



2025:DHC:1391-DB



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 03.03.2025

+ **FAO (COMM) 61/2025**

DS DRINKS AND BEVERAGES PRIVATE LIMITED

.....Appellant

Through: Mr Ashutosh Kumar Mr Sajan
Shankar Prasad, Mr Pranav
Gupta and Ms Radhika Pareva,
Advs.

versus

HECTOR BEVERAGES PRIVATE LIMITED

.....Respondent

Through: Mr. Manish Dhir, Adv.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

HON'BLE MS. JUSTICE SHALINDER KAUR

NAVIN CHAWLA, J. (ORAL)

CAV 91/2025

1. The learned counsel for the Caveator/respondent has entered appearance, therefore, the caveat stands discharged.

CM APPL. 12285/2025

2. Allowed, subject to all just exceptions.

3. The application is disposed of.

FAO (COMM) 61/2025, CM APPL. 12284/2025

4. This appeal has been filed by the appellant, challenging the



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Order dated 16.01.2025 passed by the learned District Judge (Commercial Courts-06), Central District, Tis Hazari Courts, Delhi (hereinafter referred to as the “Learned Trial Court”) on an application filed by the respondent under Order XXXIX Rules 1 & 2 of the Code of Civil Procedure, 1908 (“CPC”), in CS (Comm.) No. 350/2024, titled ***Hector Beverages Private Limited vs. DS Drinks & Beverages Private Limited***, whereby an *interim* injunction was granted against the appellant thereby restraining it from using the word ‘SWING’ for its energy drink in any manner, and in terms of prayer A(i) and A(ii) of the said application.

5. The respondent has filed the above suit contending therein that the respondent is involved in the business of food and beverages and commenced its business in the year 2009. Its product line includes various beverages under the trademark TZINGA Energy Drink, PAPERBOAT, SWING AND SWING FIZZ. It is further alleged that the products under the brand name ‘SWING’ were initially launched as a sub-brand/product variant under the main brand ‘Paper Boat’, however, over time, the products under the mark ‘SWING’ have developed a popular name and acceptance for itself in the market. The respondent claimed that it has been using the said mark since the year 2017 and has acquired tremendous goodwill in the said mark. The respondent has also registered its trademark, the details of which are as under:-



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Trade Mark	Registration Number	Class	Registration Date
	3691925	32	December 1, 2017
PAPER BOAT SWING JUICIER DRINK	5280472	32	January 11, 2022

6. The respondent was aggrieved by the appellant's adoption of the mark 'CATCH SWING ENERGY INVIGORATES & MIND'. Respondent claimed that it came across the appellant's trademark application no. 6051833 for the said mark under class 32. The said application had been filed by the appellant on a 'Proposed to be used' basis. Consequently, the respondent filed the above suit, claiming that the mark adopted by the appellant is deceptively similar to that of the respondent. The respondent asserted as under: -

Respondent's trademark	Appellant's trademark
	
<i>Similarity:</i> <i>1. The trademark SWING is copied in its entirety by the Defendant.</i> <i>2. The manner of adding other words after SWING has been done in a malicious manner to create some difference in the marks.</i> <i>3. The services provided by the Plaintiff and Defendant are identical and have the same target audience.</i>	



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7. Along with the above suit, the respondent also filed an application seeking the *interim* relief of an injunction against the appellant, restraining it from using the said trademark 'SWING' for its products, which it claimed was similar to that of the respondent.

8. The appellant filed a written statement as also a reply to the application filed under Order XXXIX Rules 1 & 2 CPC of the respondent, *inter-alia*, contending therein that the mark of the appellant being 'CATCH SWING ENERGY INVIGORATES & MIND', is distinct from that of the respondent, which uses the mark 'PAPERBOAT SWING'. It was alleged that, therefore, there is no possibility of any confusion being caused in the minds of the customers of the two products. It was further contended that as far as the energy drinks are concerned, which is the product of the appellant, the respondent uses the mark 'TZINGA'.

9. The learned Trial Court, however, on consideration of the submissions made before it and on perusal of the record, granted an *interim* injunction against the appellant, restraining it from using the mark 'SWING'. The Court observed that the word 'SWING' cannot be claimed to be a descriptive word having regard to the class of products that the parties use it for. The learned Trial Court further held that the word 'SWING' is not only common to the mark of both the parties, but is also prominently and effectively positioned mark. It was observed that the respondent is a prior user and registered owner of the mark 'PAPERBOAT SWING' and, therefore, has been able to make out a *prima facie* case for the grant of an injunction, and there is



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a likelihood of confusion being caused by the adoption of a similar mark by the appellant.

10. The learned counsel for the appellant submits that the learned Trial Court erred in holding that the word 'SWING' is a predominant part of the respondent's mark. He submits that, in fact, there is no such pleading in the plaint and that this was not a case set up by the respondent. He further submits that a composite mark 'PAPERBOAT SWING' cannot be bifurcated to grant exclusivity to the respondent over a part of the mark. In support, he places reliance on the Judgments of this Court in *Vasundhra Jewellers Pvt. Ltd. v. Kirat VinodBhai Jadvani & Anr.*, 2022 SCC OnLine Del 3370, and in *Phonepe Private Limited v. EZY Services and Another*, 2021 SCC OnLine Del 2635.

11. He further submits that the respondent is using the mark 'PAPERBOAT SWING' for juices, which is a different product from the one of the appellant, that is, an energy drink. He submits that for energy drinks, the respondent uses the mark. He submits that, therefore, the learned Trial Court erred in granting an interim injunction against the appellant, restraining it from using the mark 'CATCH SWING ENERGY INVIGORATES & MIND'.

12. On the other hand, the learned counsel for the respondent, who appears on caveat, submits that this Court would not substitute its discretion for that of the learned Trial Court. In support, he places reliance on the Judgment of the Supreme Court in *Wander Ltd. and Ors. vs. Antox India P. Ltd.*, 1990 SCC OnLine SC 490.



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13. He further submits that the predominant part of the mark of the parties is 'SWING', which is apparent from the depiction thereof on the product itself.

14. He further submits that the appellant had filed for registration of its mark on a 'Proposed to be used' basis and has, therefore, entered the market only around the time when the suit was filed, while the respondent has established goodwill over its mark. He submits that the use of a similar mark by the appellant is likely to cause confusion in the customers and, therefore, the injunction has rightly been granted by the learned Trial Court.

15. We have considered the submissions made by the learned counsels for the parties.

16. At the outset, we would remind ourselves of the limited jurisdiction that we exercise while adjudicating an appeal against an order passed by the learned Trial Court in exercise of its powers under Order XXXIX Rule 1 & 2 of the CPC. In appellate jurisdiction against such an order, this Court would not interfere with the same only because it may, in a given case, find that it would have exercised such discretion in a different manner. It is only when the learned Trial Court has erred in law or has ignored vital evidence or has committed any such similar infraction, that the Appellate Court would interfere with such an order. We quote from the Judgment of the Supreme Court in ***Wander Ltd.*** (supra) as follows:-

"14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the Appellate Court will not interfere with the exercise of



discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by the 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. If the discretion has been exercised by the Trial Court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in Printers (Mysore) Private Ltd. v. Pothan Joseph :

... These principles are well established, but as has been observed by Viscount Simon in Charles Oseption & Co. v. Johnston the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case.

The appellate judgment does not seem to defer to this principle."

17. We do not find any case made out by the appellant within the scope of the limited jurisdiction that we exercise in this appeal.

18. In the present case, even otherwise, we do not find any error to



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have been committed by the learned Trial Court in the Impugned Order. The marks of the appellant and the respondent, as depicted on their respective products, are as under:-

<i>Respondent's product</i>	<i>Appellant's product</i>
	

19. From the above, it would by itself be evident that the predominant part of the mark of the parties is 'SWING'. The same has also been pleaded by the respondent in its plaint *in extenso*. We refrain from quoting from the plaint for sake of brevity. Therefore, the submission of the learned counsel for the appellant that there is no pleading that the word 'SWING' is the predominant part of the mark of the respondent in its plaint, is liable to be rejected.

20. While it is true that a composite mark should not be dissected and should be considered as a whole, the exception lies in cases where a part of the mark is predominant in nature. In the present case, *prima facie* at least, the respondent has been able to make out a case of the word 'SWING' being the dominant part of its mark, with the mark 'PAPERBOAT' being the other dominant part which defines all its products, including the juices for which the mark 'SWING' is being used. 'PAPERBOAT' appears to be the family mark while 'Swing' is



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the sub-mark, however, equally important to identify the product with its source.

21. In this regard, it may be apposite to note the Judgment in *M/s South India Beverages Pvt. Ltd vs. General Mills Marketing Inc. & Anr.*, 2014 SCC OnLine Del 1953, wherein it was held as under :-

“19. Though it bears no reiteration that while a mark is to be considered in entirety, yet it is permissible to accord more or less importance or 'dominance' to a particular portion or element of a mark in cases of composite marks. Thus, a particular element of a composite mark which enjoys greater prominence vis-à-vis other constituent elements, may be termed as a 'dominant mark'.

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21. The view of the author makes it scintillatingly clear, beyond pale of doubt, that the principle of 'anti dissection' does not impose an absolute embargo upon the consideration of the constituent elements of a composite mark. The said elements may be viewed as a preliminary step on the way to an ultimate determination of probable customer reaction to the conflicting composites as a whole. Thus, the principle of anti-dissection' and identification of dominant mark' are not antithetical to one another and if viewed in a holistic perspective, the said principles rather compliment each other.

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23. It is also settled that while a trademark is supposed to be looked at in entirety, yet the consideration of a trademark as a whole does not condone infringement where less than the entire trademark is appropriated. It is therefore not improper to identify elements or features of the marks that are more or less important for purpose of analysis in cases of composite marks.”



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22. The above noted Judgment was also followed by this Court in ***M/s P.K. Overseas Pvt. Ltd. & Anr. v. M/s Bhagwati Lecto Vegetarians Exports Pvt. Ltd. & Anr.***, 2016 SCC OnLine Del 5420, wherein it was held as under; -

“20. It is often argued in trademark infringement cases that the trademark has to be considered as a whole and has not to be dissected. That is to say the anti-dissection rule is brought into force. On the other hand the theory of a dominant part of a trademark is propounded which essentially requires a Court to look at the trademark compositely but identify if any part thereof is the dominant part. To a layman it may appear to be a legal paradox, for on the one hand there is a rule that you cannot dissect a composite mark and on the other hand you have a rule which has the feature of dissecting. In the decision reported as 2015 (61) PTC 231 South India Beverages Pvt. Ltd. v. General Mills Marketing Inc. this issue was addressed by a Division Bench of this Court with respect to same products i.e. ice cream. The rival marks under consideration were ‘HAAGEN-DAZS’ and ‘D’DAAZS’. Propounding the rule of anti-dissection to contend that the respondent’s mark ‘HAAGENDA ZS’ should be viewed as an indivisible whole and when viewed in its entirety, it was not deceptively similar to the impugned trademark ‘D’DAAZS’, the rival argument was that ‘DAZS’ formed a prominent part of the trademark ‘HAAGEN-DAZS’ and therefore warranted protection against the impugned trademark. The Division Bench then referred to various judicial decisions and opined that the rule of anti-



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dissection essentially mandates that where the issue is of deceptive similarity between composite marks, the commercial impression of the mark as a whole needs to be considered for the reason the jurisprudence behind the anti-dissection rule was that the combination of the terms in its entirety and not its dissected elements constitute the distinctive mark. The Division Bench then referred to the decision reported as 211 (2014) DLT 296 Stiefel Laboratories v. Ajanta Pharma Ltd. and therefrom extracted the rationale for the anti-dissection rule : 'The rationale of the anti-dissection rule is based upon this assumption: 'An average purchaser does not retain all the details of a mark, but rather the mental impression of the mark creates in its totality. It has been held to be a violation of the anti-dissection rule to focus upon the 'prominent' feature of a mark and decide likely confusion solely upon that feature, ignoring all other elements of the mark. Similarly, it is improper to find that one portion of a composite mark has no trademark significance, leading to a direct comparison between only that which remains.' In view of the aforesaid, the Division Bench opined that the principles of 'anti-dissection' and that of 'identification of 'dominant mark' are not antithetical to one another but are rather complimentary. It was held that the constituent elements may be viewed as a preliminary step in ultimately determining probable customer reaction to the conflicting composites as a whole. The Division Bench expounded that the rule of anti-dissection does not absolutely restrict consideration of the constituent elements of a composite mark and more



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significantly, where less than the entire trademark was appropriated amounting to infringement thereof, there would be no violation of the anti-dissection rule. Reliance was placed on the decision reported as 380 F.3d 1340 Re Chatam Int'l, Inc, where the Court held that the commercial impression created by the dominant part 'GASPAR' of the registered mark 'GASPAR'S ALE' was far more substantial than by its other part 'ALE and therefore the impugned mark 'JOSE GASPAR GOLD' was found to be deceptively similar to the registered mark. Reference was then made to decision reported as 405 F. Supp. 530 (1975) Eaton Allen Corp. v. Paco Impressions Corp where it was held that consideration of a trademark as a whole does not preclude infringement where less than the entire trademark is appropriated. In the facts of the case, the Division Bench, rejected the appellant's arguments advanced on the basis of the anti-dissection rule to hold that the impugned mark 'D' DAAZS' infringed a dominant feature i.e. 'DAZS' of the respondents' trademark 'HAAGEN' 'DAZS' which feature can be easily relied on to trace the source of its product and therefore must be accorded protection. Thereafter, noting that the expression 'HAAGEN DAZS', was a unique combination of Danish-sounding words having no dictionary meaning in any language, the Division Bench reiterated that being an arbitrarily chosen trademark, the same was entitled to a high degree of protection and referred to the decision of this Court reported as 2010 (44) PTC 293 (Del) Kirorimal Kashiram Marketing and Agencies Pvt. Ltd. v. Shree Sita Chawal Udyog



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Mill in support thereof. The Division Bench highlighted that the consumer generally retained only a vague impression of a mark to ascertain its similarity upon encountering a new rival mark. Interestingly, the Division Bench imported the 'ordinary observer' test in copyright law to hold that this principle could be adopted if a dominant part of a trademark which had acquired a goodwill had been adopted by the defendant.

21. In view of the principles of law hereinabove discussed in the instant case plaintiffs' trademark 'India Salaam' would have both words 'India' and 'Salaam' as dominant parts thereof and use by the appellants of the trademark 'Al Salaam' would be a prima-facie case of infringement. We highlight that the sales figure by the respondents for sale of rice under the trademark 'India Salaam' justify a prima-facie opinion of reputation acquired in the trademark and that the appellant had just entered the market. Injury caused to the appellants would be minimal if injunction was granted because the appellants had yet to acquire a reputation in the trademark adopted by them."

23. In ***Phonepe Private Ltd.*** (supra) also, this Court accepted that though exclusivity can be claimed, and infringement/passing off alleged, only in respect of the entire mark of the plaintiff, and not in respect of part thereof, at the same time, it was acknowledged that it is open for the plaintiff to assert infringement on the ground that a part of the mark has been copied by the defendant, provided the part so



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copied, is the *dominant part* or the *essential feature* of the plaintiff's trademark.

24. In ***Vasundhra Jewellers Pvt. Ltd.*** (supra), this Court explained that examining of the dominant part of the trademark for comparing it with the conflicting marks is solely for the purpose of determining whether competing marks are deceptively similar when viewed as a whole.

25. Applying the above test to the conflicting marks in question, it is the *prima facie* opinion of this Court that the additions in the two marks do not detract from the predominant part of the two marks, that is, 'SWING'. The test of imperfect recollection of the customer would make them draw their attention to the mark 'SWING' even though there are other parts of the mark which make the mark a complete whole.

26. As far as the submission of the learned counsel for the appellant that the products in question are different, we again find no merit in the said contention. The appellant is dealing with energy drinks, while the respondent is using the mark in question for juice. These are allied products, available across the same counter, and cannot be considered to be so distinct so as to not cause confusion in the mind of the public if the same mark is used for the two products. Therefore, because the respondent is using its mark 'TZINGA Energy Drink' for its product of energy drink, would not disentitle the respondent from the grant of injunction as prayed for.

27. Accordingly, we find no merit in the present petition. The same



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along with the pending application is, accordingly, dismissed.

28. Needless to state, any observations made herein are only *prima facie* in nature and shall not influence the trial of the suit pending before the learned Trial Court.

NAVIN CHAWLA, J

SHALINDER KAUR, J

MARCH 3, 2025/ss/sk/DG

Click here to check corrigendum, if any