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O.A.Nos.28, 29 of 2022

O.A.Nos.28, 29 of 2022
in C.S.(Comm.Div.) Nos.6, 7 of 2022

SENTHILKUMAR RAMAMOORTHY,J

In two separate suits between the same parties, applications for interim injunctions to restrain passing off have been filed.

2. The applicant / plaintiff relies upon the trademark registration certificate of the applicant / plaintiff in class 29 in respect of the label and device marks. The certificate of renewal in such regard is also relied upon. By drawing reference to the applicant / plaintiff's label *vis-a-vis* that of the respondent / defendant, it is contended that the trade dress is such that the consumer is likely to be deceived into believing that the defendant's goods originate from the plaintiff. In order to substantiate such contention, the applicant / plaintiff emphasises the common yellow background and the use of the dual colour pattern which runs across the respective sachets. The applicant / plaintiff relies both on prior user for a considerable period of time and on the fact that the trademarks of the applicant / plaintiff are registered. The applicant / plaintiff also points



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out that the respondent / defendant is a recent entrant in the market, as evidenced by the invoice produced by the applicant / plaintiff.

3. These contentions are refuted by the respondent / defendant.

In C.S.No.6 of 2022, the respondent / defendant states that the respondent's product bears the name VAIRAM prominently; and, in C.S.No.7 of 2022, the name SATHYAM prominently. It is also pointed out that the device of two cows operating the pestle on the sachet of the respondent / defendant in C.S.No.7 of 2022 is a material differentiator. The respondent / defendant contends that the applicant / plaintiff does not have a monopoly over the colour yellow, which is commonly used in the industry in course of the sale of sesame oil.

4. In support of these contentions the respondent / defendant relies upon several judgments. It is not necessary to refer to all of them; however, reference may be made to the following judgments, A.V.Rajadurai Nadar -vs- P.Ayya Nadar and others [AIR 1997 Madras 237]; Wipro Enterprises Limited -vs- Heinz India Private Limited and others [2015(63) PTC 49 (Madurai)] and Kellogg Company -vs- Pravin Kumar Bhadabhai and others [1996(1) Arb LR 430 Delhi]. With



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reference to all these judgments, it is contended that the marks should be compared on the whole, and not with reference to individual elements of such composite mark. If the marks in question are compared in such manner, the respondent / defendant submits that the average reasonable consumer with imperfect recollection would not be deceived.

5. In matters of this nature, the Court is required to posit a potential consumer of average intelligence and imperfect recollection. If this Court were to put itself in the shoes of such person to examine the sachets in question, the only commonality appears to be the use of the colour yellow and the use of dual colour patterns running across the respective sachets. The names of the products in question are completely different leaving no scope for confusion. Even the colours used by the two parties are different. Ultimately, as held in precedents cited at the bar, the test is whether a consumer would be deceived on looking at or hearing the names of the products in question. In this case, whether considered phonetically or ocularly, *prima facie* there is little scope for deception. Nonetheless, it should be borne in mind that definitive conclusions cannot be drawn at this juncture, and these conclusions are tentative and limited to the interlocutory applications.



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6. Notwithstanding the above tentative conclusions, the respondent / defendant shall maintain and preserve separate accounts of turnover and profits in respect of the relevant products so as to ensure that such data is available, if required, in course of final disposal.

7. Subject to the above observations, both these applications are disposed of without any order as to costs.

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