



2025:DHC:153-DB



\$~24

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 10.01.2025

+ **FAO (COMM) 5/2025**
KIRAN SEHGAL PROP. M/S BALAJI TRADING
COMPANY AND OTHERSAppellants
Through: Mr.Anshuman Gargesh, Adv.
versus

VEENA AGGARWAL PROP. POWER ELECTRO
CONTROLSRespondent
Through: Nemo

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

NAVIN CHAWLA, J. (Oral)

CM APPL. 1253-54/2025 (Exemption)

1. Allowed, subject to all just exceptions.
2. The application is disposed of.

FAO (COMM) 5/2025 & CM APPL. 1252/2025

3. This appeal has been filed challenging the Order dated 13.09.2024 passed by the learned District Judge (Commercial), Court-08, Central District, Tis Hazari Court, Delhi, in CS (Comm.) 5100/2021, titled *Veena Aggarwal v. M/s Balaji Trading Company and Ors.*, whereby an *interim* order was issued restraining the appellants herein from manufacturing, marketing, selling or otherwise dealing with the products under the trademark/label 'POWERMEN DLX' and 'POWERMEN MAXX', or any other similar deceptive trademark, label etc., till the final disposal of the Suit.



2025:DHC:153-DB



4. The respondent had filed the above Suit, claiming therein that the respondent is the owner of the trademark 'POWERMAN', which has been used for manufacturing, selling, marketing and distribution of electrical goods and accessories since April 2000. The firm had been established by the deceased husband of the respondent on 01.04.2000. The trademark –'Powerman' is used by the respondent for various goods, including rotary switches, relays, rocker switches, terminal strips, volt and AM Meters, Inverters and UPS kits, and it has also been registered since 13.02.2008 as a label mark. The appellant nos.1 and 2 were the exclusive distributors of the respondent's firm for more than 10 years, till September 2021, while the appellant no.3 is the son of the appellant nos.1 and 2.

5. The respondent asserted that in August 2021, it came to the knowledge of the respondent that the appellant no.2 had applied for the registration of a similar trademark, 'POWERMEN DLX', and was also selling goods under the said trademark. The respondent served a notice dated 29.09.2021 upon the appellants. Instead of withdrawing the trademark, the appellant no.3 applied for the registration of the trademark 'POWERMEN MAXX'. Aggrieved thereby, the respondent filed the above suit.

6. The learned counsel for the appellants submits that the learned Trial Court has erred in failing to appreciate that the two marks, that is, one of the respondent and the other of the appellants, are distinct. He submits that while the mark of the respondent is 'POWERMAN' (emphasis supplied), the mark of the appellants is 'POWERMEN' (emphasis supplied).



2025:DHC:153-DB



(emphasis supplied). He further submits that the marks of the appellants are registered and, therefore, no injunction could have been granted against the appellants from using the said mark. He further submits that the respondent owes a substantial sum of money to the appellants, for which the appellants had filed a Suit for recovery against the respondent. He submits that the Suit in question has been filed by the respondent only in retaliation to the Suit filed by the appellants. He further submits that many other parties are also using the impugned mark.

7. We have considered the submissions made by the learned counsel for the appellants, however, find no merit in the same.

8. The mark of the respondent is 'POWERMAN' and admittedly, the appellant nos.1 and 2 were the exclusive distributors of the respondent firm for more than 10 years, till September 2021. The appellants have adopted a phonetically similar mark, 'POWERMEN'. The mere change of the alphabet from 'A' to 'E' would not make any significant difference. The test to be applied in such cases is of a person of imperfect recollection. The two marks are not to be kept side by side for determining whether one is deceptively similar to the other or is likely to cause confusion by its use. Phonetic Similarity of the two marks is also to be considered. The goods in which the appellants and the respondent deal are also not stated to be different. Similarly, the mere addition of suffixes such as 'DLX' or 'MAXX' would also not make any significant difference to the test of deceptive similarity in the present case.



2025:DHC:153-DB



9. As far as the plea of the appellants that its mark has been duly registered with the Trademark Registry is concerned, once the respondent is found to be the proprietor of the mark 'POWERMAN', and the mark of the appellants is found to be deceptively similar thereto, and the appellants are found to be a later adopter of the said mark, in fact, found to have adopted the mark with dishonest intention of riding on the goodwill of the respondent, therefore, mere registration of the trade mark, cannot be a ground for denying the *interim* order to the respondent. It is well-settled law that an injunction can also lie against a registered proprietor of the mark, if a case of passing off is made out by the plaintiff/proprietor of the mark. In **S. Syed Mohideen v. P. Sulochana Bai**, (2016) 2 SCC 683, it was held as under: -

“30.3. Section 28(3) of the Act provides that the rights of two registered proprietors of identical or nearly resembling trade marks shall not be enforced against each other. However, they shall be same against the third parties. Section 28(3) merely provides that there shall be no rights of one registered proprietor vis-à-vis another but only for the purpose of registration. The said provision 28(3) nowhere comments about the rights of passing off which shall remain unaffected due to overriding effect of Section 27(2) of the Act and thus the rights emanating from the common law shall remain undisturbed by the enactment of Section 28(3) which clearly states that the rights of one registered proprietor shall not be enforced against the another person.”

10. In **Toyota Jidosha Kabushiki Kaisha v. Prius Auto Industries**



2025:DHC:153-DB



Ltd., (2018) 2 SCC 1, the Supreme court held as under:-

“27. The following passage from Kerly's Law of Trade Marks and Trade Names [Kerly's Law of Trade Marks and Trade Names Thomson, 14th Edn., Sweet & Maxwell South Asian Edn., 2005.] noticed in S. Syed Mohideen [S. Syed Mohideen v. P. Sulochana Bai, (2016) 2 SCC 683 : (2016) 2 SCC (Civ) 201] may be reiterated herein for a clear exposition of the principles laying down the test for judging an action of passing-off in the Indian jurisdiction. The provisions in the Indian Trade Marks Act, 1999 incidentally are analogous to those in the U.K. Trade Marks Act, 1994

“15-034. Subject to possibly one qualification, nothing in the Trade Marks Act, 1994 affects a trader's right against another in an action for passing-off. It is, therefore, no bar to an action for passing-off that the trade name, get up or any other of the badges identified with the claimant's business, which are alleged to have been copies or imitated by the defendant, might have been, but are not registered as, trade marks, even though the evidence is wholly addressed to what may be a mark capable of registration. Again, it is no defence to passing-off that the defendant's mark is registered. The Act offers advantages to those who register their trade marks, but imposes no penalty upon those who do not. It is equally no bar to an action for passing-off that the false representation relied upon is an imitation of a trade mark that is incapable of registration. A passing-off action can even lie against a registered proprietor of the mark sued upon. The fact that a claimant is using a mark registered by another party (or even the defendant) does not of itself prevent goodwill being generated by the use of the mark, or prevent such a claimant from relying on such goodwill in an action against the registered proprietor. Such unregistered marks are



2025:DHC:153-DB



frequently referred to as ‘common law trade marks’.”

(emphasis supplied)

11. The plea of the learned counsel for the appellants that there are others, who are also using the similar mark, against whom the respondent has not taken any legal action, also does not impress us. The respondent is not required to proceed against each and every person who may be violating his rights. In the present case, the appellant nos.1 and 2 were the distributors of the respondent. They are likely to hurt the business of the respondent even more than others, whose use of the mark is not before us as on today. We would quote from the judgment of this Court in ***Pankaj Goel v. Dabur India Ltd.***, 2008 SCC OnLine Del 1744, as under:-

“17. According to us registration of RASMOLA by the Defendant/Appellant offers no complete defence to it. Even Kerly in his treatise the Trade Marks and Trade Names, as stated that passing off action can succeed on the same evidence where trademark action has failed. According to Kerly, the Trade Mark Act affords no bar to a passing off action. In fact, this concept has been statutory incorporated in India by virtue of Section 27(2) of the Trade Marks Act, 1999. Section 27(2) clearly stipulates “nothing in this Act shall be deemed to affect rights of action against any person for passing off goods or services as the goods of another person or as services provided by another person or the remedies in respect thereof.” A Division Bench of this Court in N.R. Dongre v. Whirlpool Corporation, AIR 1985 Del 300 : (1996) 16 PTC 476 (Del) (DB) had on the ground of passing off, even enjoined a registered proprietor of a



2025:DHC:153-DB



trademark from using the same mark. The said judgment was upheld by the Supreme Court in N.R.

Dongre v. Whirlpool Corporation, (1996) 5 SCC 714.

18. The Supreme Court in the case of Amritdhara Pharmacy referred to hereinabove, held the mark AMRITDHARA to be deceptively similar to the mark LAXMANDHARA. The Apex Court in the said Judgment further stipulated that the issue was to be examined by applying the test of an unwary purchaser having average intelligence and imperfect recollection. The Supreme Court in the said case held that even though a critical comparison of the two names may disclose some points of differences, yet an unwary purchaser of average intelligence and imperfect recollection would be deceived by the overall similarity of the two products.

19. We find in the present case the Appellant's and Respondent/Plaintiff's mark are not only similar but their products are identical and are purchased by the same class of customers and the said goods are sold through the same trading channel. In our view the trinity of factors makes for a case for confusion and consequently for passing off. Appellant's subsequent adoption of a similar mark seems prima facie dishonest and no amount of user can cure it. In case the injunction as granted by this Court is not continued, the use of the same mark by the Appellant is likely to deceive the public at large.

*20. In B.K. Engineering
Complaint v. U.B.H.I. Enterprises
(Registered), AIR 1985 Del 210 : (1986) 5
PTC 1 (Del) (DB), a Division Bench of this
Court has held that trading must not only be
honest but must not even unintentionally be
unfair. In Laxmikant V. Patel v. Chetan Bhat
Shah, (2002) 24 PTC 1 (SC), the Apex Court*



2025:DHC:153-DB



has held that where there is probability even in business, an injunction will be granted even though the defendants adopted the name innocently.

21. As far as the Appellant's argument that the word MOLA is common to the trade and that variants of MOLA are available in the market, we find that the Appellant has not been able to prima facie prove that the said 'infringers' had significant business turnover or they posed a threat to Plaintiff's distinctiveness. In fact, we are of the view that the Respondent/Plaintiff is not expected to sue all small type infringers who may not be affecting Respondent/Plaintiff business. The Supreme Court in National Bell v. Metal Goods, (1970) 3 SCC 665 : AIR 1971 SC 898 has held that a proprietor of a trademark need not take action against infringement which do not cause prejudice to its distinctiveness. In Express Bottlers Services Pvt. Ltd. v. Pepsi Inc., (1989) 7 PTC 14 it has been held as under:—

“....To establish the plea of common use, the use by other persons should be shown to be substantial. In the present case, there is no evidence regarding the extent of the trade carried on by the alleged infringers or their respective position in the trade. If the proprietor of the mark is expected to pursue each and every insignificant infringer to save his mark, the business will come to a standstill. Because there may be occasion when the malicious persons, just to harass the proprietor may use his mark by way of pinpricks.... The mere use of the name is irrelevant because a registered proprietor is not expected to go on filing suits or proceedings against infringers who are of no consequence... Mere delay in taking action against the infringers is not sufficient to hold that the registered proprietor has lost the mark



intentionally unless it is positively proved that delay was due to intentional abandonment of the right over the registered mark. This Court is inclined to accept the submissions of the respondent No. 1 on this point... The respondent No. 1 did not lose its mark by not proceeding against insignificant infringers...

22. In fact, in Dr. Reddy Laboratories v. Reddy Pharmaceuticals, (2004) 29 PTC 435 a Single Judge of this Court has held as under:—

“...the owners of trade marks or copy rights are not expected to run after every infringer and thereby remain involved in litigation at the cost of their business time. If the impugned infringement is too trivial or insignificant and is not capable of harming their business interests, they may overlook and ignore petty violations till they assume alarming proportions. If a road side Dhaba puts up a board of “Taj Hotel”, the owners of Taj Group are not expected to swing into action and raise objections forthwith. They can wait till the time the user of their name starts harming their business interest and starts misleading and confusing their customers.”

23. The Appellant's other argument that the Respondent/Plaintiff has itself permitted the use of the mark SIDHMOLA, SATMOLA AND CHATMOLA, does not impress us. A private settlement executed by the Respondent/Plaintiff cannot offer a licence to the world at large to infringe its mark HAJMOLA. Even otherwise we are of the view that use of similar marks by a third party cannot be a defence to an illegal act of passing off. In Century Traders v. Roshan Lal Duggar & Co., AIR 1978 Del 250 : 1 Supp PTC 720 (Del) (DB) a Division Bench of this Court has held as under:—



“Thus the law is pretty well settled that in order to succeed at this stage the appellant had to establish user of the aforesaid mark prior in point of time than the impugned user by the respondents.”

24. In fact, in Castrol Limited v. A.K. Mehta, (1997) 17 PTC 408 (DB) it has been held that a concession given in one case does not mean that other parties are entitled to use the same. Also in Prakash Roadline v. Prakash Parcel Service, (1992) 2 Arb LR 174 it has been held that use of a similar mark by a third party in violation of Plaintiff's right is no defence.”

12. As far as the plea of the appellants that the respondent owes some amount of money to the appellants is concerned, this issue would have to be determined in the Suit filed by the appellants, and cannot be a ground for the appellants to violate the rights of the respondent.

13. In view of the above, we find no merit in the present appeal. The same is accordingly dismissed.

14. Needless to state, our observations made hereinabove, are only *prima facie* in nature and would not be considered as a final opinion on the merits of the contentions raised by the parties in the Suit.

NAVIN CHAWLA, J

RAVINDER DUDEJA, J

JANUARY 10, 2025/sg/DG

[Click here to check corrigendum, if any](#)