

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPEAL FROM ORDER NO. 56 OF 2016
WITH
CIVIL APPLICATION NO. 12580 OF 2016

Nagpur Distilleries Pvt. Ltd.
A private Limited Company,
incorporated under the Companies Act, 1956
having its office at Kamptee Road, Nagpur
Through its Authorized Signatory/Director
Shri Jasbir Singh s/o Jagat Singh Anand
Age 70 years, ...Appellant

versus

The Karmaveer Shankarrao Kale
Sahakari Sakhar Karkhana Limited
(formerly known as Kopargaon
Sahakari Sakhar Karkhana Ltd.
having its office at Gautam Nagar
Post. Kolpewadi, Tq. Kopargaon
District Ahmednagar ...Respondent

.....
Mr. Shyam Dewani and Amit Yadkikar, advocates for the appellant
Mr. H.W. Kane i/b Mr. K.C. Sant, advocate for respondent
.....

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...Respondent

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Mr. Shyam Dewani and Mr. Amit Yadkikar, advocates for the appellant
Mr. Vaibhav Joglekar i/b Mr. K.C. Sant, advocate for respondent
.....

CORAM : V. K. JADHAV, J.

**Date of Reserving
the Order : 18.01.2017**

**Date of pronouncing
the Order: 15.03.2017**

PER COURT :-

1. By consent of parties, both these appeals are taken together for hearing and decision at the stage of admission.
2. Being aggrieved by the order dated 28.7.2016 passed below Exh.5 in Regular Civil Suit No.7 of 2011 and order dated 28.7.2016 passed below Exh.5 in Regular Civil Suit No. 8 of 2011, by the District Judge-2, Kopargaon, the original defendant in both the suits has preferred these two separate appeals. (For the sake of convenience, hereinafter, the parties are referred by their original status in the suits.)

3. Brief facts giving rise to these two appeals are as follows:-

i) The plaintiff manufactures sugar and molasses as a by-product and in the said process the plaintiff manufactures rectified spirit from molasses and in turn, from such, manufactures the country liquor. As per the plaintiff's case, the plaintiff owns the brand, name *भिंगरी संत्रा* since 1979. The plaintiff claims that the liquor products, bearing said artistic labels *संत्रा*, *भिंगरी संत्रा* have acquired reputation for its quality and there is much sale of the product under the said label throughout the State of Maharashtra. The plaintiff claims to be the first owner of such copyrights in the original artistic work/label "*भिंगरी संत्रा*". In the year 1986, the plaintiff requested one M/s Shama Fine Arts, Offset Printers, having their printing press at Mumbai to design for its country liquor having orange flavour a label, *inter-alia*, containing therein *देशी दारु* *भिंगरी संत्रा* and other descriptive matters in Devnagari. Accordingly, one Shri V.L. Kale of M/s. Shama Fine Arts prepared art work of the said label, got it approved from the plaintiff and printed the same for the first time on or about 18.5.1986 under the contract of service for plaintiff and issued certificate to that effect. According to the plaintiff, since 1986 the

plaintiff has been regularly and extensively using the said artistic label “भिंंगरी संत्रा” in respect of its country liquor sold in certain districts of Maharashtra. The plaintiff has also obtained registration of label “भिंंगरी संत्रा” under the provisions of Copyrights Act 1957, from Deputy Registrar of Copyrights, New Delhi. The plaintiff has also registered the label “भिंंगरी संत्रा” under the Trade and Merchandise Marks Act 1958 w.e.f. 11.1.1996 and the said registration is valid and subsisting under the Trademarks Act 1999. The said registration has been renewed under the Trademarks Act 1999 for further period of 10 years from 11.1.2003. It has also contended that by a deed of assignment dated 31.12.2012, executed by (1) Smt. Nayana Vishwanath Kale, as one legal heir and legal representative of Late Vishwanath Kale and as a person on whom the copyright in the aforesaid labels, if any, belonging to late Vishwanath Kale devolved on his death, and also as the sole proprietress of M/s. Shama Fine Art and (2) Mrs. Shalaka Prashant Pathak, as the another legal heir and representative of said late Vishwanath Kale and have assigned and transferred to the plaintiff the copyright and all other rights, title and interest, if any, in or to the aforesaid artistic work / trademark labels, including work / label “भिंंगरी संत्रा”.

ii) The defendant is a private limited company carries on similar business of distillery, manufacture and sell of country liquor. The plaintiff has instituted a Trade Mark Suit No.5 of 2010 in the Court at Nagpur against one Konkan Agro Marine Industries Pvt. Ltd. (hereinafter referred to as the "KAMIPL") for challenging the acts of infringement of copyrights and trademark committed by the said KAMIPL by its label "संत्रा 999", which is deceptively similar to the plaintiff's label भिंगरी संत्रा. In the said suit, KAMIPL has filed affidavits dated 17.2.2011 and 22.3.2011 alongwith certain documents. The said documents include the labels "लावणी संत्रा" "Lavni Santra", "फिरकी संत्रा" "Firki Santra" and "संत्रा ९०००" (deceptively similar to the plaintiff's label "भिंगरी संत्रा") of the defendant and certain approval orders in regard to the same. The plaintiff thereafter called upon the defendant to stop usage of the said labels, which the defendant has refused to do so. The plaintiff *inter-alia*, challenged the act of infringement of its Copyright under the provisions of Copyright Act 1957 in the label "भिंगरी संत्रा" committed / being committed by the defendant by virtue of the label "लावणी संत्रा". According to the plaintiff, the labels "फिरकी संत्रा" and "संत्रा ९०००" are not registered under copyrights and

trademarks laws, whereas the plaintiff's label “भिंंगरी संत्रा” is duly registered under copyright and trademark laws.

iii) According to the plaintiff, pursuant to the malafide and dishonest intention to grab the plaintiff's established market, the defendant had made an application sometime in the year 2004 to the Commissioner for approval of label “नागपुरी भिंंगरी” (deceptively similar to the label भिंंगरी संत्रा). The plaintiff objected to the said label. Thereafter, the Commissioner heard the plaintiff and defendant and upheld the said objection and rejected the said label by order dated 7.4.2004. The defendant did not challenge the order dated 7.4.2004, which has attained finality. According to the plaintiff, earlier to that the defendant was carrying on business in the name and style as M/s. Nagpur Distillers, which was a partnership firm. The defendant, even prior to coming out with the aforesaid infringing label “नागपुरी भिंंगरी”, had made applications for approval of the labels “लावणी संत्रा”, “फिरकी संत्रा” and “संत्रा ५०००” (deceptively similar to label “भिंंगरी संत्रा”) to the Commissioner. The plaintiff was not aware whether the said labels were notified on the notice board of the Commissioner's office for inviting objections or if notified, then whether the same were properly displayed thereon or not.

Despite the said labels being deceptively similar to the label “भिंररी संत” and despite being aware of the plaintiff's rights therein, the Commissioner's Office completely ignored the plaintiff's aforesaid rights and without issuing any notice, approved the said labels.

iv) According to the plaintiff, the plaintiff is entitled to a permanent order of injunction from the court restraining the defendant and their respective servants, dealers, distributors, retailers and agents from infringing the plaintiff's statutory right under Copyright Act, 1957 in its artistic work / label, as the plaintiff has suffered and is likely to suffer irreparable loss and injury to its trade and reputation on account of infringement and passing off committed by the defendant. It has also been contended that the goods sold by the defendant under the impugned labels are of inferior quality and traders and consumers are being confused and deceived and/or are likely to be confused and deceived into buying the goods of the defendant as and for the plaintiff's well known goods. By reason of the said Act of infringement by the defendant, the plaintiff suffered heavy loss and the defendant is liable to pay for the same.

v) The plaintiff has therefore, instituted R.C.S. No. 7 of 2011 praying therein that the defendant by itself, its servants, dealers, distributors, retailers, and agents be restrained by a permanent order of injunction from infringing the plaintiff's copyright in its artistic work/level "भिंगरी संत्र" under Copyright Act 1957, in any manner, whatsoever, including by reproducing the same in the material form or by printing, publishing, copying, communicating it to the public or using the impugned label "लावणी संत्र" or any other work which is in an imitation of the plaintiff's said artistic work / label or any prominent features/ substantial part thereof or any word / sign/ image having a meaning deceptively similar to the word "भिंगरी"

vi) The plaintiff, in the similar set of facts, *inter alia* challenged the act of infringement of Copyright and Trademark committed/ being committed by the defendant by virtue of label "फिरकी संत्र" and "संत्री १०००" which are deceptively similar to the plaintiff's label "भिंगरी संत्र". According to the plaintiff, the said labels are in breach of the plaintiff's right under the Trademarks Act 1999 and Copyright Act 1957.

vii) According to the plaintiff, in the impugned labels, the

defendant has thus lavishly copied all the distinctive features of the plaintiff's label "भिंगरी संत्रा" and has merely substituted the mark "भिंगरी संत्रा" by the marks "फिरकी संत्रा" and "संत्री १०००", with addition of said logo in both the impugned labels. The defendant has copied some of the essential features of the plaintiff's mark and label in such a fashion as is really likely to cause confusion. The plaintiff therefore, constrained to institute another copyright Suit No. 8 of 2011 with prayer that the defendant by itself, its servants, dealers, distributors, retailers and agents be restrained by a permanent order and injunction from infringing the plaintiff's copyright in its artistic work/label "भिंगरी संत्रा" under the Copyright Act 1957 in any manner whatsoever, including by reproducing the same in material form or by printing, publishing, copying, communicating it to the public or using the impugned label "संत्री १०००" or any other work which is in imitation of the plaintiff's said artistic work/ label or any prominent features / substantial part thereof or any work / sign/ image having meaning deceptively similar to the work "भिंगरी संत्रा".

viii) In both the suits, the plaintiff has filed an application Exh.5 seeking relief of temporary injunction against the

defendant in consonance with the prayers made in the original suit restraining thereby the defendant for causing alleged act of infringement till disposal of suits.

ix) The defendant has strongly resisted the said application Exh.5 filed in Copyright Civil Suit No. 7 of 2011 by filing reply at Exh.14. It has been contended that the instant suit and application Exh.5 fail to disclose that the label of defendant impugned in the suit bearing the mark “लावणी संत्रा” is the subject matter of trademark registration under the provisions of Trademark Act 1999 and hence incapable of being impugned in a trademark infringement suit in view of provisions of Trademark Act 1999. It has been contended that the defendant is registered proprietor of the impugned mark “लावणी संत्रा”. It has been also contended that the plaintiff was well aware of the trade labels and trade dresses used by other country liquor manufacturers in the State of Maharashtra, including the trade dress and label of the defendant, wherein the word “संत्रा” has been used widely and extensively. The plaintiff was also aware of the fact that the trade labels and/or trade dress used by the defendant were already registered under the provisions of Trade and Merchandise Marks Act 1958 and/or any subsequent statutory enactments thereto. In spite of being aware of such

specific user by the defendant, the plaintiff has categorically represented the Registrar of Copyrights to the effect that no trade mark identical with or deceptively similar to such artistic work has been registered under the Trade and Merchandise Marks Act 1958. Based on the said representation made by the plaintiff, the Registrar of Copyrights, registered the copy right in “भिंगरी संज्ञा” artistic work/label. According to the plaintiff, some such trade labels / trade dresses have already been registered under the provisions of Trade and Merchandise Act 1958. The defendant has given a list of such registered trade labels / trade dresses in the reply submitted to applications Exh.5. The defendant thus, submitted that the plaintiff has not approached the Court with clean hands and is guilty of making false statement in the plaint. The plaintiff is not entitled for equitable reliefs and the plaintiff's prayer for injunction is liable to be rejected solely on this ground. It has also contended that the plaintiff's suits and the applications should also be dismissed.

x) The defendant further contended that the defendant has been granted approval by the Commissioner of Prohibition, State of Maharashtra, sometime in or around 5.2.1991 in respect of the impugned label and since then the defendant has been using the same at Nagpur and adjoining area/ districts widely and

extensively alongwith the products of the plaintiff. The plaintiff has been well aware of the impugned label of the defendant and has acquiesced to such use and should now be estopped or barred from alleging to the contrary and / or impugning the said label of the defendant on any ground whatsoever. It is submitted that neither the provisions of Trademarks Act 1999 nor the provisions of the Copyright Act 1957 lay down any rights with regard to speculated acts of infringement and the instant suit has been filed merely to vex and/or harass the defendant.

xi) The defendant further submitted that the present suit is a clear case where the plaintiff has slept over his alleged rights for such a long period of time. In the year 1991, the plaintiff had applied to the Commissioner of State Excise for cancellation of the labels of the defendant involved in the present suit, which the plaintiff alleges to be infringing labels. After show cause notice to the defendant and after hearing the defendant, the Commissioner, vide its order dated 19.9.1991 was pleased to cancel the label of the defendant “लावणी संज्ञा” which label impugned in the present suits by the plaintiff. Against the said order of the Commissioner, the defendant carried out an appeal to the State Government, which appeal was allowed by the State Government by its order dated 5.2.1992. By the aforesaid order,

the order of the Commissioner, cancelling the labels of defendant was set aside and the matter was remitted back to the Commissioner of State Excise for fresh decision. Thereafter, the matter is pending before the Commissioner for State Excise, as per the information of the defendant. The plaintiff is aware of the label of the defendant “लावणी संत्रा” since 1991 and despite the order of the State Government, dated 5.2.1992, the plaintiff took no steps either to have the matter reheard by the Commissioner or to file the suit which the plaintiff has chosen to file now.

xii) The defendant further submitted that in the month of March, 2003, the plaintiff as well as the defendant objected to the label of one Subhash Liquor Pvt. Limited, Pune by name “भवरा संत्रा” on the ground that it was identical and was deceptively similar to the labels of plaintiff as well as the defendant. The hearing in the said matter took place on 1.4.2003. The objections of the plaintiff and defendants were rejected on 28.5.2003. Being party to the proceeding, it is palpably a false statement made by the plaintiff that the plaintiff was not aware of the allegedly infringing label of the defendant which he seeks to impugn in the suit.

The defendant further submitted that in other proceedings,

one M/s Vidarbha Bottlers Pvt. Limited, Nagpur had applied for approval of its label “लागणी संत्रा”. In the said proceeding, the objections were filed by the plaintiff, the defendant herein and one M/s. Vidarbha Distillers and one M/s. Meher Distillers on the ground that the labels in respect of which the approval was sought were deceptively similar. The approval sought for was rejected by the Joint Commissioner of State Excise, Mumbai by order dated 9.3.2005. The said order clearly discloses that it was a case of the defendant in those proceedings that label of M/s. Vidarbha Bottlers “लागणी संत्रा” was deceptively similar if not identical to its label लावणी संत्रा. It is difficult to believe that the plaintiff who had already objected to the approval of the said label in the said proceedings, despite being represented by a lawyer would not come to know of the defendant's label “लावणी संत्रा” which was put forth as a ground of objection by the defendant before the Commissioner.

xiii) The defendant accordingly submitted that the dishonest litigant like the plaintiff has no right to seek any equitable relief. The plaintiff has lost its right to seek any equitable relief of injunction on the ground of its own conduct as narrated herein-above. The plaintiff's suits as well as the applications seeking

relief of injunction are liable to be dismissed on the ground that the plaintiff has made false representations, suppressed material facts and has not approached the court with clean hands. On all these grounds, the defendant has prayed for rejection of application Exh.5.

xiv) Almost on similar grounds, the defendant has resisted the application filed at Exh.5 in Copyright civil Suit No. 8 of 2011 by filing reply Exh.15 and prayed for rejection of application Exh.5.

xv) The learned District Judge-2, Kopergaon by separate order below Exh.5 in the aforesaid suits bearing R.C.S. No. 7 of 2011 and R.C.S. No. 8 of 2011, respectively, on 28.7.2016 allowed the said application Exh.5 and thereby restrained the defendant by temporary injunction from using the artistic label “लावणी संत्रा” (produced at Exh.3/102) for selling its country liquor, until disposal of R.C.S. No.7 of 2011 and also allowed application Exh.5 thereby restrained the defendant by injunction from using the artistic label “फिरकी संत्रा” and “संत्रा १०००” (produced at Exh. 3/103, 3/104) for selling its country liquor, until disposal of R.C.S. No. 8 of 2011.

xvi) Being aggrieved by the same, the defendant has preferred

Appeal from Order No. 56 of 2016 against the order passed below Exh.5 in R.C.S. No. 7 of 2011 and Appeal from Order No. 57 of 2016 against the order passed below Exh.5 in R.C.S. No. 8 of 2011.

3. Learned counsel for the appellant submits that there was absolutely no order of any kind in the form of status quo or ad-interim injunction or of any kind whatsoever to restrain the appellant from using the said label right from filing of suits in the year 2011 till passing of impugned order i.e. 28.7.2016. It is thus apparent that after lapse of such huge period, the applications seeking temporary injunction themselves were frustrated and become infructuous. The respondent has suppressed from the trial court, the fact that the respondent was aware about usage of the label for years together, which is apparent from the proceedings fought by them as well as amongst them and the same is also apparent from various orders passed by the authorities. Thus, the alleged claim of the respondent that for the first time it came to know about infringement of label by the appellant in the year 2011 is outrightly false and baseless. The learned Judge of the trial court ignored all these material aspects and passed the impugned order.

4. Learned counsel for the appellant submits that the labels of

the appellant “लावणी संत्रा”, “फिरकी संत्रा” and “संत्रा १०००” are the subject matter of trademark registration under the provisions of Trademark Act and hence incapable of being impugned in trademark infringement suit in view of the provisions of Section 28(3) of the Trademark Act 1999. The appellant is registered proprietary of its label “लावणी संत्रा” and the same is registered with the Trademark authorities. The learned Judge of the trial court has not appreciated this aspect. The order impugned is liable to be quashed and set aside on this ground alone.

5. Learned counsel for the appellant submits that the word “संत्रा” is more generic in Nagpur region, where the factory of the appellant is situated because of its geographical advantage, in as much as the said region is the largest producer of Oranges “संत्रा”. The respondent got registered its label “भिंगरी संत्रा” artistic work/label by misrepresenting the Registrar of the Copyright, which act is not permissible in the eyes of law. Upon cursory look at the various trade label and trade dresses used by the country liquor manufacturers in the State of Maharashtra would have revealed that the device of the Goblet and the words “संत्रा” are used widely and extensively across various manufacturers. Thus, any exclusivity and/or claims to exclusivity to such elements common to the trade

are baseless and without any substance. List of such registered trade labels/trade dresses was placed before the trial court in the reply filed by the appellant, however, even this aspect is also not considered by the trial court while passing the impugned order. The Commissioner of Prohibition also has the authority to approve trade label used by the manufacturer of country liquor from time to time. In the event of any dispute, which may arise during such process of approval, the Commissioner has authority to adjudicate the said issue by giving an opportunity to the aggrieved party. The respondent has already filed its objection before the Commissioner of Prohibition, State of Maharashtra with regard to the impugned label in the suit and the same has been overruled. The trial court is not empowered to interfere and/or take up any matter under the provisions of Bombay Prohibition Act. The impugned label of the appellant has been granted approval by the Commissioner of Prohibition, State of Maharashtra, sometime in or around 5.2.1991 and ever since it has been used by the appellant at Nagpur and adjoining area/districts widely and extensively alongwith the product of the appellant. In the year 1991, the respondent had applied to the Commissioner of State Excise for cancellation of the labels of appellant involved in the suit alleging to be the infringing labels. After show cause notice to the appellant, and after hearing the appellant, the learned Commissioner vide his order dated 19.9.1991 was pleased to cancel the label of the

appellant “*लावणी संत्रा*” which label is impugned in the suit, however, the said order was set aside by the State Government by its order dated 5.2.1992. By the aforesaid order, the order of the Commissioner, cancelling labels of the appellant, was set aside and the matter was remitted back to the Commissioner for State Excise for fresh decision by the State Government. The said matter is now pending before the Commissioner of State Excise. The respondent is well aware of the label of the appellant “*लावणी संत्रा*” right since 1991 and despite the order of the State Government passed on 5.2.1992, the respondent took no step either to have the matter reheard by the Commissioner or to file suit which the respondent has chosen to file as late as it could have done in the year 2011 i.e. after 19 years of passing of the aforesaid order. Thus, the pleading of the respondent that for the first time it came to know about allegedly infringing label of the appellant in the third week of February, 2011 as pointed out is palpably false.

6. Learned counsel for the appellant submits that the learned Judge of the trial court has not considered various orders passed by the Commissioner, State Excise with regard to objection raised for infringement of various labels used for selling country liquor by various manufacturers, including the appellant and the respondent. In or about March, 2003, the respondent as well as appellant

objected to the label of one Subhash Liquor Pvt. Limited, Pune by name “*भावर संज्ञा*” on the ground that it was identical and was deceptively similar to the labels of the appellant and the respondent. The hearing of the said matter took place on 1.4.2003. Objections of the appellant as well as the respondent were rejected by the Commissioner of State Excise, by its order dated 28.5.2003. Being party to the said proceeding, it is of downright falsehood on the part of the respondent to allege that the respondent was not aware of the allegedly infringing the label of the appellant which he seeks to impugn in the suit. The suit of the respondent is suffering from delay and laches. The respondent misled the trial court as well as misrepresented the Registrar, Copyright for getting its label registered under the Copyright Act by making false statement about the date of knowledge to him for filing the suit. The respondent has failed to establish the prima facie case. The applications seeking injunction could not have been decided on the basis of probability when such injunction was capable of being misused for causing unnecessary loss and harm to the appellant, who is using the said label from years together. The suits are pending for more than 6 years, thus instead of deciding the case, at the interlocutory stage, the suits itself should be disposed of finally at very early date by giving suitable directions in this regard.

7. Learned counsel for the appellant in order to substantiate his contentions, placed his reliance on the following judgments:-

I) Anand Prasad Agrawal vs. Tarkeshwar Prasad and others, reported in (2001) 5 SCC 568, ii) J. R. Kapoor vs. Micronix India, reported in 1994 Suppl. (3) SCC 215, iii) S.M. Dyechem Ltd. vs. Cdbury (India) Ltd., reported in (2000) 5 SCC 573, iv) Shri Gopal Engg. & Chemicals Works vs. M/s. POMX Laboratory, reported in AIR 1992 Delhi 302, v) M/s. Power Control Appliances and others vs. Sumeet Machines Pvt. Ltd. reported in (1994) 2 SCC 448 , vi) Prem Singh vs. Ceeam Auto Industries, reported in AIR 1990 Delhi 233, vii) Brihan Maharashtra Sugar Syndicate vs. Meher Distilleries Pvt. Ltd. and others, reported in 2005 (1) Mh.L.J. 1132 viii) Eros International Media Ltd. vs. Telemax links India pvt. Ltd. of Bombay High Court in Notion of Motion No. 886 of 2013 in Suit No. 331 of 2013 decided on 12.4.2016 and ix) Bajaj Auto Limited vs. TVS Motor Company Ltd. reported in MIPR 2009 (3) 0033

8. Learned counsel for the respondent submits that in the year 1986, the respondent requested one M/s. Shama Fine Arts, Offset Printers to design for its country liquor, having orange flavour, a label *inter-alia* containing the expression “देशी दारु भिंगरी संत्रा” and other descriptive matters in Devnagari within the device of a wine glass framed within a vertically placed rectangle. Accordingly, one Shri V.L. Kale of said M/s, Shama Fine Arts prepared the art work of

the said label, got it approved from the respondent and printed the same for the respondent for the first time on or about 18.5.1986 under the contract of service and issued certificate to that effect. The said word marks are placed within the device of wine glass having golden yellow colour framed within a vertically placed rectangle having red background within a black border. The descriptive words are printed in black whereas the word “भिंगरी” is printed in red. All the said features have a distinctive design, lay out, colour skin and get up. Meanwhile, the respondent duly made an application to the Commissioner of State Excise for grant of approval to the said label “भिंगरी संत्रा” under the Maharashtra Country Liquor Rules 1973 and the Commissioner, after following due process, approved the above label “भिंगरी संत्रा” vide approval letter dated 4.4.1986. Further, in the years 1994 and 1998 at the request of the respondent and under contract of service, said Shri V.L. Kale of M/s. Shama Fine Arts prepared the art work designed two more labels *inter-alia* containing the expressions “देशी दाख भिंगरी संत्रा” and देशी दाख “भिंगरी संत्रा No.1”. The respondent is not concerned with the said two labels in the suit. However, in the premises aforesaid, the label “भिंगरी संत्रा” prepared by Shri V.L. Kale of M/s. Shama Fine Arts for and on behalf of and as per the directions of the respondent and under a contract of service, the respondent is first owner of the copyright in

the said original artistic labels “भिंंगरी संत्रा” and “भिंंगरी संत्रा No.1” as per the provisions of Copyright Act 1957. The respondent had instituted R.C.S. Nos. 1 of 2000 and 2 of 2004 respectively against M/s. KAMIPL and M/s. 7 Star Distilleries as regards certain infringing labels before the court. The R.C.S. No. 1 of 2000 was decreed by the judgment and order dated 12.5.2003, which refers to the correspondence made by respondent with and the order placed directing M/s. Shama Fine Arts for designing and printing the said labels. Thereafter, Shri V. L. Kale expired on 8.11.2006. Mrs. Shalaka Pathak is now Sales and Marketing Manager and the constituted attorney of M/s. Shama Fine Arts. She had executed affidavit dated 19.6.2007 thereby adopting, reiterating and confirming the contents of the affidavit dated 2.3.2004 submitted by V.L. Kale in the said R.C.S. Nos.1 of 2000 and 2 of 2004 respectively. Further, the said affidavit dated 19.6.2007 was also filed in R.C.S. No. 2 of 2007, which suit is filed by the respondent against M/s. Nevitad Distilleries Pvt. Limited for infringement of the statutory rights in the respondent's labels and for preventing passing off by the deceptively similar and infringing labels. Further by deed of assignment dated 31.12.2012 executed by legal heirs and representatives of late V.L. Kale, thereby have assigned and transferred to the respondent the copyright and all other rights, title and interest for the aforesaid artistic works/trade mark labels, including the work/label “भिंंगरी

संज्ञा”.

9. Learned counsel for the respondent submits that the respondent also filed various civil suits in the court of Additional District Judge, Kopergaon for challenging the acts of passing off due to such labels and infringement of the respondent's right in the said labels under the Copyright Act 1957 and the Trademarks Act, 1999. By judgment and decree dated 1.8.2014, the learned Additional District Judge, Kopergaon allowed R.C.S. No. 3 of 2004 filed by the respondent herein against 7 Star Distilleries and Royal Drinks Pvt. Limited, as regards the labels impugned therein, which were deceptively similar to the label “भिंंगरी संज्ञा”. The said judgment dated 1.8.2004 in R.C.S. No. 3 of 2004 was upheld by this Court vide judgment and order dated 21.11.2015, passed in First appeal No. 316 of 2015 (reported in 2016 (5) Mh.L.J. 369). In para 5 of the judgment and order dated 21.11.2015, it is held that the term “*property*” includes copyright. The right to the same is a right in rem. The said judgment and order dated 21.11.2015 has attained finality since the Special Leave Petition (C) 5926 of 2016 challenging the same has been dismissed by the Supreme Court vide order dated 11.4.2016. Thus, the issue of ownership of copyright in the artistic work/label “भिंंगरी संज्ञा” is no more *res-integra*. Thus, a judgment in rem settles the destiny of the res itself and binds all persons claiming

an interest in the property inconsistent with the judgment even though pronounced in their absence, the judgments in rem are conclusive against parties or their privies or strangers and judgment not inter parties can be relied upon in another suit.

10. The learned counsel for the respondent/plaintiff submits that the respondent apart from being the first owner of “भिंगरी संत्रा” is also the first user thereof. Therefore, any subsequent dishonest adaption and user by the appellant of labels, i.e. deceptively similar to the label “भिंगरी संत्रा” for any length of time, cannot be pleaded by the appellant as a defence to the said statutory rights of the respondent. Despite being aware, the respondent/plaintiff's right in the aforesaid labels “भिंगरी संत्रा”, the Commissioner approved the impugned labels. It further appears that the appellant original defendant after obtaining the approval to the said infringing labels, had either not used the same or its usage was intermittent or unsubstantial. In any event, the respondent was not aware of the use of the said labels until KAMIPL had filed the aforesaid affidavit dated 17.2.2011 and also produced various labels in the Trademark suit No. 5 of 2010. Learned counsel submits that the approval of the appellant's label by any authority in the hierarchy under Bombay Prohibition Act 1949 and the Maharashtra Country Liquor Rules 1973 cannot be a licence to infringe the plaintiff's right and/or to pass off

their goods as those of the plaintiff. In any event, the appellant's adaption of the essential features of the respondent's label is dishonest and malafide. The aforesaid infringing labels is clearly in breach of the respondent's statutory rights. Therefore, no amount / period of user of the said infringing label can come in the way of respondent in seeking reliefs against the same. The appellant, by imitating the respondent's label has created a confusion and deception amongst the trade and public. If the inferior country liquor of the appellant is sold to others or as that of the respondent's country liquor, the reputation, goodwill and estimation of the respondent in the market and the consumers is likely to be prejudicially affected leading to irreparable harm, loss and injury to the respondent.

11. Learned counsel for the respondent submits that the appellant used various tactics to cause delay to the hearing of the applications Exh.5. After appearance in the said suits, the appellant took time to complete the pleadings and affidavit. Thereafter, the appellant took out various applications, including adjournment applications before the trial court from time to time. After completing of the affidavit and when application Exh.5 was likely to be heard, the appellant filed Misc. Civil Application No. 28 of 2012 and 29 of 2012 in this court seeking transfer of suits No. 7 of 2011 and 8 of 2011 to

the District Court at Nagpur, with malafide intention and on certain flimsy grounds. Even the appellant obtained order of ad-interim injunction in the said application for stay of the proceedings before the trial court. Finally, by judgment and order dated 7.5.2013 passed by this court the said application bearing M.C.A. No. 28 of 2012 and 29 of 2012 were dismissed. Being aggrieved by the same, the appellant filed Special Leave Petition (Civil) No. 23886 of 2013 which was rejected by the Supreme Court vide order dated 2.9.2013. Thus, during the above period, the trial court could not take up the application Exh.5 for hearing. Meanwhile, the copyright of the respondent in the aforesaid label and any other label was admitted in deed of assignment dated 31.12.2012 executed by legal heir of Mr. V.L. Kale, who was the author of the artistic work/label “भिंंगरी संत्रा”. Moreover, the respondent's erstwhile name was changed to its present name. Pursuant to the above, the respondent was also required to submit necessary application for change in the licence and the name in the registers maintained by the Trademark Registrar and the Copyright Registrar as regards the registration of the said trade mark label/artistic work “भिंंगरी संत्रा”. In view of the above, the respondent was required to file appropriate application before the trial court for carrying out the necessary amendment to the plaint and application Exh.5 as also to bring certain documents on record. These applications were opposed by the appellant herein and the

said applications were decided in favour of the respondent after passage of some time. Thereafter, the appellant filed additional written statement and another affidavit in reply to deal with the said amendment. Thus, sometime was also lost in the above process for which the respondent cannot be blamed. Thereafter, the applications Exh.5 in both the above suits were heard and detailed written submissions supported by compilation of the judgments were filed. Thereafter, the impugned order dated 28.7.2016 was passed. Learned counsel submits that the appellant, by using the above tactics, has systematically, deliberately and with malafide intention, delayed to grant of interim injunction, status quo or any other order, which could have been granted only after full hearing on the said applications. The appellant cannot take disadvantage of the same.

12. Learned counsel for the respondent submits that the respondent has duly demonstrated that it has statutory right in the said artistic work/label “मिंगरी संत्रा” and thus entitled for the protection of statutory rights and any infringement thereof. The impugned label are thus in violation of the respondents statutory right and it will suffer irreparable loss and injury to its trade and reputation on account of infringement and passing off committed by the defendant. The learned Judge of the trial court has therefore, rightly allowed applications Exh.5.

13. Learned counsel for the respondent in order to substantiate his contentions has placed his reliance on the following judgments:-

I) Vikas Sales Corporation and another vs. Commissioner of Commercial Taxes and another, reported in (1996) 4 SCC 433, (ii) Cadila Health Care Ltd. vs. Cadila Pharmaceuticals Ltd., reported in AIR 2001 SC 1952, iii) Macleods Pharmaceuticals Ltd. vs. Intas Pharmaceuticals Ltd. and Anr, Bombay High Court in Notice of Motion No. 1060 of 2011 in Suit No. 768 of 2011, dated 29.5.2013, iv) Axys Nutrition Products Pvt. Ltd. vs. Neuvera Wellness Ventures pvt. Ltd. and others, Bombay High Court in Notice of Motion (L) No. 2806 of 2016 in Suit (L) No. 928 of 2016, dated 6.12.2016, v) Indchemie Health Specialties Pvt. Ltd. vs. Naxpar Labs pvt. Ltd. and Anr. reported in 2002 (2) Mh.L.J. 513, vi) Anglo French Drugs & Industries Ltd. vs. Eisen Pharmaceutical Co. Pvt. Ltd. of Bombay High Court in Notice of Motion Suit No. 4450 of 1996, dated 19.12.1996, vii) Jags & Jags Wholesaler pvt. Ltd. vs. Godrej Soaps Ltd. of Bombay High Court in Notice of motion No. 265 of 201 in Suit No. 354 of 2001, viii) East End Hosiery Mills Private Ltd. vs. M/s. Agarwal Textiles Mills, reported in AIR 1971 Calcutta 3, ix) Sabmiller India Ltd. vs. Jagpin Breweries Ltd., reported in 2014 (5) Bom.C.R. 721, x) Glaxo Operations UK Ltd. Middlesex (England) and others vs. Samrat Pharmaceuticals, Kanpur, reported in AIR 1984 Del. 265, xi) Dev Dutt vs. Union of India and others, reported in (2008) 8 SCC 752, xii) Punjab Land Development and Reclamation Corporation Ltd. Chandigarh vs. Presiding officer, Labour Court, Chandigarh and others, reported

in (1990) 3 SCC 682, xiii) Asian Paints (I) Ltd. vs. M/s. Jaikishan Paints & Allied Products, reported in 2002 (4) Mh.L.J. 536, xiv) State of U.P. And another vs. Synthetics and Chemicals Ltd. and Anr. reported in (1991) 4 SCC 139

14. I have carefully considered the submissions advanced by learned counsel for the respective parties. With their able assistance, I have perused the pleadings, grounds taken in the appeals, annexures thereto, reply filed by the respondent and the judgment cited across the bar by learned counsel for the respective parties.

15. Before dealing with elaborate submissions made on behalf of the both the parties, it would be necessary to reproduce herein below certain provisions of Copyright Act 1957:-

“2. Interpretation - In this Act, unless the context otherwise requires-

(a) "adaptation" means-

(i)

(ii)

(iii)

(iv)

(v) (a)

(b)

(c) "artistic work" means-

(i) a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a

photograph, whether or not any such work possesses artistic quality;

(ii) an [work of architecture]; and

(iii) any other work of artistic craftsmanship;

(d) "author" means-

(i) in relation to a literary or dramatic work, the author of the work;

(ii) in relation to a musical work, the composer;

(iii) in relation to an artistic work other than a photograph, the artist;

(iv) in relation to a photograph, the person taking the photograph;

(v) in relation to any literary, dramatic, musical or artistic work which is computer-generated, the person who causes the work to be created.

(m) " infringing copy" means-

(i) in relation to a literary, dramatic, musical or artistic work, a reproduction thereof otherwise than in the form of a cinematographic film;

(ii) in relation to a cinematograph film, a copy of the film made on any medium by any means;

(iii) in relation to a sound recording, any other recording embodying the same sound recording, made by any means;

(iv) in relation to a programme or performance in which such a broadcast reproduction right or a performer's right subsists under the provisions of this Act, the sound recording or a cinematographic film of such programme or performance,

if such reproduction, copy or sound recording is made or imported in contravention of the provisions of this Act.

(y) "work" means any the following works, namely-

(i) a literary, dramatic, musical or artistic work;

(ii)

(iii)

3. Meaning of publication .- For the purposes of this Act, "publication" means making a work available to the public by issue of copies or by communicating the work to the public.

13. Works in which copyright subsists.- (1) Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say,-

(a) original literary, dramatic, musical and artistic works;

(b) cinematograph films and

(c) [sound recording]

(2) Copyright shall not subsist in any work specified in sub-section (1), other than a work to which the provisions of section 40 or section 41 apply, unless,-

(i)

(ii)

(iii)

(3) Copyright shall not subsist

(a)

(b)

(4)

(5) In the case of an copyright shall subsist only in th artistic character and design and shall not extend to processes or methods of construction.

14. Meaning of Copyright; (1). For the purposes of this Act

“copyright” means the exclusive right, subject to the provisions of this Act to do or authorize the doing of any of the following acts in respect of a work or any substantial part thereof, namely-

(a)

(b)

(c) in the case of an artistic work,-

(i) to reproduce the work in any material form including -

(A) the storing of it in any medium by electronic or other means;
or

(B) depiction in three-dimensions of a two-dimensional work; or

(C) depiction in two-dimensions of a three-dimensional work;

(ii) to communicate the work to the public;

(iii) to issue copies of the work to the public not being copies already in circulation;

(iv) to include the work in any cinematograph film;

(v) to make any adaptation of the work;

(vi) to do in relation to an adaptation of the work any of the acts specified in relation to the work in sub-clauses (i) to (iv);

17.....

(a)

(b)

(c) in the case of a work made in the course of the author's employment under a contract of service or apprenticeship, to which clause (a) or clause (b) does not apply, the employer shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein;

18. Assignment of copyright. -(1) The owner of the copyright in an existing work or the prospective owner of the copyright in a future work may assign to any person the copyright either wholly or partially and either generally or subject to limitations and either for the whole term of the copyright or any part thereof:

Provided that in the case of the assignment of copyright in any future work, the assignment shall take effect only when the work comes into existence.

[Provided further that no such assignment shall be applied to any medium or mode of exploitation of the work which did not exist or was not in commercial use at the time when the assignment was made, unless the assignment specifically referred to such medium or mode of exploitation of the work.

Provided also that the author of the literary or musical work included in a cinematograph film shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for the utilization of such work in any form other than for the communication to the public of the work along with the cinematograph film in a cinema hall, except to the legal heirs of the authors or to a copy right society for collection and distribution and any agreement to contrary shall be void:

Provided also that the author of the literary or musical work included in the sound recording but not forming part of any cinematograph film shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for any utilization of such work except to the legal heirs of the authors or to a collecting society for collection and distribution and any assignment to the contrary shall be void.]

(2) Where the assignee of a copyright becomes entitled to any right comprised in the copyright, the assignee as respects the rights so assigned, and the assignor as respects the rights not assigned, shall be treated for the purposes of this Act as the owner of copyright and the provisions of this Act shall have effect accordingly.

(3) In this section, the expression "assignee" as respects the assignment of the copyright in any future work includes the legal representatives of the assignee, if the assignee dies before the work comes into existence."

16. In view of the provisions of Section 2(c), 13 and 17 of Copyright Act 1957, the respondent plaintiff claims to be the first owner of Copyright in the artistic labels “‘‘भिंगरी संत्रा’’” and as per the provisions of Section 14 (a) (c) of the Copyright Act 1957, the respondent plaintiff claims to be its exclusive right to use the said artistic trade marks/ labels in the material form. In view of the provisions of clauses (b), (g) and (h) of Section 2 and Section of Section 29 of the Trademarks Act 1999, the respondent plaintiff claims its exclusive right to use for its country liquor and to protect infringement thereof. The respondent plaintiff claims its statutory right to protect its copyright and trademark in the said labels and to prevent any acts of passing off and to file appropriate proceeding to prevent infringement thereof and to obtain reliefs in the manner provided by them.

17. The appellant defendant has brought on record the facts of registration of its label “‘‘फिरकी संत्रा’’” under Trademark Act 1999. In view of the said registration and provisions of Section 28(3) of the Trademarks Act 1999, the plaintiff has deleted the prayers of infringement of trademarks under Trademark Act 1999 and other consequential reliefs as regards “‘‘फिरकी संत्रा’’”. However, the

appellant-defendant has not registered the label “फिरकी संत्रा” under Copyright Act 1957. The respondent-plaintiff is therefore seeking relief of infringement of copyright and other reliefs as regards to the labels “लावणी संत्रा”, “फिरकी संत्रा” and relief of infringement of trademark and copyright as regards the label “संत्री १०००”.

18. On careful consideration of the pleadings and the documents placed in support thereof, *prima facie*, it appears that one Shri V.L. Kale of M/s. Shama Fine Arts has prepared artistic work of the said label, got it approved from the respondent plaintiff and printed the same for the respondent plaintiff, for the first time on 18.5.1986 under the contract of service for respondent/plaintiff and issued certificate to that effect. By the deed of assignment in the year 2012, executed by heir and legal representative of late V.L. Kale, they assigned and transferred to the respondent plaintiff copyright and all other rights, title and interest (in short “copyrights”) in or to the aforesaid artistic work/trade mark labels, including the work/label “भिंगरी संत्रा” for consideration on terms and conditions set out in the said deed of assignment.

19. The respondent plaintiff had instituted R.C.S. No. 3 of 2004 against one 7 Star and Distilleries Ltd. and Royal Drinks Pvt. Ltd. as regards the labels impugned therein, which were deceptively similar

to the label “भिंगरी संत्रा”. The learned Additional District Judge, Kopargaon decreed the said R.C.S. No. 3 of 2004. The said judgment and decree passed by the Additional District Judge, Kopargaon dated 1.8.2014 in R.C.S. No. 3 of 2004 was upheld by this Court vide judgment and order dated 21.11.2015 passed in First appeal No. 316 of 2015. In the said suit, the respondent plaintiff approached the court with similar plea about the contract of service with V.L. Kale of M/s. Shama Fine Arts. Mr. V.L. Kale, had submitted his affidavit in the said suit that since 1979, M/s. Shama Fine Arts has been designing and printing several artistic and distinctive labels for and on behalf of the plaintiff (respondent herein) and in the year 1986 the plaintiff (respondent herein) requested M/s. Shama Fine Arts for its country liquor new label, inter-alia, contending expression देशी दारु “भिंगरी संत्रा” with the details as given in the affidavit. Furthermore, the deed of assignment executed by legal heirs of late V.L. Kale was also produced on record detailing the fact of assignment, ownership of the copyright of the work. This Court in the aforesaid first appeal No. 316 of 2015, in para 11(b) has made the following observations:-

“11.

(a)

(b) The defendants have not come out with a case that it is

not V.L. Kale, who is the author of artistic work but it is some other person. No such other person is named by the defendants. The oral evidence on record suggesting the original author to be V.L. Kale. The Deed of assignment by L.Rs. of V.L. Kale in favour of the plaintiff is at Exh.130. The certificates issued by V.L. Kale Exh.120 and 121 coupled with this evidence, the presumption given U/s 48 of the Copyright Act. All these facts would unequivocally go to establish that it was V.L. Kale, who was the original author of the said work. The District Court has considered the fact that affidavit filed by V.L. Kale, who has subsequently expired on 8.11.2006 can be made admissible in evidence under clause 7 of Section 32 of the Indian Evidence Act. In fact, the said affidavit is made by him against his own interest and even the legal representatives of V.L. Kale have deposed about the same. The plaintiff as such proves himself to be the owner of the copyright in annexure A by virtue of Section 17 of the Copyright Act and even by virtue of Section 18 of the said Act. As the Deed of Assignment is also executed in his favour, the defendants have failed to rebut the said evidence led by the plaintiff and presumption attributed to Exh.94. The defendants even remotely have not proved that the said label is prepared by some other person. Only a vague denial is made by the defendants which is not sufficient to rebut the said presumption.”

20. In the instant case, the appellant defendant has also not come out with a case that it is not late V.L. Kale, who is author of artistic work but it is some other person. In para 5 of the judgment, the learned Single Judge of this Court held that the property includes

copyright. The right to the same is a right in rem. The said judgment and order dated 21.11.2015 in the aforesaid first appeal No. 316 of 2015 has attained finality, since special leave petition No. (C) 5926 of 2016 challenging the same, has been dismissed by the Supreme Court vide order dated 11.4.2016.

21. In the case of ***Vikas Sales Corporation and another vs. Commissioner of Commercial Taxes and another, (supra)*** relied upon by learned counsel for the respondent, the Supreme Court in para 19 and 22 of judgment, has held that the property includes copyright, trademarks and patent. The right to the same is a right in rem. The law of property is right of property and rights in rem would include copyright and patent. The rights of copyright, trademark and remedies in connection thereto are matters in rem.

22. In the case of ***R. Viswanathan and others vs. Rukn-UI-Mulk Syed Abdul Wajid and others, reported in AIR 1963 SC 1, (supra)*** relied upon by learned counsel for the respondent (plaintiff) in para 17 of the judgment, the Supreme court has reproduced the observations of the author Cheshire in his Private International Law 6th Edition in the manner that the judgment in rem has been defined as 'a judgment of a court of competent jurisdiction determining the status of a person or thing (as distinct from the particular interest in it

of a party to the litigation); and such a judgment is conclusive evidence for and against all persons whether parties, privies or strangers of the matter actually decided.' A judgment in rem settles the destiny of the res itself 'and binds all persons claiming an interest in the property inconsistent with the judgment even though pronounced in their absence' .

23. In view of the observations made by the learned Single Judge of this Court in the aforesaid first appeal No. 316 of 2015 in para 11(b) r.w. Para 5 and in the light of the observations made by the Supreme Court in the aforesaid judgment, the respondent plaintiff has made out strong prima facie case in seeking injunction against the appellant/defendant.

24. So far as the acts of infringement of copyright and trademark alleged to have been committed or being committed by the defendant by virtue of label “फिरकी संत्रा” and “संत्री १०००” and by virtue of another label “लावणी संत्रा” which are deceptively similar to the plaintiff's label “भिंंगरी संत्रा” is concerned, I have carefully gone through all labels. On perusal of the specimen of artistic work/trade label “भिंंगरी संत्रा”, it appears that the descriptive words are printed in black whereas the word “भिंंगरी” is printed in red colour. All the

said features have a distinctive design, lay out, colour skin and get up. On perusal of the label of appellant/defendant, allegedly infringing trade mark label, prima facie, it appears that the impugned labels are deceptively similar to the plaintiff's label. All marks are placed within the device of wine glass having golden yellow colour framed within a vertically placed rectangle having red background within a black border. It appears from the impugned labels that the distinct features of the plaintiff's label "भिंगरी संत्रा" has been copied in the impugned labels. It further appears that some of the essential features of the plaintiff's mark and label have been copied in such a fashion as is likely to cause confusion. The prominent amongst them is distinctive design, lay out, colour skin, get up, use and placing of descriptive words. Thus, the aforesaid similarities/resembles in the rival labels are likely to cause confusion in the minds of the consumers of the country liquor, who are generally illiterate or are less educated, of average intelligence and ordinary prudence and do not have photographic memory with regard to contents of a label. The statistics about the large sale of the country liquor bearing the said trade mark of the plaintiff is also placed on record. *Prima facie*, the respondent/plaintiff's apprehension about affecting its good will and business in respect of the said product appears to be well founded.

25. In the case of ***Pidilite Industries Ltd. vs. S.M. Associates and others, reported in (2003) 5 Bom.C.R. 295***, this Court has referred the judgment of Madras High Court in the case of C. Cunniah & Co. vs. Balraj & Co. (A.I.R. 1961 Madras 111) and in para 37 of the judgment, reproduced the observations made in para 7 therein.

37. In (C. Cunniah & Co. v. Balraj & Co.), A.I.R. 1961 Madras 111 Division Bench held:

“7. The sole question for our consideration, therefore, is whether the respondents picture is a copy or a colourable imitation of the appellants picture. In (Hanfsataengl v. W.H. Smith and Sons), 1905 (1) Ch. 519, Kekewich, J., defined the copy thus:

“A copy is that which comes so near to the original as to suggest that original to the mind of every person seeing it.

Applying this test, the degree of resemblance between the two pictures, which is to be judged by the eye, must be such that the person looking at the respondents picture must get the suggestion that it is the appellants picture.....”

38. The judgment in C. Cunniah & Co. v. Balraj & Company was followed by a Division Bench of the Madras High court in (D.C.S. Bureau v. United Concern), A.I.R. 1967 Madras 381. It was also referred to by the Supreme Court in (R.G. Anand v. Delux Films), A.I.R. 1967 Supreme Court 1613, and followed by this Court in (Astra IDL Ltd. v. T.T.K, Pharma Ltd.), 1992 Bom. C.R. 298 : A.I.R. 1992 Bombay 195 and by the Karnataka High Court in (Associated Electronics v. Sharp Tools), A.I.R. 1991 Karnataka 406”.

26. Further in para 40 of the judgment, in the case of ***R.G. Anand vs. Deluxe Films reported in AIR 1967 SC 1613*** (supra) the observations of the Supreme Court are also referred to;-

“40. In R.G. Anand v. Deluxe (supra) the Supreme Court held that it was not necessary that the infringement should be an exact copy of the original but its resemblance in the original in a large manner is sufficient to indicate that it is a copy. The following is one of the important tests laid down by the Supreme Court in paragraph 46(3) while considering whether one work is a copy of the other :

“46.. (1)

(2)

(3) One of the surest and the safest 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 is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.”

27. After referring to those two judgments, as aforesaid, this Court in para 42 and 43 of the said judgment has made the following observations:-

“42 On examining the two works, I have little hesitation in holding that the first defendant’s work is an attempt on its part to copy the plaintiff’s work. The similarities relate to the “fundamental” and “substantial” aspects of the works I have already referred to earlier. It is clear to me that there has been an infringement of the plaintiff’s

copyright by the first defendant. The first defendant's work has incorporated the essential and substantial features of the plaintiff's work. The differences, it is equally obvious, have been incorporated thereafter. That being the case, one of the strongest tests of infringement of copyright goes against the first defendant.

43 The variation in the two works can be of no consequence to the plaintiff's case of infringement of copyright, That in the plaintiff's work the red and black portions, were to the right and left sides respectively whereas, in the defendant's work they are, to the left and right side respectively, that the upper band is marginally narrower in the defendant's work than the plaintiffs, that the black portion in the lower band is larger in the first defendant's work and that in the first defendant's work, the black and red portions were divided not by a vertical but by an slanted line are to my mind nothing but minor variations. Despite these variations, I am of the view that the viewer would nevertheless be clearly of the opinion and get an impression that the first defendant's work is a copy of the plaintiff's work. These differences are not substantial and do not have any effect on the plaintiff's case. The variations to my mind are nothing but a reminder that every intelligent copyright must introduce a few changes."

This Court has also observed that while deciding the question of infringement of copyright, it is not necessary that the defendants work must be exact reproduction of the plaintiff's work. What is essential is to see whether there is reproduction of the substantial part of the plaintiff's work.

27. In most of the cases relied upon by the learned counsel for

the respondent/plaintiff, the importance is given as to whether, in totality, the mark objected is likely to cause deception or confusion in the minds of ordinary people. It is not necessary that the deception shall be initiated to cause such confusion.

28. Learned counsel for the appellant-defendant vehemently submitted that it has been specifically denied that the respondent-plaintiff is the first owner of the copyright in the artistic label as exclusive right to produce the artistic label in the material form including the prominent features, central idea or get up or design etc. It has been contended that the respondent-plaintiff has slept over on his alleged right for long period and as such, the plaintiff is dis-entitled itself for grant of interim relief in the nature of injunction. The respondent-plaintiff has suppressed material facts and failed to approach the Court with clean hands. It has been also contended that the plaintiff did not take any step against the defendant despite the knowledge of the label which they were using. Thus, the plaintiff's suits suffer from delay, laches and acquiescence.

29. As discussed in detail in the foregoing paras, *prima facie*, there is evidence that the respondent-plaintiff is author of the first owner and prior user of such artistic work. Mere delay caused in bringing action of infringement of the trademark or copyright would

not defeat to grant injunction in such case. The respondent-plaintiff succeeded against various unscrupulous manufacturers as regards such marks/labels, which are deceptively similar to the mark/label “भिंगरी संत्रा”.

30. On careful perusal of the impugned label “फिरकी संत्रा”, it appears that the impugned label is deceptively similar to the plaintiff’s label “भिंगरी संत्रा”. Similar is the case with the impugned label of defendant “लावणी संत्रा”. *Prima facie*, it appears that the appellant-defendant has copied some of the essential features of the plaintiff such as outlet, design, colour skin, genetic use and specimen of the words in such a fashion as is likely to cause confusion. It is to be noted here that the consumers of the country liquor are generally illiterate or less educated persons. Such class of consumers generally choose/select the liquor on the basis of the lay out, design, colour skin, get up etc. Those consumers lacking average intelligence to note the dissimilarities into two products.

31. In the case of ***S.M. Dychem Ltd. vs. Cadbury (India) Limited, reported in (2000) 5 SCC 573, (supra)*** relied upon by learned counsel for the appellant, the Supreme Court has observed that dissimilarity in essential features in devices and composite marks are relevant. The Supreme court has also observed in the said

case that the mark has to be considered as the whole thing, as the true test is whether the totality of the impression given both orally and visually is such that it is likely to cause mistake, deception or confusion. The Supreme Court on examination of the relative strength held on facts that there was dissimilarity in the essential features of plaintiff's mark and defendant's mark and the chances were more in favour of the defendant and therefore, the plaintiff not entitled to temporary injunction.

32. In the case of ***Cadila Health Care Ltd. vs. Cadila Pharmaceuticals Ltd. reported in AIR 2001 SC 1952 (supra)*** relied upon by learned counsel for the respondent, the Supreme Court distinguished the facts in the case of ***S.M. Dyechem Ltd. (supra)*** and disagreed with the observations made in the said case and held that the dissimilarities in the essential features cannot be given importance than similarities.

33. In the case of ***J.R. Kapoor vs. Micronix India, reported in 1994 Suppl. (3) 215 (supra)*** relied upon by learned counsel for the appellant, the Supreme court has observed that the Micro-chip technology being the base of many of the products, the word 'micro' has much relevance in describing the products. Anyone producing any product with the use of micor-chip technology would be justified

in using the said word as a prefix to his trade name. It has been observed that those, who are familiar with the use of electronic goods know fully well and are not likely to be misguided or confused merely by, the prefix 'micro' in the trade name. Phonetically the words 'tel' and 'nix' being totally dissimilar are not going to create any such confusion in the mind of the users. The Supreme Court after considering colour combination, design etc. of both the trades held that there is no remote chance of the buyers and users being misguided or confused by the two trade names and logos.

In the instant case, however, the class of consumers is altogether different and because of the similarities in the essential features, such as lay out, design, colour skin, get up as used and placement of the descriptive words, is likely to cause confusion.

34. In the case of ***Shri Gopal Engineering & Chemicals Works vs. M/s. POMX Laboratory, reported in AIR 1992 Delhi, 302 (supra)***, relied upon by learned counsel for the appellant that the Delhi High Court has not refused injunction merely on the basis of the delay in filing application, however, further observed that the motion is not decided on the ground of delay and there is strong prima facie case to show that the defendant has been in open concurrent trade since the year 1983 with business spread over in

entire State of Uttar Pradesh, a State of which the plaintiff claims to be its center of activity.

However, in the instant case, the appellant-defendant though claims to be the user of the impugned label since long, failed to substantiate the same by giving sales figure of the said product.

35. In the case of ***M/s. Power Control Appliances and others vs. Sumeet Machines Pvt. Ltd., reported in (1994) 2 SCC 448 (supra)*** relied upon by learned counsel for the appellant, the Supreme Court dealt with the question of acquiescence and its applicability. In the facts of said case, Supreme Court observed that acquiescence implies positive acts; not merely silence or inaction such as involved in laches. If the plaintiff stood by knowingly and let the defendants build up an important trade until it had become necessary to crush it, then the plaintiffs would be stopped by their acquiescence. If the acquiescence in the infringement amounts to consent, it will be a complete defence. The acquiescence must be such as to lead to the inference of a licence sufficient to create a new right in the defendant.

In the instant case, prima facie, I do not find any such contingencies and there is no material placed on record by the

appellant-defendant to draw inference of implied consent on the part of the respondent-plaintiff.

36. In the case of ***Prem Singh vs M/s. Ceeam Auto Industries (supra) reported in AIR 1990 Delhi 233 (supra)***, relied upon by learned counsel for the appellant, the Delhi High Court in the facts of the said case held that the plaintiff himself not originator of the design and was shown to have adopted or imitated trade mark/copy right of third party, would not be entitled to relief from the Court.

In the instant case, *prima facie* there is evidence that the respondent plaintiff is original owner of the label and the defendant has failed to produce any document on record to show that the plaintiff adopted or imitated the aforesaid label of third party.

37. In the case of ***Brihan Maharashtra Sugar Syndicate vs. Meher Distilleries Pvt. Ltd. and others, reported in 2005 (1) Mh.L.J. 1132 (supra)***, relied upon by learned counsel for the appellant, in the facts of the said case the plaintiffs' suit was decreed against the defendant for infringement of copyright and in the appeal against the said decree, this Court observed that the plaintiffs themselves have tried to make out a case that they are not original authors of the copyright and original author is architect, who

according to the plaintiffs, worked for them on commission. The burden to establish this particular fact was invited by the plaintiffs and this burden has not been discharged by them. Consequently, the stay was granted to the decree passed by the trial court.

In the instant case, *prima facie*, it appears that the respondent plaintiff is original owner of the label of the said product and the plaintiff's said right, as original owner, has also acknowledged by this court

38. In the case of ***Bajaj Auto Limited vs TVS Motors Company Ltd. reported in MIPR 2009 (3) 0033 (supra)*** relied upon by learned counsel for the appellant, the Supreme Court by referring its earlier decision in ***Special Leave Petition (C) No. 21594 of 2009, in the case of Shree Vardhman Rice and Gen Mills vs. Amar Singh Chawalwala*** wherein it is observed that, "without going into the merits of the controversy, we are of the opinion that the matters relating to trademarks, copyrights and patents should be finally decided very expeditiously by the trial court instead of merely granting or refusing to grant injunction. Experience shows that in the matters of trade marks, copyrights and patents, litigation is mainly fought between the parties about the temporary injunction and that goes on for years and years and the result is that the suit is hardly

decided finally. This is not proper.”

In the facts of the present case, mere delay without acquiescence does not amount to laches. Mere delay is not sufficient to defeat for grant of injunction in the case involving trade mark or copyright. *Prima facie*, there is evidence about adaption of impugned label by the defendant dishonestly. Thus, the plea of concurrent user is not valid defence to an action of infringement. The plaintiff has *prima facie* established that prior to the defendant's user 'deceptively similar word' the plaintiff has got essential artistic work done under the contract of service from third party. The plaintiff is author/first owner and prior user of such artistic work. Therefore, no period of using the said infringed label or registration of the impugned label under the Trademark Act 1999 can come in the way of the plaintiff in seeking relief. The plaintiff has thus succeeded in demonstrating strong *prima facie* case.

39. In view of the aforesaid observations and ratio laid down by the Supreme Court and observations made by various High courts on the issue, involved and dealt with in the present matter, I do not find any fault in the impugned order passed by the trial Court. However, suits came to be instituted in the year 2011 and even in the year 2017, the parties are fighting for interim relief, I deem it appropriate to

issue certain directions to the trial court to expedite the hearing of the suit and dispose of the same, as expeditiously as possible, preferably within a period of six months, by conducting the hearing on day to day basis, if possible. Hence, I proceed to pass the following order:-

O R D E R

- I. Appeal from Order No. 56 of 2016 and Appeal from Order No. 57 of 2016 are hereby dismissed.
- II. The learned District Judge-1, Kopargaon, who is trying both the suits, is hereby directed to hear and dispose of the Regular Civil Suit No. 7 of 2011 and Regular Civil Suit No. 8 of 2011, as expeditiously as possible, preferably within a period six months from today, by conducting the trial on day to day basis, if possible, without granting unnecessary adjournments.
- III. Both the appeals are accordingly disposed of.

40. In view of disposal of appeals, nothing remains to be adjudicated in pending civil applications and the same are

accordingly disposed of.

41. At this stage, learned counsel for the appellant requests for stay to the effect of this order for a period of four weeks from today. Since, this Court has issued certain directions to the trial court to dispose of pending suits, as expeditiously as possible, preferably within a period of six months, request stands refused.

(V. K. JADHAV, J.)

rlj/