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

Reserved on: 2 December 2025

Pronounced on: 15 December 2025

+ **FAO(OS) (COMM) 105/2019 & CM APPL. 22368/2019**

LEAYAN GLOBAL PVT LTDAppellant

Through: Mr. Shravan Kumar Bansal,
Mr. Rishi Bansal, Mr. Ajay Amitabh
Suman, Mr. Pankaj Kumar and Mr. Rishabh
Gupta, Advs.

versus

BATA INDIA LTDRespondent

Through: Mr. Neeraj Grover, Mr.
Kashish Sethi, Ms. Harshita Chawla, Mr.
Angad Deep Singh and Ms. Mohana Sarkar,
Advs.

+ **FAO(OS) (COMM) 193/2019**

BATA INDIA LTDAppellant

Through: Mr. Neeraj Grover, Mr.
Kashish Sethi, Ms. Harshita Chawla, Mr.
Angad Deep Singh and Ms. Mohana Sarkar,
Advs.

versus

CHAWLA BOOT HOUSE & ANRRespondents

Through: Mr. Shravan Kumar Bansal,
Mr. Rishi Bansal, Mr. Ajay Amitabh
Suman, Mr. Pankaj Kumar and Mr. Rishabh
Gupta, Advs.



CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR
HON'BLE MR. JUSTICE OM PRAKASH SHUKLA

% **JUDGMENT**
15.12.2025

The *lis*

1. CS (Comm) 110/2019¹, instituted by Bata India Ltd² against Leayan Global Pvt Ltd³, is presently pending before a learned Single Judge on the Intellectual Property Division of this Court.
2. Bata has alleged, in the suit, that Leayan, by use of the mark POWER FLEX, for footwear, has infringed the mark POWER, which is the registered trademark of Bata in respect of footwear. Bata has, therefore, in the suit, prayed for a decree of permanent injunction, restraining Leayan from using any mark of which POWER constitutes a dominant part in respect of footwear or other allied goods.
3. Bata also filed, in the suit, IA 3051/2019 seeking interlocutory injunction against Leayan, pending disposal of the suit from using the mark POWER FLEX or any other mark which may be identical or deceptively similar to the Bata's mark POWER.
4. On 27 February 2019, the learned Single Judge passed an *ex parte ad interim* order, restraining Leayan from using the mark POWER in respect of footwear either on its own or in combination

¹ "the suit" hereinafter

² "Bata" hereinafter

³ "Leayan" hereinafter



with any other word till the next date of hearing.

5. Bata had further prayed that Leayan be also restrained from using the expression POWER OF REAL LEATHER. However, the learned Single Judge deferred the decision on this request till completion of pleadings on the application, merely stating that, in the said tagline, no undue emphasis would be placed on the word “POWER”. Leayan was also granted liberty to move the Court for disposal of existing stocks.

6. Leayan moved IA 4472/2019 for being permitted to sell the existing stocks of the allegedly infringing goods. A stock statement was stated to have been filed with the documents filed by Leayan, which indicated 38415 pairs of footwear lying in stock. The learned Single Judge granted the prayer for disposal of the stock in the following terms on 27 March 2019 :

“5. The Defendants were given liberty to move an application for disposal of any existing stock. Since this was stock which was already manufactured by the Defendants, prior to the grant of injunction on 27th February, 2019, the Defendant is permitted to dispose of the stock as mentioned in the statements subject to the following conditions:

(i) The Defendants are directed to file monthly statement of disposal of the said stock;

(ii) Defendants shall file an affidavit in respect of the value of the said stock which is disposed of;

(iii) No fresh manufacturing is permitted with the impugned marks.

6. The permission to dispose of the stock is subject to further orders in the interim injunction application which is listed for hearing on 3rd April 2019.”



7. Leayan also filed IA 3686/2019 under Order XXXIX Rule 4 of the Code of Civil Procedure, 1908⁴ for vacation of the ex parte *ad interim* order dated 27 February 2019 passed by the learned Single Judge.

8. The learned Single Judge, by order dated 16 April 2019, disposed of IA 3051/2019 filed by Bata under Order XXXIX Rules 1 and 2 of the CPC and IA 3686/2019 filed by Leayan under Order XXXIX Rule 4 of the CPC with the following directions :

“a) Defendant No.2 is restrained from using the mark/word ‘POWER’ in respect of footwear, clothing and accessories and other related products including the mark ‘POWER FLEX’ or any other mark containing the word ‘POWER’ or a combination thereof;

b) The use of the tagline ‘THE POWER OF REAL LEATHER’ as part of an advertising slogan or a tagline is permitted, however, no undue prominence shall be given to the word ‘POWER’;

c) The existing stock of products as mentioned in para 32 above is permitted to be sold by filing a monthly statement of disposal, including the value of the stock so sold, subject to the final adjudication in the suit.”

9. The aforesaid order dated 16 April 2019, of the learned Single Judge, has been challenged before us in the present appeals both by Leayan and by Bata. Leayan has challenged direction (a) in the impugned order whereas Bata has challenged directions (b) and (c).

10. We have heard Mr. S.K. Bansal, learned counsel for the Leayan and Mr. Neeraj Grover, learned counsel for the Bata, at length.



Proceedings before the learned Single Judge

Rival contentions of Leayan and Bata before the learned Single Judge

Contentions of Leayan

11. Before the learned Single Judge, Leayan submitted as under:

- (i) In its reply to the First Examination Report issued by the Trade Marks Registry, in response to Bata's application for registration of its various POWER derivative marks, Bata had claimed that the mark POWER and similar marks such as POWERGUN and POWER LABEL were visually, structurally and conceptually different from each other. Bata could not, therefore, be heard to plead that the mark POWER FLEX of Leayan was deceptively similar to the mark POWER of Bata.
- (ii) POWER was a laudatory expression and could not be monopolized.
- (iii) The word POWER was a common dictionary word, over which exclusivity could not be claimed.
- (iv) Various applications had been filed before the Trade Marks Registry for registration of trade marks of which POWER was a part in respect of footwear.



(v) Leayan had commenced use of the mark POWER FLEX in 2010-2011. Mr. Virat Kohli was its brand ambassador. The suit which was instituted only in 2019 was, therefore, grossly belated.

(vi) POWER FLEX was never used by Leayan in isolation as a trade mark but was always used in conjunction with the mark RED CHIEF.

(vii) There was, therefore, no chance of confusion between the marks.

(viii) Leayan used the mark POWER FLEX for leather footwear whereas Bata used the mark POWER for sporting footwear. This, again, obviated the possibility of any confusion between the marks.

(ix) Leayan had used the mark POWER FLEX in an honest and concurrent fashion since 2011. Such open and extensive use itself operated as a bar to grant of interim relief restraining use of the mark.

(x) Given the extent of user of the mark POWER FLEX by Leayan and the extent to which the mark was advertised, using celebrities amongst others, Bata could not have been unaware of the said mark.

(xi) The advertisements depicting the mark POWER FLEX



were also published in leading newspapers such as “Amar Ujala”.

12. Without prejudice to these submissions, Leayan undertook, before the learned Single Judge to use the mark POWER FLEX only for leather footwear and only in conjunction with the mark RED CHIEF, in a composite fashion, without any special prominence to the word POWER.

Contentions of Bata

13. Responding to Leayan’s submissions, Bata contended before the learned Single Judge as under:

- (i) The mark POWER, both as a word mark and as a device mark, was registered in favour of Bata, not only for sports footwear but also for leather goods.
- (ii) Bata had enormous goodwill in the mark POWER. The sale proceeds of goods using the mark POWER by Bata for the year 2018, were to the tune of approximately ₹ 480 Crores, which was 20% of the total sales of Bata.
- (iii) Leayan had contended, falsely, that it was not using the mark POWER FLEX independently and it was only using the mark in conjunction with the mark RED CHIEF.



(iv) The suit could not be said to be belated. The cause of action for instituting the suit arose only when Leayan filed evidence of use of the mark POWER FLEX in the opposition proceedings before the Trade Marks Registry. Prior thereto, Bata had no knowledge of Leayan's use of the mark POWER FLEX.

(v) Having itself applied for registration of the mark POWER FLEX, Leayan was estopped from contending that the mark POWER was descriptive or laudatory or was disentitled to exclusivity being a common dictionary word.

(vi) The advertisements cited by Leayan were for the RED CHIEF brand.

(vii) No separate sales turnover figures from sale of goods bearing the mark POWER FLEX effected by Leayan were provided.

14. Premised on these contentions, Bata pressed its prayer for grant of interlocutory relief.

Findings of the learned Single Judge

15. The learned Single Judge commences her observations and findings with a note of disapproval at Bata having impleaded Chawla Boot House⁵, who was a retailer of Leayan as the first defendant, and Leayan itself as the second defendant. The learned Single Judge has



gone on to issue directions to the Registry and seek undertakings from all plaintiffs in Intellectual Property Rights matters that the main contesting defendant in the suit has to be arrayed as the first defendant.

16. Though Mr. Grover, learned counsel for the Bata took exception to this note of disapproval, Bata can really have no grievance against the practice directions to the Registry issued by the learned Single Judge. We, however, have our reservations as to whether, in the absence of any mandate, in the CPC or in any other statute, plenary or subordinate, requiring the “main contesting defendant” to be arrayed as Defendant 1, such a direction could be issued by the learned Single Judge. Besides, as Mr. Grover, points out, the manufacturer of the infringing goods and the seller of the infringing goods are equally infringers within the meaning of Section 29 of the Trade Marks Act, 1999, as both use the infringing mark in the course of trade. It might be doubtful, therefore, whether merely on the basis of the size of the enterprise, one of them can be treated as the main defendant and the other as the subsidiary defendant. More on this hereinafter.

17. In so far as the merits of the matter are concerned, the learned Single Judge has observed and held as under:

- (i) Bata was the registered proprietor of several registrations for the word mark POWER as well as for POWER derivative marks.



(ii) The earliest registration of 1971, was for the mark

POWER with the arrow logo



(iii) As a standalone mark, POWER was registered in Bata's favour, both as a word mark and a device mark since 1975.

(iv) The earliest invoice furnished by Bata evidencing use of the mark POWER, for footwear, dated back to 29 September 1988.

(v) Bata had also produced considerable evidence of goodwill having been amassed by its mark POWER. Advertisements, dating back to 1980s, were on record, showing use of the mark POWER in association with the Indian Cricket Team. An exclusive window, with the POWER branded footwear, also depicted that cricketers such as Kapil Dev and Sachin Tendulkar, had used POWER on their cricket bats. The POWER mark had also been positioned as the international sports brand of Bata. There were various stores which exclusively retailed POWER branded footwear, the first of which was launched in March 2018.

(vi) Leayan's contention that it was not using the mark POWER FLEX in isolation, but was always using it in conjunction with the mark RED CHIEF, was incorrect. The mark POWER FLEX was used, in isolation, on the inside of the footwear manufactured by Leayan.



(vii) The advertisement dated 2 February 2011, featuring Virat Kohli, on which Leayan relied, indicted that it was for RED CHIEF branded products and not for products bearing the mark POWER FLEX.

(viii) Bata had at least 40 years' priority of user of the mark POWER over the use the mark POWER FLEX by Leayan.

(ix) The evidence of use of the mark POWER FLEX by Leayan was sketchy. No independent sales turnover had been provided for goods bearing the mark POWER FLEX. There were only six or seven advertisements, in the "Amar Ujala" periodical, and no other evidence of any major publicity of the mark POWER FLEX.

(x) In accordance with the law declared by the Division Bench of this Court in *Pankaj Goel v. Dabur India Ltd*⁶, it could, therefore, be stated that Bata had acquiesced to the use of the mark POWER FLEX by Leayan and had thereby allowed Leayan to build up a reputation.

(xi) The plea of Leayan that there was no likelihood of confusion as the mark POWER FLEX was used by it for leather footwear, whereas the mark POWER was used by Bata for sports goods, was without merit.



(xii) There was always reasonable scope of Bata expanding the use of the mark POWER to include leather footwear. Courts were required to bear in mind such reasonable scope of expansion, as held by the Supreme Court in ***Laxmikant V. Patel v. Chetan Bhai Shah***⁷.

(xiii) Moreover, sports goods and goods in leather footwear were goods which were allied and cognate. It was a matter of common knowledge that companies used to manufacture both kinds of goods under one brand.

(xiv) It could not be reasonably believed that, while adopting the mark POWER FLEX, Leayan was unaware of the POWER brand of the Bata.

(xv) Having applied for registration of the mark POWER FLEX, Leayan was estopped from contending that the mark POWER was laudatory, a dictionary word or otherwise not entitled to any claim for exclusivity.

(xvi) Even on merits, it could not be said that the mark POWER was descriptive of the footwear manufactured by Bata. At the highest, it was only suggestive. In this context, reliance was placed on Trademarks and Unfair Competition by Thomas Mc Carthy, which opined that the aspect of whether a mark was descriptive or suggestive, could be decided by examining

(a) the degree of imagination required to connect the



mark with the product, and

(b) the competitors' need to use the mark.

The word POWER did not immediately direct the mind to shoes or footwear. It required a leap of mind to connect the word POWER with footwear. The dictionary meaning of the word POWER was essentially related to ability, control or authority, dominance, etc. As such, POWER could, at best, be treated as a suggestive mark for footwear. Thereby, it was rendered inherently distinctive.

(xvii) Even if one were to apply instead of the aforementioned two tests suggested in Mc Carthy, the intuitive perception test devised in *Union Carbide Corp. v. Ever-Ready, Inc.*⁸, the word POWER, when used for footwear, was distinctive and not descriptive.

18. Based on these findings, the learned Single Judge arrived at the conclusion that the mark POWER was exclusively associated with Bata's brand of footwear and that use of the mark POWER, either in isolation or in combination with other words, for footwear, accessories, clothing etc. violated the statutory or common law rights of Bata in the said mark.

19. On the basis of this conclusion, the learned Single Judge went on to issue direction (a) in the impugned order, reproduced in para 8 supra.

⁸ 531 F. 2d. 366



20. The issuance of directions (b) and (c) was sought to be justified on the following findings:

“33. However, the Court is also conscious of the fact that Defendant No. 2's use in the last 4-5 years, has not been as restricted as the Plaintiff made it out to be in the plaint. The documents which have been filed by Defendant No. 2 do show that Defendant No. 2 has had at least some years of use even though not very prominent, prior to the filing of the present suit. The Plaintiff's stand that Defendant No. 2's usage came to its knowledge only through the evidence in the opposition proceedings, seems a bit farfetched when seen in the context of the documents placed on record by Defendant No. 2. While holding that the Plaintiff is entitled to grant of interim injunction, Defendant No. 2 is permitted to exhaust the entire stock of 'POWER FLEX' branded goods, available with it. ...

34. *Vide* order dated 27th March, 2019, this Court had already permitted the Defendant to sell the existing stock, subject to certain conditions. The said conditions are again reiterated in this order.

35. Further, while Defendant No. 2 would not be permitted to use the mark 'POWER FLEX' as a trademark, the English language use of the word 'POWER' as part of an advertising slogan or as in tagline 'THE POWER OF REAL LEATHER' cannot be enjoined. The case laws cited by both the sides are well settled.”

21. Aggrieved thereby, Leayan is before us in the present appeal.

Rival Contentions

Submissions of Mr. S. K. Bansal

22. Assailing the impugned judgment, Mr. Bansal, learned Counsel for Leayan advances the following submissions:



(i) Bata had deliberately impleaded CBH, one of the retailers of Leayan, as Defendant 1. This was in order to avoid Leayan noticing the matter in the cause list and was, even otherwise, not permissible as held by the Division Bench of this Court in *Micolube India Ltd v. Maggon Auto Centre*⁹.

(ii) The impugned judgment does not take stock of the extensive goodwill and reputation which Leayan's POWER FLEX products had acquired even prior to the filing of the suit. Our attention was invited, in this context, to various advertisements, on pan-India basis, both in the print media as well as on televisions and invoices of POWER FLEX products manufactured by Leayan, which were on record before the learned Single Judge. Moreover, Leayan operated through over 135 stores all over India. Having thus acquiesced to the use, by Leayan, of the POWER FLEX mark for an extended period of time, by which the mark had acquired goodwill and reputation, Bata could not belatedly seek to injunct use of the mark.

(iii) In this context, it was pointed out that Leayan had submitted its application for registration of the word mark POWER FLEX in Class 25 on 7 September 2009. The opposition to the application was filed by Bata only on 15 September 2017. Counter-statement by way of response to the opposition was filed by Leayan on 22 March 2018. The suit came to be instituted by Bata only in February 2019. Between 2010 and 2019, Leayan had extensively used the POWER



FLEX mark and garnered considerable goodwill therein. Reliance was placed, for this purpose, on para 29 of the judgment of a learned Single Judge of this Court in **QRG Enterprises v. Surendra Electricals**¹⁰, the appeal against which was dismissed in **QRG Enterprises v. Surendra Electricals**¹¹. Apropos the judgment of the Supreme Court in **Midas Hygiene Industries (P) Ltd v. Sudhir Bhatia**¹², it was submitted that the proposition that delay could not stand in the way of grant of injunction in a case in which infringement was found to exist, as enunciated therein, was applicable only to cases where the defendant had acted dishonestly. In this context, reliance was further placed on the following authorities

- (a) paras 57, 62 and 83 of the judgment of the Division Bench of the High Court of Calcutta in **Shree Ganesh Besan Mill v. Ganesh Grains Ltd**¹³,
- (b) paras 3, 25, 37, 41 and 43 of the judgment of the Division Bench of this Court in **Intex Technologies (India) Ltd v. M/s AZ Tech (India)**¹⁴,
- (c) para 6 of the judgment of the Supreme Court in **Neon Laboratories Ltd v. Medical Technologies Ltd**¹⁵,
- (d) paras 16, 18 and 19 of the judgment of the Division Bench of this Court in **Shree Nath Heritage Liquor Pvt Ltd v. M/s Allied Blender & Distillers Pvt Ltd**¹⁶,

¹⁰ 120 (2005) DLT 456

¹¹ 2007(98) DRJ 499 (DB)

¹² (2004) 3 SCC 90

¹³ AIR 2022 Cal 171

¹⁴ 2017 SCC OnLine Del 7392

¹⁵ (2016) 2 SCC 672

¹⁶ (2015) 63 PTC 551



(e) paras 3, 23, 26 and 30 of the judgment of the Division Bench of this Court in ***Rhizome Distilleries P Ltd v. Pernod Ricard S.A. France***¹⁷,

(f) para 13 of the judgment of the Supreme Court in ***Amritdhara Pharmacy v. Satya Deo Gupta***¹⁸,

(g) the judgment of the Supreme Court in ***UOI v. N. Murugesan***¹⁹, and

(h) paras 16, 17, 19, 20, 23 and 25 of the judgment of the Division Bench of this Court in ***Sanjha Chulha v. Sanjha Chulha***²⁰.

(iv) Bata had, in its plaint, provided sales figures only from 2008.

(v) Para 17 of the plaint had sought to point out that the appellant had applied under Section 23 of the Trade Marks Act for registration of the mark POWER FLEX in Class 25 on “proposed to be used” basis. This submission was misleading, as the application was filed on “proposed to be used” basis in 2009, whereas it was published in the Trade Marks Journal on 15 May 2017, by which time the POWER FLEX mark had been extensively used by Leayan and had acquired considerable goodwill and reputation.

(vi) In view of the goodwill and reputation that the POWER

¹⁷ 2009 SCC OnLine Del 3346

¹⁸ AIR 1963 SC 449

¹⁹ (2022) 2 SCC 25

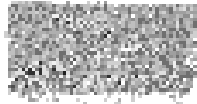
²⁰ (2023) 93 PTC 373



FLEX mark of Leayan had amassed by 2017, the submission of Bata, in its suit, that it had come to learn of the use, by Leayan, of the POWER FLEX mark, only in 2017, could not be believed.

(vii) Prosecution history estoppel was also pleaded. Reliance was placed, in this context, on para 4 of the written statement filed by Leayan before the learned Single Judge by way of response to the plaint, which read thus:

“4. That the plaintiff on 17.10.2012 was also issued Examination Report alongwith search report by the Trade Mark Registry in its trademark application no. 2186513 in



class 25 for trademark Ld. Registrar in the said Examination Report cited objection under Section 11 of the Trade Marks Act, 1999 as the search report cited POWER label registered under no. 1324117 in class 25 in favour of R.V. Himamudeen and POWERGUN label registered in favour of RAJ KUMAR JAGGI.

The plaintiff in its reply to the said Examination Report inter-alia stated:

“An objection has been raised by the Examiner under Section 11 of the Act that the mark is deceptively similar to the marks as shown in the search report. The subject mark is artistically conceptualized and graphically represented mark of the applicants. When observed carefully it gives a unique impression, which is visually structurally and conceptually different, leaving no room for any confusion among the purchasing public and trade. Besides being visually different, the subject mark has been extensively and continuously used by the applicants since the year 1975. Thus, it has already obtained distinctiveness through extensive usage. The applicant happens to be the bone-fide adopter of the mark POWER (logo), the applicant is using the mark POWER FLASH DEVICE WITH POWER (L) since 1975.”



The applicant wishes to associate the subject application with prior Registration No. 1072354.

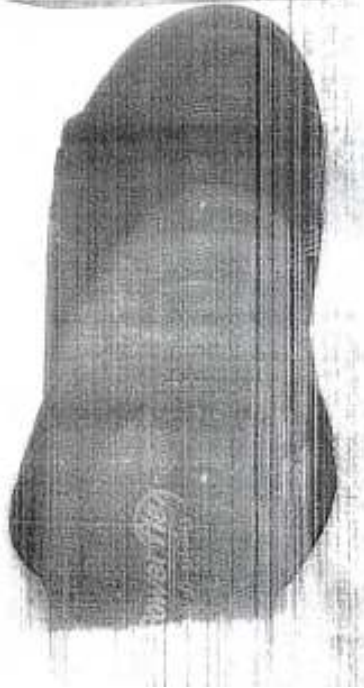
It is well settled in law that while comparison of marks it is not proper to compare a portion of a mark with a portion of another mark. Hence the above objections cannot be sustained under Section 11.”

(viii) There was no possibility of likelihood of confusion between the marks in view of the difference in the manner in which they were used. For this purpose, our attention was invited to the following photographs of Leayan’s footwear bearing the POWER FLEX mark:





PHOTOGRAPHS OF THE SHOE OF THE DEFENDANTS



- (ix) Moreover,
- (a) Leayan used the POWER FLEX mark for leather shoes, whereas Bata used its mark for canvas footwear and
 - (b) Leayan's shoes sold for over ₹ 8,000/- whereas Bata's POWER footwear was priced in the range of ₹ 2,000/-.
- (x) In these circumstances, the finding, of the learned Single Judge, that the evidence of the use of the mark POWER FLEX by Leayan was sketchy was not justified.

23. For all these reasons, Mr. Bansal submits that the impugned judgment deserves to be quashed and set aside.



Submissions of Mr. Neeraj Grover

24. Responding to Mr. Bansal's submissions, Mr. Neeraj Grover, appearing for Bata, asserts thus:

(i) No invoice, evidencing sale of goods bearing the POWER FLEX mark had been filed by Leayan with its written statement before the learned Single Judge.

(ii) In its counter-statement by way of response to the opposition by Bata to Application 1859213 of Leayan for registration of the POWER FLEX mark in Class 25, the only evidence submitted by Leayan was of user was in the form of

- (a) four illegible advertisements and
- (b) approximately 25 invoices, the earliest of which was of 2017, none of which referred to POWER FLEX marked goods.

(iii) There was no data forthcoming on any of the newspaper advertisements cited by Leayan, except some dates written in hand, which, too, did not mention the years in which the advertisements had been purportedly issued.

(iv) In-flight magazine advertisements, on which Leayan had placed reliance, too, did not refer to the POWER FLEX mark, except in very few cases.



(v) There were no sales figures, or figures of turnover, authenticated by any chartered accountant, produced by Leayan, as would establish long user, by it, of the POWER FLEX mark.

(vi) The learned Single Judge was, therefore, correct in holding that the evidence of user by Leayan of the POWER FLEX mark was sketchy.

(vii) As Bata had opposed the application filed by Leayan for registration of the POWER FLEX mark, there could be no question of acquiescence.

(viii) The plea of honest and concurrent user was never raised even before the Registrar of Trade Marks²¹ in Leayan's counter-statement filed by way of response to Bata's opposition. Besides, the plea of honest and concurrent user is a plea which is available under Section 12²² at the stage of application for registration of a trademark, and is not a plea available as a defence to an infringement action.

(ix) The position that emerged was, therefore, that Bata was the prior registered proprietor of the POWER mark with registrations of the mark both as a word mark as well as a

²¹ "ROTM" hereinafter

²² **12. Registration in the case of honest concurrent use, etc.—** In the case of honest concurrent use or of other special circumstances which in the opinion of the Registrar, make it proper so to do, he may permit the registration by more than one proprietor of the trade marks which are identical or similar (whether any such trade mark is already registered or not) in respect of the same or similar goods or services, subject to such conditions and limitations, if any, as the Registrar may think fit to impose.



device mark.

(x) In these circumstances, no exception could be taken to the decision of the learned Single Judge to injunct the use, by Leayan, of the POWER FLEX mark.

25. Mr. Grover further advanced the following submissions, in FAO(OS)(COMM) 193/2019, which was essentially directed against the concluding paras 33 to 35 of the impugned judgment:

(i) The learned Single Judge was not justified in allowing Leayan to use the tagline THE POWER OF REAL LEATHER. In this context, our attention was invited to the advertisement, in the Trade Marks Journal of 28 May 2018, of the application filed by Leayan for registration of the said tagline as a trademark, in which the tagline appeared as under:



(ii) The learned Single Judge was also not justified in permitting Leayan to exhaust the stock of POWER FLEX footwear stated to be available with it. No safeguards were put in place to ensure that the stock which was exhausted was the



existing stock. No open ended right to sell existing stock could thus be granted to Leayan. The consequence of such an open ended right was that, till date, Leayan was continuing to sell stocks which were purportedly in existence on the date of passing the impugned judgment by the learned Single Judge and had sold over 1 lakh shoes.

(iii) In these circumstances, it was prayed that Leayan ought to be directed to deposit the proceeds of the sales effected by it in terms of the liberty granted by the learned Single Judge, or at least a considerable part thereof.

(iv) The learned Single Judge was also not justified in deleting CBH from the array of parties. At least one of the invoices, which was on record, had been issued by CBH, for POWER FLEX marked goods. CBH was also, thereby, guilty of infringing Bata's POWER marks. Moreover, no application had been filed under Order I Rule 10 of the CPC, seeking at deletion of CBH from the array of parties.

Submissions of Mr. S.K. Bansal in rejoinder

26. Mr. Bansal submits, in rejoinder, that Bata cannot be heard to contend that the advertisements filed by Leayan were illegible, especially, as, in para 19 of the plaint, the only objection taken by Bata to the said advertisements were that their authenticity appeared to be in dispute. No plea regarding the advertisements were being illegible was taken. This plea could not, therefore, be urged in appeal.



27. Mr. Bansal further pointed out that paras 18 and 20 of the impugned judgment acknowledged the fact that there were advertisements, evidencing use of the POWER FLEX mark by Leayan, of 2011-12. The finding, of the learned Single Judge, that there were only six or seven such advertisements was incorrect. Over 100 advertisements, showing sale of POWER FLEX branded goods on pan-India basis, were available on record.

28. Insofar as Mr. Grover's contention that the invoices filed by Leayan did not refer to the mark POWER FLEX was concerned, Mr. Bansal submitted that the invoices referred to Article Numbers, and that invoices in such cases do not mention the brand of the product.

29. Mr. Bansal also contests Mr. Grover's contention that, in the garb of acting under the liberty provided by the learned Single Judge, Leayan had disposed of goods in excess of those which were in stock. He submits that 38,000 pairs of footwears were in stock, and that Leayan was only disposing of approximately 1000 pieces per quarter, so that the disposal was still continuing.

30. Finally, Mr. Bansal submits that the learned Single Judge was entirely justified in allowing use, by Leayan, of the tagline THE POWER OF REAL LEATHER, as the use of POWER as a part of the said tagline could not result in confusion in the minds of the public.



Analysis

Re. FAO (OS) (Comm) 105/2019

31. Re: Submission that impleadment of CBH as Defendant 1 in the suit was improper and illegal.

31.1 Mr. Bansal's first submission was that the very impleadment of CBH as Defendant 1 in the suit was improper and illegal and engineered with a view to ensure that the matter would not be noticed in the cause list. He places reliance for this submission on the judgment of the Division Bench of this Court in *Micolube India Ltd.*

31.2 Before addressing this submission, we may note that, even if Mr. Bansal's submissions were to be accepted, and the impleadment of CBH as Defendant 1 were to be treated as irregular, that cannot constitute a ground for us to reverse the judgment of the learned Single Judge. In fact, the learned Single Judge has also, in a manner of speaking, agreed with Mr. Bansal's submission and has even issued directions to the Registry to ensure that, in all future cases, the main contesting defendant is Defendant 1.

31.3 Mr. Grover submits that CBH cannot be treated as a non-contesting defendant. He points out that sale of goods bearing infringing marks is also an act of infringement, as Section 29(2)²³

²³ (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



envisages “use” of the deceptively similar mark within the course of trade as infringement, and Section 29(6)(b)²⁴ of the Trade Marks Act includes, in “use”, offering of the goods bearing the infringing mark for sale, especially as infringement, within the meaning of Section 29(2), involves dealing with goods bearing the infringing mark in the course of trade. As such, Leayan and CBH were equally guilty of infringement, and neither one could be treated as lesser defendant than the other.

31.4 We agree with this submission. The law does not distinguish between degrees of defendants. A defendant may be a contesting defendant or a *proforma* defendant. Among contesting defendants, there cannot be a “main” contesting defendant and a supplementary contesting defendant. For all one knows, in a given case, the “main contesting defendant” may not even choose to contest the case whereas the other contesting defendant(s) may!

31.5 CBH was, therefore, as much a contesting defendant as Leayan. We cannot, therefore, agree with Mr. Bansal, or for that matter with the learned Single Judge, in the finding that the impleadment of CBH as Defendant 1 was irregular, much less illegal.

(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.

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

(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;

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31.6 Besides, intellectual property litigant cannot afford to reside in its own pristine heaven, alien to the CPC. Civil litigation in this country has to abide by the provisions of the statute, and the prevailing procedural statute in that regard is the CPC. The CPC does not contain any provision which requires a plaintiff to implead defendants in a particular sequence. All necessary and proper parties have to be impleaded as defendants, and that is all.

31.7 Nor are there any provisions to be found in the Delhi High Court (Original Side) Rules, 2018 or in the Intellectual Property Division Rules, 2022, applicable in this Court, specifying the sequence in which the defendants have to be arrayed. Even for this reason, it cannot be said that the appellant's impleadment of CBH as Defendant 1 in the suit was in any way irregular.

31.8 A learned Single Judge of this Court has, in *Micolube India Ltd v Maggon Auto Centre*²⁵, opined as under:

“25. Another factor which goes against the plaintiff is the manner in which the parties have been arrayed. The defendant No. 2 is the main defendant who has the registration of the well known mark ‘MICO’ in respect of automotive parts. However, the plaintiff has chosen to array Maggon Auto Centre as the main defendant when, according to the averments made in paragraph 17 of the plaint, it is averred that the defendant No. 1 is only a dealer of the impugned goods of the defendant No. 2 and that the exact relationship between them is not known to the plaintiff and that the defendant No. 2 is called upon to disclose the exact relationship between them. It is unfortunate that the main defendant (Motor Industries Co. Ltd.) has been arrayed as defendant No. 2 and Maggon Auto Centre, who is alleged to be a dealer of the main defendant and whose exact relationship is unknown to the plaintiff is arrayed as defendant No. 1. It is not only in this case, but in several other cases that this Court has noticed this unhealthy trend



on the part of the plaintiffs to array the main defendant as defendant No. 2 or defendant No. 3 while naming some innocuous dealer or retail outlet as defendant No. 1. The object is easily discernible. When the counsel for the main defendants scan the list of cases, they would not be able to know as to whether any case has been filed against them so as to enable them to appear on the very first date on which the case is listed before court. The very fact that the plaintiff has also indulged in this practice is also an indicator that it did not want the counsel for the defendant No. 2 to appear on the first date on which the matter was taken up for consideration of the grant or non-grant of ad interim injunction. *This fact also disentitles the plaintiff to any equitable relief. I am of the view that the plaintiff has concealed and suppressed material facts from this Court.*”

(Emphasis supplied)

31.9 In para 16 of the impugned judgment, the learned Single Judge has observed that the Division Bench of this Court has, in ***Micolube India Ltd v. Maggon Auto Centre***²⁶, which was the appeal against ***Micolube-I***, upheld the view of the learned Single Judge as contained in para 28 of the said decision.

31.10 We cannot agree. There is no affirmation, in the judgment of the Division Bench in ***Micolube-II***, of the observation of the learned Single Judge, in para 25 of ***Micolube-I***, that merely because a “lesser” defendant had been impleaded as the first defendant in the suit, the plaintiff would be disentitled to interim relief.

31.11 The view that the manner in which the defendants have been arrayed as party in the suit can be a ground to disentitle a plaintiff to interim relief is, to our mind, contrary to the basic principles governing Order XXXIX of the CPC. There are only three considerations which govern grant of injunction in Order XXXIX,



which are (i) the existence of a *prima facie* case, (ii) balance of convenience and (iii) the possibility of irreparable loss ensuing to the plaintiff were injunction not to be granted. To these, the decisions in ***Ramnik Lal Bhutta v. State of Maharashtra***²⁷ and ***Raunaq International Ltd v. I.V.R. Construction Ltd***²⁸ added a fourth consideration, which was public interest.

31.12 Apart from these, there is no other consideration which governs grant, or refusal, of interim relief, in terms of Order XXXIX of the CPC.

31.13 We, therefore, do not agree with the observation, in para 25 of ***Micolube-I***, that the sequence in which the defendants in a suit have been arrayed by the plaintiff can constitute a relevant consideration for grant, or refusal, of interim relief.

31.14 Equally, therefore, the impugned judgment, to the extent it adopts the same view, can also not be sustained.

31.15 That said, this is not a factor on the basis of which we can either uphold or set aside the impugned judgment of the learned Single Judge.

32. Principles relating to infringement and injunction

32.1 Before proceeding to the impugned order, it would be relevant

²⁷ (1997) 1 SCC 134

²⁸ (1999) 1 SCC 492



to set out the basic principles relating to trademark infringement and remedies available thereagainst, as contained in the Trade Marks Act, in so far as they are relevant to the issues in controversy.

32.2 Infringement – Deceptive similarity and likelihood of confusion

32.2.1 Infringement is entirely defined in Section 29 of the Trade Marks Act. Of its various sub-sections and clauses, the only clause of significance, for our purpose, is Section 29(2)(b)²⁹. The ingredients of tort of infringement as envisaged by Section 29(2)(b) are the following:

(i) Infringement has to be of a registered trademark. As such, no one can allege that his trade mark, which is not registered under Section 23 of the Trade Marks Act, is infringed.

(ii) Infringement has to be by a person who is neither a registered proprietor of the infringing mark or using the infringing mark by way of permitted use. “Permitted use” is defined in Section 2(r)³⁰. A user of a registered trade mark, with

²⁹ (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—

(b) its similarity to the registered trade mark and the identity or similarity 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.

³⁰ (r) “permitted use”, in relation to a registered trade mark, means the use of trade mark—

(i) by a registered user of the trade mark in relation to goods or services—

(a) with which he is connected in the course of trade; and

(b) in respect of which the trade mark remains registered for the time being; and

(c) for which he is registered as registered user; and

(d) which complies with any conditions or limitations to which the registration of registered user is subject; or



permission to do so in terms of Section 2(r) is not, therefore, an infringer.

(iii) The infringing mark must be “used in the course of trade”. The Trade Marks Act does not specifically define “use in the course of trade”. However, Section 29(6) and Section 2(2)(b) and (c) are relevant in this regard.

(iv) Section 29(6) states that, for the purposes of Section 29, a person uses a registered mark in any one or more of the four circumstances enumerated in Clauses (a) to (d) thereof. These are if

- (a) the mark is affixed to goods or to their packaging,
- (b) the said goods are, under the mark,
 - (i) offered or exposed for sale, or
 - (ii) put on the market, or
 - (iii) stocked for the purposes of offering or exposing the goods for sale or putting them on the market, or
 - (iv) imported or exported, or
- (c) the mark is used on business papers or in advertising.

(v) “Use of a mark”, for the purposes of the Trade Marks

(ii) by a person other than the registered proprietor and registered user in relation to goods or services—

- (a) with which he is connected in the course of trade; and
- (b) in respect of which the trade mark remains registered for the time being; and
- (c) by consent of such registered proprietor in a written agreement; and
- (d) which complies with any conditions or limitations to which such user is subject and to which the registration of the trade mark is subject

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Act, is also explained in Section 2(2)(b) and (c)³¹. Read together, and in relation to goods, Section 2(2)(b) and 2(2)(c)(i) state that reference, in the Trade Marks Act, to the use of a mark shall be construed as a reference to the use of

- (a) printed or other visual representation of the mark and
- (b) use of the mark upon, or in any physical or in any other relation whatsoever, to the goods.

(vi) The infringing mark must be similar to the registered trademark.

(vii) The goods or services covered by the rival marks must be identical or similar.

(viii) Owing to the similarity between the marks, and the identity or similarity of the goods or services covered thereby, there is, on the part of the public, likelihood of

- (a) confusion, or
- (b) an association between the marks.

32.2.2 Likelihood of confusion

³¹ (2) In this Act, unless the context otherwise requires, any reference—

- (b) to the use of a mark shall be construed as a reference to the use of printed or other visual representation of the mark;
- (c) to the use of a mark,—
- (i) in relation to goods, shall be construed as a reference to the use of the mark upon, or in any physical or in any other relation whatsoever, to such goods;
- (ii) in relation to services, shall be construed as a reference to the use of the mark as or as part of any statement about the availability, provision or performance of such services;



The following passages, from *Pernod Ricard India Pvt Ltd v. Karanveer Singh Chhabra*³², classically delineate the principles on the basis of which the Court is to examine whether there is likelihood of confusion, in a trade mark infringement analysis:

“35. The average consumer test is a central standard in trademark and unfair competition law. It assesses whether there exists a likelihood of confusion between two marks, or whether a mark lacks distinctiveness or is merely descriptive. The test is grounded in the perception of the average consumer - a person who is reasonably well-informed, observant, and circumspect, but not an expert or overly analytical. As held by the European Court of Justice in *Lloyd Schuhfabrik Meyer v. Klijsen Handel BV*³³, the average consumer forms an overall impression of a mark rather than dissecting it into individual components.

35.1. A key feature of this test is the recognition that consumers rarely recall trademarks with perfect accuracy. For example, this Court in *Amritdhara Pharmacy v. Satyadeo Gupta* emphasized that the comparison must be made from the perspective of a person of average intelligence and imperfect recollection. Thus, minor phonetic or visual similarities may cause confusion if the marks share prominent or memorable features. The test also considers that the degree of consumer attentiveness may vary depending on the nature of the goods: greater care may be exercised when purchasing luxury items than in the case of everyday consumer goods.

35.2. The test is equally relevant to both inherent and acquired distinctiveness. A mark has inherent distinctiveness if, by its very form and appearance, it identifies trade origin to the average consumer at the time of registration. A mark may acquire distinctiveness if, through consistent and prolonged use, it becomes associated by a significant portion of the relevant public with a particular commercial source - even if the consumer cannot name the source precisely. What matters is not that the consumer knows the producer, but that the mark serves as an indicator of origin.

35.3. However, the test has limitations. In cases involving product shapes or designs, where the features serve a technical function or add substantial value, policy considerations may override consumer perception. While the average consumer may

³² 2025 SCC OnLine SC 1701

³³ Case C-342/97; [2000] FSR 77, ECJ



identify the essential characteristics of a product's shape or configuration, their opinion is not determinative in assessing registrability, especially where legal prohibitions against functional or aesthetic monopolies come into play.

35.4. The doctrine of imperfect recollection, closely linked to the average consumer test, emphasizes the importance of first impression. Courts have cautioned against overly technical or granular comparisons of trademarks [See: *James Crossley Eno v. William George Dunn*³⁴ and *Aristoc Ltd. v. Rysta Ltd*³⁵]. Instead, they have favoured realistic assessments that account for hazy memory, indistinct pronunciation, and fleeting visual impressions. Notably, invented or fanciful words are generally more difficult to recall than common or descriptive ones, and distinctive features are more likely to be retained in the consumer's memory.

35.5. The foundational test for assessing deceptive similarity remains the *Pianotist Test*, as laid down in *Pianotist Co. Ltd's Application*³⁶ by Justice Parker. Indian courts continue to apply this holistic standard, which requires consideration of the visual and phonetic similarity of the marks, the nature of the goods, the class of consumers, and all surrounding circumstances. Justice Parker framed the test as follows:

“You must take the two words. You must judge of them, both by their look and by their sound. You must consider the goods to which they are applied, the nature and kind of customer who would be likely to buy the goods, and all the surrounding circumstances. You must further consider what is likely to happen if each of these trademarks is used in a normal way for the respective goods. If, considering all these circumstances, you come to the conclusion that there will be confusion - not necessarily that one trader will be passed off as another - but that there will be confusion in the mind of the public leading to confusion in the goods, then registration must be refused.”

35.6. This multifactorial framework complements the modern average consumer test, ensuring that the analysis of deceptive similarity remains practical and context-sensitive. It focuses on the overall commercial impression left by the marks, rather than conducting a mechanical or analytical breakdown. Indian courts have consistently adopted this approach in determining the likelihood of confusion in both infringement and passing off

³⁴ H.L. (E) 1890, June 19. Vol. XV. App. Cas. Page 252

³⁵ 1945 AC 68 (HL)

³⁶ (1906) 23 RPC 774



actions.”

32.3 Sequelae to infringement

32.3.1 Where infringement is found to exist, the consequences envisaged by Section 28 follow.

32.3.2 Section 28(1)³⁷ confers, on the registrant of every validly registered trademark, two rights.

32.3.3 The first is the exclusive right to use the mark in relation to the goods or services in respect of which it is registered. In other words, the registrant can oppose or contest the use of the registered trademark, in respect of the goods or services for which the mark is registered by any other person. The exclusive right to use the mark vests, and rests, with its registrant.

32.3.4 The second right that Section 28(1) confers on the registrant of a validly registered trademark is the right to obtain relief in respect of infringement of the mark “in the manner provided by” the Trade Marks Act. The manner in which relief can be obtained in cases of infringement is provided in sub-section (1) of Section 135³⁸. Sub-section (1) of Section 135 of the Trade Marks Act permits a court to,

³⁷ 28. **Rights conferred by registration.-**

(1) Subject to the other provisions of this Act, the registration of a trade mark shall, if valid, give to the registered proprietor of the trade mark the exclusive right to the use of the trade mark in relation to the goods or services in respect of which the trade mark is registered and to obtain relief in respect of infringement of the trade mark in the manner provided by this Act.

³⁸ 135. **Relief in suits for infringement or for passing off.-**

(1) The relief which a court may grant in any suit for infringement or for passing off referred to in Section 134 includes injunction (subject to such terms, if any, as the court thinks fit) and at the option of the plaintiff, either damages or an account of profits, together with or without any order for the delivery-up of the infringing labels and marks for destruction or erasure.



in cases of infringement, grant relief by way of injunction as well as by way of damages and delivery up.

32.4 Sections 29 and 28 are, therefore, the provisions which deal with infringement and the rights available to the proprietor of a registered trademark which is infringed.

32.5 Sections 17 and 30

32.5.1 The right to claim exclusivity in respect of a registered trademark, as envisaged in Section 28(1) of the Trade Marks Act is, however, subject to Section 17³⁹, which applies to marks which consist of more than one part, and which, therefore, may be referred to as “composite” trademarks. Section 17(1) clarifies that the registration of a composite trademark would confer, on the registrant, the right to claim exclusivity over the whole registered trademark. Section 17(2) makes the position clearer. Clauses (a) and (b) of Section 17(2), read together, proscribe any claim of exclusivity in respect of a part of a registered composite trademark, where

- (i) the part is not separately registered as a trademark,
- (ii) no application has been filed to register the said part as a

³⁹ 17. **Effect of registration of parts of a mark.—**

- (1) When a trade mark consists of several matters, its registration shall confer on the proprietor exclusive right to the use of the trade mark taken as a whole.
 - (2) Notwithstanding anything contained in sub-section (1), when a trade mark—
 - (a) contains any part—
 - (i) which is not the subject of a separate application by the proprietor for registration as a trade mark; or
 - (ii) which is not separately registered by the proprietor as a trade mark;
 - or
 - (b) contains any matter which is common to the trade or is otherwise of a non-distinctive character,
- the registration thereof shall not confer any exclusive right in the matter forming only a part of the whole of the trade mark so registered.



separate trademark,

- (iii) the mark is common to the trade or
- (iv) the mark is non-distinctive in character.

32.5.2 The various sub sections of Section 30 encapsulate exceptions to Section 29. In other words, even if the act of the defendant satisfies the ingredients of infringement as defined in one or more of the sub-sections of Section 29, the act would nonetheless not amount to infringement if it falls within one or more of the sub-sections of Section 30.

32.5.3 Of these, the only clause which is relevant for our purposes is Section 30(2)(a)⁴⁰, which excludes, from the ambit of “infringement”, use of a trademark to indicate

- (i) the kind,
- (ii) the quality,
- (iii) the quantity,
- (iv) the intended purpose,
- (v) the value,
- (vi) the geographical origin,
- (vii) the time of production, or
- (viii) other characteristics,

of goods. A mark which indicates the characteristics of the goods in respect of which it is used is, therefore, not infringing by virtue of Section 30(2)(a) even if it otherwise satisfies the ingredients of one or

⁴⁰ (2) A registered trade mark is not infringed where—
(a) the use in relation to goods or services indicates the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services or other characteristics of goods or services;



more of the sub-sections of Section 29.

32.6 Exceptions to the right to obtain injunction

32.6.1 Sections 28(3) and 33 to 36 envision circumstances in which no injunction can be obtained against an infringing mark. In other words, even if a defendant's marks is infringing within the meaning of Section 29 and none of the exceptions to infringement as envisaged in Section 30 applies, the plaintiff would still not be entitled to injunction if the case falls within Section 28(3) or Sections 33 to 36.

32.6.2 Of these provisions, we need to refer only to Sections 33(1)⁴¹ and 35.

32.6.3 Acquiescence – Section 33

32.6.3.1 Section 33(1) deals with acquiescence. It disentitles the proprietor of a registered trademark from opposing the use of a later trademark, if he has acquiesced for a continuous period of five years in the use of such later trademark, being aware of the said use.

32.6.3.2 Section 33(1) is confusingly worded. It starts with the words, “Where the proprietor of *an earlier trade mark* has acquiesced

⁴¹ 33. **Effect of acquiescence.—**

(1) Where the proprietor of an earlier trade mark has acquiesced for a continuous period of five years in the use of a registered trade mark, being aware of that use, he shall no longer be entitled on the basis of that earlier trade mark—

(a) to apply for a declaration that the registration of the later trade mark is invalid, or

(b) to oppose the use of the later trade mark in relation to the goods or services in relation to which it has been so used,

unless the registration of the later trade mark was not applied in good faith.



for a continuous period of five years in the use of a *registered trade mark ...*” The consequence, where acquiescence within the meaning of Section 33(1) is found to exist, is that the proprietor of the earlier trade mark cannot “oppose the use of the later trade mark in relation to the goods or services in relation to which it has been so used”.

32.6.3.3 This creates logistical difficulties in understanding the provision. Under the Trade Marks Act, opposition, to the use of a trade mark, can only be by way of an injunction under Section 135(1), on the ground of infringement. Else, one would have to apply to removal of the mark from the register of trade marks, under Section 47(1)⁴² (on the ground of non-use) or Section 57(1) or (2)⁴³.

⁴² 47. Removal from register and imposition of limitations on ground of non-use.—

(1) A registered trade mark may be taken off the register in respect of the goods or services in respect of which it is registered on application made in the prescribed manner to the Registrar or the [High Court] by any person aggrieved on the ground either—

(a) that the trade mark was registered without any bona fide intention on the part of the applicant for registration that it should be used in relation to those goods or services by him or, in a case to which the provisions of Section 46 apply, by the company concerned or the registered user, as the case may be, and that there has, in fact, been no bona fide use of the trade mark in relation to those goods or services by any proprietor thereof for the time being up to a date three months before the date of the application; or

(b) that up to a date three months before the date of the application, a continuous period of five years from the date on which the trade mark is actually entered in the register or longer had elapsed during which the trade mark was registered and during which there was no bona fide use thereof in relation to those goods or services by any proprietor thereof for the time being:

Provided that except where the applicant has been permitted under Section 12 to register an identical or nearly resembling trade mark in respect of the goods or services in question, or where the [Registrar or the High Court, as the case may be,] is of opinion that he might properly be permitted so to register such a trade mark, the [Registrar or the High Court, as the case may be,] may refuse an application under clause (a) or clause (b) in relation to any goods or services, if it is shown that there has been, before the relevant date or during the relevant period, as the case may be, bona fide use of the trade mark by any proprietor thereof for the time being in relation to—

(i) goods or services of the same description; or

(ii) goods or services associated with those goods or services of that description being goods or services, as the case may be, in respect of which the trade mark is registered.

⁴³ 57. Power to cancel or vary registration and to rectify the register.—

(1) On application made in the prescribed manner to the [High Court] or to the Registrar by any person aggrieved, the [Registrar or the High Court, as the case may be,] may make such order as it may think fit for cancelling or varying the registration of a trade mark on the ground of any contravention, or failure to observe a condition entered on the register in relation thereto.

(2) Any person aggrieved by the absence or omission from the register of any entry, or by any entry made in the register without sufficient cause, or by any entry wrongly remaining on the register, or by any error or defect in any entry in the register, may apply in the prescribed manner to the [High Court] or to the Registrar, and the [Registrar or the High Court, as the case may be,]

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32.6.3.4 A *registered* trade mark cannot, however, be infringing, as we have already noted. There cannot, therefore, be any opposition to use of a *registered* trade mark (except on the ground of passing off). When, then, would the bar to injunction on the ground of acquiescence, under Section 33, apply, as it applies only where the plaintiff has acquiesced to the use, by the defendant, of a *registered trade mark*?

32.6.3.5 Or are the words “registered trade mark” as employed in Section 33 to be understood as the registered trade mark of the plaintiff? Besides the fact that such a construction does not strictly flow from Section 33, that would give rise to a further question – Would Section 33 not apply where the defendant is using a deceptively similar trade mark? If, therefore, a plaintiff acquiesces to the use, by the defendant, of a trade mark which is deceptively similar to the registered trade mark of the plaintiff for a continuous period of five years, would, or would not, Section 33 apply?

32.6.3.6 These are all issues on which the statute is not clear, and upon which the Court may, in an appropriate case, have to deliberate. In the present case, as we would find hereinafter, no acquiescence can legitimately be pleaded by Leayan, so that we need not enter further into that thicket.

32.7 Section 35 – Descriptive marks cannot be injuncted

may make such order for making, expunging or varying the entry as it may think fit.

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32.7.1 Section 35 proscribes an injunction against the use of a defendant's trademark, if the said trademark is a *bona fide* use of

- (i) the name of the defendant,
 - (ii) the place of business of the defendant,
 - (iii) the name of the place of business of the defendant,
 - (iv) the name of the predecessor in business of the defendant
- or
- (v) a description of the character or quality of the goods or services in respect of which it is used.

32.8 The sustainability of the impugned judgment has to be assessed on the basis of the above principles. We proceed, therefore, to apply these principles to the facts before us.

33. The aspects of registration and infringement

33.1 It is not in dispute that, among others, Bata is the registered proprietor of the word mark POWER and the device mark , in Class 25, for "footwear included in Class 25" with effect from 7 March 1975. Class 25 is titled "clothing, footwear, headwear". The Explanatory Note to Class 25, as contained in the Nice Classification applicable for registration of trade marks, states that Class 25 "includes mainly clothing, footwear and headwear for human beings". All footwear, therefore, falls in Class 25. The goods in respect of which Bata's POWER word and device marks stand registered, and the leather footwear for which Leayan uses the POWER FLEX mark,



therefore, are both in Class 25.

33.2 Thus, Bata was the registered proprietor of the word mark of POWER as a word as well as device mark, in Class 25 for footwear with effect from as far as back as 7 March 1975. Leayan, on the other hand, has no registration for any mark, including POWER FLEX, in any class.

33.3 Thus, Leayan, cannot claim any right to use the mark POWER FLEX either as its registered user or permissive user within the meaning of Section 29(2)(b) of the Trade Marks Act.

33.4 The plea of difference in goods

33.4.1 Leayan sought to contend that, as the POWER FLEX mark is used for leather footwear and Bata's POWER mark is used for canvas footwear, the goods are not similar, and there is no likelihood of confusion between the marks.

33.4.2 This plea was rightly rejected by the learned Single Judge on two grounds.

33.4.3 Firstly, Section 29(2)(b) does not require the rival marks to be used in respect of identical goods. They may be used for identical, or similar, goods. The word "similar" as used in Section 29(2)(b) includes goods which are allied or cognate. In fact, with the advancement and expansion of trade and commerce, the scope of the expression "similar" as used in Section 29(2)(b) has expanded



manifold. We are in an age in which, under one umbrella brand, goods which are completely diverse and unconnected with each other may be manufactured or sold under the same mark. In such a scenario, canvas footwear and leather footwear have necessarily to be regarded as “similar” goods, for the purposes of Section 29(2)(b).

33.4.4 This conclusion would also stand fortified by the fact that both kinds of footwear fall within Class 25.

33.4.5 The learned Single Judge has also correctly held that, while examining the aspect of similarity and likelihood of confusion, the Court must take into account the possibility of scope for expansion of the plaintiff’s commercial enterprise. Simply put, Bata may today be using the mark POWER for canvas footwear, but there is every possibility of Bata expanding the range of footwear manufactured and sold by it under the POWER brand to include leather footwear or any other kind of footwear.

33.4.6 This may be easily understood when one applies, to the present case, the perception of the consumer of average intelligence and imperfect recollection, who is the mythical personality from whose point of view the aspect of likelihood of confusion between the marks has to be assessed. There is every likelihood of such an average consumer, who is aware of the POWER brand of Bata used for canvas footwear, on coming across the POWER FLEX brand for leather footwear, presuming that Bata might have expanded its reach to include leather footwear. This likelihood of confusion stands exaggerated by the similarities between the marks POWER and



POWER FLEX. The mark POWER FLEX subsumes, in its entirety, the POWER brand of Bata. An average consumer who is unaware of the realities of the situation has every likelihood of believing that POWER FLEX is a sub-brand of POWER, especially as both the marks are used for footwear.

33.4.7 In this context, it is also necessary to note that Section 29(2)(b) does not inexorably require likelihood of confusion in the mind of the public, for infringement to be found to exist. Even the likelihood of an association between the marks would suffice. Applying this principle, there is every likelihood of a consumer who comes across, who is aware of Bata's POWER brand, used for canvas footwear, and later comes across Leayan's POWER FLEX brand used for leather footwear, believing an association between the marks. The consumer, it must be remembered, is a man of *imperfect* recollection.

33.4.8 The fact that Bata's POWER mark is used for canvas footwear and Leayan's POWER FLEX mark for leather footwear, therefore, is not of any substantial significance.

33.5 Two other principles, which apply while examining the aspect of likelihood of confusion, and which further support the finding of the learned Single Judge in that regard, required to be mentioned.

33.6 Marks not to be placed side by side

The first is that the aspect of infringement is not required to be



examined by placing the rival marks side by side.⁴⁴ The average consumer must have come across Bata's POWER brand at one point of time and, later, come across Leayan's POWER FLEX brand. The Court, while assessing whether infringement has taken place, has to examine the likelihood of confusion or association, in the mind of such a consumer, when he chances across Leayan's POWER FLEX brand after having known of Bata's POWER mark or come across Bata's POWER mark at an earlier point of time.

33.7 Initial interest confusion

33.7.1 The second aspect is that the likelihood of confusion or association has to be examined from an "initial interest" point of view.⁴⁵ What is pivotal, therefore, is the initial impression that Leayan's POWER FLEX mark creates in the mind of the average consumer who has earlier come across, or who is aware of, Bata's POWER mark. If, at first glance, initial impression that is created in the mind of such a consumer is that he has seen the mark earlier, or that the two marks may be associated in some way, that by itself suffices to make out a case of infringement.

33.7.2 In *Shree Nath Heritage Liquor*, the Division Bench of this Court, speaking through Pradeep Nandrajog, J. has pithily referred to the state of mind of such a consumer as one of "wonderment". If, on coming across Leayan's POWER FLEX mark, the consumer of average intelligence and imperfect recollection is placed in a state of

⁴⁴ Refer *Pernod Ricard India Pvt Ltd v. Karanveer Singh Chhabra*, 2025 SCC OnLine SC 1701

⁴⁵ Refer *Pernod Ricard, Shree Nath Heritage Liquor, Under Armour Inc. v. Anish Agrawal*, 2025 SCC OnLine Del 3784 (DB)



wonderment as to whether he has seen the said mark earlier, or whether the mark which he has seen earlier is in any way associated with the POWER FLEX mark, that constitutes infringement, with nothing else required to be shown.

33.8 Applying these principles, we find ourselves entirely in agreement with the learned Single Judge in her finding that there was deceptive similarity between the POWER FLEX mark of Leayan and POWER mark of Bata. As both the marks were used for goods which were similar, there is also likelihood of confusion. The ingredients of Section 29(2)(b) thereby, stands fully satisfied. A *prima facie* case of infringement is, therefore, made out.

34. Defences as raised by Leayan – The “distinctive-descriptive” see-saw

34.1 As we have already noticed, the inquisitorial exercise, in a trade mark infringement action, does not end with the finding that the plaintiff’s mark is registered, and that the defendant’s mark is infringing. The Court has additionally to consider whether the case falls within one of the exceptions to infringement, or to grant of injunction.

34.2 Mr. Bansal has invoked two of these exceptions. He contends that

- (i) Bata’s POWER mark is not distinctive, and
- (xi) Leayan’s POWER FLEX mark is descriptive in nature.

Mr. Bansal, thereby, invokes both Section 17(2)(b) and Section 35 of



the Trade Marks Act.

34.3 We address these submissions individually, as they are fundamentally different. Both are defences. However, Section 17(2)(b) is a defence which attacks the plaintiff's mark as lacking in distinctiveness, whereas Section 35 is cited as a defence against injunction of the defendant's mark, even if it were assumed to be infringing. Section 17(2)(b), therefore, applies to the plaintiff's mark, whereas Section 35 applies to the defendant's.

34.4 Re. plea that the POWER mark lacks distinctiveness – Section 17(2)(b)

34.4.1 Though Section 17(2)(b) does not permit any claim of exclusivity over a mark which is not distinctive, it does not contain any guideline as to how to decide whether a particular mark is, or is not, distinctive. The Trade Marks Act is, however, thankfully not silent in this regard, as the answer to this query is to be found in Section 9(1)(a)⁴⁶ of the Trade Marks Act. Section 9 contains the absolute grounds on which registration of a trademark may be refused. Clause (a) of Section 9(1) does not allow registration of trademarks which are devoid of any distinctive character. The expression “devoid of any distinctive character” is explained, in the same clause, as “not capable of distinguishing the goods or services of one person from those of another person”. There is no reason as to why this

⁴⁶ 9. **Absolute grounds for refusal of registration.—**

- (1) The trade marks—
(a) which are devoid of any distinctive character, that is to say, not capable of distinguishing the goods or services of one person from those of another person;

shall not be registered:

Signature Not Verified

Digitally Signed By: AHT
KUMAR
Signing Date: 15.12.2025
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FAO(OS) (COMM) 105/2019 and FAO(OS) (COMM) 193/2019



explanation for the expression “devoid of any distinctive character” should not be applied to understand the expression “non-distinctive character” in Section 17(2)(b).

34.4.2 Thus, by virtue of Section 17(2)(b), no exclusivity can be claimed over a mark which is not capable of distinguishing the goods of one person from those of another. *The aspect of distinctiveness, or the absence of it, has, therefore, to be assessed not merely by referring to the mark in vacuo, but in the context of the goods or services for which it is used.* A common dictionary word, which may be part of daily usage, may become distinctive when used for goods or services with which it has no immediate connection.

34.4.3 We, in this context, are in entire agreement with the learned Single Judge’s observation that the word “POWER” does not evoke a connect, in the mind, between the mark and footwear, as it may, for example, evoke, if it were to be used in the context of boxing gloves. While the mark POWER may, therefore, *arguendo*, not be distinctive when used for an item such a boxing gloves or, for that matter, an electric plug, it *is* distinctive when used for footwear.

34.4.4 Leayan’s contention that the mark POWER was lacking in distinctiveness cannot, therefore, be accepted.

34.5 Re. plea that POWER FLEX is a descriptive mark, and cannot be injuncted – Section 35



34.5.1 In the impugned judgment, the learned Single Judge has also gone on to distinguish between descriptive marks and suggestive marks. Marks which are descriptive are not capable of being registered, in view of Section 9(1)(b)⁴⁷ and cannot be enjoined because of Section 35; however, marks which, though not descriptive, are merely suggestive, may be registered, and can be enjoined. The position in law, in this regard, stands settled by the judgment of the Supreme Court in *T.V. Venugopal v. Ushodaya Enterprises*⁴⁸.

34.5.2 The learned Single Judge has referred to various tests that have been evolved from time to time to decide whether a mark is distinctive or suggestive. In the facts of the present case, we do not deem any detailed discussion on that aspect to be necessary as, in our view, the word POWER FLEX is not even suggestive of footwear. The mark POWER FLEX does not bring, to mind, footwear. It cannot, therefore, be regarded as “(descriptive) of the character or quality” of the leather footwear of Leayan, within the meaning of Section 35.

34.6 Even if it were to be assumed that Leayan’s POWER FLEX footwear was flexible in nature, which is one of Mr. Bansal’s contentions, that would, at the highest, render the mark POWER FLEX suggestive of the characteristics of the leather footwear used by Leayan, and not descriptive thereof. The applicable test, to determine

⁴⁷ 9. **Absolute grounds for refusal of registration.—**

(1) The trade marks—

(b) which consist exclusively of marks or indications which may serve in trade to designate the kind, quality, quantity, intended purpose, values, geographical origin or the time of production of the goods or rendering of the service or other characteristics of the goods or service;

shall not be registered:

⁴⁸ (2011) 4 SCC 85



whether a mark is descriptive, or suggestive, of the goods in respect of which it is used, or neither, is, to our mind, the extent to which the imagination must be strained to draw a connect between the mark and the goods. If the connect is immediate, the mark is descriptive; if, by straining the imagination, a connection can be found, the mark may be suggestive; if, however, there is no connect at all – such as, for example, the mark TODAY for perfumes – the mark is neither. Illuminatingly, *Pernod Ricard* refers to marks such as Air India, Mother Dairy, HMT, Windows, Doordarshan, LIC and SBI as being descriptive.

34.7 As the mark POWER FLEX is not descriptive of the characteristics of the leather footwear for which it was used by Leayan, Leayan cannot claim the protection of Section 35.

34.8 Thus, as

- (i) Bata's POWER mark cannot be said to be lacking in distinctiveness and
- (ii) Leayan's POWER FLEX mark is not entitled to the protection of Section 35,

there is no statutory impediment against the grant of injunction in favour of Bata and against Leayan for use of the mark POWER FLEX in respect of footwear.

35. Re. plea of delay and acquiescence

35.1 One of Mr. Bansal's principal arguments was predicated on the principles of delay and acquiescence. He submitted that Leayan has



been using the POWER FLEX since 2010-11, i.e. for eight years before the suit was instituted by Bata. During this period, Leayan garnered considerable goodwill and reputation in the mark POWER FLEX. Having thus permitted Leayan to acquire goodwill and reputation in the mark POWER FLEX over an extended period of time, despite knowing the fact that Leayan was using the said mark, Bata was proscribed from seeking to injunct the mark at a belated stage, on the principles of delay and acquiescence.

35.2 There are multifarious reasons why this submission cannot be accepted, both of facts as well as of law.

35.3 No evidence of goodwill or reputation of POWER FLEX mark of Leayan

35.3.1 The first is that, as the learned Single Judge has correctly held, the evidence of the mark POWER FLEX or Leayan having garnered goodwill and reputation was sketchy. Mr. Bansal has taken serious exception to the use of this expression by the learned Single Judge. We, however, are in entire agreement with the learned Single Judge in this regard.

35.3.2 Mr. Bansal essentially sought to predicate his plea of goodwill and reputation on

- (i) newspaper advertisements
- (ii) invoices,
- (iii) TV advertisements and
- (iv) the presence of over 135 stores of Leayan, pan-India.



35.3.3 As the learned Single Judge has correctly held, we are concerned, here, not with Leayan's goodwill and reputation, but with the goodwill and reputation of Leayan's mark POWER FLEX.

35.3.4 When one examines the material on which Mr. Bansal has placed reliance, in this context, the following picture emerges:

(i) Out of 97 newspaper advertisements, on which Mr. Bansal placed reliance, only 10 newspaper advertisements have dates printed on them and all of them have the same date, which is 13 October 2013. No date of printing of any of the other newspaper advertisements is visible. As such, it is unknown as to when the said newspaper advertisements were issued.

(ii) Though Leayan has placed on record 81 invoices, the mark POWERFLEX does not figure on even one of them. Mr. Bansal sought to contend that it was a matter of trade practice that invoices referred only to Article Numbers of the goods in respect of which they were issued. No material, to support this submission, is forthcoming. Nor is there any material on record to connect the Article Numbers mentioned in the invoices with the POWER FLEX brand of the Leayan. As such, the invoices on which Mr. Bansal has placed reliance are of no value at all.

(iii) None of the TV advertisements, cited by Mr. Bansal, has any reference to the mark POWER FLEX.



35.3.5 We, therefore, are of the view that, if anything, the learned Single Judge has been charitable in her use of the word “sketchy” with reference to the evidence placed by Leayan on record to demonstrate goodwill and reputation of the mark POWER FLEX. The material is, to our mind, as good as nil.

35.3.6 Though in the context of passing off actions, the Supreme Court has, in *Brihan Karan Sugar Syndicate (P) Ltd v. Yashwantrao Mohite Krushna Sahakari Sakhar Karkhana*⁴⁹ has held that “the volume of sale and extent of advertisement made ... of the product in question will be a relevant consideration for deciding whether the appellant had acquired a reputation or goodwill”. In the present case, Leayan has not placed, on record, its sales figures or the promotional expenses incurred by it in respect of sales of footwear bearing the POWER FLEX mark, as would suffice to demonstrate acquisition of goodwill and reputation.

35.3.7 Thus, on facts, there is nothing to substantiate Mr. Bansal’s contention that the mark POWER FLEX, of Leayan had amassed goodwill or reputation. Even on facts, therefore, the principle of acquiescence, as advanced by Mr. Bansal, is without substance.

35.4 Plea not statutorily available as POWER FLEX mark is not registered

35.4.1 Besides, even statutorily, this plea is not available to the petitioner. As we have already noted, the effect of acquiescence is



statutorily covered by Section 33 of the Trade Marks Act. Acquiescence is a defence only for the proprietor of a registered trade mark. A plaintiff, who has acquiesced to the use by a defendant, of its registered trademark for a continuous period of five years or more cannot, thereafter, seek to oppose use of the said mark by the defendant for the said goods or services.

35.4.2 Inasmuch as the Trade Marks Act itself restricts the availability of the plea of acquiescence as a defence against injunction, only to the proprietor of a registered trade mark, we are of the opinion that a mark such as Leayan's POWER FLEX, mark not being a registered trade mark, cannot seek the protection of Section 33.

35.5 No acquiescence in fact

Yet another reason why the plea of acquiescence is not available to Leayan is the filing of the opposition by Bata, to Leayan's application for registration of the POWER FLEX mark. Objection and acquiescence cannot go hand in hand. One who objects, cannot be said to acquiesce. The opposition, filed by Bata to Leayan's application for registration of the POWER FLEX mark, amounts to an objection to the use of the POWER FLEX mark by Leayan. Bata having objected to the use of the POWER FLEX mark by Leayan, the plea of acquiescence has necessarily to fail.

35.6 Delay and acquiescence no ground in view of *Midas Hygiene Industries*



35.6.1 Besides, the plea that Bata cannot be granted injunction on the ground of delay and acquiescence also stands defeated by the judgment of the Supreme Court in *Midas Hygiene Industries*. Paras 5 and 6 of *Midas Hygiene Industries* read thus:

“5. The law on the subject is well settled. *In cases of infringement either of trade mark or of copyright, normally an injunction must follow. Mere delay in bringing action is not sufficient to defeat grant of injunction in such cases.* The grant of injunction *also* becomes necessary if it prima facie appears that the adoption of the mark was itself dishonest.

6. In this case it is an admitted position that the respondents used to work with the appellants. The advertisements which had been issued by the appellants in the year 1991 show that at least from that year they were using the mark laxman rekha on their products. Not only that but the appellants have had a copyright in the marks krazy lines and laxman rekha with effect from 19-11-1991. The copyright had been renewed on 23-4-1999. A glance at the cartons used by both the parties shows that in 1992 when the respondent first started he used the mark laxman rekha on cartons containing colours red, white and blue. No explanation could be given as to why that carton had to be changed to look almost identical to that of the appellant at a subsequent stage. This prima facie indicates the dishonest intention to pass off his goods as those of the appellants.”

(Emphasis supplied)

35.6.2 Mr. Bansal has sought to submit that the enunciation of the law, in *Midas Hygiene Industries*, that wherever infringement is found to exist, injunction must follow, and that delay cannot stand in the way of grant of injunction, must be read as limited to cases of dishonesty. He seeks to submit that a conjoint reading of paras 5 and 6 of *Midas Hygiene* would lead to this conclusion.

35.6.3 We do not agree. To our mind, the opening sentences in para 5 of *Midas Hygiene Industries* postulate an absolute proposition, which



is that where infringement is found to exist, injunction must follow, and delay in bringing the action before the Court is not a defence against such injunction. The Supreme Court has only gone on to clarify that where dishonesty is found to exist, the principle applies with additional force. The judgment cannot, in any manner of speaking, be read as limiting the applicability of the principle only to cases of dishonesty.

35.6.4 The exposition of law in para 5 of *Midas Hygiene Industries* is, therefore, a complete answer to the proposition that a period of eight years, which had elapsed between the commencement of user, by Leayan, of the POWER FLEX mark, and the institution of the suit by Bata, would operate as a bar to grant of injunction as sought by Bata against Leayan. As the case is one *prima facie* of infringement, and no statutory exception to grant of injunction applies, the decision in *Midas Hygiene Industries* eminently justifies the grant, by the learned Single Judge, of injunction in favour of Bata and against Leayan.

35.7 Mr. Bansal's submission that Bata is not entitled to injunctive relief against Leayan on the ground of delay and acquiescence too, therefore, fails.

The Sequitur

36. The appellant has, therefore, failed to make out any case for us to interfere with the impugned judgment of the learned Single Judge.



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37. We now advert to Bata's appeal. Mr. Grover has objected to

- (i) the refusal, by the learned Single Judge, to injunct the use, by Leayan, of the tag line THE POWER OF REAL LEATHER,
- (ii) the deletion of CBH from the array of defendants, and
- (iii) the permission granted, to Leayan, to exhaust the existing stock subject to filing a monthly disposal statement.

38. On these aspects, our views are as under:

(i) We find no reason to interfere with the decision, of the learned Single Judge, not to grant any injunction against the use, by Leayan, of the tag line THE POWER OF REAL LEATHER. It is clear, from the tag line as it is used by Leayan, that there is no emphasis on the word POWER. That being so, an average consumer would read, and recollect, the tagline as a whole, as emphasizing the leather content of the footwear. He is unlikely, merely because of the use of POWER as a part thereof, to link the tagline to Bata's POWER range of products. There is, therefore, neither any chance of confusion, or of association, between the tagline THE POWER OF REAL LEATHER and the mark POWER of Bata.

(ii) We agree, however, that CBH could not have been deleted from the array of defendants. Even without a trial, or any application under Order I Rule 10 of the CPC, the learned



Single Judge, to our mind, ought not to have come to a final conclusion that CBH was not a necessary or proper party. The decision to delete CBH is, therefore, liable to be set aside.

(iii) The decision to allow Leayan to exhaust existing stock, subject to furnishing a statement with the Court, was well within the discretion vested in the learned Single Judge, and does not result in any lasting prejudice to Bata. We see no liberty, therefore, to interfere with this direction either.

39. Mr. Grover contends, however, that, in the garb of acting under the said liberty, Leayan has been clearing and selling goods which are far in excess of the stock available with it. He, therefore, prays that Leayan be directed, at the very least, to deposit the sale proceeds with this Court.

40. We are not inclined to examine either of these pleas, as they would appropriately have to be urged by Bata by filing separate applications before the learned Single Judge, in accordance with law. We reserve liberty with Bata to do so.

Conclusion

41. Resultantly, both appeals are dismissed, except to the extent of the direction to delete CBH from the array of defendants, which is set aside.



42. There shall be no orders as to costs.

C. HARI SHANKAR, J.

OM PRAKASH SHUKLA, J.

DECEMBER 15, 2025
DSN/YG/AR/AKY