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OA. Nos.9 & 10 of 2024
in
C.S. (Comm. Div.) No.2 of 2024

P.B.BALAJI, J.

Pending the suit seeking the reliefs of injunction restraining the respondent from infringing the Applicant's trademarks and also passing of an other reliefs, these two Applications have been taken out to restrain the respondent or anyone claiming through them, from in any manner infringing the Applicant's trademark “MELANGE” (OA. No.10 of 2024) and to restrain the respondent or anybody claiming through them, from passing off the respondent's establishment as and for the Applicant's by use of deceptively similar mark and artistic work “MELANGE”, or any other deceptively similar mark or artistic work whatsoever, pending disposal of the suit (OA. No.9 of 2024).

2. I have heard Mr.Arun C. Mohan, learned counsel for the Applicant and Mr.Ramesh Ganapathy, learned counsel for the respondent in these Applications.



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3. The learned counsel for the Applicant, Mr.Arun C. Mohan, would submit that the word “MELANGE” is used by both the Applicant and the respondent in Textile Business. According to him, the Applicant has been using “MELANGE” right from 2004 onwards and the respondent has adopted it only in the year 2017 and therefore, the Applicant is the prior adopter of the trademark “MELANGE”.



4. In reply, Mr.Ramesh Ganapathy, the learned counsel for the respondent would first and foremost submit that even before the Applicant started using “MELANGE”, one Ms.Sangita Singh Kathiwada has been using “MELANGE”, moreso in the same line of business viz., Textiles. Therefore, according to the learned counsel for the respondent, the applicant is not entitled to claim prior usage and when the said Ms.Sangita Singh is also a registered trademark holder, three registered marks co-exist without any confusion whatsoever.



5. Insofar as infringement, he would also submit that no interim relief can be granted since the respondent also has registration in his favour and therefore, straightaway prayed for dismissal OA No.10 of 2024.

6. Insofar as OA No.9 of 2024, Mr.Ramesh Ganapathy, learned counsel for the respondent would contend that no interim relief can be granted, since the Applicant has not approached the Court at the earliest instance and the delay in seeking urgent relief would be fatal to the case of the Applicant. He would also state that “MELANGE” is not a coined or invented word and therefore, no *prima facie* case also exists for entitling the Applicant to an interim relief.

7. Insofar balance of convenience and irreparable hardship, Mr.Ramesh Ganapathy, learned counsel would submit that apart from the delay aspect, the Applicant has not shown any presence in Kerala, whereas the respondent is limiting his business only within the State of Kerala and under Article 19 (1)(g) of the Constitution of India, the respondent has right to do business and the same cannot be scuttled. He would also submit that there is no question of any confusion as a result of the different territories in



which the goods are sold and moreover, the Applicant's claim to be “well known” is also not well founded since such a claim has not been declared by either the Registrar or by any Competent Court of Law.

8. He would also submit that it is not even the case of the Applicant that the respondent has indulged in any mis-representation and it is a clear case where a big Company wants to crush a small entrepreneur by approaching this Court, though the respondent admittedly is carrying on business only in the state of Kerala.

9. The learned counsel for the respondent would place reliance on the following decisions:

9.(i). *M/s.Power Control Appliances Vs. Sumeet Machines (P) Limited*, reported in (1994) 2 SCC 448, where the Hon'ble Supreme Court dealing with delay held that where a trader allows a rival trader to expend money over a considerable period in the building up of a business with the aid of a mark similar to his own, he will not be allowed to stop his rival's business.



9.(ii). *Modern Snacks Private Limited Vs. Modern Foods Enterprises (P) Limited*, reported in (2023) SCC online Del 3872, where a learned Judge of the Delhi High Court, referring to Power Control's ruling of the Hon'ble Supreme Court, held that when the plaintiff, despite being aware of the use of the mark by the defendant, did not choose to initiate any action till the filing of the suit, it shall have an important impact in determining the balance of convenience and irreparable harm, two of the three parameters to judge a claim of interim injunction.

9.(iii). *Dhariwal Industries Limited and another Vs. M.S.S. Food Products*, reported in (2005) 3 SCC 63, where the Hon'ble Supreme Court held that “ the big fish should not be allowed to swallow small fish” and while considering balance of convenience, the question of delay and latches might be a relevant aspect to be considered.

9.(iv). *Indian Performing Rights Society Limited Vs Sanjay Dalia and another* reported in (2015) 10 SCC 161, where the Hon'ble Supreme Court, referring to Section 20 of the Code of Civil Procedure, 1908 and Section 134 of Trademarks Act, 1999 held that it cannot be interpreted in a



manner authorising the plaintiff to institute the suit at a different place other than the place of his ordinary residence or principal office and incidentally the cause of action, wholly or in part has also arisen.

10. In reply, Mr.Arun C.Mohan, learned counsel for the Applicant would submit that the delay is not so inordinate as to prevent the Court from coming to the aid of the Applicant regarding the business of the respondent being restricted to state of Kerala. He would submit, by their own documents, the respondent has shown wide presence in social media and internet and therefore, the fact that the Applicant does not have business outside of Kerala is of no consequence.

11. Meeting the argument of the learned counsel for the respondent, Mr.Ramesh Ganapathy, regarding prior use of Ms.Sangita Singh Kathiwada, Mr.Arun C. Mohan, learned counsel for the Applicant would submit that the right sought for is in personam and vis.a.vis the applicant and the respondent and the Applicant is better placed, admittedly being the prior user of “MELANGE” and the registration or prior use by Ms.Sangita Singh Kathiwada would be irrelevant for the purposes of the present claim of the



Applicant. In fact, he would also state that such prior use by the said Ms.Sangita Singh Kathiwada is also not proved or established by satisfactory documents being placed on record.

12. In support of his submissions, he would place reliance on the following decisions:

12 (i) *Cadila Health Care Limited Vs. Cadila Pharmaceuticals Limited*, reported in (2001) 5 SCC 73, where the Hon'ble Supreme Court, held that in a county like India, where there are several languages and large percentage of population is illiterate, application of principles of English Law regarding dissimilarity of marks or the customer knowing about distinguishing characteristics of the marks, may not be practically possible. The Hon'ble Supreme Court further held that in an action for passing off, the class of purchasers who are likely to buy the goods bearing the marks they require, depends on their education and intelligence and degree of care they are likely to exercise would also be a relevant factor.

12 (ii). *Kaviraj Pandi Durga Dutt Sharma Vs. Navaratna Pharmaceutical Laboratories*, reported in (1964) SCC Online SC 14, where the Hon'ble Supreme Court held that if essential features of the trademark of



the plaintiff have been adopted by the defendant, the fact that the get-up, packing and other writing or marks on the goods show marked differences, it 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. The Hon'ble Supreme Court, further held that where the marks are identical, no further questions arise since the infringement is made out regarding goods being deceptively similar. The Hon'ble Supreme Court held that the same has to be ascertained by a comparison of the two marks, the degree of resemblance in order to cause deception and being capable of definition by laying down objective standards and that the persons who would be deceived viz., the purchasers of the goods and it would be subject to consideration. It was further held that resemblance may be phonetic, visual or in the basic idea represented by the plaintiff's mark.

12 (iii). In *Indian Shaving Products Limited and another Vs. Gift Pack and another*, reported in (1998) SCC Online Delhi 829, the Delhi High Court, dealing with *publici juris* held that the Court is called upon to decide disputes in between the parties before it and cannot be expected to adjudicate upon a dispute which is not before it.



12 (iv). In *Midas Hygiene Industries (P) Limited and another Vs. Sudhir Bhatia and others*, reported in (2004) 3 SCC 90, the Hon'ble Supreme Court held that in cases of infringement, either of trademark or of copyright, normally an injunction must follow and mere delay in bringing action is not sufficient to defeat grant of injunction.

12 (v). In *Mount Mettur Pharmaceutical (P) Limited Vs. Dr.A.Wander and Another* reported in PTC (Suppl) (2) 714 (Mad) (DB), the Division Bench of our High Court held that primary test which should be judged by their look and by their sound and whether it is likely to cause confusion in the mind of any person. The goods to which the mark is to be applied, nature and kind of customers who are likely to buy the goods are circumstances that would require consideration.

12 (vi). In *Corn Products Refining Company Vs. Shangrila Food Products Limited*, reported in (1960) 1 SCR 968, where the Hon'ble Supreme Court held that absolute identity of two competing marks or their close resemblance is only one of the tests for determining the question of likelihood of deception or confusion and that trade connection would be a relevant test independent of other tests and all surrounding circumstances should be factor.



12 (vii). In *Toyota Jidosha Kabushiki Kaisha Vs. Prius Auto Industries Limited and Others*, reported in (2018) 2 SCC Page 1, the Hon'ble Supreme Court held that commercial and business morality which is the foundation of the law of passing off should not be allowed to be defeated by casting an onerous burden on the claimant to prove actual confusion and that preponderance of probabilities should be left to judge the claim.

12 (viii). In *Brihan Karan Sugar Syndicate Private Limited Vs. Yashwantrao Mohite Krushna Sahakari Sakhar Karkhana* reported in 2023 INSC 831, where the Hon'ble Supreme Court held that statement of sales certified by a Chartered Accountant indicating expenses incurred on advertisement and promotion and sales figures may constitute a material which can be considered for examining whether a prima facie case was made out for an interim order, however at the time of final hearing of the suit, such figure would have to be proved in the manner known to law.

13. I have considered the rival submissions advanced by the learned counsel on either side. I have also gone through the records and decisions on which reliance is placed on by the learned counsel on either side.



14. First I shall take up O.A. No.10 of 2024, I find that both the

Applicant and respondent have registration of “MELANGE” in their favour.

Therefore, the question of infringement of the Applicant's trademark does not arise at this juncture. No doubt OP.TM No.1 of 2024 has also been filed against the respondent for rectification. This matter shall be tested only at the time of final hearing of the rectification petition and after the parties lead evidence during trial. Therefore, I do not see any case made out for grant of an interim injunction insofar as OA. No.10 of 2024 is concerned.

15. Coming to OA. No.9 of 2024, admittedly, “MELANGE” is being used by the Applicant and the respondent. Therefore, without going into the visual depiction by the parties, there cannot be two opinions on the fact that phonetically the name “MELANGE” used by the respondent is the same as that being used by the Applicant. Records also reveal the fact that the Applicant is certainly the prior user of “MELANGE” in the market. It is also not in dispute that both the Applicant and the respondent are dealing in the business of Textiles.

16. Coming to the aspect of delay, the Applicant has issued a cease



and desist notice dated 22.12.2021. Therefore, atleast in December, 2021, the Applicant knew about the use of “MELANGE” by the respondent. No doubt, the respondent sent a reply to the said notice without any delay whatsoever. A second notice was issued by the Applicant only on 07.08.2023 to which also the respondent sent a reply on 02.09.2023. Thereafter, the suit papers have been signed on 15.12.2023 and filed before this Court on 05.01.2024. The question to be considered here is whether there is any inordinate delay on the part of the Applicant and whether such delay would amount to acquiescence.

17. In the decisions that have been relied on by the learned counsel for the respondent concerning the aspect of delay, on the facts of those cases, where delay extended to more than three years and on facts, Courts also have found that the Applicant had acquiesced of the use of the respondent and in such circumstances, held *prima facie* case, balance of convenience and irreparable hardships against the Applicant seeking interim injunction. However, the same cannot be said of the present case.

18. Even though the first cease and desist notice was issued on



22.12.2021, almost in the last week of the year 2021, it was followed up with the second cease and desist notice in the First week of August, 2023, and within four months, the suit also came to be executed. At best, there is a delay of 20 months between the two cease and desist notices. However there is nothing on record, atleast as of now to show that the Applicant has acquiesced of the use of “MELANGE” by the respondent during the interregnum period.

19. Even in *Modern Snacks Private Limited's*, case (referred herein supra), relying on the dictum of the Hon'ble Supreme Court in *M/s.Power Control Appliances'* case, (referred herein supra), the Court reiterated that acquiescence implies positive acts and not merely silence or inaction such as involved in latches and that acquiescence must be such as to lead to the inference of a licence sufficient to create a new right in the defendant. Even in *M/s.Power Control Appliances'* case, (referred herein supra), the Hon'ble Supreme Court held that acquiescence is sitting by, when another is invading the rights and spending money on it and that it is a course of conduct inconsistent with the claim for exclusive rights in a trademark, trade name etc. Here, I do not find any such material to support the argument of



the learned counsel for the respondent that the Applicant has acquiesced itself of the respondent's use of “MELANGE”. Further, as already found the delay is not so inordinate to deny relief to the Applicant.

20. Coming to the next question of the prior use of Ms.Sangita Singh Kathiwada, as rightly pointed out by the learned counsel for the Applicant, though it is claimed that one Ms.Sangita Singh Kathiwada has been using “MELANGE” even prior to the adoption of “MELANGE” by the Applicant, I do not see this coming in the way of granting an interim relief in favour of the Applicant for two reasons viz., one, the so called prior user, even assuming she holds a registered trademark “MELANGE”, the present *lis* is to be tested between the Applicant and the respondent and not the use or otherwise of a third party, since the issue of passing off is being raised in the Suit as well as in OA. No.9 of 2024. Further, excepting newspaper cuttings, I do not find any reliable materials placed before the Court for establishing prior use by Ms.Sangita Singh Kathiwada. Therefore, I am unable to agree with the argument of Mr.Ramesh Ganapathy, learned counsel for the respondent that since the Applicant is not the prior user of “MELANGE”, the Applicant is not entitled to the interim relief as prayed



for. In fact, here I am in agreement with the ratio laid down by the Delhi High Court, in *Indian Shaving Products Limited's* case, (referred herein supra). I am only testing the dispute raised by the Applicant herein against the respondent and the alleged prior user, Ms.Sangita Singh Kathiwada is not before this Court and she is not claiming any relief against the plaintiff. Therefore, it cannot be stated that the mark has become *publici juris*, disentitling the plaintiff from exclusive right over “MELANGE”.

21. Coming to the next argument of Mr.Ramesh Ganapathy regarding jurisdiction and also territory of sales, insofar as the issue of the institution of the suit, though normally the plaintiff would be expected to sue the defendant only in Kerala, in the present case admittedly, the Applicant has also filed a rectification petition before this Court and that apart, plaintiff also holds a valid registration of “MELANGE” in its favour obtained before the Registrar whose jurisdiction is amenable to this Court. In such circumstances, I do not see any prejudice caused to the respondent by the act of the Applicant instituting the suit before this Court.

22. Regarding the argument that the respondent sells his product only



within the state of Kerala and the plaintiff has also not shown any presence in the state of Kerala, it would not create any confusion in the mind of the customer, though I find such argument attractive at first blush, going by the documents that have been filed on the side of the respondent, it is seen that the respondent's claims wide presence in Youtube Channel and has also been conferred with a Youtube Creator Award. Further, it is seen from the social media profile of the respondent that they have more than 365 thousand followers in Youtube and 84 thousand followers in Facebook. Certainly, such followers would not be merely limited to viewers and customers in Kerala, but all over the country and probably even beyond. Technology has advanced to such heights that it is no longer necessary for a customer to purchase clothes by physically going to a store. Purchase can be made online from the comfort of the drawing room itself. Therefore, I am unable to countenance the argument of the learned counsel Mr.Ramesh Ganapathy, that presence of the respondent being limited to State of Kerala and at the same time, the Applicant not having shown any presence in the State of Kerala, there is no likelihood of deception. The way in which business is done these days, especially online, it cannot be said that a person sitting in Kerala cannot cause any deception to a purchaser from a different



State.

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23. Admittedly, it is not the Applicant's case that the respondent is causing any deception. However, as rightly held by the Court in the *Modern Snacks Private Limited* case, relying on *Hindustan Pencils Private Limited Vs. Universal Trading Company*, reported in 2000 PTC 561 (DB), even if there is an honest concurrent user and there is inordinate delay or latches, it would only defeat the claim of damages or rendition of accounts but injunction may not be refused.

24. In view of the foregoing, having tested the facts of the present case in line with the trinity principles governing the law of interim injunction, namely, prima facie case, balance of convenience and irreparable injury or hardship, I find that the Applicant has made out a case for grant of an interim injunction as prayed for in O.A No. 9 of 2024, pending disposal of the suit.



25. Accordingly, OA. No.9 of 2024 is allowed, granting an interim injunction as prayed for and OA No.10 of 2024 is hereby dismissed.

21.06.2024

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P.B.BALAJI, J.
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Pre-delivery order made in
OA. Nos.9 & 10 of 2024
in C.S. No.2 of 2024

21.06.2024