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IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

THURSDAY, THE 29TH DAY OF APRIL 2021

THE HON'BLE MR. JUSTICE R. SUBRAMANIAN

C.S. No.350 of 2010

S. Gopi

Proprietor, M/s.Bangalore Prasanna Perfumes,

34, Boologanathar Koil Street,

Tiruchi 620 082,

having his Branch at

No.31, Subba Reddy Street,

West Mambalam, Chennai 600 033.

... Plaintiff

Vs

Mr.B.Sri Hari, Trading as

M/s.Sri Maha Ganapathi Cottage Industries,

Atkinson School Backside,

Jaya Nagar Colony, Gollapudi,

Vijayawada – 25.

... Defendant

Civil suit praying that this Hon'ble Court be pleased to pray for a judgment and decree:

a) granting a permanent injunction restraining the defendant, its servants or agents or anyone claiming through it from in any manner infringing the plaintiff's registered trade mark "GAYATHRI" together with the device of Goddess GAYATHRI by using the offending trade mark "SRI MATA GAYATRI" together with the device of "Goddess GAYATHRI" or any other mark or marks which are identical and similar to or a colourable imitation of the plaintiff's Registered trade mark "GAYATHRI" together



with the device of Goddess GAYATHRI;

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b) granting a permanent injunction restraining the defendants, its servants or agents or anyone claiming through it from in any manner infringing the plaintiff's copyrighted artistic work "GAYATHRI" together with the device of Goddess GAYATHRI by using the offending artistic work "SRI MATA GAYATHRI" together with the device of Goddess GAYATHRI or any other work or works which are identical and similar to or a colourable imitation of the plaintiff's well established copyrighted artistic work "GAYATHRI" together with the device of Goddess GAYATHRI";

c) granting a permanent injunction restraining the defendant, its servants or agents or anyone claiming through it from in any manner passing off of its products including sanbrani dhoop sticks and other products bearing the offending artistic work and trade mark "SRI MATA GAYATHRI" together with the device of Goddess GAYATHRI as and for the celebrated dhoop/sambrani sticks and other products of the plaintiff bearing the copyrighted artistic work and well established trade mark "GAYATHRI" together with the device of Goddess GAYATHRI either by manufacturing or selling or offering for sale or in any manner advertising the same;

d) directing the defendant to surrender the entire stock of unused



offending trade mark labels bill books etc. bearing the offending trade mark “SRI MATA GAYATHRI” together with the device of Goddess GAYATHRI, together with blocks and dyes for destruction;

e) directing the defendant to render a true and faithful accounts of the profits earned by the defendant through the sale of its products including sambrani dhoop sticks and other products sold under the offending trade mark “SRI MATA GAYATHRI” together with the device of Goddess GAYATHRI and directing payment of such profits to the plaintiff for the passing off committed by the defendant; and

f) directing the defendant to pay to the plaintiff the cost of the suit;

This suit having been heard on 07.04.2021 in the presence of Mr.S.Diwakar for M/s.Rajesh Ramanathan, Advocate for the plaintiff herein and Mr.V.Sivakumar, Advocate for the defendant herein and upon reading the plaint filed herein and the other exhibits therein referred to and upon perusing the evidence adduced therein and having stood over for consideration till this date and coming on this day before this court for orders in the presence of said advocates for the parties hereto, it is ordered and decreed as follows:-

That B. Sri Hari, Trading as M/S Sri Maha Ganapathi Cottage Industries, the defendant herein its servants or agents or anyone claiming through it be and is hereby restrained by an order of permanent injunction



from (a) in any manner infringing the plaintiff's registered trade mark “GAYATHRI” together with the device of Goddess GAYATHRI by using the offending trade mark “SRI MATA GAYATHRI” together with the device of “Goddess GAYATHRI” or any other mark or marks which are identical and similar to or a colourable limitation of the plaintiff's Registered trade mark “GAYATHRI” together with the device of Goddess GAYATHRI,

(b) in any manner infringing the plaintiff's copyrighted artistic work “GAYATHRI” together with the device of Goddess GAYATHRI by using the offending artistic work “SRI MATA GAYATHRI” together with the device of Goddess GAYATHRI or any other work or works which are identical and similar to or a colourable imitation of the plaintiff's well established copyrighted artistic work “GAYATHRI” together with the device of Goddess GAYATHRI”; and

(c) in any manner passing off of its products including sanbrani dhoop sticks and other products bearing the offending artistic work and trade mark “SRI MATA GAYATHRI” together with the device of Goddess GAYATHRI as and for the celebrated dhoop/sambrani sticks and other products of the plaintiff bearing the copyrighted artistic work and well established trade mark “GAYATHRI” together with the device of Goddess GAYATHRI either by manufacturing or selling or offering for sale or in any



(2) That the defendant herein, be and is hereby directed to surrender the entire stock of unused offending trade mark labels bill books etc. bearing the offending trade mark “SRI MATA GAYATRI” together with the device of Goddess GAYATHRI, together with blocks and dyes for destruction;

(3) That the defendant herein, be and is hereby directed to render a true and faithful accounts of the profits earned by the defendant through the sale of its products including sambrani dhoop sticks and other products sold under the offending trade mark “SRI MATA GAYATRI” together with the device of Goddess GAYATHRI and directing payment of such profits to the plaintiff for the passing off committed by the defendant;

4. That the defendant herein, do pay to the plaintiff herein, the costs of this suit, as and when taxed by the taxing officer of this Court and noted in the margin thereof.

WITNESS THE HON'BLE MR. JUSTICE SANJIB BANERJEE,
CHIEF JUSTICE, HIGH COURT AT MADRAS AFORESAID, THIS THE
29TH DAY OF APRIL 2021.

Sd/-

ASSISTANT REGISTRAR (Comm. Cases)

//Certified to be true copy//

Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

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24/05/2021

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C.S. No.350 of 2010

ORDER

DATED : 29.04.2021

THE HON'BLE MR.JUSTICE
R. SUBRAMANIAN

FOR APPROVAL: 26/07/2021

APPROVED ON: 27/07/2021

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

Reserved on 07.04.2021	Delivered on 29.04.2021
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CORAM**THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN****C.S.No.350 of 2010****S. Gopi**

Proprietor, M/s.Bangalore Prasanna Perfumes,
34, Boologanathar Koil Street,
Tiruchi 620 082,
having his Branch at
No.31, Subba Reddy Street,
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... Plaintiff

Vs

Mr.B.Sri Hari, Trading as
M/s.Sri Maha Ganapathi Cottage Industries,
Atkinson School Backside,
Jaya Nagar Colony, Gollapudi,
Vijayawada – 25.

... Defendant

Prayer : Complaint filed under Order IV Rule 1 of the Original Side Rules and under Order VII Rule 1 of the Code of Civil Procedure, read with Sections 134 & 135 of the Trade Marks Act, 1999 & under Sections.55, 56 & 62 of the Copyright Act, 1957, praying for the following judgment and decree:-

(a) granting a permanent injunction restraining the defendant, its servants or agents or anyone claiming through it from in any manner



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infringing the plaintiff's registered trade mark "GAYATHRI" together with the device of Goddess GAYATHRI by using the offending trade mark "SRI MATA GAYATHRI" together with the device of :Goddess GAYATHRI" or any other mark or marks which are identical and similar to or a colourable limitation of the plaintiff's Registered trade mark "GAYATHRI" together with the device of Goddess GAYATHRI;

- (b) granting a permanent injunction restraining the defendants, its servants or agents or anyone claiming through it from in any manner infringing the plaintiff's copyrighted artistic work "GAYATHRI" together with the device of Goddess GAYATHRI by using the offending artistic work "SRI MATA GAYATHRI" together with the device of Goddess GAYATHRI or any other work or works which are identical and similar to or a colourable imitation of the plaintiff's well established copyrighted artistic work "GAYATHRI" together with the device of Goddess GAYATHRI";
- (c) granting a permanent injunction restraining the defendant, its servants or agents or anyone claiming through it from in any manner passing off of its products including sanbrani dhoop sticks and other products bearing the offending artistic work and trade mark "SRI MATA GAYATHRI" together with the device of Goddess GAYATHRI as and for the celebrated dhoop/sambrani sticks and other products of the plaintiff bearing the copyrighted artistic work and well established trade mark "GAYATHRI" together with the device of Goddess GAYATHRI either by manufacturing or selling or offering for sale or in any manner advertising the same;
- (d) directing the defendant to surrender the entire stock of unused offending trade mark labels bill books etc. bearing the offending trade



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mark “SRI MATA GAYATRI” together with the device of Goddess GAYATHRI, together with blocks and dyes for destruction;

- (e) directing the defendant to render a true and faithful accounts of the profits earned by the defendant through the sale of its products including sambrani dhoop sticks and other products sold under the offending trade mark “SRI MATA GAYATRI” together with the device of Goddess GAYATHRI and directing payment of such profits to the plaintiff for the passing off committed by the defendant; and
- (f) directing the defendant to pay to the plaintiff the cost of the suit;

For Plaintiff : Mr.S.Diwakar
for M/s.Rajesh Ramanathan

For Defendant : Mr.V.Sivakumar

J U D G M E N T

The plaintiff, who is a Registered Proprietor of the Trade Mark as well as the Copy Right engaged in manufacturer of Agarbathies, Dhoop Sticks, Sambrani Sticks, Dasangam Powder, Dasangam Sticks, Sambrani bathies etc. for several years, has come forward with the above suit seeking a decree for permanent injunction restraining the defendant from infringing his Trade Mark and Copy Right, passing of the defendant's goods as the goods of the plaintiff, for accounts and for surrender of the stock with



offending trade mark labels.

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2. According to the plaintiff, one Mrs.Kamakshi wife of Krishnamurthy was carrying on business, under the name and style of M/s.Bangalore Prasanna Perfumes, in manufacturing and selling the above products. During the course of the said business, the said Kamakshi had conceived and adopted a trade mark “GAYATHRI” together with the device of GODDESS GAYATHRI on 21.06.1993 and she has been using the said mark continuously in all her products including Sambrani bathies and sticks. During the year 2001, the plaintiff had taken over the business of M/s.Bangalore Prasanna Perfumes as a going concern along with the assets and liabilities including the trademark and the copy right. Ever since the date of his purchase i.e., 29.10.2001, the plaintiff has been continuously and extensively selling his products with the trade mark GAYATHRI together with the device of Goddess Gayathri.

3. The plaintiff would also claim that he has got a very good sales turnover and his products are being sold in all the Southern States. The trade mark Gayathri together with the device of Goddess Gayathri has been registered under Class 3 with the Trademark Authority, a Legal Use

Certificate of the said mark has also been obtained by the plaintiff. The



plaintiff would further claim that he has also obtained a registration of the copy right of the label 'GAYATHRI' along with the device of GODDESS GAYATHRI under the Copyright Act.

4. On 01.08.2008, the plaintiff came to know that the defendant had applied for trade mark registration for the trade mark 'SRI MATA GAYATHRI' as a word mark in Telugu language claiming that he has been using it from 01.01.2003. The plaintiff has opposed the said registration and the opposition is pending with the Authorities. Upon an investigation in the market, the plaintiff found that the defendant has been using the mark 'Sri Mata Gayatri' along with the device of 'Goddess Gayathri' with the same colour scheme as that of the cartons used by the plaintiff. The plaintiff also claimed that the defendant has been using the mark in respect of "Supari" and not in respect of Dhoop sticks and incense sticks before 2009. The plaintiff would claim that the action of the defendant in adopting a similar lay out, colour scheme, a deceptively similar name and the device of Goddess Gayathri in his cartons would amount to infringement of the trade mark as well as the copy right of the plaintiff. It is also claimed that the defendant is passing off his products as if they are the products of the plaintiff. The plaintiff would seek the reliefs of injunction and accounting on the strength of the above pleadings.



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5. The suit is resisted by the defendant contending as follows:

The adoption of the mark 'Sri Mata Gayatri' and the use of the device of Goddess Gayathri are honest, *bona fide* and without reference to the mark of the plaintiff. It is also claimed that the defendant is selling the goods in the State of Andhra Pradesh under the same trade mark from the year 2003 without any interruption. It is also claimed that the defendant had applied only for registration of the words 'Sri Mata Gayatri' in Class 3 in respect of dhoop sticks and incense sticks. According to the defendant, the device of GAYATHRI and the word GAYATHRI are the *publici juris* and nobody is entitled to claim exclusive right to the device of Goddess and the name.

6. A preliminary objection was also raised to the jurisdiction of this Court. It is also claimed that if the device of the Goddess Gayathri is ignored the only part that remains is the word Gayathri and the same cannot be said to be similar to the mark used by the defendant namely 'Sri Mata Gayatri'. The defendant would also claim that his products are not sold within the jurisdiction of this Court. It is also claimed that the joinder of the reliefs based on copyright and trade mark would amount to mis-joinder of causes of action. The claim of the plaintiff regarding user of the mark by



the defendant. On the above pleadings, the defendant sought for dismissal of the suit.

7. On the basis of the above pleadings, this Court had framed the following issues:

1. Whether the defendant has infringed the well established and registered mark GAYATHRI with the device of the Goddess Gayathri of the plaintiff by using the trademark SRI MATA GAYATHRI together with the device of Goddess Gayathri?

2. Whether the defendant has infringed the registered copyright of the plaintiff?

3. Whether the defendant is passing off his goods as and for the goods of the plaintiff?

4. Whether the plaintiff is entitled for the relief of injunction as prayed for?

5. Whether the defendant is bound to surrender the unused offending trademark labels bearing the offending trademark SRI MATA GAYATHRI together with the device of Goddess Gayathri?

6. Is the plaintiff entitled for the relief of accounts and profits



from the defendant?

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7. To what future relief or reliefs the plaintiff is entitled to?

8. The suit being in the nature of a commercial dispute as defined under Section 2(1)(c)(17) of the Commercial Courts Act, this Commercial Division had taken cognizance of the suit.

9. At Trial, the plaintiff was examined as P.W.1 and Exs. P1 to P4 were marked. The sole defendant was examined as D.W.1 and Exs. D1 and D2 Series were marked.

10. Heard Mr.S.Diwakar, learned counsel appearing for M/s.Rajesh Ramanathan, for the plaintiff and Mr.V.Sivakumar, learned counsel appearing for the defendant.

Issue No.1:

11. The facts that both the plaintiff and the defendant are selling the same or substantially similar products is not in dispute. The medium of sale viz., through shops is also not in dispute. The plaintiff is the Registered owner of the trade mark for use in his products viz. Agarbathies, Incense



and Sambrani bathies falling within Class 3. The Mark so registered is the word GAYATHRI with the picture of GODDESS GAYATHRI. The Legal Use Certificate produced by the plaintiff would show that the registration is for the word mark Gayathri and the label. Ex.P1 is the Certificate of Registration issued to the plaintiff, while Ex.P2 is the Copy Right Registration. Exs.P3 and P4 are the specimens of the plaintiff's and the defendant's labels.

12. It is not in dispute that the plaintiff is the Registered Owner of the Trademark GAYATHRI with the picture of GODDESS GAYATHRI depicted in a particular manner. The colour scheme used by the plaintiff is predominantly yellow and red combination. The defendant's label bears the name SRI MATA GAYATRI and depicts the picture of Goddess Gayathri seated on a lotus flower with a swan in the front. It is to be seen, as to whether, the colour scheme, the get up and the style of writing are so similar so as to create a confusion in the minds of an ordinary customer and he would purchase the goods of the defendant thinking that they are that of the plaintiff.

13. While Mr.S.Diwakar, learned counsel appearing for the plaintiff

would make a comparison of the plaintiff's label marked as Ex.P3 and the



defendant's label marked as Ex.P4 to contend that the overall colour scheme and the get up of the two labels would show that the defendant's label is deceptively similar to that of the plaintiff's label and therefore, there is every likelihood of innocent purchaser being misled into believing that both the products are the same. Mr.S.Diwakar, would also point out that on the side panels of the labels, the defendant had copied exactly what the plaintiff had depicted and therefore, it is nothing but a brazen attempt by the defendant to infringe the trademark of the plaintiff. The learned counsel would also point out that the Legal User Certificate would show that the entire mark along with the words contained therein has been registered and therefore, the defendant cannot use the trademark of the plaintiff.

14. Contending contra, Mr.V.Sivakumar, learned counsel appearing for the defendant would submit that there is no right conferred on the registered holder in the colour scheme of the trademark. He would also point out that the word GAYATHRI and the picture of Goddess Gayathri are *publici juris* and there cannot be an injunction restraining a person from using those words. The learned counsel would also submit that if the colour scheme and the picture are excluded what remains in the trademark of the plaintiff is only the words 'GAYATHRI' which is vastly different from the defendant's usage 'SRI MATA GAYATRI'. The learned counsel would



also further contend that the defendant is not selling his products within the jurisdiction of this Court and therefore, there cannot be an infringement.

15. I have considered the rival submissions.

16. A perusal of the evidence of P.W.1 and the documents produced by the plaintiff would show that the plaintiff has been using the Trademark since 1993 and has also obtained a registration in 2004. It is also seen that the plaintiff has obtained an assignment of the right to use the trademark from the original owner Mrs.Kamakshi. The defendant would admit that he started selling his products only in the year 2003. Therefore, it is very clear that the plaintiff is a prior user and also a Registered Holder of the trademark.

17. In considering whether the mark of the defendant is deceptively similar to that of the plaintiff the test laid down by the Hon'ble Supreme Court in *Parley Products (P) Ltd v. J.P. & Co., Mysore*, reported in *AIR 1972 SC 1359*, have been recognized as the best method to decide the question of deceptive similarity. It will be useful to reproduce the method in the language of the Hon'ble Supreme Court itself.



conclusion whether one mark is deceptively similar to another, the broad and essential features of the two are to be considered. They should not be placed side by side to find out if there are any differences in the design and if so, whether they are of such character as to prevent one design from being mistaken for the other. It would be enough if the impugned mark bears such an overall similarity to the registered mark as would be likely to mislead a person usually dealing with one, to accept the other if offered to him. In this case we find that the packets are practically of the same size, the colour scheme of the two wrappers is almost the same; the design on both though not identical bears such a close resemblance that one can easily be mistaken for the other. The essential features of both are that there is a girl with one arm raised and carrying something in the other with a cow or cows near her and hens or chickens in the foreground. In the background there is a farm house with a fence. The word "Glucose Biscuits" in one and "Glucose Biscuits" on the other occupy a prominent place at the top with a good deal of similarity between the two writings. Anyone in our opinion who has a look at one of the packets to-day may easily mistake the other if shown on another day as being the same article which he had seen before. If one was not careful enough to note the peculiar features of the wrapper on the plaintiffs' goods, he might easily mistake the defendants' wrapper for the plaintiffs' if shown to him some time after he had



seen the plaintiffs'. After all, an ordinary purchaser is not gifted with the powers of observation of a Sherlock Holmes. We have therefore no doubt that the defendants' wrapper is deceptively similar to the plaintiffs' which was registered. We do not think it necessary, to refer to the decisions referred to at the Bar as in our view each case will have to be judged on its own features and it would be of no use to note on how many points there was similarity and in how many others there was absence of it."

18. Similar views were also expressed by the Hon'ble Supreme Court in ***Cadila Health Care Ltd., v. Cadila Pharmaceuticals Ltd.***, reported in ***AIR 2001 SC 1952***. While rejecting the contention that phonetic similarity or similarity in design cannot be applied to pharmaceuticals products since they are mostly sold on prescription of Doctors, the Hon'ble Supreme Court observed as follows:

"38. Trade mark is essentially adopted to advertise one's product and to make it known to the purchaser. It attempts to portray the nature and, if possible, the quality of the product and over a period of time the mark may become popular. It is usually at that stage that other people are tempted to pass off their products as that of the original owner of the mark. That is why it is said that in a passing off action, the plaintiff's right is "against the conduct of the defendant which leads to or is intended or



39. Public interest would support lesser degree of proof showing confusing similarity in the case of trade mark in respect of medicinal product as against other non-medicinal products. Drugs are poisons, not sweets. Confusion between medicinal products may, therefore, be life threatening, not merely inconvenient. Noting the frailty of human nature and the pressures placed by society on doctors, there should be as many clear indicators as possible to distinguish two medicinal products from each other. It is not uncommon that in hospitals, drugs can be requested verbally and/or under critical/pressure situations. Many patients may be elderly, infirm or illiterate. They may not be in a position to differentiate between the medicine prescribed and bought which is ultimately handed over to them. This view finds support from McCarthy on Trade Marks, 3rd Edition, para 23.12 of which reads as under:

"The tests of confusing similarity are modified when the goods involved are medicinal products. Confusion of source or product between medicinal products may



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produce physically harmful results to purchasers and greater protection is required than in the ordinary case. If the goods involved are medicinal products each with different effects and designed for even subtly different uses, confusion among the products caused by similar marks could have disastrous effects. For these reasons, it is proper to require a lesser quantum of proof of confusing similarity for drugs and medicinal preparations. The same standard has been applied to medical products such as surgical sutures and clavicle splints."

19. From the above judgments of the Hon'ble Supreme Court, it is clear that what is to be looked at is a broad similarity and the Court should examine the marks independent of each other and find out, as to whether, the so called similarities would create a confusion in the mind of the consumer and the consumer would be impelled to purchase the product of the defendant, as if it is the product of the plaintiff. I have examined the labels that have been produced as Exs.P3 and P4. The broad colour scheme as well as the picture of Goddess Gayathri are quite similar. The printing of the labels and the font used (style of writing) is also substantially similar. While the plaintiff uses the word Gayathri alone the defendant has prefixed

it with the words 'SRI MATA'.



20. I have examined the marks/labels in the manner suggested by the Hon'ble Supreme Court in ***Parley Products (P) Ltd v. J.P. & Co., Mysore***, *cited supra*, I am convinced that the confusion would arise in the mind of the consumer and the consumer is likely to be misled into believing that the defendant's goods are that of the plaintiff. Of course there are certain differences in the portrayal of the picture of Goddess Gayathri, but what should be looked at is the overall similarity and not the minute dissimilarities.

21. No doubt the learned counsel appearing for the defendant would vehemently contend that there is no trademark in the colour scheme and attempt to rely upon the judgment in ***Colgate Palmolive Co. Limited and Ors. v. Patel and Ors***, reported in ***2005 (31) PTC 583 (Del)***. However, the same question arose before this Court in ***S.V.S. Oil Mills, rep. by its Partner vs. S.V.N Agro-refineries***, reported in ***(2004) 3 MLJ 543***, wherein a Division Bench of this Court considered the issue relating to the colour scheme and at paragraph 16 of the said judgment, the Division Bench had observed as follows:

“16. It is true that the plaintiff cannot claim any monopoly over any colour or scheme and the colours and it is also seen that yellow and red colours are commonly used by oil manufacturers in the containers for the sale of edible



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oil. Nor is it the case of the plaintiff that it has any monopoly right over the colours yellow and red, but the case of the plaintiff is that the second defendant was a partner of the plaintiff firm till February, 2001 and the second defendant has known the reputation and goodwill of the plaintiff's trademark SVS on inverted triangle. The case of the plaintiff is that after the second defendant left the firm, he started business using the word SVS and when the use of the word SVS was objected to and this Court passed an order holding that the second defendant should not use the trade name SVS, the second defendant changed the trade name into SVN instead of SVS but started to use the labels with the similar colour scheme and getup of the plaintiff from December, 2002 to exploit the goodwill and reputation of the plaintiff to market his products as that of the plaintiff. As already observed by us, no manufacturer can claim any monopoly over a particular colour as it is permissible for any manufacturer to use any colour on his packages. It is true that while the brand name of a manufacturer is a relevant factor, the colour scheme and getup of the container or packages are also equally important in the marketing of the goods as the customers would normally associate the colour scheme and getup of the packages with the products of their choice. There are many cases where the popular consumer goods are identified by the colour scheme and the way in which the articles are packed. We are of the view that the impression regarding the colour



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scheme and the getup in the labels or container would get imprinted in the minds of the customers and that would carry in their mind in choosing the product by their appearance in the departmental shops or in the super market or in any other shop. The Supreme Court has repeatedly held that what has to be seen in the case of a passing off action is the mind of an unwary purchaser with average intelligence and imperfect recollection. When such a person goes to the market for the purchase of an article, the entire layout including the brand name, colour scheme and getup of the container would be the guiding factor in the purchase of the article. We are prima facie of the view that the domestic articles are purchased not only by their brand names, but also by the colour scheme and getup of the container in which the goods are marketed. In our view, it would be totally unrealistic to focus one's attention to the brand name of an article ignoring the colour scheme and getup in the case of passing off action. In our view, even in the case of articles of daily use, like toothbrush, the same colour scheme and getup found in two articles with slight variation in brand name of the article would cause confusion in the mind of the user. It is true that a customer may select the oil on the basis of the brand name. However, if the articles of the same kind are displayed in a shop with slight variation in the trade name with the same colour scheme and getup, there is likelihood of deception to be caused in the mind of an



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unwary purchaser in the purchase of the article. The oil is not sold on medical prescription, but it is openly available and openly sold in the shops and departmental stores. We are of the view that if same colour scheme and getup of the labels of the plaintiff are used by the defendants with the trademark phonetically similar to the plaintiff with reference to the same kind of articles it would create confusion in the minds of unwary purchasers while purchasing the articles of one manufacturer as that of the other manufacturer. We are unable to accept the wide proposition submitted by the learned counsel for the respondents that since the plaintiff's articles are sold only by the trademark SVS on inverted triangle which are prominently displayed on the label, the colour scheme and getup are not important. We have already observed that it is not open to the plaintiff also to claim monopoly over the particular colour or getup. As rightly submitted by Mr. Sharma, learned counsel for the appellant, there cannot be serious objection for the use of same colours by the defendants with a different getup. Equally, there is no explanation from the defendants for their change in the getup and colour of the label from the one previously used and in the absence of any explanation we find that there is some force in the submission of Mr. Sharma, learned counsel for the appellant that the defendants have adopted in the label the same colour scheme and getup as that of the plaintiff with a view to cash on the reputation and



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goodwill of the plaintiff.

17. *We are of the view that the material form, colour and getup of the wrapper or label or container of the articles are the physical means of expression and the design of the container or the label is of great significance as it is meant to catch the vision of any purchaser. The design of the label would include not only the trademark, but also the colour scheme and getup of the wrapper or container as well. It is well known that there are several eye-catching designs and the customers familiar with the articles would invariably be guided and attracted to purchase goods by the sight of label and they would invariably be guided by the physical appearance of the labels used for the articles for sale. We are of the view, there is a power behind the design of the label as the customers have the intuitive instinct to select the goods by the design, colour and getup and the trade name and if the goods of same kind with the same colour scheme and getup in the labels belonging to two manufacturers with phonetic similarity in trade names are exhibited or offered for sale, a normal consumer of average intelligence with imperfect memory would take one article as belonging to other.”*

22. It should also be noticed that after the introduction of the

Trademark Rules, 2017, the earlier classification of goods was deleted and

the classification of goods was required to be made based on the



international classification of goods and services (NICE Classification). It is conceded that the trademark registry has not implemented the said requirement and new classifications have not been made as yet. In any event in view of the Rules and India being a country which uses the NICE classification, the broader classification provided in the NICE classification can be looked into. As per the NICE classification there are at least 34 classes of goods and 11 classes of services. The products viz., Agarbathies, Dhoop Sticks, Sambrani Stick etc. would, in my opinion, fall within class 3 of the said classification which reads as follows:

*“Class 3: Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps, **perfumery**, essential oils; cosmetics; hair lotions; dentifrices.”*

The classification available as of today is much broader and wider. Section 7 of the Trademarks Act also mandates the Trademark Registry to classify the goods and services in accordance with the international classification of goods and services.

23. Useful reference could also be made to the judgment of the

Division Bench of this Court in ***M/s.Devi Pesticides Private Ltd., v.***

<https://hcservices.ecourts.gov.in/hcservices/>

M/s.Shiv Agro Chemical Industries, reported in 2006 (3) LW 350, wherein



a Division Bench of this Court it was dealing with a case of phonetic similarity and identical colour scheme and lay out in the packings has held as follows:

“13. Learned counsel for the applicant contended that respondent/ defendant's trademark SUPER BOOM is phonetically similar and identical to that of the plaintiff's trademark BOOM PLUS and BOOM FLOWER-n and has resulted in causing confusion in the minds of its customers who are agriculturists. It is also their claim that the classes of purchasers who are likely to buy the products are mostly the agriculturists. In this regard, learned Counsel for the applicant heavily relied on a decision of the Apex Court reported in Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd. (AIR 2001 SC 1952), considering phonetic similarity the Hon'ble Supreme Court observed as follows:,

‘19. With respect, we are unable to agree that the principle of phonetic similarity has to be jettisoned when the manner in which the competing words are written is different and the conclusion so arrived at is clearly contrary to the binding precedent of the court in Amritdhara's case [1963]2SCR484 where the phonetic similarity was applied by judging the two competing marks. Similarly, in Durga Dutt Sharma's case (AIR 1965 SC 980), it was observed that 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 imitation, no further evidence is required to establish that the plaintiff's rights are violated.

It is well settled principle of law that any action for infringement and pass off where the similarity between the plaintiff and defendant's trademark is so close either visually, phonetically or otherwise and the court reaches the conclusion that there is imitation, no further evidence is required to establish that the plaintiff's rights are violated. This is clear from the above decision.”

24. In ***Laxmikant V. Patel v. Chetanbai Shah and Another***, reported in **2002 (3) SCC 65**, the Hon'ble Supreme Court had observed as follows:

“10. ...The law does not permit any one to carry on his business in such a way as would persuade the customers or clients in believing that the goods or services belonging to someone else are his or are associated therewith. It does not matter whether the latter person does so fraudulently or otherwise. The reasons are two. Firstly, honesty and fair play are, and ought to be, the basic policies in the world of business. Secondly, when a person adopts or intends to adopt a name in connection with his



business or services which already belongs to someone else it results in confusion and has propensity of diverting the customers and clients of someone else to himself and thereby resulting in injury.”

25. Section 29 of the Trademarks Act, 1999, lays down as to what would amount to infringement of a Trademark. Section 29 reads as follows:

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



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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 subsection (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



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(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 labeling 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



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this section to the use of a mark shall be construed accordingly.

26. The case on hand would fall within Clause (c) of Sub Section 2 of Section 29 and it could be seen that Subsection (3) of Section 29 creates a presumption that such user is likely to cause confusion, therefore the burden is on the defendant to prove that there would not be any confusion. As already pointed out, I had examined the marks in the manner suggested by the Hon'ble Supreme Court in ***Parley Products (P) Ltd v. J.P. & Co., Mysore***'s case. It is clear to my mind that both the packages are so similar that they are likely to cause confusion in the minds of an ordinary customer of average intelligence. As we have already seen in ***Cadila Health Care Ltd., v. Cadila Pharmaceuticals Ltd.***, the Hon'ble Supreme Court has pointed out that what should be looked at is the overall similarity and not the certain differences.

27. No doubt the defendant would contend that the plaintiff cannot claim an exclusive right for use of the picture of the word of Goddess Gayathri, once the plaintiff's mark is registered as a whole and a copy right has also been issued for the label, the plaintiff's mark would be infringed, if it is shown that the defendant is using the same picture of Goddess Gayathri



with the same colour scheme and the same get up in such a way that it is deceptively similar to the mark of the plaintiff. Once there is an infringement the plaintiff would be automatically entitled to an injunction. Since I have held that the marks are deceptively similar, I find that the plaintiff would be entitled to an injunction restraining the defendant from infringing the trade mark of the plaintiff by using the same colour scheme and the pictorial representations as found in the plaintiff's registered mark. Issue No.1 is answered in favour of the plaintiff.

Issue No.2:

28. The plaintiff has also sought for an injunction regarding copy right. The plaintiff has obtained a copy right registration of the artistic work with a device of Goddess Gayathri. The defendant is using almost the same colour scheme with very little difference which would definitely amount to infringement of the copy right of the plaintiff. Therefore, Issue No.2 is also answered in favour of the plaintiff.

Issue Nos.3 and 4:

29. While answering Issue No.1, I have concluded that the defendant's adoption of the trademark of the plaintiff with very little differences would create a confusion in the mind of the consumer with



average intelligence and he would buy the product of the defendant thinking that it is the product of the plaintiff. Therefore, the Issue No.3 is also answered to the effect that the defendant is passing off his goods as the goods of the plaintiff. Hence the plaintiff would be entitled to an injunction and Issue Nos.3 and 4 are answered in favour of the plaintiff.

Issue No.5:

30. In the light of the answers to Issue Nos. 1 to 4, the fifth issue regarding surrender of the labels containing the offending trademarks should also be answered in favour of the plaintiff and the plaintiff is entitled to a decree for surrender of the unused offending labels

Issue No.6:

31. Since the plaintiff has established that there has been infringement of the trademark by the defendant the plaintiff would undoubtedly be entitled to the relief of accounts. The plaintiff is at liberty to apply under Order XX Rule 17 for accounts.

32. In fine the suit is decreed as prayed for with costs.

List of Witness examined on the side of the plaintiff:

PW1 – S.Gopi (Plaintiff)

List of Exhibits marked on the side of the Plaintiff:



<i>Sl. No.</i>	<i>Exhibits</i>	<i>Description of Documents</i>	<i>Date</i>
1	Ex.P1	The photocopy of the trademark registration certificate under No.131792	07.09.2007
2	Ex.P2	The Photocopy of the copyright registration certificate under No.A-73467/2005	16.05.2005
3	Ex.P3	The specimen of the plaintiff's label	-
4	Ex.P4	The specimen of the Defendant's label	-

List of Witness examined on the side of the Defendant:

DW1 - Sri Hari (Defendant)

List of Exhibits marked on the side of the Defendant:

<i>Sl. No.</i>	<i>Exhibits</i>	<i>Description of Documents</i>	<i>Date</i>
1	Ex.D1	The photocopy of the Permanent Registrar Certificate	13.04.2007
2	Ex.D2 (Series)	The Photocopies of the invoices	29.08.2005, 01.04.2006, 13.09.2007 & 18.04.2008

Sd./-R.S.M.J.

29/04/2021

//Certified to be true copy//

Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)