



2026:DHC:1248-DB



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **FAO (COMM) 44/2026, CM APPL. 9539/2026, CM APPL. 9540/2026, CM APPL. 9541/2026, CM APPL. 9542/2026 & CM APPL. 9543/2026**

SANJAY GUPTA AND VINAY GUPTA Appellants
Through: **Mr. Gaurav Gogia, Adv. with Mr. S.K. Bansal. Adv.**

versus

VINEET JAIN, PROPRIETOR OF VIJAYPAL VINEET KUMAR AND CORespondent
Through:

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

JUDGMENT (ORAL)

% **11.02.2026**

C. HARI SHANKAR, J.

1. This appeal assails order dated 16 January 2026 passed by the learned District Judge (Commercial Courts-06)¹, Tis Hazari Courts, Delhi in CS (Comm) 48/2026², issued summons in the suit and notice in the application under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908³ filed by the appellant, returnable on 27 February 2026, i.e. 16 days from now. The appellant (the plaintiff in the suit) is aggrieved by the rejection, by the learned Commercial Court, of the

¹ "learned Commercial Court" hereinafter

² "the suit" hereinafter

³ "CPC" hereinafter



appellant's prayer for *ex parte ad interim* injunction and appointment of a local commissioner to seize the allegedly infringing goods from the premises of the respondent-defendant.

2. In these circumstances, we suggested, to Mr. Gogia who appears on behalf of the appellant that it would be more expedient if we were to direct the learned Commercial Court to decide the Order XXXIX application on 27 February 2026.

3. We pointed out to Mr. Gogia that, else, observations which we may have to enter, if the appeal were to be argued exhaustively at an *ad interim* stage, may, if we were not in agreement with his submissions, prejudice the hearing of the application under Order XXXIX Rules 1 and 2.

4. Mr. Gogia, however, requested us to decide the present appeal on merits.

5. We have heard him at length.

6. Having done so, we are of the opinion that no case whatsoever is made out for us to interfere with the impugned order passed by the learned Commercial Court.

7. Scope of interference

7.1 The scope of interference, by courts hearing appeals against orders passed by commercial courts in intellectual property matters



under Order XXXIX Rules 1 and 2 of CPC stands authoritatively settled by the following passages from the judgment of the Supreme Court in ***Wander Ltd v. Antox India (P) Ltd.***⁴:

“14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion *except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle.* Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below *if the one reached by that court was reasonably possible on the material.* The appellate court would normally not be justified in interfering with the exercise of discretion under appeal *solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion.* If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in ***Printers (Mysore) Private Ltd. v. Pothan Joseph***⁵:

“... These principles are well established, but as has been observed by Viscount Simon in ***Charles Osenton & Co. v. Jhanaton***⁶ ‘...the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case’.”

7.2 In its recent decision in ***Pernod Ricard India (P) Ltd v. Karanveer Singh Chhabra***⁷, the Supreme Court has reiterated the ***Wander*** principle thus:

⁴ 1990 Supp SCC 727

⁵ AIR 1960 SC 1156

⁶ 1942 AC 130

⁷ 2025 SCC OnLine SC 1701



19.8. In *Wander Ltd.*, this Court elaborated the principles governing the grant or refusal of interim injunctions in trademark infringement and passing off actions. It was underscored that appellate courts ought to be circumspect in interfering with the discretionary orders of lower courts in such matters. Interference is warranted only where the discretion has been exercised arbitrarily, capriciously, perversely, or in disregard of settled legal principles.”

7.3 Thus, in an appeal against an interlocutory order passed by the learned Commercial Court, the appellate Court would not substitute its subjective view for the view adopted by the learned Commercial Court. It is only if the learned Commercial Court errs on principle that the Court would interfere. Otherwise, factual and discretionary findings of the learned Commercial Court are ordinarily immune from interference in appeal. Still more circumspect, in our view, would be the scope of interference where the order under challenge is not even an order disposing of the application under Order XXXIX Rules 1 and 2 of the CPC but merely an *ad interim* order.

8. We have, therefore, examined Mr. Gogia’s submissions keeping these principles in mind.

9. Mr. Gogia has pressed, into service, pleas of trade mark infringement, passing off by way of copying of trade dress as well as copyright infringement.

10. We independently examine each of these submissions.

11. Facts



11.1 The appellant is the registered proprietor, under Section 23 of the Trade Marks Act, 1999, of only one trade mark, which is the device mark **GOLDEN EAGLE**, in Class 1, for “chemicals of all kinds including citric acid & mono sodium glucamate and naushadar”.

11.2 Thus, though the registration is for a device mark, the device is no more than the words “Golden Eagle” written in a bold format. The registration is effective from 29 July 2013.

11.3 The respondent has no trade mark registration in its favour.

11.4 The appellant submits that the use, by the respondent, of the mark “Golden Kingfisher” for mono sodium glutamate⁸ infringes the appellant’s registered trade mark.

12. The impugned order

On this aspect, the learned Commercial Court has held, in the impugned order, as under:

“3. After having gone through the submissions advanced by counsel for the plaintiff and perusal of record, particularly comparing the plaintiff’s trade mark i.e. GOLDEN EAGLE and impugned trade mark of the defendant i.e. GOLDEN KINGFISHER, I find that the first word in both the trade marks of parties is ‘GOLDEN’ which is similar. The word ‘GOLDEN’ often describes a quality, characteristic, or sense of excellence (E.g., “Golden colour”, “Golden opportunity”). Trade Mark Law prevents a single entity from monopolizing words that other traders need to describe their own products and services in a bone fide manner.

⁸ “MSG” hereinafter



3.1 *The next word in the plaintiff's trade mark and impugned trade mark of the defendant is 'EAGLE' and 'KINGFISHER' respectively which are not similar as they are entirely different types of birds belonging to different family with massive differences in size, habitat, diet and behaviour. Further, the colour combination of packaging of the plaintiff and impugned packaging of defendant do not seem to be similar. The upper part and lower part of the packaging of plaintiff are in two logos showing Eagle in golden colour and in white colour whereas the impugned trade dress/packaging of the defendant contains one logo showing Kingfisher in blue colour. Further, the packaging of the plaintiff seems to be original holographic texts i.e. 'SANVIN' whereas the impugned packaging of the defendant does not contain the same.*

4. *In the light of the aforesaid facts and circumstances, particularly, after comparing the trade mark of both the parties and their trade dress, it seems that they are not similar and there is little likelihood of confusion between them. Accordingly, I am not inclined to grant ex-parte ad-interim injunction against the defendant. Let other party be also heard on the application under Order XXXIX Rule 1 & 2 CPC. Accordingly, the prayer of the plaintiff for issuing ad-interim injunction is declined."*

(Emphasis supplied)

13. We are of the view that the learned Commercial Court applied the correct principles and that there is no error, whatsoever, in the afore-extracted paragraphs from the impugned order.

14. Re. infringement

14.1 Mr. Gogia sought to invoke the principle of conceptual similarity, otherwise known as idea infringement. He presses into service, for this purpose, the judgment of this Bench in ***Madan Lal Purshottam Dass Foods Pvt Ltd v. B.L. Agro Industries Ltd***⁹.

14.2 There are ways and ways in which a person may pack his goods,



or devise a trade mark whereunder they would be peddled. The principle of idea infringement applies where the trade mark of the plaintiff reflects a unique or inventive idea (or concept), and mark of the defendant too uses the same idea, or concept.

14.3 Mr. Gogia repeatedly emphasized his plea of “conceptual similarity”. No such concept is known to the Trade Marks Act. Injunction, under the Trade Marks Act, follows infringement. Infringement, under the various sub-sections of Section 29¹⁰ of the

¹⁰ 29. Infringement of registered trade marks.—

- (1) 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 is identical with, or deceptively similar to, the trade mark in relation to goods or services in respect of which the trade mark is registered and in such manner as to render the use of the mark likely to be taken as being used as a trade mark.
- (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
 - (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.
- (3) In any case falling under clause (c) of sub-section (2), the court shall presume that it is likely to cause confusion on the part of the public.
- (4) 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—
 - (a) is identical with or similar to the registered trade mark; and
 - (b) is used in relation to goods or services which are not similar to those for which the trade mark is registered; and
 - (c) the registered trade mark has a reputation in India and the use of the mark without due cause takes unfair advantage of or is detrimental to, the distinctive character or repute of the registered trade mark.
- (5) A registered trade mark is infringed by a person if he uses such registered trade mark, as his trade name or part of his trade name, or name of his business concern or part of the name, of his business concern dealing in goods or services in respect of which the trade mark is registered.
- (6) For the purposes of this section, a person uses a registered mark, if, in particular, he—
 - (a) affixes it to goods or the packaging thereof;
 - (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;
 - (c) imports or exports goods under the mark; or
 - (d) uses the registered trade mark on business papers or in advertising.
- (7) A registered trade mark is infringed by a person who applies such registered trade mark to a material intended to be used for labeling or packaging goods, as a business paper, or for advertising goods or services, provided such person, when he applied the mark, knew or had reason to believe that the application of the mark was not duly authorised by the proprietor or a licensee.
- (8) A registered trade mark is infringed by any advertising of that trade mark if such advertising—
 - (a) takes unfair advantage of and is contrary to honest practices in industrial or



Trade Marks Act, requires the rival marks to be identical, or deceptively similar. No yardsticks, to assess “similarity”, are available in the Trade Marks Act. All that Section 29 requires is that the similarity should result in “likelihood of confusion”, or a likelihood that, owing to the similarity, an association between the marks is likely to arise in the minds of the public. The “public”, as held by the Supreme Court in a host of decisions, starting from *Amritdhara Pharmacy v. Satya Deo Gupta*¹¹, is a consumer of average intelligence and imperfect recollection. The recollection of such a consumer being imperfect, two marks, for similar goods, using the same “idea”, may result in a likelihood of confusion. It is thus that the principle of “idea infringement” has evolved, in trade mark jurisprudence. The concept is neither foreign, nor alien, to Section 29, but is merely a judicially devised yardstick to assess the existence, or otherwise, of deceptive similarity in a given case.

14.4 Madan Lal Purshottam Dass presented a classical instance of idea infringement. The Court, in that case, was dealing with rival marks for groundnut oil. In rural areas, groundnut oil is made by a process which involves tethering oxen to a grinding wheel which then grinds and extracts oil from the seeds. We had held the facts in *Madan Lal Purshottam Dass* to make out a case of idea infringement because the plaintiff had devised a novel method of depicting the product, in its trade mark, by showing oxen tethered to the grinding wheel, i.e., by

commercial matters; or

(b) is detrimental to its distinctive character; or

(c) is against the reputation of the trade mark.

(9) Where the distinctive elements of a registered trade mark consist of or include words, the trade mark may be infringed by the spoken use of those words as well as by their visual representation and reference in this section to the use of a mark shall be construed accordingly.

¹¹ AIR 1963 SC 449

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using the process by which the oil was extracted as the trade mark under which the product was sold.

14.5 It was in these circumstances that we had held that a unique method of depicting the product had been devised by the plaintiff in that case. As the defendant had adopted an identical method of depicting the product, which was by showing oxen tethered to a grinding wheel, we held that it was a case of idea infringement.

14.6 No such case, to our mind, is made out in the present instance. There is no connection whatsoever between the marks GOLDEN EAGLE or GOLDEN KINGFISHER and the product to which these marks refer, which is MSG. Neither mark draws, to mind, the product which it represents.

14.7 Mr. Gogia sought to make out a case of “conceptual similarity” by pointing out that the eagle and the kingfisher are both birds of prey. Essentially, he sought to contend that there was no reason why the respondent chose a bird of prey instead of any other bird, or for that matter any other living creature, which was not a bird.

14.8 These, to our mind, are arguments which are completely devoid of force. There can be no fetter on a party representing its product in any manner, so long as the manner of representation does not amount to infringement or passing off. We may also note that Mr. Gogia sought to query as to how the respondent had adopted a colour combination of golden and blue instead of any other colour combination. We reiterate that, so long as the colour combination or other methods of depiction



used by the respondent in its packing do not fall foul of the principles of infringement or passing off, there can be no restriction whatsoever on the manner in which the respondent packs or sells its products.

14.9 The trade mark, or trade dress, that a trader chooses to use for his goods is entirely his prerogative. Any injunction, in that regard, under Section 135¹² of the Trade Marks Act, can be issued only if the trade mark or trade dress is infringing, or results in passing off, by the trader, of his goods as those of another. “Closeness” with another trader’s mark, irrespective of the degree of closeness, is not tortious in absence of any element of infringement or passing off.

14.10 The learned Commercial Court has, by a clear and cogent process

¹² **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.
- (2) The order of injunction under sub-section (1) may include an ex parte injunction or any interlocutory order for any of the following matters, namely:—
 - (a) for discovery of documents;
 - (b) preserving of infringing goods, documents or other evidence which are related to the subject-matter of the suit;
 - (c) restraining the defendant from disposing of or dealing with his assets in a manner which may adversely affect plaintiff’s ability to recover damages, costs or other pecuniary remedies which may be finally awarded to the plaintiff.
- (3) Notwithstanding anything contained in sub-section (1), the court shall not grant relief by way of damages (other than nominal damages) or on account of profits in any case—
 - (a) where in a suit for infringement of a trade mark, the infringement complained of is in relation to a certification trade mark or collective mark; or
 - (b) where in a suit for infringement the defendant satisfies the court—
 - (i) that at the time he commenced to use the trade mark complained of in the suit, he was unaware and had no reasonable ground for believing that the trade mark of the plaintiff was on the register or that the plaintiff was a registered user using by way of permitted use; and
 - (ii) that when he became aware of the existence and nature of the plaintiff’s right in the trade mark, he forthwith ceased to use the trade mark in relation to goods or services in respect of which it was registered; or
 - (c) where in a suit for passing off, the defendant satisfies the court—
 - (i) that at the time he commenced to use the trade mark complained of in the suit, he was unaware and had no reasonable ground for believing that the trade mark for the plaintiff was in use; and
 - (ii) that when he became aware of the existence and nature of the plaintiff’s trade mark he forthwith ceased to use the trade mark complained of.



of reasoning, observed that the marks GOLDEN EAGLE and GOLDEN KINGFISHER are not similar, so as to result in the use of the latter resulting in infringement of the former. The principles applied by the learned Commercial Court are correct. Within the *Wander* parameters, we cannot substitute our subjective view, in that regard, for the view of the learned Commercial Court.

14.11 We, therefore, agree with the learned Commercial Court that no case of infringement is made out.

15. Re. passing off

15.1 We now proceed to examine the aspect of passing off.

15.2 The distinction between infringement and passing off is tellingly underscored by the following passages from the judgment of the Supreme Court in *Kaviraj Pandit Durga Dutt Sharma v. Navaratna Pharmaceuticals Laboratories*¹³:

“28. The other ground of objection that the findings are inconsistent really proceeds on an error in appreciating the basic differences between the causes of action and right to relief in suits for passing off and for infringement of a registered trade mark and in equating the essentials of a passing off action with those in respect of an action complaining of an infringement of a registered trade mark. We have already pointed out that the suit by the respondent complained both of an invasion of a statutory right under Section 21 in respect of a registered trade mark and also of a passing off by the use of the same mark. The finding in favour of the appellant to which the learned counsel drew our attention was based upon dissimilarity of the packing in which the goods of the two parties were vended, the difference in the physical appearance of the two packets by

¹³ AIR 1965 SC 980



reason of the variation in the colour and other features and their general get-up together with the circumstance that the name and address of the manufactory of the appellant was prominently displayed on his packets and these features were all set out for negating the respondent's claim that the appellant had passed off his goods as those of the respondent. These matters which are of the essence of the cause of action for relief on the ground of passing off play but a limited role in an action for infringement of a registered trade mark by the registered proprietor who has a statutory right to that mark and who has a statutory remedy for the event of the use by another of that mark or a colourable imitation thereof. While an action for passing off is a Common Law remedy being in substance an action for deceit, that is, a passing off by a person of his own goods as those of another, that is not the gist of an action for infringement. The action for infringement is a statutory remedy conferred on the registered proprietor of a registered trade mark for the vindication of the exclusive right to the use of the trade mark in relation to those goods" (Vide Section 21 of the Act). The use by the defendant of the trade mark of the plaintiff is not essential in an action for passing off, but is the sine qua non in the case of an action for infringement. No doubt, where the evidence in respect of passing off consists merely of the colourable use of a registered trade mark, the essential features of both the actions might coincide in the sense that what would be a colourable imitation of a trade mark in a passing off action would also be such in an action for infringement of the same trade mark. But there the correspondence between the two ceases. In an action for infringement, the plaintiff must, no doubt, make out that the use of the defendant's mark is likely to deceive, but where the similarity between the plaintiff's and the defendant's mark is so close either visually, phonetically or otherwise and the court reaches the conclusion that there is an imitation, no further evidence is required to establish that the plaintiff's rights are violated. Expressed in another way, if the essential features of the trade mark of the plaintiff have been adopted by the defendant, the fact that the get-up, packing and other writing or marks on the goods or on the packets in which he offers his goods for sale show marked differences, or indicate clearly a trade origin different from that of the registered proprietor of the mark would be immaterial; whereas in the case of passing off, the defendant may escape liability if he can show that the added matter is sufficient to distinguish his goods from those of the plaintiff.

29. When once the use by the defendant of the mark which is claimed to infringe the plaintiff's mark is shown to be "in the course of trade", the question whether there has been an infringement is to be decided by comparison of the two marks. Where the two marks are identical no further questions arise; for then the infringement is made out. When the two marks are not identical, the plaintiff would



have to establish that the mark used by the defendant so nearly resembles the plaintiff's registered trade mark as is likely to deceive or cause confusion and in relation to goods in respect of which it is registered (Vide Section 21). A point has sometimes been raised as to whether the words "or cause confusion" introduce any element which is not already covered by the words "likely to deceive" and it has sometimes been answered by saying that it is merely an extension of the earlier test and does not add very materially to the concept indicated by the earlier words "likely to deceive". But this apart, as the question arises in an action for infringement the onus would be on the plaintiff to establish that the trade mark used by the defendant in the course of trade in the goods in respect of which his mark is registered, is deceptively similar. This has necessarily to be ascertained by a comparison of the two marks — the degree of resemblance which is necessary to exist to cause deception not being capable of definition by laying down objective standards. The persons who would be deceived are, of course, the purchasers of the goods and it is the likelihood of their being deceived that is the subject of consideration. The resemblance may be phonetic, visual or in the basic idea represented by the plaintiff's mark. The purpose of the comparison is for determining whether the essential features of the plaintiff's trade mark are to be found in that used by the defendant. The identification of the essential features of the mark is in essence a question of fact and depends on the judgment of the Court based on the evidence led before it as regards the usage of the trade. It should, however, be borne in mind that the object of the enquiry in ultimate analysis is whether the mark used by the defendant as a whole is deceptively similar to that of the registered mark of the plaintiff."

15.3 Thus, unlike infringement, which involves a mark to mark comparison, in the case of passing off, added matter may make all the difference. The court is required to compare the entire representation of the product by the defendant to the representation of the product by the plaintiff while examining a case of passing off.

15.4 The rival trade dresses adopted by the plaintiff and the defendant to pack their products have been compared in the plaint itself, thus:



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15.5 It is plainly clear, from a bare glance on the two packings of the appellant and the respondent that there is no visual similarity between them as would make out a case of passing off. In fact, except for the fact that both contain blue as one of the colours, there is little similarity between them. The golden colour used by the respondent is completely different from the golden colour used by the appellant. Besides, the names of the products are boldly depicted in both, and there is no likelihood of any consumer mistaking one for the other. The added material on the two packings, therefore, result in sufficient dissimilarity between them, as would disabuse any notion of a consumer being confused between one and the other.

15.6 As such, we do not find a case of deceptive similarity between the trade dresses of the respondent and the appellant, as would sustain a finding of passing off, to have been made out.

15.7 Besides, passing off involves three ingredients, i.e. goodwill, misrepresentation and damages. Thus, even if the two trade dresses were, *arguendo*, to be treated as similar to each other, the appellant would additionally have to establish accumulation of goodwill by use of the marks asserted by the appellant prior to the adoption of the mark used by the respondent, in order to sustain a case of passing off. The fact that such goodwill has to be established prior to the adoption of the mark by the respondent stands settled by the Supreme Court in ***Toyota Jidosha Kabushiki Kaisha v. Prius Auto Industries Ltd***¹⁴ as well as

¹⁴ (2018) 2 SCC 1



Pernod Ricard.

15.8 The manner in which goodwill has to be established, both at the *prima facie* stage and the final stage in a suit, stand authoritatively settled by the judgment of Supreme Court in ***Brihan Karan Sugar Syndicate Pvt Ltd v. Yashwantrao Mohite Krushna Sahakari Sakhar Karkhana***¹⁵, from which we may, to advantage, reproduce the following passages:

“12. There is a finding recorded by the High Court in the impugned judgment that the labels used on the bottle of country liquor sold by the appellant and the labels on the bottle of country liquor sold by the respondent are similar. At this stage, we may note the legal position regarding the factual details which are required to be proved in a passing off action. Firstly, we may refer to a decision of this Court in ***Satyam Infoway Ltd. v. Siffynet Solutions (P) Ltd.***¹⁶ Paras 13 to 15 of the said decision read thus:

“13. The next question is, would the principles of trade mark law and in particular those relating to passing off apply? An action for passing off, as the phrase “passing off” itself suggests, is to restrain the defendant from passing off its goods or services to the public as that of the plaintiff's. It is an action not only to preserve the reputation of the plaintiff but also to safeguard the public. The defendant must have sold its goods or offered its services in a manner which has deceived or would be likely to deceive the public into thinking that the defendant's goods or services are the plaintiff's. The action is normally available to the owner of a distinctive trade mark and the person who, if the word or name is an invented one, invents and uses it. If two trade rivals claim to have individually invented the same mark, then the trader who is able to establish prior user will succeed. The question is, as has been aptly put, who gets these first? *It is not essential for the plaintiff to prove long user to establish reputation in a passing off action. It would depend upon the volume of sales and extent of advertisement.*

14. The second element that must be established by a

¹⁵ (2024) 2 SCC 577

¹⁶ (2004) 6 SCC 145



plaintiff in a passing off action is misrepresentation by the defendant to the public. The word “misrepresentation” does not mean that the plaintiff has to prove any mala fide intention on the part of the defendant. Of course, if the misrepresentation is intentional, it might lead to an inference that the reputation of the plaintiff is such that it is worth the defendant's while to cash in on it. An innocent misrepresentation would be relevant only on the question of the ultimate relief which would be granted to the plaintiff [*Cadbury-Schweppes (Pty) Ltd. v. PUB Squash Co. (Pty) Ltd.*¹⁷; *Erven Warnink Besloten Vennootschap v. J. Townend & Sons (Hull) Ltd.*¹⁸]. What has to be established is the likelihood of confusion in the minds of the public (the word “public” being understood to mean actual or potential customers or users) that the goods or services offered by the defendant are the goods or the services of the plaintiff. In assessing the likelihood of such confusion the courts must allow for the “imperfect recollection of a person of ordinary memory” [*Aristoc Ltd. v. Rysta Ltd.*¹⁹].

15. The third element of a passing off action is loss or the likelihood of it.”

(emphasis supplied)

13. Thus, the volume of sale and the extent of advertisement made by the appellant of the product in question will be a relevant consideration for deciding whether the appellant had acquired a reputation or goodwill.

14. At this stage, we may also refer to the decision of this Court in *Toyota Jidosha Kabushiki Kaisha*. In this decision, this Court approved its earlier view in *S. Syed Mohideen v. P. Sulochana Bai*²⁰ that the passing off action which is premised on the rights of the prime user generating goodwill, shall remain unaffected by any registration provided in the Act. In fact, this Court quoted with approval, the view taken by the House of Lords in *Reckitt & Colman Products Ltd. v. Borden Inc.*²¹. The said decision lays down triple tests. One of the tests laid down by the House of Lords was that the plaintiff in a passing off action has to prove that he had acquired a reputation or goodwill connected with the goods. Thereafter, in para 40 of *Toyota*, this Court held that if goodwill or reputation in a particular jurisdiction is not established by the plaintiff, no other issue really would need any further examination

¹⁷ (1981) 1 WLR 193

¹⁸ (1979) 3 WLR 68

¹⁹ 1945 AC 68 (HL)

²⁰ (2016) 2 SCC 683

²¹ (1990) 1 WLR 491 (HL)



to determine the extent of the plaintiff's right in the action of passing off.

17. For establishing goodwill of the product, it was necessary for the appellant to prove not only the figures of sale of the product but also the expenditure incurred on promotion and advertisement of the product. Prima facie, there is no evidence on this aspect. While deciding an application for a temporary injunction in a suit for passing off action, in a given case, the statements of accounts signed by the Chartered Accountant of the plaintiff indicating the expenses incurred on advertisement and promotion and figures of sales may constitute a material which can be considered for examining whether a prima facie case was made out by the appellant-plaintiff. However, at the time of the final hearing of the suit, the figures must be proved in a manner known to law.”

(Italics in original; underscoring supplied)

15.9 In the present case, the appellant has not placed on record any figure relating to the promotional or advertisement expenses incurred by it in promoting its mark. Insofar as the sales figures are concerned, there are no CA certified sales figures on record.

15.10 The appellant has merely provided, with the plaint, the following table:

TO WHOM IT MAY CONCERN

Yearwise sale of Mark Golden Eagle

Year	Turnover (Golden Eagle) (₹)
2019	1541000.00
2020	600000.00
2021	0.00
2022	18936400.27
2023	34522164.50
Total	555599564.77



The aforesaid table is not certified by any Chartered Accountant. There is, therefore, at the *prima facie* stage, no way of ascertaining whether these figures are correct. In fact, we see no reason why the appellant did not choose to place on record any CA certified figures to establish goodwill as required by the judgment in ***Brihan Karan Sugar Syndicate***.

15.11 In any event, no case of goodwill can be said to have been made out at the *prima facie* stage, within the parameters of principles laid down by the Supreme Court in ***Brihan Karan Sugar Syndicate***.

15.12 Absent any deceptive similarity between the trade dresses and absent any proof of goodwill in the appellant's mark prior to adoption of the mark by the respondent, no case of passing off can be made out either.

16. Re. Copyright infringement

16.1 Mr. Gogia then sought to press the case of copyright infringement. According to him, the trade dress of the appellant (as in para 15.4 *supra*) constitutes an artistic work within the meaning of Section 2(c)²² of the Copyright Act and the respondent, by adopting the trade dress depicted in para 15.4 *supra* has infringed the appellant's

²² 2. **Interpretation.**— In this Act, unless the context otherwise requires,—

- (c) “artistic work” means,—
 - (i) a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possesses artistic quality;
 - (ii) a work of architecture; and
 - (iii) any other work of artistic craftsmanship;



copyright.

16.2 Infringement of copyright is defined in Section 51²³ of the Copyright Act. Mr. Gogia has drawn our attention to Section 51(b)(i) and submits that a case of infringement is made out within the meaning of the said provision.

16.3 Section 51(b)(i) provides that copyright in any work would be deemed to be infringed when any person makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, any infringing copy of the work.

16.4 The aspect of whether the copy is infringing, or otherwise, has to be decided by reference to Section 51(a).

16.5 Section 51(a) states that copyright in a work would be deemed to

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- ²³ 51. **When copyright infringed.** – Copyright in a work shall be deemed to be infringed—
- (a) when any person, without a licence granted by the owner of the Copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act—
 - (i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or
 - (ii) permits for profit, any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright; or]
 - (b) when any person—
 - (i) makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or
 - (ii) distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or
 - (iii) by way of trade exhibits in public, or
 - (iv) imports into India,any infringing copies of the work:
Provided that nothing in sub-clause (iv) shall apply to the import of one copy of any work for the private and domestic use of the importer.
Explanation.—For the purposes of this section, the reproduction of a literary, dramatic, musical or artistic work in the form of a cinematograph film shall be deemed to be an “infringing copy”.



be infringed when a person, without a licence granted by the owner of the copyright, does anything which, the exclusive right to do which, by the Copyright Act, is conferred upon the owner of copyright.

16.6 Section 51(a) relates us back, therefore, to Section 14 of the Copyright Act which sets out the rights of copyright owner. In a case of copyright, if any right to use the copyrighted work in the manner envisaged by Section 14 is exploited by any other person it would amount to infringement of the copyright within the meaning of Section 51(a).

16.7 Apropos artistic works, Section 14(c) states that copyright would confer exclusive right, on the owner of the copyright,

- (i) to reproduce the work in any material form including —
 - (a) the storing of it in any medium by electronic or other means; or
 - (b) depiction in three-dimensions of a two-dimensional work; or
 - (c) depiction in two-dimensions of a three-dimensional work,
- (ii) to communicate the work to the public,
- (iii) to issue copies of the work to the public not being copies already in circulation,
- (iv) to include the work in any cinematograph film,
- (v) to make any adaptation of the work, or
- (vi) to do in relation to adaptation of the work any of the acts specified in relation to the work in sub-clauses (i) to (iv);



16.8 A Division Bench of this Court has in *Microfibres Inc. v. Girdhar & Co*²⁴ extended, to the concept of adaptation of work to Section 14(c)(v) and (vi), cases in which the image used by the respondent is substantially similar to that used by the appellant and has thereby likened the provisions of the Copyright Act to the Trade Mark Act to that extent.

16.9 In view of our finding that there is *no* visual or other similarity between the packing of the respondent and the packing of the appellant, clearly, no case of infringement of copyright is made out either.

Conclusion

17. We, therefore, are of the opinion that no *prima facie* case either of infringement of trade mark, passing off by the respondent, or infringement of copyright can be said to have been made out by the appellant in the present case.

18. Consequently, the appellant has not made out any case for grant of interlocutory injunction in its favour.

19. Accordingly, there is no question of appointing any local Commissioner to seize goods from the premises of the respondent.

20. In view thereof, the present appeal is without merit and is accordingly dismissed.



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21. We, however, clarify that these observations made by us are *prima facie* in nature and would not inhibit or influence the learned Commercial Court while considering the merits of the suit pending before it.

22. The appeal is accordingly dismissed in *limine*.

C. HARI SHANKAR, J.

OM PRAKASH SHUKLA, J.

FEBRUARY 11, 2026/dsn