

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 10.03.2017

+ **FAO (OS) (COMM) 77/2016 & CM Nos.33194-97/2016**

BRITANNIA INDUSTRIES LTD ... Appellant

versus

ITC LIMITED ... Respondent

Advocates who appeared in this case:-

For the Appellant : Mr Sudhir Chandra Agrawal, Senior Advocate with
Mr Sagar Chandra, Ms Ishani Chandra and Mr Ankit Rastogi.
For the Respondent : Mr Rajiv Nayyar, Mr Sandeep Sethi and Ms Pratibha M. Singh,
Sr Advocates with Mr Sudeep Chatterjee, Ms Jaya Mandelia,
Ms Nupur Lamba and Mr Nikhil Lal

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE ASHUTOSH KUMAR

JUDGMENT

BADAR DURREZ AHMED, J

1. This appeal is directed against the order passed by a learned single Judge of this court on 06.09.2016 in IA No.10139/2016 which was an application under Order XXXIX Rules 1 & 2 of the Code of Civil Procedure, 1908 (hereinafter referred as 'CPC'). The said application was filed by the respondent / plaintiff (ITC) in its suit being CS (Comm) 1128/2016.

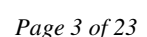
2. ITC had filed the said suit seeking an injunction restraining the appellant / defendant (Britannia Industries Limited) from violating its purported rights in the packaging / trade dress of its product “Sunfeast Farmlite Digestive – All Good” biscuit by allegedly using a deceptively and confusingly similar trade dress for its “Nutri Choice Digestive Zero” biscuit. An injunction was sought for restraining Britannia from, *inter alia*, passing off ITC’s alleged rights in the trade dress / packaging / label and dilution of the mark etc.

3. The learned single Judge has, by virtue of the impugned order, granted an interim injunction against Britannia and in favour of ITC in the following manner:-

“44. An interim injunction is, accordingly, issued restraining Britannia from using the impugned packaging get-up/wrapper for its Nutri Choice Digestive Zero biscuits in the present form during the pendency of this suit. It will however be open to Britannia to adopt the packaging it uses for the product internationally or while retaining the yellow colour, substitute the blue colour in the impugned packaging with any other distinctive colour other than variants of blue. In sum, it can adopt any packaging which is distinctively different from the packaging that is currently used by ITC for its Sunfeast Farmlite Digestive All Good biscuits.

45. The Court grants Britannia four weeks' time to phase out the existing stocks of Nutri Choice Zero Digestive biscuits with the

4. Both the products are packaged solely in “pillow packages”. The packaging of ITC’s “Sunfeast Farmlite Digestive – ALL GOOD” Biscuit, which was allegedly launched in February 2016, is as under:-



NutriChoice
HEALTHY CHOICE
STREET FOODS
STREET FOODS

INGREDIENTS:
 WHEAT FLOUR, SUGAR, BUTTER, YEAST, SALT, VANILLA FLAVOR, BAKING POWDER, RAASANA, CITRIC ACID, AND OTHERS.

Net Wt. 100g (3.52 oz)

Net Wt. 100g (3.52 oz)

Ingredients:
 WHEAT FLOUR, SUGAR, BUTTER, YEAST, SALT, VANILLA FLAVOR, BAKING POWDER, RAASANA, CITRIC ACID, AND OTHERS.

nutri choice

0% Added Sugar Maida

Digestive zero

Healthificious™

Net Wt. 100g (3.52 oz)

nutri choice

0% Added Sugar Maida

Digestive zero

Healthificious™

Net Wt. 100g (3.52 oz)

6. Before we proceed further, it would also be pertinent to note that Britannia has been using a different box type packaging for the same biscuit in the international market. The packaging for the same in the international market is as under:-



7. It is also relevant to point out that Britannia has been a market leader insofar as biscuits are concerned. Britannia Digestive biscuits are being sold under three different variants. One variant is the “Nutri Choice Hi Fibre Digestive” biscuit. The other variant is the “Nutri Choice Digestive 5 Grain” biscuit and the third variant is the one in issue, that is, the “Nutri Choice Digestive Zero” biscuit. The three variants were packaged as under:-

Sl. No.	Product	Variant	Colour Scheme	Used Since
1.	Nutrchoice Digestive	Hi-Fibre	Yellow + Red	October, 2014
				
2.	Nutrchoice Digestives	5 Grain	Yellow+ Green	October, 2014
				
3.	Nutrchoice Digestive	Zero	Yellow + Blue	2016
				

8. From the operative portion of the interim injunction order, which has been extracted above, it is evident that Britannia has been restrained from using the colour blue in the packaging for the ‘Digestive Zero’ variant of biscuits, while it has been permitted to retain the colour – yellow. In other words, the entire controversy in the present appeal centres around the use of

blue and / or its variants in the packaging. It is, therefore, clear that in case the appellant / Britannia uses the same packaging, but substitutes the blue with any other colour, which is not a variant of blue, then there would be no case for passing off. It further follows that all other elements of the packaging other than the combination of yellow with blue do not, at this *prima facie* stage, make out a case of passing off vis-à-vis the trade dress / get-up.

9. The present case, therefore, has to be considered as one of passing off in relation to the trade dress / get-up. Passing off is a common law tort and each case of passing off depends on its own facts. The essential attributes which need to be established for a successful passing off action have often been considered as the classical trinity, which, in the words of Lord Oliver in **Reckitt & Colman Products Ltd v. Borden: 1990 RPC 341** **HL**, are as under:-

“First, he must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying ‘get-up’ (whether it consists simply of a brand name or a trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive specifically of the plaintiff’s goods or services.

Secondly, he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by him are the goods or services of the plaintiff.

Thirdly, he must demonstrate that he suffers or, in a *quia timet* action, that he is likely to suffer damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the plaintiff.”

10. It is evident that a passing off action has to be examined from the standpoint of three factors: (1) goodwill and reputation; (2) misrepresentation / possibility of deception; and (3) likelihood of damage. We must also note that goodwill and reputation do not refer to the same thing though, there could be some degree of overlap. There may be a reputation and yet there may not exist any goodwill. As an example, a particular mark may have a reputation worldwide. But, there may be no sales under that mark in a particular territory, say, India. Thus, although the mark would have a reputation worldwide, including India, it would not have a goodwill attached to it in India. It is not just the reputation, but the goodwill which constitutes property inasmuch as it represents a link between the business and the customer.

11. In **A.G. Spalding & Bros v. A.W. Gamage Limited: (1915) 32 RPC**

273 (284), it was observed by the House of Lords as under:-

“There appears to be considerable diversity of opinion as to the nature of the right, the invasion of which is the subject of what are known as passing-off actions. The more general opinion appears to be that the right is a right to property. This view naturally demands an answer to the question – property in what? Some authorities say property in the make, name, or get-up improperly used by the defendant. Others say, property in the business or goodwill likely to be injured by the misrepresentation. Lord Herschell in *Reddaway v. Banham* [L.R. (1906) A.C. 139] expressly dissents from the former view; and if the right invaded is a right of property at all, there are, I think, strong reasons for preferring the latter view.”

The nature of a passing-off action was explained by Justice Wynn-Parry in

Derek McCulloch v. Lewis A. May: 65 RPC 58 (64) in the following

words:-

“With that statement of the relevant facts and my conclusion on the question of fraud, I now turn to examine the nature of this action. It is of the essence of an action for passing off to show, first, that there has been an invasion by the defendant of a proprietary right of the plaintiff, in respect of which the plaintiff is entitled to protection, and, secondly, that such invasion has resulted in damage or that it creates a real and tangible risk that damage will ensue.

It is with the first part of that proposition that I am immediately concerned. It is established beyond argument that under the law of England a man is not entitled to exclusive proprietary rights in a fancy name *in vacuo*; his right to protection in an action for passing off must depend on his showing that he enjoys a reputation in that name in respect of some profession or business that he carries on or in

respect of some goods which he sells. Further, he must show that the acts of the defendant of which he complains have interfered or are calculated to interfere with the conduct of his profession, business, or selling goods, in the sense that those acts of the defendant have led or are calculated to lead the public to confuse the profession, business or goods of the plaintiff with the profession, business, or goods of the defendant. The element of confusion is essential, but the element of confusion necessitates comparison.”

(underlining added)

12. The following observations in **H.P. Bulmer Ltd and Showerings Ltd v. J. Bollinger S.A. and Champagne Lanson Pere et Fils**: [1978] RPC 79

are also relevant:-

“A man who engages in commercial activities may acquire a valuable reputation in respect of the goods in which he deals, or of the services which he performs, or of his business as an entity. The law regards such a reputation as an incorporeal piece of property, the integrity of which the owner is entitled to protect. This does not, of course mean that he is entitled to protection against legitimate competition in the market. If A’s goods have acquired a reputation on the market connected with a particular name, mark or get-up, A cannot complain if the value of that reputation is depreciated by B coming on to the market with similar goods which acquire a reputation which owes nothing to the name, mark or get-up associated with A’s goods. A can, however, complain if B in the course of his operations uses in connection with his goods the name, mark or get-up associated with A’s goods or one so closely resembling it as to be likely to lead to confusion on the market between the goods of A and those of B. By so doing B wrongfully appropriates to himself part of the reputation belonging to A and so infringes the integrity of A’s property in that reputation.

This proprietary right recognised by the law is not a right in the name, mark or get-up itself; it is a right in the reputation or

goodwill of which the name, mark or get-up is the badge or vehicle: Singer v. Loog (1882) 18 Ch. D. 395, per Lord Justice James at 412; (1882) 8 A.C. 15, per Lord Chancellor Selborne at 26, 27; Lord Watson at 38, 39; Burberrys v. Cording (1909) 26 R.P.C. 693, per Parker, J. At 701; A.G.Spalding Bros. V. A.W. Gamage Ltd. (1915) 32 R.P.C. 273 PER Lord Parker at 284. Upon analysis it seems to me to be clear that in principle this must be so. If B has made use of a name, mark or get-up which has become distinctive of A's goods, B does not damage or interfere with A's right or ability to use that name, marke or get-up but he does, or may be likely to damage A in respect of his trade, that is to say, in respect of his, A's enjoyment of an exclusive right to make use on the market of the reputation of his goods. What is damages or liable to be damaged is that reputation. It is this which A is entitled to have protected.

If B sells goods which are not A's goods in such a way as to give the impression that they are A's goods, A may be injured in respect of his trade in either or both of two ways. He may lose sales of his own goods which he might otherwise have made, and the reputation which his goods enjoy may be depreciated by the confusion of B's goods with his so that A's competitive position in the market may be weakened. Moreover the exclusivity of the association of the name, mark or get-up with A's business might, perhaps, be shown to be itself a valuable asset as a powerful means of bringing A's goods to the notice of the public, thus maintaining and promoting A's competitive position on the market. It has not, however, been suggested that modern advertising techniques have made it possible for a name to acquire an intrinsic value of its own as an advertising asset. Such a suggestion (if feasible at all in any case) would have to be supported by evidence of a kind which is wholly absent from, and would seem to be most unlikely to be available in, the present case. I accordingly proceed upon the established basis (see the cases just cited) that a claim to relief against passing off cannot be based upon an alleged right of property in a name, nor in a mark or get-up. It is injury, or the likelihood of injury, to the reputation of A's goods or business, that is to say his goodwill, that forms the

cause of action. If B's conduct has not the effect of damaging, or being likely to damage A in respect of his trade, B is not guilty of the tort of passing off.

XXXXX

XXXXX

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I would respectfully accept and adopt this view. When a member of the public purchases goods on the market believing them to be the goods of A, it is A's goods that he wants, not the name, mark or get-up, which is no more than a label or badge which signifies that the goods are A's goods. It is the reputation of the goods that matters: It is the association of the name, mark or get-up with those goods, distinguishing them from other men's goods, which makes the name, mark or get-up important, serving as a vehicle of the information that the goods are goods of the kind which has the reputation.

What is of value to A in his trade or business is his ability to attract customers in the market. This depends upon the reputation of the commodity in which he deals. It is this reputation which in a passing off action he is seeking to protect, not any right of property in a name, mark or get-up. Moreover, as Lord Parker went on to point out, passing off may occur where no name, mark or get-up is used in the representation that B's goods are those of A: and there may be a passing off of B's activities, not involving any physical goods, as A's activities or as carried on by B in conjunction with or as agent for or an associate of A, without the use of any confusing name, mark or get-up. These considerations, in my opinion, strongly support the preference expressed by Lord Parker for regarding the protection of the plaintiff's business or goodwill as the object of relief in passing off.

It is well settled that a plaintiff in a passing off action does not have to prove that he has actually suffered damage by loss of business or in any other way. A probability of damage is enough, but the actual or probable damage must be damage to him in his trade or business, that is to say, damage to his

goodwill in respect of that trade or business. “Goodwill” is a word of wide import. It was defined succinctly by Lord Macnaghten in IRC v. Muller & Co.’s Margarine Limited (1901) A.C. 217 at 224, as the attractive force which brings in custom. That force may be due to many and diverse circumstances differing in every case. It can, I venture to suggest, be said to embrace every circumstance which contributes to the success and value of the business to which it relates. It is, to use the language of Lord Macnaghten in Trego v. Hund (1896) A.C. 7 at 24 “The whole advantage, whatever it may be, of the reputation and connection of the firm.”

Goodwill is undoubtedly a form of property. It is, in my judgment, against infraction of this incorporeal property that the law will protect a plaintiff in a passing off action. So I think that in the present case one should keep prominently in mind the question whether what the plaintiffs have done (for, having regard to the form of the present action, the roles of the plaintiffs and the defendants are the reverse of what is usual) has injured or is likely to injure the defendants in their trade as makers of Champagne.

To make good a right to the exclusive use of a trade name, mark or get-up (not being a registered trade mark) the claimant must normally establish that it has become distinctive of his goods or business to the exclusion of the goods or business of anyone else. That it has become distinctive in this way is normally, if not always, the consequence of use of the name, mark or get-up by the claimant or his predecessors in trade or business which has resulted in the name, mark or get-up being associated in the minds of the public, or of the relevant section of the public, with the goods or business of the claimant and his predecessors exclusively.”

(underlining added)

13. The distinction between the proprietary right in a brand name or get-up as against the goodwill and reputation of an individual’s business was

brought out in *Harrods Ltd v. Harrodian School Ltd*: [1996] RPC 697

(711) in the following manner:-

“It is well settled that (unless registered as a trade mark) no one has a monopoly in his brand name or get up, however, familiar these may be. Passing off is a wrongful invasion of a right of property vested in the claimant; but the property which is protected by an action for passing off is not the claimant's proprietary right in the name or get-up which the defendant has misappropriated but the goodwill and reputation of his business which is likely to be harmed by the defendant's misrepresentation.”

(underlining added)

14. With regard to imitation of get-up in a passing off action, the following is stated in Kerly's Law of Trade Marks and Trade Names, 15th Edition (P. 652):-

“It is usually true in some degree that a trader's goods are recognised as his by their general appearance, or “get-up”. Accordingly, resemblance of get-up is not uncommonly an ingredient in passing off, and it is possible for imitation of get-up alone to amount to passing off. Such cases are rare, since few traders rely on get-up alone to distinguish their goods, so that trade names and word trade marks are ordinarily present too, and in these days, in this country¹, a difference in names is enough to warn the public that they are getting one trader's goods and not the other's². Accordingly, there can hardly be passing off by get-up alone (in the usual sense of substitution of one make of a product for another) unless the resemblance between the goods is extremely close, so close that it can

¹ cf. *White, Hudson v. Asian* [1965] R.P.C. 45 (PC, Singapore)

² *Saper v. Specter's*: 1953 (70) R.P.C. 173]

hardly occur except by deliberate imitation; and even that may not be enough³. But there are forms of passing off in which a difference of name is not important: for example, where the goods themselves are distinct enough from the claimant's for a different product name to be expected⁴. The relative importance to be attributed to names and word marks on the one hand, and to get-up on the other, is a matter upon which different people have different views; with the result that the outcome of disputes about get-up is exceptionally hard to predict.⁵

(underlining added)

It is further stated in Kerly's (at p. 567) that:-

“As in any other passing off case, a claimant relying upon get-up must prove his reputation: he must prove, that is, that the get-up concerned indicates his goods and no one else's⁶. In particular, he must show that distinctiveness lies in the get-up and not (for instance) in his name or trade marks, if those appear on the goods⁷. Thus, if a claimant by his cautions and advertisements shows that he relies wholly or mainly on his trade mark or business name, he makes his case on general get-up, apart from trade mark or business name, more difficult to establish⁸. A trader who introduces a new feature into the get-up of his goods does not thereby acquire any proprietary interest in it, so as to be able to prevent its use by competitors, until it has become so identified with his goods that its use by others is calculated to deceive⁹. No case can be made merely¹⁰ by showing an imitation of the parts of the get-up of goods which are common to the trade¹¹. But very little evidence of user may

³ *Campare Saper v. Specter's with Tavener Rutledge v. Specter's*: 1959 R.P.C. 83

⁴ 1912 (29) R.P.C. 81

⁵ cf. *New Way v. Lucking* (1960) R.P.C. 147

⁶ *Jones v. Anglo-American*: 1912 (29) R.P.C. 361

⁷ *Schweppes v. Gibbens*: 1905 (22) R.P.C. 113

⁸ *Imperial Tobacco v. Purnell*: 1904 (21) R.P.C. 368

⁹ *Klissers Farmhouse Bakeries v. Harvest Bakeries*: [1989] R.P.C. 27.

¹⁰ *Bryant & May v. United Match*: (1933) 50 R.P.C. 12.

¹¹ *Payton v. Snelling*: [1901] A.C. 308

be sufficient to establish distinctiveness where the get-up is not only novel but striking¹², even though it consists of a combination of commonly used parts. ...”

(underlining added)

15. From the above, it is evident that in a passing off case, it is the goodwill which is sought to be misappropriated. It is this misappropriation which provides a cause of action at common law. Thus, before a passing off action can succeed, the plaintiff must establish that a goodwill attaches to the goods he supplies in the mind of the purchasing public by association with the identifying get-up under which the particular goods or services are offered to the public. The connection between the get-up must be such that it is recognized by the public as distinctive specifically of the plaintiff's goods or services. In other words, in the facts of the present case, ITC, in order to succeed at this stage, must establish, at least *prima facie*, that the combination of yellow and blue that is used in its packaging for its “Sunfeast Farmlite Digestive – All Good” biscuit has become distinctive specifically of its goods. In other words, whenever a possible customer sees a packaging for digestive biscuits using the combination of yellow and blue, it is immediately recognized as being sourced from the plaintiff and not from anyone else.

¹² *Weingarten v. Bayer: (1905) 22 R.P.C. 341*

16. The learned single Judge has observed that when a new product with a distinctive packaging is introduced, it is not necessary for the plaintiff to show that it has established a formidable reputation in that product for a number of years. He has further observed that the factum of sales of 5 crores was a significant factor in examining the question of reputation of the product, as also the factum of Rs 14 crores spent on advertising. The answer of the learned counsel for the Britannia is that the figure of Rs 5 crores sales is not substantiated by any Chartered Accountant's Certificate and that the sum of Rs 14 crores spent on advertising is not only in respect of the get-up, but more so for the trade marks and other features of the product. The issue here, in this case of passing off, is not that a new biscuit or a new product has acquired popularity in a short span of time, but whether the get-up and, in particular, the colour combination of yellow and blue has become exclusively identifiable with the plaintiff's product ? In other words, whether the combination of yellow and blue has become a clear and established source identifier?

17. The learned single Judge felt that Britannia had been late in introducing its "Digestive Zero" variant till after six months after ITC introduced its product and this, according to the learned single Judge, was a

factor which weighed in favour of ITC. We do not think that this could be a factor because ultimately what has to be seen is whether the combination of yellow and blue had attained the distinction amongst the public as being exclusively related to the plaintiff's product. Although the learned single Judge had observed that the question whether the packaging of "Sunfeast Farmlite Digestive – All Good" biscuits had become identified with the product was a matter of evidence, he also observed that the sales of Rs 5 crores of the said biscuits in a short span of five months was indicative of the growing reputation of ITC's product which deserved protection. We are of the view that the focus ought to be on the question whether the get-up (the yellow-blue combination of the package) was exclusively and distinctively associated with ITC. We must also emphasize that in order for ITC to establish its alleged exclusive right over the get-up (the yellow-blue combination), ITC would have to establish, even *prima facie*, that such get-up has become distinctive of ITC's farmlite biscuits to the exclusion of biscuits of anyone else. The goodwill or reputation is in relation to the get-up as a source identifier. Does that get-up bring in custom on account of it being a label or badge which indicates that the biscuits were ITC's biscuits? The question is – has that been established ? We think not.

18. Furthermore, the learned single Judge had quoted Kerly in paragraph 30 of the impugned order. The said passage itself makes it clear that if a claimant by his cautions and advertisements shows that he relies “wholly or mainly” on his trade mark or business name, he makes his case on general get-up apart from trade mark or business name more difficult to establish. In the present case, we find that ITC in its advertisements mainly relies on its trade marks and business name. That being the case, ITC would, in any event, have greater difficulty in establishing its claim based on general get-up and in the present case, on the combination of yellow and blue.

19. It is also pointed out in Kerly that a trader, who introduces a new feature into the get-up of his goods, does not thereby acquire any proprietary interest in it so as to be able to prevent its use by competitors, until it has become so identified with his goods that its use by others is calculated to deceive. The question that needs to be examined is – whether the combination of yellow and blue in the packaging of ITC’s biscuits had become so identified with ITC’s biscuits that its use by others, such as Britannia, would be regarded as being calculated to deceive ? We do not think that in the short span of time and, particularly when Britannia has alleged that the first invoice of ITC is of May 2016, the yellow-blue

combination in the packaging of ITC's biscuits had become so identified with ITC so as to enable ITC to prevent its use by competitors.

20. Of course, as mentioned in *Kerly*, very little evidence of user may be sufficient to establish distinctiveness where the get-up is not only novel but striking, even though it consists of a combination of commonly used parts. In our view, the get-up and specifically the yellow-blue combination, does not fall in this category. This aspect ought to have been considered by the learned single Judge.

21. We may also note the contention on behalf of Britannia that the colour blue was being used worldwide in relation to sugarless or zero sugar products. Of course, the learned counsel for ITC submitted that there are many sugarless or zero sugar products which do not use the colour blue in their packaging. But, the fact remains that there are a good number of products which use the colour blue for sugarless, zero sugar or sugar free products. Furthermore, it was also suggested by the learned counsel for Britannia that it was using similar packaging for its Digestive Hi Fibre and Digestive 5 Grain biscuits, which all had the features of stacked biscuits, ears of wheat and other grains. The Digestive Hi Fibre packaging, which was also a pillow packing, had a yellow-red combination. The Digestive 5

Grains packing employed the yellow – green combination. In this context, it was suggested on behalf of Britannia that the packing for “Nutri Choice Digestive Zero” biscuits employed the yellow – blue combination to distinguish its other products. It was, therefore, submitted that the three variants of its Digestive biscuits had the same genre of package design and the similar colour concepts. Yellow was the primary colour with a combination of red for Digestive Hi Fibre and a combination with green for the Digestive 5 Grain biscuits and now with a combination of blue for its Digestive Zero biscuits. It was submitted that in this backdrop, Britannia could not be charged with aping the packaging or at least the colour combination employed by ITC for its “Sunfeast Farmlite Digestive – All Good” biscuits. It is true that intention is not necessary for demonstrating the second element of passing off, that is, misrepresentation, but it is also a factor which needs to be taken into consideration. This is so because Britannia has been using yellow as the primary colour in combination with red and green for its earlier products and, therefore, its natural evolution into a combination of yellow and blue for the Digestive Zero product was quite understandable. We are making these comments because of the observations of the learned single Judge to the effect that even if it were to be accepted that yellow as a colour was integral to Britannia’s packaging

scheme for Digestive biscuits, Britannia's purpose could well be served by adopting a colour other than blue, to combine with the yellow colour of its packaging. The question, however, remains – why should Britannia be required to adopt a colour other than blue ? It could be asked to do so only if ITC had established that the get-up in the form of the yellow-blue combination employed by it had become so distinctive of its products that whenever any person saw the yellow-blue combination on a package of digestive biscuits, he would associate it with ITC. But, this has not been established, even *prima facie*. This is apart from the issue that other distinct and different identifiers exist on the packaging such as different product names, trade marks and trade names.

22. We need not elaborate further on the arguments and counter-arguments and the various decisions that were cited before us as that would be unnecessary. It is well-settled that each case turns upon its own facts. It is also clear from the discussion above that the combination of yellow and blue as used by ITC for its “Sunfeast Farmlite Digestive – All Good” biscuits – has not become so identified with its goods as to become a ‘badge’ of its goodwill.

23. The appropriation of and exclusivity claimed vis-à-vis a get-up and particularly a colour combination stands on a different footing from a trade mark or a trade name because colours and colour combinations are not inherently distinctive. It should, therefore, not be easy for a person to claim exclusivity over a colour combination particularly when the same has been in use only for a short while. It is only when it is established, may be even *prima facie*, that the colour combination has become distinctive of a person's product that an order may be made in his favour. We feel that the present is not such a case. When the first element of passing off, in our view, is not established, we need not examine the other elements of misrepresentation and likelihood of damage.

24. For the foregoing reasons, we are of the view that ITC was not entitled to an interim injunction and, therefore, the impugned order is set aside. There shall be no order as to costs.

BADAR DURREZ AHMED, J

ASHUTOSH KUMAR, J

March 10, 2017

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