiff's logo is registered, but also in respect of goods falling in other classes in respect of which the Defendant is using and/or is intending to use its impugned logo and which classes are mentioned in the Defendant's Affidavit-in-Reply dated 5th May, 2015 (Exhibit-C page 25 of the Notice of Motion).

2.4 That for considering the question of infringement, it is necessary to

consider whether the impugned logo of the Defendant is deceptively similar to the Plaintiff's logo.

2.5 That the impugned logo of the Defendant is deceptively similar to the Plaintiff's logo, both visually and structurally.

2.6 That for the purpose of comparison of the two marks, the factors laid down by the Hon'ble Supreme Court of India in the case of *Cadila Healthcare Ltd. vs. Cadila Pharmaceuticals Ltd.*¹ such as nature of marks; degree of resemblance between the marks; similarity in the goods of rival traders; the nature of goods; the class of purchasers; the mode of purchase; and any other surrounding circumstances, relevant to the extent of dissimilarity between the competing marks, are required to be considered.

2.7 That while considering the aforesaid factors, the principles of comparison as laid down by the Courts in respect of label marks are required to be applied.

2.8 That it is a well settled principle that the test of comparisons of the marks side-by-side is not a sound one, because a purchaser will seldom have the two marks actually before him, when he makes his purchase; and the marks with many differences may yet have an element of similarity which will cause deception (*National Chemicals vs. Reckitt & Colman*²).

2.9 That side-by-side comparison is required to be avoided because the

¹ 2001 PTC 300

² AIR 1991 Bom. 76 at 81

question is whether the person who sees the impugned mark, in the absence of the Plaintiff's mark, and in view only of the general recollection that such person has of what the nature of the Plaintiff's mark was, would be liable to be deceived, and to think that the trade mark before him is the same as that of the Plaintiff of which he has a general recollection (*Sadow's Application*³).

2.10 That the resemblance need not be such as would deceive persons who should see two marks placed side-by-side. If the rule is so restricted, it would be of no practical use (*Seixo vs. Provezelde*⁴).

2.11 That the reason for applying this test is that the marks are remembered rather by general impressions or by some significant detail, than by any photographic recollection of the whole (*De Cordoa vs. Vick Chemical*⁵).

2.12 That if the impugned mark contains a feature which is a striking feature, which feature or similar one is present in the Plaintiff's mark, a case for infringement is made out -- *Taw vs. Notek*⁶ and *Reliance Industries Ltd. vs. Anand Traders*⁷

2.13 That the principles of comparison were summarised by the Hon'ble Supreme Court in the case of *Parle Products vs. J.P. & Co.*⁸, wherein it is held

³ (1914) 31 RPC 196 at 205

⁴ (1866) 1 Chancery Appeal 192 at 196

⁵ (1951) 68 RPC 103 at 106

⁶ (1951) 68 RPC 271

⁷ 1999 PTC 414

⁸ AIR 1972 SC 1359 at 1362

that in order to come to the conclusion whether one mark is deceptively similar to another, the broad and essential features of the two marks are to be considered and they should not be placed side-by-side to find out if there are any differences in the design, and if so, whether they are of such a 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 mark as would be likely to mislead a person usually dealing with one, to accept the other, if offered to him.

2.14 That in order to decide the question of deceptive similarity, the Court is required to consider the features which are common and not to concentrate on the distinguishing features. The observations of the Hon'ble Supreme Court in *S.M. Dyechem Ltd. vs. Cadbury India Ltd.*⁹ to the effect that distinguishing features should be considered, were held not to be good law by the Hon'ble Supreme Court subsequently in *Cadila Healthcare Ltd. vs. Cadila Pharmaceuticals Ltd.* (supra).

2.15 That as held in *Saville Perfumery vs. June*¹⁰ the essential and distinguishing features in both the marks are required to be considered. Also in *James Chadwick vs. National Sewing*¹¹ (which decision was upheld by the

⁹ 2000 PTC 297

¹⁰ (1941) 58 RPC 147 at 162

¹¹ AIR 1951 Bom. 147 at 152, 153

Hon'ble Supreme Court in the case reported in AIR 1953 SC 357) , Chief Justice Chagla inter alia observed that, *"what is important is to find out what is the distinguishing or essential feature of the trade mark already registered and what is the main feature or the main idea underlying that trade mark, and if it is found that the trade marks whose registration is sought, contains the said distinguishing or essential feature or convey the same idea, then ordinarily the Registrar would be right if he came to the conclusion that the trade mark should not be registered. The real question is as to how a purchaser, who must be looked upon as an average man of ordinary intelligence, would react to a particular trade mark what association he would form by looking at the trade mark, and in what respect he would connect the trade mark with the goods which he would be purchasing. It is impossible to accept that a man looking at a trade mark would take in every single feature of the trade mark. The question would be, what would he normally retain in his mind after looking at the trade mark? What would be the salient features of the trade mark which in future would lead him to associate the particular goods with that trade mark?."*

2.16 That if the Court feels satisfied on inspection of the mark itself, in coming to the conclusion that some particular feature is the distinguishing feature of the mark, then evidence as to what is an essential feature is not necessary.

2.17 That applying the aforesaid principle, it becomes clear that the

Defendant's impugned logo has taken the whole of the Plaintiff's logo, and by adding what the Defendant describes as a drop of water as a background to the essential feature, makes no difference. Similarly, using the essential feature of the Plaintiff's logo in a reverse manner also makes no difference. The background device, which the Defendant claims to be a drop of water, does not make the impugned mark different from the Plaintiff's logo. An overall impression which one gets looking at the impugned mark is that it is a copy of the Plaintiff's logo inasmuch as the whole of the Plaintiff's logo is, though in a reverse way incorporated in the impugned mark. A purchaser familiar with the Plaintiff's logo is bound to get confused when he sees the impugned mark, because he does not have both the marks before him and he has a general impression of the Plaintiff's logo.

2.18 That in the present case, this Court need not push further the enquiry as to whether the impugned mark is deceptively similar or not, because the Defendant intended to create deception or confusion. The intention of the Defendant to create deception or confusion is clear from the fact that the Plaintiff's logo has been registered from 1999 and has been extensively used by the Plaintiff and it is not even denied by the Defendant that the Defendant was not aware of the Plaintiff's logo; the Defendant is not honest or candid in giving an explanation for adoption of the impugned mark; the explanation for adoption

given in the reply to the Plaintiff's Notice, in its Letter dated 20th October, 2014 and in paragraph 7 of the Affidavit-in-Reply at page 15 of the Notice of Motion are inconsistent with each other. Therefore, when the explanation for adoption is not honest, and/or that there are inconsistencies, the Court can presume that the Defendant adopted the mark with the intention to cause confusion (*Kerly's law of Trade Marks, 12th Edition, paras 16-73 at page 408 and Aktiebolaget Volvo vs. Volvo Steel Ltd.*¹²)

2.19 That the impugned logo of the Defendant is deceptively similar to the Plaintiff's logo. The Plaintiff has made out a strong prima facie case for grant of interim injunction on the basis of its registration for goods falling in Classes 7, 9 and 11 and services falling in Class 40.

2.20 That the Plaintiff has specifically pleaded in paragraph 4.4 that the Plaintiff's logo is a well known trade mark. The material produced by the Plaintiff and referred to in paragraphs 3.2, 3.3, 3.4, 3.5 and 3.6, including the exhibits referred to therein i.e. from Exhibit "H" to Exhibit "Q", clearly show that the Plaintiff's logo is a well known trade mark.

2.21 That the use of the impugned logo by the Defendant is without due cause and by such use the Defendant is taking unfair advantage of the distinctive character and repute of the Plaintiff's registered logo.

¹² 1998 (18) PTC page 47 at 98, para 73.

2.22 That the use of the impugned logo by the Defendant is detrimental to the distinctive character and repute of the Plaintiff's registered logo.

2.23 That the Plaintiff is entitled to injunction on the basis of registration in other classes in view of the fact that the Plaintiff's mark is a well known trade mark and the Defendant is committing an act of infringement within the meaning of Sections 28 and 29 (4) of the Act.

2.24 That the Plaintiff is also entitled to injunction on the basis of passing-off since the Defendant's impugned logo is deceptively similar to the Plaintiff's logo.

2.25 That the Plaintiff is also entitled to interim reliefs on the basis of copyright. The Plaintiff's logo is an original artistic work. The Plaintiff's logo is registered as an artistic work under the Copyright Act and a Certificate of Registration is produced at Exhibit-D page 46 of the Plaint. The said registration is an evidence of the Plaintiff's entitlement to copyright in the artistic work. The impugned mark of the Defendant at Exhibit-E page 52 is a substantial reproduction or a colourable imitation of the Plaintiff's artistic work. The addition of the background of a device which according to the Defendant is a drop of water makes no difference as far as the question of colourable imitation or substantial reproduction is concerned.

2.26 That as emphasised by the Hon'ble Supreme Court in the case of *R.G.*

*Anand vs. Deluxe Films*¹³, one of the surest and the safest tests 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, is clearly of the opinion, and gets an unmistakable impression that the subsequent work appears to be a copy of the original.

2.27 That in the case of infringement of copyright, the question whether a person will be deceived or not is irrelevant. What is relevant is whether the Defendant has copied the Plaintiff's work. It is the Plaintiff's labour that is required to be protected.

2.28 That the entire artistic work of the Plaintiff is incorporated in the impugned work of the Defendant, by making slight alterations. As held in *C. Cunniah & Co. vs. Balraj & Co.*¹⁴, in deciding the question of infringement of copyright, there need not be an exact reproduction to support the inference that the Defendant's work was taken from the Plaintiff's work because every intelligent copying must introduce a few changes.

2.29 That the balance of convenience is also on the Plaintiff's side. That in the circumstances, the Notice of Motion be made absolute with costs.

3. The Learned Advocate appearing for the Defendant has submitted as follows:

¹³ AIR 1978 SC pg. 1613

¹⁴ AIR 1961 Madras page 111

3.1 That the basis of the Plaintiff's claim that the rival marks are identical and/or deceptively similar is wholly misconceived and/or baseless, and/or even otherwise untenable in law. Once it is found that the rival marks are not identical, and/or deceptively similar, and/or are not likely to cause confusion and/or deception, there is no question whatsoever of grant of any reliefs.

3.2 That the rival marks are as different as chalk and cheese and there is no similarity between the two in any manner whatsoever. This is apparent to the naked eye itself. Once it is apparent to the naked eye itself that there is no similarity at all between the rival marks, this by itself ought to disentitle the Plaintiff from any reliefs whatsoever. No further inquiry of any nature is therefore required.

3.3 Even assuming whilst denying, that there is even an iota of similarity between the rival marks, the same differ in absolutely every single material aspect which in itself makes the rival marks completely different and/or distinct and/or dissimilar.

3.4 That the differences and/or dissimilarities in the rival marks even if one was to compare them, are as follows:

- (i) The impugned logo of the Defendant is in the shape of a drop, as contrasted with the round circular shape of the logo of the Plaintiff.
- (ii) The impugned logo symbolizes and/or conveys the idea of the

Defendants' initials being 'c' and 'e' artistically depicted inside the said drop, while the Plaintiff itself calls its logo as the 'R' logo.

(iii) The impugned logo is formed by combining 'c' and 'e', the initials that form the brand name Concord Enviro. The initials are combined in a way that they give a feeling of fluidity and energy to the symbol. The 'c' of Concord is embracing the 'e' of Enviro which means that this is a Company that is contributing to create a better and cleaner environment, which is part of the mission statement of the Defendant. The fluidity is further emphasized by the water bubble that envelopes the 'c' and 'e' to stand for clean water. That is totally absent in the Plaintiff's logo.

(iv) The impugned logo symbolizes water i.e. the industry in which the Defendant operates, the said being treatment of waste-water, and the same is completely different in comparison to the Plaintiff's logo i.e. the letter 'R', which is written in an artistic manner, inside a circle. In the Plaintiff's 'R' logo, the 'R' is formed in inverse space that is white colour or no colour.

3.5 That the test to assess and/or compare rival marks are judicially well settled in several decisions including in the case of *Pianotist Company Limited's Application*¹⁵, *F. Hoffmann-La Roche & Co. Ltd. vs. Geoffrey Manner & Co.*

¹⁵ 23 RPC 774 at 777

*Pvt. Ltd.*¹⁶; *Hiralal Parbhudas vs. Ganesh Trading Company and others*¹⁷

3.6 That applying the test laid down in the said judgments, there is no manner of doubt that the rival marks are completely distinct and/or different, and that there is no similarity whatsoever between them.

3.7 That the Plaintiff has submitted that there is no objection to the water droplet forming a part of the Defendant's logo. In fact it is submitted on behalf of the Plaintiff that the existence of the water droplet is irrelevant, as the Defendant has otherwise copied the essential feature of the Plaintiff's registered logo i.e. the curve. Therefore it is argued that the water droplet forming a part of the Defendant's logo is liable to be ignored.

3.8 It is impermissible in law to break up the rival logos into integers and compare the marks after such dissection. The Plaintiff's argument that the water droplet which forms an essential feature of the Defendant's logo should be ignored, or that its presence is irrelevant, is contrary to settled law. It is trite law that a mark is required to be compared as a whole. Weightage is required to be given to each feature of the rival marks, such that they are compared as a whole. The exercise of taking a portion of a mark and comparing it with a portion of another mark is impermissible. This is exactly what the Plaintiff has sought to

¹⁶ 1969 (2) SCC 716

¹⁷ AIR 1984 Bom 218

do in the present case.

3.9 That while it is trite that marks are to be compared and assessed as a whole, even if the rival logos are dissected and only the rival ‘curves’ are compared, as wrongly propounded by the Plaintiff, the same exhibit distinct differences making them all together different and/or distinct. More particularly: (i) the Plaintiff’s curve tapers towards the left and becomes extremely wide/squarish to the right, giving it a unique shape, (ii) the curvature to the right is wide/squarish and angled such that the ‘flame’ in the middle leads to a formation of an ‘R’, and (iii) the Plaintiff’s “curve” is very ‘rounded’ and/or “circular” and virtually completes “circular shape”. All these facets are absent in the “curve” appearing in the Defendant’s mark. The Defendant’s curve does not become wider/squarish towards the right. The curve tapers at both ends giving the curve an identity completely different and distinct from the Plaintiff’s “curve”. There is no ‘flame’ in the middle and there is obviously no formation of an “R”. Further, the Defendant’s curve is also not as ‘rounded’ or “circular” as the Plaintiff’s curve, and falls much short of completing a “circular shape”. Thus, the rival “curves” by themselves are also absolutely different and distinct.

3.10 That the Defendant has not canvassed the proposition that while

assessing deceptive similarity, more regard has to be paid to the parts which are not common, while at the same time not disregarding the common parts. It is this manner of comparison employed by the Apex Court in the case of *S.M. Dyechem Ltd. vs. Cadbury India Ltd.* (supra) which was subsequently disapproved by the Hon'ble Supreme Court in the case of *Cadila* (supra) relied upon by the Plaintiff.

3.11 That therefore the rival logos in the present case are required to be compared as a whole, without disregarding any feature thereof, more importantly in the present case, the essential feature of a water droplet, which dominates the Defendant's logo. While the similarities are required to be considered, significant dissimilarities can certainly not be ignored, especially when such dissimilarities are the essential features. If one compares the rival logos as a whole, it is absolutely clear that there is no similarity whatsoever.

3.12 That it is also settled that it is important to consider the 'idea' conveyed by rival marks. An "idea" assumes even more importance in respect of a logo mark, which in itself is a "depiction", as opposed to a word mark, and is as such more 'expressive'. In this case, even the idea conveyed by the rival logos is *ex-facie* entirely distinct and/or different. The idea conveyed by the Defendant's Concord Enviro logo is that of a 'water droplet' and 'c' and 'd' written inside

the water droplet in a green coloured curve signify concord and enviro. The use of blue and green colour obviously signifies ‘water’ and the ‘environment’. The Defendant being engaged in the business of waste water purification, reuse systems and solid waste re-cycling, has adopted a logo which conveys the idea of conservation of the environment and water. As opposed to this, the idea conveyed by the Plaintiff’s logo is totally different. The Plaintiff itself calls its logo, available in various colours, as an ‘R’ logo. “R” obviously signifies “Reliance Industries Limited”, a corporate entity. The middle portion of its logo is a “flame” according to the Plaintiff’s own case. The Plaintiff’s logo does not convey the idea of water or environment, let alone conservation of water or environment. In fact, in more ways than one, the idea conveyed by the Defendant’s logo is the anti-thesis of the idea conveyed by the logo of the Plaintiff. In this case, even the idea conveyed by the rival logos is ex-facie entirely distinct and/or different.

3.13 The Plaintiff has in the most unique and ex-facie, impermissible manner sought to argue that this Court must compare the logo of the Plaintiff when rotated to the right as depicted at page 51 of the Plaint, with the Defendant’s impugned logo which then, according to the Plaintiff, appears to be an inverted or reversed or mirror image of the Defendant’s logo depicted at page 52. Such

convoluted mode of comparison is absolutely impermissible. Even here, contrary to settled law, the Plaintiff has requested the Court to completely disregard an essential feature of the Defendant's impugned logo being the water droplet from comparison.

3.14 That even otherwise, when such an ex-facie impermissible and flawed comparison is made, it is apparent that the logos are different and distinct. Such a comparison shows that while the Plaintiff's logo has a horizontal 'flame' in the middle of its logo, no such flame exists in the Defendant's logo. The dimensions and shape of the 'curve' forming a part of the Plaintiff's logo and the Defendant's logo, as more particularly set out hereinabove, are entirely different. Now, on account of the 'rotation', the Plaintiff's logo is wide/squarish at the bottom and is tapering towards the top. The 'curve' forming a part of the Defendant's logo is clearly not so, as it tapers at both ends retaining an identity completely distinct from that of the 'curve' of the Plaintiff's logo. Further, such a 'rotated' logo of the Plaintiff conveys no idea whatsoever, while the Defendant's logo exhibits the idea of conservation of water and environment, in the manner set out hereinabove. As such, there is absolutely no similarity in the marks depicted at pages 51 and 52 of the Plaintiff. A recourse to a mode of comparison which is contrary to settled law only exposes the fragility of the

Plaintiff's case regarding deceptive similarity between the rival logos.

3.15 That what the Plaintiff is seeking is a monopoly on a curve of virtually every shape and/or size and/or dimension and/or design and/or artistic work, which is clearly impermissible.

3.16 That it is not the Defendant who is guilty of a microscopic comparison between the rival logos. While it is trite that rival logos are liable to be compared as a whole, the aforesaid exercise of pointing out material dissimilarities in the rival curves has been necessitated only in view of the Plaintiff's contention that one must only look and compare parts of the rival logos, in the present case being curves, while disregarding the other features.

3.17 That as held by the Hon'ble Supreme Court in the case of *Khoday Distilleries Ltd. vs. Scotch Whisky Association and others*¹⁸, it is trite law that to decide the question of deceptive similarity, the nature and kind of customer who is likely to buy, as also other surrounding circumstances, play an important factor.

3.18 That the customers and/or purchasers who would buy the Defendant's products are such that would not buy them without any deliberation. The Defendant is engaged in the business of development, manufacturing and

¹⁸ (2008) 10 SCC 723

installation of waste water treatment and reuse systems as well as solid waste recycling. Such products are not sold across the counter. This is also a factor which works against the Plaintiff being granted any relief.

3.19 That even otherwise, the Defendant has acted in good faith and the manner in which the Defendant's logo was adopted is completely honest and/or bona fide. The manner in which the Defendant's mark was adopted is set out in the Defendant's reply dated 20th October, 2014, to the Plaintiff's Cease and Desist Notice dated 8th August, 2014.

3.20 That ultimately what is of utmost importance in evaluating similarity between rival marks, is the assessment of this Court on a plain viewing of the rival logos. No further enquiry is warranted if this Court feels that the rival logos are not similar and/or deceptively similar (*Mahendra & Mahendra Paper mills Ltd. vs. Mahindra & Mahindra Ltd.*¹⁹)

3.21 That the Plaintiff has miserably failed to make out a case under Section 29 (4) of the Act. Even assuming that the Plaintiff's logo is a well known mark, that by itself is not sufficient to claim relief under Section 29 (4) of the Act. All the ingredients of Section 29 (4) of the Act are required to be satisfied. That at least two ingredients of Section 29 (4) of the Act are not satisfied in the present

¹⁹ (2002) 2 SCC 147

case i.e. the use by the Defendant of its logo, cannot be said to be without due cause and taking unfair advantage of.

3.22 That as is evident from what is stated in the Letter dated 20th October, 2014, which is a response to the Plaintiff's Cease and Desist Notice dated 8th October, 2014, and the Affidavit of Mrs. Nidhi Prerak Goel dated 6th August, 2016, the Defendant has honestly adopted and/or coined its logo. The Defendant's logo was honestly coined by the wife of one of the Directors of the Defendant, who has a Diploma in Designing and a Degree in Advertising, who also happens to be the sister-in-law of the Managing Director of the Defendant.

3.23 That the Defendant has also placed on record, marks and/or logos of several other entities engaged in similar business which have used not only different shapes and/or forms of a water droplet, but also different curves in the colour green or otherwise signifying environment. The Plaintiff's case that the adoption by the Defendant of its logo is not honest is ex-facie untenable. This is apparent not only from the circumstances in which the Defendant has adopted its logo, but also from a bare look at the same, as it is absolutely different, distinct and dissimilar from the Plaintiff's logo. Once it is found that the adoption on the face of it is not one which is without due cause/taking unfair advantage of, there is no question of claiming any relief under Section 29 (4) of the Act.

3.24 That since the rival logos are completely different and/or distinct and/or dissimilar, there is neither any misrepresentation on the part of the Defendant nor is there any likelihood of confusion and/or damage to the Plaintiff. As such, no case whatsoever in respect of passing off is made out.

3.25 That again since the rival logos are completely different and/or distinct and/or dissimilar, there is absolutely no similarity whatsoever in the rival logos. It is ex-facie evident that the Defendant's logo is neither a copy, nor a substantial reproduction of the Plaintiff's logo. By no stretch of imagination whatsoever, can it be said that any person after seeing the rival marks would be of the opinion, or would get an impression that the Defendant's logo is by and large a copy of the Plaintiff's logo.

3.26 This is clearly a case where the Plaintiff, an extremely powerful corporate with unlimited resources is seeking to brow beat and harass, honest and bona fide entities doing legitimate business, and is trying to seek an all pervasive monopoly on a curve, which is impermissible in law.

3.27 That the balance of convenience is in favour of the Defendant.

3.28 That the case law relied upon by the Plaintiff does not assist their case.

3.29 That the Notice of Motion therefore be dismissed with costs.

4. I have considered the contents of the plaint, affidavits filed by the parties, oral and written submissions, and the case law relied upon by them.

5. As set out hereinabove, the Plaintiff's are claiming injunctive reliefs in the Notice of Motion on the basis of infringement of the Plaintiff's registered trade marks, infringement of copyright and passing off, on the ground that the

Defendant's impugned logo



(Exhibit-E page 52 of the Plaint) is

deceptively similar to the Plaintiff's logo



(Exh.A pages 42 and 43

of the Plaint). According to the Plaintiff, the Plaintiff's logo is an essential feature of each of the said trade marks. The Defendant is using or is intending to use the impugned logo mark in respect of goods falling in classes 7, 9 and 11 and services falling in class 40. The Plaintiff has registration in these classes.

6. As submitted by the Plaintiff, for considering the question of infringement, it is necessary to consider whether the aforestated impugned logo of the Defendant is deceptively similar to the Plaintiff's logo.

7. The Hon'ble Supreme Court has in *Cadila Healthcare Ltd. vs. Cadila*

Pharmaceuticals Ltd. (supra) laid down the factors for comparison of the two marks, which are reproduced hereunder:

- "(a) The nature of the marks i.e. whether the marks are word marks or label marks or composite marks, i.e. both words and label works.*
- (b) The degree of resemblance between the marks, phonetically similar and hence similar in idea.*
- (c) The nature of the goods in respect of which they are used as trade marks.*
- (d) The similarity in the nature, character and performance of the goods of the rival traders.*
- (e) The class of purchasers who are likely to buy the goods bearing the marks they require, on their education and intelligence and a degree of care they are likely to exercise in purchasing and/or using the goods.*
- (f) The mode of purchasing the goods or placing orders for the goods.*
- (g) Any other surrounding circumstances which may be relevant in the extent of dissimilarity between the competing marks".*

The Hon'ble Supreme Court has in paragraph 36 of its Judgment also made it clear that weightage should be given to each of the aforesaid factors depending upon the facts of each case, and the same weightage cannot be given to each factor in every case.

8. It is settled law that the test of comparisons of the marks side- by-side is not a sound one, because it is unlikely that the purchaser will have the two marks before him. Therefore, what is required to be determined by the Court is whether a purchaser who sees the impugned mark in the absence of the Plaintiff's mark, would only on the basis of a general recollection of what the nature of the Plaintiff's mark was, think that the trade mark before him is the same as the Plaintiff's mark, and thereby be deceived.

9. According to the Plaintiff, the Defendant has in its impugned logo taken the whole of the Plaintiff's logo (the curve) which is an essential feature of the Plaintiff's mark/logo, and is therefore guilty of infringement. In my view, assuming that the Plaintiff's curve is an essential feature of its mark, the alleged essential feature of the Plaintiff's logo cannot be said to be a part of the impugned logo of the Defendant. There is no similarity between the Plaintiff's logo (curve) and the curve used by the Defendant. There is a clear difference and/or distinction between the Plaintiff's curve which is in round circular shape and the curve used by the Defendant. In fact, what is referred to as the 'curve' used by the Defendant is, as explained by the Defendant, the initials of the Defendant i.e. 'c' and 'e', which are artistically depicted inside the water droplet, which is an essential feature of the Defendant's logo. As against this,

the Plaintiff itself calls its logo ('curve') as the 'R' logo, since the letter 'R' is written in an artistic manner inside the circle. In the Plaintiff's 'R' logo, 'R' is formed in inverse space that is white colour or no colour. It therefore cannot be held that any person on seeing the impugned logo of the Defendant, would in view of the general recollection of the Plaintiff's mark or otherwise, be deceived to think that the trade mark before him is the same as the Plaintiff's mark. Therefore it can be safely concluded that the impugned logo of the Defendant does not contain any essential or distinguishing feature of the Plaintiff's logo as alleged or at all.

10. It is submitted on behalf of the Defendant that it is trite law that a mark should be compared as a whole. The Defendant is correct in its submission that weightage is required to be given to each feature of the rival mark such that they are compared as a whole. The rival logos are required to be compared as a whole without disregarding any feature thereof, more importantly, in the present case the essential feature of a water droplet which dominates the Defendant's logo. While the similarities are required to be considered, significant dissimilarities cannot be ignored.

11. In the case of *F. Hoffmann-La Roche & Co. Ltd.* (supra), it is inter alia held that the marks must be compared as a whole. The relevant portion of

paragraph 7 of the said Judgment is reproduced hereunder:

"7. ... It is also important that the marks must be compared as a whole. It is not right to take a portion of the word and say that because that portion of the word differs from the corresponding portion of the word in the other case there is no sufficient similarity to cause confusion. The test is whether the totality of the proposed trade mark is such that it is likely to cause deception or confusion or mistake in the minds of persons accustomed to the existing trade mark"

12. The Plaintiff itself has relied on the decision of the Hon'ble Supreme Court in the case of *Parle Products vs. J.P. & Co.* (supra), wherein the Hon'ble Supreme Court has held that in order to come to the conclusion whether one mark is deceptively similar to another, the broad and essential features of the two marks are to be considered. It would be enough if the impugned mark bears such an **overall similarity** to the registered mark as would be likely to mislead a person usually dealing with one to accept the other if offered to him.

13. This Court has in its decision in *Hiralal Parbhudas vs. Ganesh Trading Company and others* (supra), whilst setting out the test to compare the two marks, inter alia, asserted that overall similarity is the touchstone. Paragraph 5 of the said decision is relevant and is reproduced hereunder:

"5. What emerges from these authorities is (a) what is the main

idea or salient features, (b) marks are remembered by general impressions or by some significant detail rather than by a photographic recollection of the whole, (c) overall similarity is the touchstone, (d) marks must be looked at from the view and first impression of a person of average intelligence and imperfect recollection, (e) overall structure, phonetic similarity of idea are important and both visual and phonetic tests must be applied, (f) the purchaser must not be put in a state of wonderment, (g) marks must be compared as a whole, microscopic examination being impermissible, (h) the broad and salient features must be considered for which the marks must not be placed side by side to find out differences in design and (i) overall similarity is sufficient. In addition, indisputably must also be taken into consideration the nature of the commodity, the class of purchasers, the mode of purchase and other surrounding circumstances”.

In the present case, apart from the fact that the Defendant’s impugned logo has not incorporated the ‘essential feature’ of the Plaintiff’s registered logo, as alleged, upon comparison of the rival logos as a whole, it is absolutely clear that there is no similarity whatsoever. Even the idea conveyed by the rival logos is ex-facie entirely distinct and/or different as explained/submitted by the Defendant and set out in paragraph 3.12 hereinabove.

14. The Plaintiff has also sought to argue that this Court must compare the

Plaintiff's logo when rotated to the right as depicted at page 51 of the Plaintiff with the Defendant's impugned logo which then, according to the Plaintiff, appears to be an inverted or reversed or mirror image of the Defendant's logo. I am in agreement with the Defendant's submission that such convoluted mode of comparison cannot be permitted. No average man with imperfect recollection is going to look at the 'rotated' mark of the Plaintiff and be led to believe that the inverted or reversed or mirror image of such 'rotated' logo is deceptively similar to the Defendant's logo, so as to cause confusion. Again such a 'rotated' logo of the Plaintiff, conveys no idea whatsoever while the Defendant's logo exhibits the idea of conservation of water and environment in the manner set out hereinabove.

15. The Hon'ble Supreme Court has in para 16 of its decision in *Mahendra & Mahendra Paper Mills Ltd.* (supra), inter alia held that it is well settled that whether there is a likelihood of deception or confusion arising, **is a matter for decision by the Court**, and no witness is entitled to say whether the mark is likely to deceive, or to cause confusion. Paragraph 16 of the said decision is relevant and is reproduced hereunder:

"16. This question has been considered by different High Courts and this Court in umpteen cases from time to time. On analysis of the principles laid down in the decisions, certain recognised

parameters relating to the matter have emerged. Without intending to be exhaustive some of the principles which are accepted as well settled may be stated thus: that whether there is a likelihood of deception or confusion arising is a matter for decision by the Court, and no witness is entitled to say whether the mark is likely to deceive or to cause confusion; that all factors which are likely to create or allay deception or confusion must be considered in combination; that broadly speaking, factors creating confusion would be, for example, the nature of the market itself, the class of customers, the extent of the reputation, the trade channels, the existence of any connection in course of trade, and others."

Therefore, in my view, in the present case, as set out hereinabove, not only is there no similarity found upon the rival logos being compared, but the rival logos are found to be absolutely different and/or distinct and/or dissimilar. There is no question whatsoever of any confusion and/or deception being caused on account of the use of the rival logos. This is apparent to the naked eye itself. In view thereof no further enquiry is required and the Plaintiff is not entitled to claim any relief on this ground alone.

16. I am also of the view that the Defendant has acted in good faith and the Defendant's logo is honest and bona fide. The manner in which the Defendant's

mark was adopted is set out in the Defendant's reply dated 20th October, 2014 to the Plaintiff's Cease and Desist Notice dated 8th August, 2014. Only because the Defendant has tried to give a more elaborate explanation qua the adoption of their mark in the Affidavit-in-Reply, does not make the adoption of the logo dishonest or lacking in bona fides. Again only because the Defendant and/or Mrs. Nidhi Prerak Goel, wife of one of the Directors, has not stated that she had not seen/come across the Plaintiff's logo earlier, cannot be construed to mean that the Defendant has been dishonest in adopting their logo.

17. Again it is trite law that to decide the question of deceptive similarity, the nature and kind of customers who are likely to buy, as also other surrounding circumstances, play an important factor. This was held in no uncertain terms by the Hon'ble Supreme Court in the case of *Khoday Distilleries Ltd. vs. Scotch Whisky Association (supra)*, and by this Court in the case of *Hiralal Parbhudas (supra)*. In the present case, the Defendant is engaged in the business of development, manufacturing and installation of waste water treatment and reuse systems as well as solid waste re-cycling. Such products are not sold across the counter. The customers and/or purchasers who buy the Defendant's products would be such as would not buy the Defendant's products without any deliberation. These factors, apart from the fact that the rival logos are not similar

but are distinctly different and dissimilar, also must weigh against the Plaintiff being granted any relief.

18. Since the rival logos are completely different and/or distinct, the question of there being any likelihood of confusion and/or damage to the Plaintiff, and the goods of the Defendant being passed-off as that of the Plaintiff does not arise, and the Plaintiff's case in respect of passing-off fails. Again in view of there being no similarity between the rival logos, which in fact are completely dissimilar, by no stretch of imagination can it be said that a person after seeing the rival marks would be of an opinion or would get an impression that the Defendant's logo appears to be a copy of the original. Therefore the allegation made by the Plaintiff that the Defendant is guilty of infringement of copyright is also not established.

19. Though there can be no dispute as regards the findings of the Hon'ble Courts in the decisions relied upon by the Plaintiff, in view of the facts of the present case, and the findings arrived at herein, the same does not lend assistance to the Plaintiff.

20. The Plaintiff has therefore failed to make out a prima facie case. The rival logos being completely different, and/or distinct, and/or even otherwise

such as are not likely to cause confusion, the Plaintiff's case in respect of infringement of trade mark and/or copyright as also passing-off fails. In view thereof, the balance of convenience is in fact in favour of the Defendant and against the Plaintiff.

21. In view of the aforesaid findings, this Court is not required to go into the question as to whether the Plaintiff's mark/logo is a well known mark/logo and consequently whether the Plaintiff is entitled to the relief of injunction restraining the Defendant from using the impugned logo even in respect of goods which are not similar to the goods or services for which the Plaintiff's mark is registered. The Notice of Motion is therefore dismissed with costs. Place the suit before the regular Court for directions on 12th July, 2016 on the Supplementary Board.

(S.J. KATHAWALLA, J.)