

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR.

Appeal Against Order No.58/2017

(Ramesh Khatanmal Lulla .vs. Mohammad Yusuf Abdul Gaffar)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders or directions Court's or Judge's orders.
and Registrar's orders

Mr. N.A. Lalwani, Advocate for Appellant.
Mr. M.G. Sarda, Advocate for Respondent.

CORAM : Manish Pitale, J.
RESERVED ON : February 20, 2018.
PRONOUNCED ON : March 09, 2018.

ORDER

By this appeal, the original defendant has challenged order dated 20.06.2017 passed by the Court below i.e. District Judge, Akola, whereby an application for temporary injunction filed by the respondent-original plaintiff has been allowed and the appellant has been temporarily restrained from manufacturing, trading, offering or dealing in the product "Fafda Powder" under the name of "New Gai Chhap", which is found to be deceptively similar to the registered trade mark "Gai Chhap" of the respondent pertaining to the same product, till the decision of the main suit.

2. The respondent-plaintiff filed suit for

permanent injunction, infringement of registered trade mark and for claim of damages against the appellant on the ground that the appellant was manufacturing and selling the aforesaid product Fafda Powder under a mark that was deceptively similar to the registered trade mark "Gai Chhap" with a picture of cow being a registered trade mark of the respondent. In this suit, an application for temporary injunction under Order 39 Rules 1 and 2 of the Code of Civil Procedure was moved by the respondent, seeking to restrain the appellant, his agents and servants from infringing the registered trade mark, during the pendency of the suit. The appellant filed written statement in the aforesaid suit and denied the claims of the respondent.

3. By the impugned order dated 20.06.2017, the Court below has allowed the application for temporary injunction filed by the respondent, holding that there was sufficient material on record to demonstrate that the impugned mark of the appellant was deceptively similar to the registered trade mark of the respondent and that there was every likelihood of confusion in the mind of customers of the appellant. On this basis, the Court below concluded that the respondent

had satisfied the requirements for grant of temporary injunction and it passed the impugned order.

4. Mr. N.A. Lalwani, learned counsel appearing on behalf of the appellant, submitted that the impugned order was unsustainable because it was not in terms of the law laid down by the Hon'ble Supreme Court on the issue as to when can a temporary injunction order be granted in cases where infringement of trade mark is alleged. It is contended that the mark of the appellant is distinct from the registered trade mark of the respondent and that caricature of cow being very common in the trade and class to which the trade mark in the present case relates, it could not be said that the mark of the appellant was deceptively similar to that of the respondent. It was further contended that for making a comparison between the two marks, they would have to be considered as a whole and that significant dissimilarities in the marks could not be ignored. It was also contended that "Gai Chhap" pertained to a generic word commonly used and that therefore, the respondent could not claim a monopoly over the same. It was the case of the appellant that when evidence about actual damage or loss

suffered by the respondent as also about any person being confused by the mark of the appellant, was not brought on record by the respondent, it could not be said that *prima facie* case was made out for grant of temporary injunction by the respondent. On this basis, it was contended that the court below had committed a grave error in allowing the application for temporary injunction filed by the respondent. The learned counsel for the appellant placed reliance on the following judgments:-

- (i) M/s S.M. Dychem Ltd. .vs. M/s Cadbury (India) Ltd. - (2000) 5 Supreme Court Cases 573
- (ii) Hindustan Unilever Ltd. .vs. Ashique Chemicals & Ors. - 2011 (5) ALL MR 776.
- (iii) Reliance Industries Ltd. .vs. Concord Enviro Systems Pvt. Ltd. - Notice of Motion No. 573 of 2015 in Suit No. 309 of 2015.
- (iv) Skyline Education Institutes .vs. S.L. Vaswani - 2010 (2) ALL MR 427.
- (v) Datamatics Global Services Ltd. .vs. Royal Datamatics Private Ltd. - 2016 (5) ALL MR 279.

- (vi) Prakash Agro Industries Ltd. .vs. S.R.K. Products Pvt. Ltd. - 2014 (7) ALL MR 854.
- (vii) Shelke Beverages Pvt. Ltd. .vs. Rasiklal Manikchand Dhariwal - 2010 (3) ALL MR 667.
- (viii) M/s Orange City Mobile Collection .vs. M/s City Collection - Appeal Against Oder No. 81 of 2014.

5. On the other hand, Mr. M.G. Sarda, the learned counsel appearing on behalf of the respondent-plaintiff submitted that the impugned order passed by the Court below was justified, particularly because the present case concerned a registered trade mark of the respondent. It was submitted that when the Court is concerned with a case of registered trade mark and its infringement, violation of a statutory right of the plaintiff is the subject matter and in such cases, grant of temporary injunction has to be considered by applying the law laid down by the Hon'ble Supreme Court in the context of statutory rights available to the respondent, since its mark is a registered trade mark. It was contended that as per law laid down by the Hon'ble Supreme Court and this Court in various judgments, once it was

demonstrated before the Court that the mark of the respondent was a registered trade mark and that *prima facie* the appellant was infringing the same by the use of a mark that was identical in essential features or deceptively similar leading to confusion in the mind of the customer, a case for grant of temporary injunction was made out. As per the law laid down in various judgments, once it was proved that there was likelihood of deception or confusion, proof of actual loss or damage was not necessary to be proved by the plaintiff in order to successfully claim an order of temporary injunction. It was submitted that likelihood of deception or confusion certainly led to the conclusion that there was likelihood of loss or damage and that therefore, at the *prima facie* stage for grant of temporary injunction, proof of actual loss or damage suffered by the plaintiff was not necessary to be brought on record. It was submitted that registration certificate placed on record pertaining to the trade mark of the respondent demonstrated that the mark as a whole with the picture of cow and the words written above and below the picture were registered and that it was *prima facie* proved by the respondent that the mark used by the appellant was both visually and phonetically similar to the

registered trade mark of the respondent and that there was every likelihood of deception or confusion in the mind of the customers. This was particularly so because, the appellant was also selling the same product i.e. Fafda Powder under its mark of “New Gai Chhap”. The learned counsel appearing on behalf of the respondent relied upon the following judgments in support of his contentions:-

- (i) Ruston and Hornsby India Ltd. .vs. Zamindara Engineering Comopany - AIR 1970 S.C. 1649.
- (ii) Laxmikant V. Patel .vs. Chentanbhai Shah- AIR 2002 S.C. 275.
- (iii) Cello Household Products .vs. Modware India - Notice of Motion (L) No. 209/2017 in Suit (L) No.48/2017.
- (iv) Court Receiver, High Court .vs. R.R. Omerbhoy Pvt. Ltd. - 2003(3) ALL MR 873.
- (v) Balsara Hygience Products Ltd. .vs. Brighto Chemical Industrial - 1996(16) PTC 452.
- (vi) Swal Corporation Ltd. .vs. Universal Pesto Chem Industries (I) Pvt. Ltd. - Notice of Motion

No.3434/2007 in Suit No.
2524/2007.

- (vii) Sabmiller India Ltd. .vs. Jagpin
Brewerries Ltd. - 2014 (5) Bom.
C.R. 721.
- (viii) Rahul Uttam Suryavanshi .vs.
Sunil Manikchand Kasliwal -
2016 (6) All MR 513.

6. Having heard the learned counsel for the parties, the question that arises for consideration in the present appeal is, as to whether the order of temporary injunction granted by the Court below was justified and whether the parameters for grant of temporary injunction, in cases where infringement of registered trade mark was alleged by the plaintiff, were satisfied in the present case.

7. In order to answer the aforesaid questions, it would be necessary to refer to relevant provisions of the Trade Marks Act, 1999 (for short "Act") and judgments of the Hon'ble Supreme Court and this Court, in the context of grant of temporary injunction in a case where the plaintiff alleges infringement of a registered trade mark. Section 2(h) of the aforesaid Act defines the term "deceptively similar" which is relevant for an action to be

undertaken for infringement of registered trade marks under Section 29 of the said Act. The said provisions read as follows:-

*"Section 2(h). **"deceptively similar"**, - A mark shall be deemed to be deceptively similar to another mark, if it so nearly resembles that other mark as to be likely to deceive or cause confusion.*

Section 29 Infringement of registered trade marks-- (1) *A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which is identical with, or deceptively similar to, the trade mark in relation to goods or services in respect of which the trade mark is registered and in such manner as to render the use of the mark likely to be taken as being used as a trade mark.*

(2) *A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which because of—*

(a) *its identity with the registered trade mark and the similarity of the goods or services covered by such registered trade mark; or*

(b) *its similarity to the registered trade mark and the identity or similarity of the goods or services covered by such registered trade mark; or*

(c) its identity with the registered

trade mark and the identity of the goods or services covered by such registered trade mark, is likely to cause confusion on the part of the public, or which is likely to have an association with the registered trade mark.

(3) In any case falling under clause (c) of sub-section (2), the court shall presume that it is likely to cause confusion on the part of the public.

(4) A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which — (a) is identical with or similar to the registered trade mark; and (b) is used in relation to goods or services which are not similar to those for which the trade mark is registered; and (c) the registered trade mark has a reputation in India and the use of the mark without due cause takes unfair advantage of or is detrimental to, the distinctive character or repute of the registered trade mark.

(5) A registered trade mark is infringed by a person if he uses such registered trade mark, as his trade name or part of his trade name, or name of his business concern or part of the name, of his business concern dealing in goods or services in respect of which the trade mark is registered.

(6) For the purposes of this section, a person uses a registered mark, if, in

particular, he—

(a) affixes it to goods or the packaging thereof;

(b) offers or exposes goods for sale, puts them on the market, or stocks them for those purposes under the registered trade mark, or offers or supplies services under the registered trade mark;

(c) imports or exports goods under the mark; or

(d) uses the registered trade mark on business papers or in advertising.

(7) A registered trade mark is infringed by a person who applies such registered trade mark to a material intended to be used for labelling or packaging goods, as a business paper, or for advertising goods or services, provided such person, when he applied the mark, knew or had reason to believe that the application of the mark was not duly authorised by the proprietor or a licensee.

(8) A registered trade mark is infringed by any advertising of that trade mark if such advertising—

(a) takes unfair advantage of and is contrary to honest practices in industrial or commercial matters; or

(b) is detrimental to its distinctive character; or

(c) is against the reputation of the trade mark.

(9) Where the distinctive elements of a registered trade mark consist of or include words, the trade mark may

be infringed by the spoken use of those words as well as by their visual representation and reference in this section to the use of a mark shall be construed accordingly."

8. In the present case, the respondent/plaintiff has claimed infringement of its registered trade mark. A certificate of registration of the trade mark issued by the Registrar of Trade Marks along with the registered trade mark as annexed to the said certificate is placed on record by the respondent. The mark being used by the appellant herein is also placed on record. In order to examine whether the order of temporary injunction granted by the Court below is justified or not, it has to be kept in mind that the present case concerns infringement of a registered trade mark, i.e. violation of a statutory right of the respondent, as opposed to an action of passing off. The difference between an action for infringement of registered trade mark and that for passing off has been recognized in judgments over a period of time. In the case of **Kaviraj Pandit Durga Dutt Sharma .vs. Navratna Pharmaceutical Laboratories - A.I.R. 1965 Supreme Court 980**, the Hon'ble Supreme Court has held as follows:-

"28. The other ground of objection that the findings are inconsistent really proceeds on an error in appreciating the basic differences between the causes of action and right to relief in suits for passing off and for infringement of a registered trade mark and in equating the essentials of a passing off action with those in respect of an action complaining of an infringement of a registered trade mark. We have already pointed out that the suit by the respondent complained both of an invasion of a statutory right under [s. 21](#) in respect of a registered trade mark and also of a passing off by the use of the same mark. The finding in favour of the appellant to which the learned Counsel drew our attention was based upon dissimilarity of the packing in which the goods of the two parties were vended, the difference in the physical appearance of the two packets by reason of the variation in their colour and other features and their general get-up together with the circumstance that the name and address of the manufacture of the appellant was prominently displayed on his packets and these features were all set out for negating the respondent's claim that the appellant had passed off his goods

as those of the respondent. These matters which are of the essence of the cause of action for relief on the ground of passing off play but a limited role in an action for infringement of a registered trade mark by the registered proprietor who has a statutory right to that mark and who has a statutory remedy in the event of the use by another of that mark or a colourable imitation thereof. While an action for passing off is a Common Law remedy being in substance an action for deceit, that is, a passing off by a person of his own goods as those of another, that is not the gist of an action for infringement. The action for infringement is a statutory remedy conferred on the registered proprietor of a registered trade mark for the vindication of "the exclusive right to the use of the trade mark in relation to those goods"(Vide [s. 21](#) of the Act). The use by the defendant of the trade mark of the plaintiff is not essential in an action for passing off, but is the sine qua non in the case of an action for infringement. No doubt, where the evidence in respect of passing off consists merely of the colourable use of a registered trade mark, the essential features of both the

actions might coincide in the sense that what would be a colourable imitation of a trade mark in a passing off action would also be such in an action for infringement of the same trade mark. But there the correspondence between the two ceases. In an action for infringement, the plaintiff must, no doubt, make out that the use of the defendant's mark is likely to deceive, but where the similarity between the plaintiff's and the defendant's mark is so close either visually, phonetically or otherwise and the court reaches the conclusion that there is an imitation, no further evidence is required to establish that the plaintiff's rights are violated. Expressed in another way, if the essential features of the trade mark of the plaintiff have been adopted by the defendant, the fact that the get-up, packing and other writing or marks on the goods or on the packets in which he offers his goods for sale show marked differences, or indicate clearly a trade origin different from that of the registered proprietor of the mark would be immaterial; whereas in the case of passing off, the defendant may escape liability if he can show that the added matter is sufficient to distinguish his

goods from those of the plaintiff.

29. When once the use by the defendant of the mark which is claimed to infringe the plaintiff's mark is shown to be "in the course of trade", the question whether there has been an infringement is to be decided by comparison of the two marks. Where the two marks are identical no further questions arise; for then the infringement is made out. When the two marks are not identical, the plaintiff would have to establish that the mark used by the defendant so nearly resembles the plaintiff's registered trade mark as is likely to deceive or cause confusion and in relation to goods in respect of which it is registered (*Vide [S. 21](#)*). A point has sometimes been raised as to whether the words "or cause confusion" introduce any element which is not already covered by the words "likely to deceive" and it has sometimes been answered by saying that it is merely an extension of the earlier test and does not add very materially to the concept indicated by the earlier words "likely to deceive". But this apart, as the question arises in an action for infringement the onus would be on the

plaintiff to establish that the trade mark used by the defendant in the course of trade in the goods in respect of which his mark is registered, is deceptively similar. This has necessarily to be ascertained by a comparison of the two marks-the degree of resemblance which is necessary to exist to cause deception not being capable of definition by laying down objective standards. The persons who would be deceived are, of course, the purchasers of the goods and it is the likelihood of their being deceived that is the subject of consideration. The resemblance may be phonetic, visual or in the basic idea represented by the plaintiffs mark. The purpose of the comparison is for determining whether the essential features of the plaintiff's trade mark are to be found in that used by the defendant. The identification of the essential features of the mark is in essence a question of fact and depends on the judgment of the Court based on the evidence led before it as regards the usage of the trade. It should, however, be borne in mind that the object of the enquiry in ultimate analysis is whether the mark used by the defendant as a whole is deceptively similar to that of the registered mark of the plaintiff."

9. The aforesaid position of law shows that there is a distinction in actions initiated for infringement of registered trade mark and a mere complaint of passing off. It has a bearing on the manner in which the question of grant of temporary injunction is to be considered by the Court. In the case of **Ramdev Food Products (P) Ltd. .vs. Arvindbhai Rambhai Patel and others -(2006) 8 Supreme Court Cases 726**, the Hon'ble Supreme Court has held as follows:-

"121. Kerly's Law of Trade Marks and Trade Names, Thirteenth Edition states as under about the general test for grant of an interim injunction:

"In trade-mark infringement cases irreparable damage, in this sense, is relatively easily shown, since infringement may easily destroy the value of a mark or at least nullify expensive advertising in a way that is hard to quantify for the purposes of an inquiry into damages. This has more recently come to be referred to, in cases where the defendant's conduct is not directly damaging but merely reduces the distinctive character of the

claimant's mark, as "dilution".....

..... In particular, although it is usually neither necessary nor appropriate to assess the degree of probability of success which the claimant's action has (provided that it is arguable, and subject to the principle of American Cyanamid that the merits may be resorted to as a 'tie-breaker' if the balance of convenience is very even,) in trade mark and passing off cases, it is very hard to avoid doing so, since the better the claimant's case on the likelihood of deception (frequently the major issue) the greater the harm which he is likely to suffer. Accordingly, in appropriate cases, where the state of the evidence permits it, the court may seek to weigh up the merits in deciding whether to grant interim relief."

122. Thus, when a prima facie case is made out and balance of convenience is in favour of the appellant, it may not be necessary to show more than loss of goodwill and reputation to fulfil the condition of irreparable injury. In fact, if the first two pre-requisites are fulfilled, in trade mark actions irreparable loss can

be presumed to have taken place.

123. The expression "irreparable injury" in that sense would have established injury which the plaintiff is likely to suffer."

10. The aforesaid position of law, therefore, shows that when the plaintiff alleges infringement of registered trade mark and is able to show that the defendant is using a mark that is identical or similar to the registered trade mark and that it is a colourable use, irreparable loss can be presumed to have taken place and it would be enough to show the loss or injury that the plaintiff is likely to suffer.

11. It has been further held in this context in the case of **S.M. Dyechem Ltd. .vs. Cadbury (India) Ltd.** (supra) by the Hon'ble Supreme Court as follows:-

"19.This point deals with the principles applicable for grant of temporary injunction in trade mark cases. Before American Cyanamid Co., vs. Ethicon Ltd. (1975(1) ALL E.R. 504, it was customary for the Courts

to go into prima facie case in trade mark cases for grant or refusal of temporary injunction. But in American Cyanamid, it was observed that it was sufficient if a "triable issue" was presented by the plaintiff and the merits need not be gone into. The said judgment was referred to by this Court in Wander Ltd. Vs. Antox India (P) Ltd. (1990) Supple. SCC 727. The judgment in Wander Ltd. was followed in Power Control Appliances Vs. Sumeet Machines (P)Ltd. (1994) 2 SCC 448). But in Gujarat Bottling Co. Ltd. Vs. Coca Cola Co. (1995) 5 SCC 545, this Court again adverted to the prima facie case principle while granting temporary injunction.

20. All these rulings have been reviewed recently in Colgate Palmolive (India) Ltd. Vs. Hindustan Lever Ltd. (1999)7 SCC 1. It was pointed to this Court that there was considerable criticism of the principles laid down in American Cyanamid. (See also Floyd, Interlocutory Injunctions since Cyanamid (1983 E 1 PR 238), (Cole, Interlocutory

Injunctions in U.K. Patent Cases (1979 E 1 PR 71) (see also Edenborough M and Tritton, American Cyanamid revisited (1996 E1 PR 234) and Philipps in 1997 JBL 486). This Court referred to the recent judgment of Laddie in UK.

21. In U.K., Laddie, J. reconsidered the principle recently and explained American Cyanamid in his judgment in Series 5 Software Vs. Clark (1996)1 All ER 853(Ch.D). The learned Judge observed that in American Cyanamid, Lord Diplock did not lay down that the relative strength of the case of each party need not be gone into. Thereafter, this Court in Palmolive case has referred to Laddie J's view and said that the view of Laddie, J. is correct and that American Cyanamid cannot be understood as having laid down anything inconsistent with the 'old practice'. We may also add that now the courts in England go into the question whether the plaintiff is likely or unlikely to win in the suit i.e. into the comparative strength of the case of the rival parties - apart from the

question of balance of convenience. [See again Laddie, J. in Barclay's Bank Inc Vs. R.B.S. Advanta, 1998 RPC 307 where such a question is posed and where Series 5 Software was followed. Therefore, in trade mark matters, it is now necessary to go into the question of 'comparable strength' of the cases of either party, apart from balance of convenience. Point 4 is decided accordingly."

12. Thus, the aspect of comparable strength of the cases of the two parties, is to be examined, apart from the aspect of balance of convenience, when considering the question of grant or refusal of temporary injunction in a case where the plaintiff shows infringement of a registered trade mark. In the same judgment of **S.M. Dyechem** (supra), the Hon'ble Supreme Court has held that in a case of infringement, the Court has to decide whether the marks are similar and that in doing so, the two marks have to be considered as a whole. It was further held that in an infringement action it was sufficient if there was over all similarity as would mislead a person usually dealing with one to accept the other if offered to him. If the essential features visually,

phonetically or otherwise were shown to be similar, it would be sufficient on the part of the plaintiff. The relevant portion of the aforesaid judgment in this context reads as follows:-

"33. This Court has laid down in Corn Products Refining Co. Vs. Shangrila Food Products Ltd. (AIR 1960 SC 142), which was a case of infringement, that it would be for the court to decide whether the marks were similar. It was observed that "in deciding the question of similarity between two marks, the marks have to be considered as a whole". (Emphasis supplied). Again in K.R. Chinna Krishna Chettiar Vs. Sri Ambal and Co. and Anr. (AIR 1970 SC 146), where the question of similarity arose at the stage of opposition to the appellant's mark by the respondents (who had a registered trade mark), it was observed that: (SCC p.134, paras 6 & 7)

"it is for the court to decide the question on a comparison of the competing marks as a whole.....

The resemblance between the two marks must be considered with reference to the ear as well as the eye". (emphasis supplied)

In Roche and Co. Vs. Geoffrey Manners and Co.Pvt. Ltd. (AIR 1970 SC 2062), the question of 'deceptive similarity' was raised by the appellant (a registered trade

mark holder) for removal of the respondent's trade mark, in rectification proceedings. (The decision is relevant in an infringement action except that the burden of proof in an infringement action is on the plaintiff while in an application for rectification it is the applicant). It was again observed in the above case that: (SCC p.720, para 7)

"it is necessary to apply both the visual and phonetic tests..... It is also important that the marks must be compared as whole..... The true test is whether the totality of the proposed trade mark is such that it is likely to cause deception or confusion or mistake in the minds of persons accustomed to the existing trade mark". (emphasis supplied).

In yet another case of an infringement action, Parle Products (P) Ltd. Vs. J.P. and Co., Mysore (AIR 1972 SC 1359), the question was in relation to a wrapper with the words 'Gluko biscuit' and the particular colour scheme, the general get up used for sale of Parle's Gluco Biscuit' so printed on the wrapper. There was a farmyard with a girl in the centre carrying a pail of water and cows and hens around her in the background of a farm-house. The defendant was selling biscuits with the name 'Glucose Biscuits'. The wrapper contained picture of a girl supporting with one hand a bundle of hay on her head and carrying a

sickle and a bundle of food, with cows and hens around, in the background of a building. This Court held, on those facts, that in an infringement action, it was sufficient if there was 'overall similarity' as would mislead a person usually dealing with one to accept the other if offered to him. Here the packets were of the same size and the colour scheme and design were having close resemblance. The marks should not be kept side by side and compared. The essential features of both marking were a girl with one arm raised and carrying something in the other while the cows or hens were near her, in the background of a house. The decision of this Court in Durga Dutt Sharma Vs. Navaratna Pharmaceutical Laboratories (AIR 1965 SC 980), was a case where the respondent-registered holder of the trade mark opposed the appellant's registration. The question of deception arose in that context. Both were using the word 'Navratna Pharmaceutical laboratories' in connection with sale of Ayurvedic medicines. It was held that for judging whether the later mark was deceptive, it was sufficient if the similarity was so close visually, phonetically or otherwise. If the essential features had been proved to be adopted by the opposite party, that was sufficient. The fact that the get-up, packing and other writing or marks on the

goods or packets showed marked difference was not material, though such features could be material in a passing-off action and the defendant might escape liability by showing some additional matter to distinguish his goods. The purpose of comparison was to see if the essential features were different. The object of inquiry was to find out if the defendant's mark was as a whole similar to the plaintiff's registered mark. Ruston and Hornsby Ltd. Vs. The Zamindara Engineering Co. (1969(2) SCC 727) was again a case of an infringement action. It was admitted that the words 'Ruston and Rustam' were deceptively similar and the fact that to the latter, "India" was suffixed made no difference. The court pointed out the difference between an infringement action and a passing off action and held that if there was colourable imitation, the fact that the get up was different was not relevant in an infringement action though it might have had relevance in a passing off action, and in that context referred to Saville Perfumery Ltd. Vs. Jump Perfect Ltd. [(1941) 58 RPC 147 (161)]."

13. In the context of the submissions made on behalf of the appellant that actual loss ought to have been demonstrated by the respondent to successfully claim an order of temporary injunction, it is relevant that the

present case concerns infringement of a registered trade mark. This Court in the case of **Balsara Hygiene Products Ltd.** (supra) in the context of a registered trade mark has held as follows:-

"10. A bare look at both the labels Exhibits 'A' and label used by the defendants clearly shows that the defendant's label except the word 'magnet' and some other words is exact replica of the plaintiff's label and the only intention is to get the advantage of the reputation, name and registered Trade Mark. When the label itself is registered as Exhibit 'A', its user by the defendant for selling his product, is prima facie dishonest. No evidence of sell and actual loss is required in such cases."

In fact, in the case of the **Court Receiver, High Court .vs. R.R. Omerbhoy Pvt. Ltd.** (supra), this Court in the context of infringement of registered trade mark has held that even if the business of the plaintiff is not in operation for some reason, the defendant does not have a right to represent its business as that of the plaintiff and that an injunction cannot be denied merely because the plaintiff has no business.

14. The aforesaid position of law laid down by the judgments of the Hon'ble Supreme Court and this Court show that when it is a case of infringement of registered trade mark, the Court has to examine whether the mark of the defendant is identical or similar to the registered trade mark and once it is found that the essential features of the registered trade mark has been copied by the defendant, irreparable injury or loss that the plaintiff would suffer has to be presumed. This is because a case involving infringement of registered trade mark concerns his statutory right and its violation if *prima facie* demonstrated by the plaintiff, should suffice for grant of an order of temporary injunction, because the loss or injury is presumed and at the *prima facie* stage of consideration of an application for temporary injunction, proof of actual loss is not necessary. The moment it is found that the defendant has used a mark which is identical or similar to the registered trade mark, loss or dilution of the good will that the plaintiff enjoys on the basis of registered trade mark has to be presumed. In such a situation, the balance of convenience clearly tilts in favour of the plaintiff. Apart from this, the plaintiff has to establish comparative

strength of its case in order to successfully claim an order of grant of temporary injunction. In order to reach a finding, the Court also has to examine whether the mark of the defendant is identical to that of the registered trade mark or it can be said to be deceptively similar as defined by Section 2(h) of the aforesaid Act and in arriving at a finding on the same, the Court has to see whether a customer of average intelligence and imperfect recollection would be misled by the mark of the defendant and confuse it with the registered trade mark of the plaintiff due to over all similarity in the essential features with the registered trade mark.

15. Applying the aforesaid principles to the facts of the present case, it will have to be examined whether *prima facie* the mark of the appellant-defendant is identical or similar to the registered trade mark of the respondent-plaintiff and whether the essential features of the registered trade mark, seen as a whole, have been copied in the mark of the appellant so as to confuse or mislead a customer of average intelligence and imperfect recollection. In this context, it is relevant that the mark of the respondent which is registered consists not only of words or picture but the

mark as a whole including placement of the words, the picture and the over all layout of the mark.

16. The registered trade mark of the respondent shows that there is a picture of cow and words “Gai Chhap, Akola”, written above the picture of the cow and the words “Fafda Powder” are written below the picture of the cow. Thereafter, below the words “Fafda Powder”, details about the packing, net weight and price etc. of the product is given and at the bottom is the name of the manufacturer. The mark of the appellant shows that a picture of the cow and the positioning of the words “New Gai Chhap”, “Fafda Powder” and other details as also the name of the manufacturer are in the same position as that of the registered trade mark of the respondent. Only the word “Akola” is on the right hand side of the picture of cow while in the registered trade mark of the respondent, the said word is in the middle, just above the picture of cow. The colour of the pattern on the picture of cow in the mark of the appellant is identical to that of the respondent. The word “new” is written in smaller font on the left side of the words “Gai Chhap” in the mark of the appellant. Comparing the two marks as a whole, *prima*

facie, the impression gathered is that essential features of the registered trade mark of the respondent have been identically shown in the mark of the appellant and that there seems to be over all similarity in the two. It is likely to create confusion and *prima facie* appears to be deceptive in its similarity.

17. The Court below has examined these aspects of the present case to reach the conclusion that the respondent deserves an order of temporary injunction in his favour. The contention raised on behalf of the appellant that actual loss must be shown or that some material must be placed on record to show that the respondent has suffered actual loss due to use of the mark by the appellant, deserves to be rejected, because once the Court *prima facie* comes to the conclusion that the respondent-plaintiff has been able to show over all similarity and copying of essential features of the registered trade mark, the irreparable loss or injury in the absence of an order of temporary injunction has to be presumed. It has been held in the case of **Balsara Hygiene Products Ltd.** (supra) that no evidence of actual loss is required in such cases. In fact, the likelihood of loss follows when the plaintiff is able to show

a strong *prima facie* case of infringement of its registered trade mark by the defendant. The balance of convenience clearly lies in favour of the respondent-plaintiff in the facts and circumstances of the present case.

18. Apart from this, as comparative strength of the case of the rival parties is to be examined, in the present case the respondent-plaintiff has placed on record material to show that it has been using its mark since the year 1995 and that the Registrar of Trade Marks has granted certificate of registration on 16.02.2015. Another significant aspect of this case is that the mark of the respondent is registered in respect of the product of “Fafda Powder” and that the appellant is selling the same product by using its mark. This shows that the comparative strength of the case of the respondent is much higher than that of the appellant in the context of grant of an order of temporary injunction.

19. The learned counsel for the appellant has relied upon judgments of this Court in the case of **Shelke Beverages Pvt. Ltd** (supra) and **M/s Orange City Mobile Collection** (supra) to contend that in the absence of material to *prima facie* show that the

respondent suffered actual losses due to the use of its mark by the appellant, the order of temporary injunction could not have been granted. The judgment in the case of **Shelke Beverages Pvt. Ltd** (supra) is clearly distinguishable on facts because in that case there was an agreement between the plaintiff and the defendant relating to assignment of user for consideration of royalty payable under a royalty agreement. In the context of the claim of the plaintiff in that case, where such an assignment was given to the defendant, this Court has held that unless the plaintiff showed *prima facie* that it had suffered actual losses, an order of temporary injunction could not be granted. In the present case, such facts regarding assignment of user for consideration of royalty do not exist and the respondent has a registered trade mark in its favour and it has claimed that the appellant has infringed the same and that action against the appellant is being taken in terms of Section 29 of the aforesaid Act. Therefore, reliance placed on behalf of the appellant on the aforesaid judgment in the case of **Shelke Beverages Pvt. Ltd** (supra) is misplaced.

20. In its judgment in the case of **M/s Orange City Mobile Connection** (supra),

this Court has specifically proceeded on the basis that the case concerned an action on the basis of passing off alone and that it was not a case concerning infringement of registered trade mark. In the present matter, the case of the respondent is that of the infringement of its registered trade mark, which is a violation of a statutory right and, therefore, the principles applicable for deciding the question of grant or refusal of temporary injunction are different. Therefore, the reliance placed on behalf of the appellant on the aforesaid judgment of this Court in the case of **M/s Orange City Mobile Collection** (supra) is also misplaced.

21. The appellant has failed to demonstrate that the Court below has committed any serious error while granting the order of temporary injunction in favour of the respondent. In fact, in the case of **Ramdev Food Products (P) Ltd.** (supra), the Hon'ble Supreme Court has held in the context of jurisdiction of appellate Court to interfere with such orders of the trial Court while granting temporary injunction, as follows :-

"125. We are not oblivious that normally the appellate court would be slow to

interfere with the discretionary jurisdiction of the trial court.

126. The grant of an interlocutory injunction is in exercise of discretionary power and hence, the appellate courts will usually not interfere with it. However, appellate courts will substitute their discretion if they find that discretion has been exercised arbitrarily, capriciously, perversely, or where the court has ignored settled principles of law regulating the grant or refusal of interlocutory injunctions. This principle has been stated by this court time and time again. [See for example [Wander Ltd. v. Antox India P. Ltd](#) (1990) Supp SCC 727, [Lakshmikant V. Patel v. ChetanBhai Shah](#) (2002) 3 SCC 65 and [Seema Arshad Zaheer v. MC of Greater Mumbai](#) (2006) 5 SCALE 263]

127. The appellate court may not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the

matter at the trial stage it would have come to a contrary conclusion."

22. Applying the said principle to the facts of the present case, it is clear that the findings rendered by the Court below cannot be said to be perverse and it cannot be said that the discretion exercised was arbitrary, capricious or perverse. The said principle laid down by the Hon'ble Supreme Court demonstrates that the scope of interference in the discretion exercised by the Court below is very limited and that the appellant in the present case has not been able to make out a case for exercise of such jurisdiction by this Court in his favour. The judgments relied upon in support of the contentions raised on behalf of the appellant concern passing off action and they would not apply strictly to the present case, which concerns infringement of registered trade mark of the respondent, being a situation of violation of a statutory right protected under the provisions of the aforesaid Act.

23. In the light of the above, the appellant has failed to make out any ground for interference with the impugned order passed by the Court below. Accordingly, this

appeal is dismissed with no order as to costs.

24. Needless to say the observations made in this order are only on the question of grant of temporary injunction in favour of the respondent and the discretion exercised by the Court below in that context. The Court below shall not be influenced by the observations made in this order, while deciding the suit filed by the respondent on merits.

JUDGE

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