

**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE**

BEFORE

**HON'BLE SHRI JUSTICE SUSHRUT ARVIND
DHARMADHIKARI**

&

HON'BLE SHRI JUSTICE PRANAY VERMA

MISC. APPEAL No. 232 of 2021

BETWEEN:-

1. **PERNOD RICARD INDIA PRIVATE LIMITED
A COMPANY INCORPORATED UNDER THE
COMPANIES ACT 1956 HAVIN ITS
REGISTERED OFFICE AT 5TH FLOOR, D-3
DISTRICT CENTER SAKET, NEW DELHI
110017 (DELHI)**
2. **PERNOD RICARD USA LLC A COMPANY
INCORPORATED UNDER THE LAWS OF
UNITED STATES OF AMERICA 250 PARK
AVENUE, 17TH FLOOR NEW YORK (OTHER
COUNTRY)**

.....APPELLANTS

***(BY SHRI AMIT AGRAWAL – SENIOR ADVOCATE WITH SHRI MANOJ MANAV-
ADVOCATE)***

AND

**KARANVEER SINGH CHHABRA TRADING AS J.K.
ENTERPRISES A PROPRIETARY CONCERN AT
155, GURUNANAK TIMBER MARKET, DHAR
ROAD, INDORE (MADHYA PRADESH)**

.....RESPONDENT

***(BY SHRI S.C. BAGADIYA- SENIOR ADVOCATE WITH SHRI AYUSH JAIN-
ADVOCATE)***

Reserved on : 05.09.2023

Pronounced on : 03.11.2023

*This appeal having been heard and reserved for orders, coming on for pronouncement this day, **HON'BLE JUSTICE PRANAY VERMA** pronounced the following.*

JUDGMENT

This appeal has been preferred by the plaintiffs/appellants under Order 43 Rule 1(r) of the Code of Civil Procedure read with Section 13 of the Commercial Courts Act, 2015 against the order dated 26.11.2020 passed by the Commercial Court, Indore, whereby their application under Order 39 Rule 1 and 2 of the CPC for issuance of temporary injunction has been rejected.

2. As per the plaintiffs, they are in business of manufacturing and distribution of wines, liquors and spirits. They are manufacturing and selling whisky in the name of 'Blenders Pride' and 'Imperial Blue'. They have registered trade mark in respect of them and also have such registered trade mark in respect of Seagram's which is the house mark of plaintiff No.1 and which is used in India and Internationally and which appears on their products sold under various brands. The defendant has imitated the aforesaid trade mark of plaintiffs and is manufacturing and selling its whisky under the trade mark 'London Pride'. The trade mark of plaintiffs namely; Blenders Pride was adopted in 1973 and was registered in favour of Seagram's Company Limited. The plaintiffs have become proprietors of the said trade mark in India with effect from 27.06.2018. Blenders Pride is marketed with a distinctive label and Seagram's logo.

3. Further case of plaintiffs is that Pride is the most essential and distinctive component of their mark 'Blenders Pride' which they have been using since 1995. The same has distinctive features and has acquired

considerable goodwill and reputation in India. They are also using another mark 'Imperial Blue' since 1997 and are selling whisky under the same in distinctive label, packaging and trade dress. The same has also acquired goodwill and reputation. The plaintiffs have obtained registration in respect of their trademark in Class -33. Likewise, the trade mark 'Seagram's' is a registered trade mark of plaintiff No.2 of Class-33. The defendant is imitating all the aforesaid trades marks of plaintiffs and has filed a Trade Marks application of a trade mark London Pride in class-33 which has been objected to by plaintiffs. The plaintiffs acquired knowledge that defendant is selling London Pride whisky which is deceptively similar to its Blenders Pride trade mark. The whiskey of defendant is being sold by putting label, using packaging, getup and trade dress deceptively similar to Imperial Blue. Their bottles bear the trade mark Seagram's. Plaintiffs are the prior users of all their trade marks and their products are having enormous sale in the country. The defendant by using the label London Pride and with the manner of its packaging, getup and trade dress is practicing misrepresentation and fraud to deceive the customers. It is impinging upon the trade mark, goodwill and reputation of plaintiff's trademarks and is deriving illegal benefits by doing the same which is causing enormous monetary loss, injury and damage to plaintiffs.

4. Contending aforesaid, the plaintiffs have instituted an action before the trial Court intra alia seeking the following reliefs:-

“ 38. In the aforesaid premises, and in the interest of justice, the Plaintiffs most respectfully pray that this Hon'ble Court may be pleased to grant the following reliefs;

i) a decree for permanent injunction restraining the Defendant, its proprietors, partners as the case may be, assigns in business, sister concerns, associates, agents, dealers, distributors, stockists etc. from manufacturing, selling, offering for sale, advertising in any manner

including on the internet, directly or indirectly dealing in whisky or any alcoholic or non-alcoholic beverages under the trade mark LONDON PRIDE and/or label and/or packaging and/or any other label/packaging and/or trade mark that may be identical/deceptively similar to IMPERIAL BLUE label or packaging and/or deceptively similar to the trade mark BLENDERS RIDE and/or SEAGRAM'S amounting to infringement of Plaintiffs' registered trade marks as enunciated in the plaint;

ii) a decree for permanent injunction restraining the defendant, its proprietors, partners as the case may be, assigns in business, sister concerns, associates, agents, dealers, distribution, stockists etc. from manufacturing, selling, offering' for sale, advertising in any manner including on the internet, directly or indirectly dealing in whisky or any alcoholic and non-alcoholic beverages under the impugned LONDON PRIDE label/ packaging or any other label/ packaging that may be a colorable imitation or substantial reproduction oof IMPERIAL BLUE label/ packaging in respect of their arrangement of features as may amount to infringement of copyright of the Plaintiffs therein;

iii) a decree for permanent injunction restraining the Defendant, its proprietor, partners and the case may be, assigns in business, sister concerns, associates, agents, dealers, distribution, stockists etc. from manufacturing, selling, offering' for sale, advertising in any manner including on the internet, directly or indirectly dealing in whisky or any alcoholic and non-alcoholic beverages under the trade — mark LONDON PRIDE and/or -label/ packaging/get-up/trade dress/trade mark or any - other label/ packaging/get-up/trade dress/trade mark as may be deceptively similar with IMPERIAL BLUE label/ packaging/ get-up/trade dress and / or trade marks BLENDERS PRIDE or SEAGRAM'S as may lead to confusion or deception amounting to passing off of the goods/business of the Defendant for those of the Plaintiffs or may constitute acts of unfair competition;

iv) a decree for delivery up of all the infringing containers, packaging, labels, printing materials, printing cylinders, blocks, dyes, articles etc. to an authorized representative of the Plaintiffs for destruction/ erasure;

v) an order for rendition of accounts of profits illegally earned by the Defendant and a decree for an amount so found due or, in the alternative, a decree for Rupees One

Crone (Rs.1,00,00,000/-)towards token damages may be passed in favour of the plaintiffs and against the defendant;”

5. Along with the plaint the plaintiffs also filed an application under Order 39 Rule 1 and 2 of the CPC for issuance of temporary injunction in the following terms:

“ 39. It is therefore, respectfully prayed that this Hon’ble Court may be pleased to grant an order of interim injunction restraining the Defendant, its proprietor, partners as the case may be, assigns in business, sister concerns, associates, agents, dealers, distributors, stockists etc. from manufacturing, selling, offering for sale, advertising in any manner including on the internet, directly or indirectly dealing in whisky or any alcoholic or non-alcoholic beverages under the trade mark LONDON PRIDE and/or label and/or packaging and/or or any other label / packaging and/or any other lable/packaging and/or "trade mark that may be identical/deceptively similar with IMPERIAL BLUE label/ packaging/ get-up / trade dress and/or trade marks BLENDERS PRIDE or SEAGRAM’S amounting to infringement of Plaintiffs’ trade mark registrations and/or copyright and/or passing off and/or unfair competition.

It is further respectfully prayed that in view of the facts and circumstances of the present case and in the interest of justice and the public interest, an *ex-parte* ad interim injunction order in the aforementioned terms may kindly be passed in favour of the Plaintiffs/Applicants and against the Defendant.”

6. The defendant contested the application for issuance of temporary injunction by filing its reply submitting that it is the proprietor of London Pride and is a registered copyright owner of the artistic work London Pride and all other intellectual properties connected therewith. He is manufacturing and selling liquor in the brand name of London Pride in Madhya Pradesh. His trademark London Pride is entirely different in name, style and composition from any of the earlier registered trademarks.

The brand name London Pride is also registered with the Excise Department of State of Madhya Pradesh. There is no similarity between the mark of defendant London Pride and the marks of plaintiffs as is being contended by them who have no prima facie case, irreparable injury or balance of convenience in their favour. The defendant however did not dispute the facts regarding plaintiff's trademarks and their registration and the fact that they are being used by them.

7. By the impugned order the trial Court has observed inter alia that the two brands of the parties when put to comparison, the only significant similar feature is the word 'PRIDE'. There is no other similarity visible in the two. The packaging, style, shape and logo; are all different. The word 'Pride' is commonly used in common parlance. It cannot be said that exclusivity in respect of the same is attributed to plaintiffs. Pride is a distinct word and is not used as suffix of any word. A consumer going into the market to purchase premium/ultra premium whisky will not be confused by the word 'Pride' in the name of any brand. The mark has to be compared as a whole. Merely by using word 'Pride' in its trademarks it cannot be said that defendant has imitated plaintiff's trademarks. The packaging of brands of plaintiffs and defendant shows remarkable differences. Plaintiffs cannot claim exclusivity in respect of bluish shade. The front of packaging distinctively bears two names, which are dissimilar. The side view is even more distinct. The colour combination on the side is different. Only on the basis of similarity of logo, it cannot be said that defendant's entire packaging style and trade dress is imitation of plaintiff's design. The bottles of the two products are distinctively identifiable. Plaintiff's bottle has embossing of 'Seagram

Quality'. Eventually, it held that overall no similarity is found in defendant's brand which can be said to be such imitation of plaintiff's trademarks, which would deceive the consumers of their products. In consequence plaintiff's application for issuance of temporary injunction has been rejected.

8. Learned senior counsel for the plaintiffs has submitted that the whole approach of the trial Court is illegal and erroneous. Plaintiff's entire registered trademark ought to have been compared with defendant's trademark without splitting up and dissecting any of the trademarks to adjudicate visual, phonetic and structural similarity. It has however split up the word 'Pride' and has then made the comparison. Splitting up of a registered word "TM' is impermissible even according to Section 28(1) of the Trade Marks Act, 1999. The plaintiffs have registered word 'TM' into Blenders Pride. These principles are applicable even at the stage of consideration of an application for issuance of temporary injunction. In this regard reliance was placed by him on the decisions of the Supreme Court in *Kaviraj Pandit Durga Dutt Sharma vs. Navaratna Pharmaceutical Laboratories AIR 1965 SC 980*, *Amritdhara Pharmacy vs. Satya Deo Gupta AIR 1963 SC 449*, *Corn Products Refining Co. vs. Shangri-la Food Products Ltd. AIR 1960 SC 142*, of the Delhi High Court in *Pankaj Goel vs. Dabur India Ltd 2008 (38) PTC 49 (Del.) (DB)*, *M/s. Amar Singh Chawal Wala vs. M/s Shree Vardhman Rice and Genl. Mills ILR (2009) VI Delhi 399*, *M/s. Kirorimal Kashiram Marketing vs. M/s Shree Sita Chawal Udyog Mill 2010 SCC Online Del 2933*, *P.M. Diesels Ltd. vs. M/s S.M. Diesels 1994 (28) DRJ 574*, *Sentini Bio Products Pvt. Ltd. vs. M/s. Allied Blender & Distillers Pvt. Ltd. 2015*

SCC Online Del 10164, South India Beverages Pvt. Ltd. vs. General Mills Marketing Inc. 2014 SCC Online Del 1953 and of the Bombay High Court *Pidilite Industries Limited vs. Jubilant Agri & Consumer Products Limited 2014 SCC Online Bom 50*.

9. He has further contended that comparison between two competing marks should be done with the viewpoint of a man of average intelligence with imperfect recollection which has not been done by the trial Court. In this regard reliance has been placed by him on the decisions of the Supreme Court in *Parle Products Ltd. vs. J.P. & Co. AIR 1972 SC 1359, Amritdhara Pharmacy (Supra)*, of the Delhi High Court in *Pankaj Goel (Supra)*, of the Madras High Court in **Rhizome Distilleries Pvt. Ltd, Vs. Union of India and others 2016 (65) PTC 132 (Mad) (DB)** and of the Delhi High Court in *Pernod Richard India Private Ltd. vs. Frost Falcon Distilleries Ltd. CS (Comm) 94/2021*. Comparison of products of plaintiffs and defendant unmistakably shows that the essential features are common and are likely to create a confusion in the mind of a man of average intelligence with imperfect recollection. The trial Court has however held that purchaser of 'premium' and 'ultra premium' whisky are not likely to be deceived because consumers of whisky cannot be considered to be in that category which is contrary to the aforesaid judgments.

10. It is also submitted that the concept of overall similarity has been completely ignored by the trial Court which ought to have considered the overall structural, phonetic and visual similarity between the products. It has erroneously held that there are more dissimilarities in the label and packaging material of the competing label marks without applying the

aforesaid parameters. In this regard reliance has been placed on the judgment of *Parle Products (supra)*, *Amritdhara Pharmacy (supra)*, *Heinz Italia vs. Dabur India Ltd. 2007 (35) PTC 1 (SC)*, *S.M. Dyechem vs. Cadbury (India) Ltd. (2000) 5 SCC 573* and *Cadila Health Care vs. Cadila Pharmaceuticals (2000) 5 SCC 73*.

11. It is also submitted that the act of the defendant of dishonestly adopting previously existing registered trademark of plaintiffs is an actionable tort and requires issuance of temporary injunction forthwith without any further proof of other necessary ingredients. In this regard reliance has been placed on the decisions of *Heinz Italia (supra)*, *T.V. Venugopal vs. Ushodaya Enterprises Ltd. (2011) 4 SCC 85* and *Pankaj Goel (supra)*. It is further submitted that registration of a copyright does not give a license to defendant to infringe plaintiff's registered trade marks. In this regard reliance has been placed on *Aditya Birla Nuvo vs. M/s. R.S. Sales Corporation 2018 SCC Online Del 9794*, *Glaxo Operations UK Ltd. vs. Samrat Pharmaceuticals, Kanpur, 1983 SCC Online Del 276* and *Kaira District Co-op. Milk Producers Union Ltd. vs. Bharat Confectionery Works, PTC (Suppl) (1) 615 (Del)*. In a suit alleging infringement, keeping in view the delay in concluding the cases, refusal of temporary injunction has far reaching consequences which cannot be compensated for as held in *Neon Laboratories Ltd. vs. Medical Technologies Ltd. (2016) 2 SCC 672*. Since the trial Court has acted arbitrarily and perversely in exercising its discretion, this Court has ample jurisdiction to set aside its order and grant temporary injunction to plaintiffs. Reliance has been placed on *Wander Ltd. vs. Antox India P. Ltd. 1990 (Supp) SCC 727*, *Seema Arshad Zaheer vs. Municipal*

Corporation of Greater Mumbai (2006) 5 SCC 282 and Ramdev Food Products Pvt. Ltd. Vs. Arvinbhai Rambhai Patel and others (2006) 8 SCC 726.

12. ***Per contra***, learned counsel for the defendant has supported the impugned order and has submitted that the same is in sound exercise of jurisdiction by the trial Court and no illegality or perversity can be pointed out in the same. It has made a thorough evaluation of the marks of both the parties and has thereupon come to its conclusions. Overall comparison of trade marks of plaintiffs with that of defendant unmistakably shows that there is no similarity in them which may cause any confusion in the mind of a consumer who shall go to purchase the same. The product of both the parties is not sold loose but is sold in a box and comparison of the boxes does not show any such similarity between them where one can be confused with the other. The colour scheme, heading, writing, logo and other particulars of both of them are totally different. Not only the essential features are different but the overall picture is also different. It is further submitted that for seeking temporary injunction, plaintiffs were required to prove actual damages having been suffered by them which they have not done. Mere prima facie case in favour of plaintiffs is wholly insufficient and it was also mandatory for them to show that injury has been suffered by them or that refusal of temporary injunction would be irreparable since they can always be compensated in terms of money. Reliance has been placed on the decisions of the Supreme Court in ***Wander Ltd. (supra), Cadila Healthcare Ltd. (Supra), Rhizome Distilleries Pvt. Ltd. (supra), Best sellers retail (India) Pvt. Ltd. vs. Aditya Birla Nuvo Ltd. & others (2012) 6 SCC 792, Uttaranchal Road***

Transport Corporation vs. Mansaram Nainwal (2006) 6 SCC 366, The Punjab Cooperative Bank Ltd. Vs. The Commissioner of Income Tax AIR 1940 PC 230 and of the Delhi High Court in Cipla Limited vs. M.K. Pharmaceuticals (2007) SCC Online Delhi 2012. It is hence submitted that the appeal deserves to be dismissed.

13. We have considered the submissions of the learned counsel for the parties and have perused the record.

14. The principles as regards grant of interim injunction pending suit have been considered by the Supreme Court on various occasions and they are quite well settled. In one of such decision in the matter of *Colgate Palmolive (India) Ltd vs. Hindustan Lever Ltd 1999 (7) SCC 1* it was summarized as under:

“24. We, however, think it fit to note herein below certain specific considerations in the matter of grant of interlocutory injunction, the basic being non-expression of opinion as to the merits of the matter by the court, since the issue of grant of injunction, usually, is at the earliest possible stage so far as the time-frame is concerned. The other considerations which ought to weigh with the court hearing the application or petition for the grant of injunctions are as below:

(i) extent of damages being an adequate remedy;

(ii) protect the plaintiff's interest for violation of his rights though, however, having regard to the injury that may be suffered by the defendants by reason therefor;

(iii) the court while dealing with the matter ought not to ignore the factum of strength of one party's case being stronger than the other's;

(iv) no fixed rules or notions ought to be had in the matter of grant of injunction but on the facts and circumstances of each case — the relief being kept flexible;

(v) the issue is to be looked at from the point of view as to whether on refusal of the injunction the plaintiff would suffer irreparable loss and injury keeping in view the strength of the parties' case;

(vi) balance of convenience or inconvenience ought to be considered as an important requirement even if there is a serious question or prima facie case in support of the grant;

(vii) whether the grant or refusal of injunction will adversely affect the interest of the general public which can or cannot be compensated otherwise.”

15. In an appeal against refusal of temporary injunction by the trial Court, the Appellate Court will not interfere unless it is shown that the trial Court has acted illegally or perversely since relief regarding grant of temporary injunction is a discretionary relief. Merely because two views were possible, it would not be sufficient to dislodge the order of the trial Court. If it appears that a plausible view has been taken, interference shall be declined. In this regard it was held by the Supreme Court in **Wander Ltd. and another Vs. Antox India 1990 (Supp) SCC 727** as under:

“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.....”

16. It was further held by the Supreme Court in *Mohd. Mehtab Khan and Ors. Vs. Khushnuma Ibrahim and Ors. 2013(9) SCC 221* as under :

“20. In a situation where the learned trial court on a consideration of the respective cases of the parties and the documents laid before it was of the view that the entitlement of the plaintiffs to an order of interim mandatory injunction was in serious doubt, the appellate court could not have interfered with the exercise of discretion by the learned trial Judge unless such exercise was found to be palpably incorrect or untenable. The reasons that weighed with the learned trial Judge, as already noticed, according to us, do not indicate that the view taken is not a possible view. The appellate court, therefore, should not have substituted its views in the matter merely on the ground that in its opinion the facts of the case call for a different conclusion. Such an exercise is not the correct parameter for exercise of jurisdiction while hearing an appeal against a discretionary order. While we must not be understood to have said that the appellate court was wrong in its conclusions what is sought to be emphasised is that as long as the view of the trial court was a possible view the appellate court should not have interfered with the same following the virtually settled principles of law in this regard as laid down by this Court in *Wander Ltd. v. Antox India (P) Ltd.*”

17. As regard the primary submission of the learned Senior counsel for the plaintiffs to the effect that the entire registered trademark should be compared with the offending trademark without spitting up and dissecting any of the trade marks to adjudge visual, phonetic and structural similarity is concerned, the same has been emphatically laid down by the Supreme

Court on numerous occasions in the judgments which have been relied upon hence there cannot be any quarrel with the said proposition. Though it is contended that the trial Court has split up and dissected the trademarks of the contesting parties and has thereafter held that there is no similarity in the same, but from the impugned order it does not appear so. Be that as it may, since the allegation of plaintiffs is that the mark London Pride as a whole is remarkably similar to the mark Blenders Pride, upon comparison of the products i.e. the bottles which have been produced before us and the pictures which have been reproduced at various places in the pleadings, there does not appear to be any similarity in both of them. The height and colour of the bottles is itself quite different. Blenders Pride is round in shape whereas London Pride is cylindrical in shape. The label fixed upon both of them is having entirely different pattern. Even a man of average intelligence with imperfect recollection, which as per the learned counsel for plaintiffs is the real test for comparison, would not be in any manner confused with the identity of both the bottles. There would be no occasion for him not to be able to distinguish between both of them. At a glance, he would be able to make out that both are not similar at all. Likewise, the boxes in which the bottles are sold are also different in their shape itself. While the box of Blenders Pride is much broader the box of London Pride is not so. The writings on the boxes are different. The Hologram, the manner in which the words are written on the boxes and various other features on them cannot in any manner deceive a common man or create a confusion in his mind as regards their identity. By merely looking at both the boxes, he can very easily make out as to which is the box of Blenders Pride and which is the box of London Pride. This is also the factual position as regards comparison of the box of Imperial Blue

whisky with the box of London Pride whisky. Rather they are even more distinct as the box of London Pride has a flag kind of printing over it.

18. In so far as comparison of respective bottles of Imperial Blue and London Pride is concerned, it is in fact difficult to make out any similarity in them. In the respective bottles, the word 'Imperial' is written in a slanting manner whereas the word 'London' is written in a straight line. The arrangement of the words is quite dissimilar. The shape of the bottles also appears to be different. The shape of mark on the label on both of them is also different. Since in the name of the product, which is written boldly in the front part of the bottles, there is no similarity whatsoever, there would not be any occasion for a common man to be in any manner deceived in them. Overall appearance of defendant's mark cannot be said to be deceptively similar to marks of plaintiffs. Thus, examining the marks of plaintiffs with the mark of defendant as a whole, neither there is any visual nor phonetic nor structural similarity between any of the boxes or bottles of the plaintiffs with that of the boxes or bottles of the defendant. It is not a matter of mere dissimilarity but is a case of there being no actual similarity. It hence cannot be prima facie held that defendant's mark infringes the mark of plaintiffs.

19. Furthermore, none of the individual features of plaintiff's mark, such as the blue colour or the golden dome shaped design can be said to have come to be associated with plaintiff's product. The plaintiff does not possess any registration in respect of the colours used in its Imperial Blue mark, or in any individual part of the design, including the dome shape. In terms of Section 2 (m) of the Trade Marks Act, 1999 the plaintiffs could have sought registration in respect of combination of colours used in their

label or for the shape of their bottle. That has not been done by them. The plaintiffs have got the labels registered in full and the labelled bottle, as individual device marks. Any claim to exclusivity in respect of a part of plaintiff's marks would infringe Section 17(2) of the Trade Marks Act, 1999. Section 17 is as under:

“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.”

20. In any case, no material has been placed by plaintiffs to show that individual elements of their registered marks, such as the blue colour, the golden dome, or the arrangement of letters on the label, or even the shape of the bottle, have acquired secondary meaning over a period of time, or have become associated with their marks.

21. Much emphasis has been laid on behalf of plaintiffs on the commonality of the word ‘Pride’ in Blenders Pride and London Pride bottles. However, it is to be seen that registration of trade mark of

plaintiffs is in the name of 'Blenders Pride' and not 'Pride'. It is not only a single word 'Pride' which has been registered in name of plaintiffs but the entire name i.e. 'Blenders Pride' which has been registered. It was open for plaintiffs to have got the word 'Pride' registered separately under the provisions of Section 15 of the Trade Marks Act, 1999 which is an under:

“15. Registration of parts of trade marks and of trade marks as a series.—(1) Where the proprietor of a trade mark claims to be entitled to the exclusive use of any part thereof separately, he may apply to register the whole and the part as separate trade marks.

(2) Each such separate trade mark shall satisfy all the conditions applying to and have all the incidents of, an independent trade mark.

(3) Where a person claiming to be the proprietor of several trade marks in respect of the same or similar goods or services or description of goods or description of services, which, while resembling each other in the material particulars thereof, yet differ in respect of—

(a) statement of the goods or services in relation to which they are respectively used or proposed to be used; or

(b) statement of number, price, quality or names of places; or

(c) other matter of a non-distinctive character which does not substantially affect the identity of the trade mark; or

(d) colour,

seeks to register those trade marks, they may be registered as a series in one registration.”

22. Protection of Trade Mark is available only for a complete trade mark and not any word therein unless the same is registered as a whole as well as in part as separate trade mark. The plaintiffs have not got the word 'Pride' separately registered as a trade mark. The word 'PRIDE' denotes quality of the product when used in context with 'BLENDERS'. It is laudatory in nature, signifying the pride of blenders in their product. Pride

is a noun and is of common usage which even otherwise cannot be registered being a generic word. It cannot be treated as distinctive or as being capable of distinguishing the product of plaintiffs from that of any other manufacturer of whisky. The complete trade mark has to be used and protected as such and its holder cannot bifurcate the same on his own.

23. Merely by use of the word 'Pride' by the defendant there cannot be any misconception or misapprehension in the mind of the consumer, a common man, which may lead to any confusion in his mind. It cannot be lost sight of the fact that the products such as the present one are known by and are purchased by their entire name and if not then more often by their first word. The first word of the trade mark of plaintiffs is 'Blenders' whereas that of the defendant is 'London'. There is absolutely no similarity in them leave aside any dissimilarity. 'PRIDE' being a generic, common place and laudatory expression in 'BLENDERS PRIDE' mark, the common man would certainly treat 'BLENDERS' part of plaintiff's mark as the dominant part. The question of comparison of the words 'Imperial Blue' and 'London Pride' does not even arise. Thus, even going by the name of product of both the parties, there would be no possibility for a common man to be confused or being misled by the name of product of defendant. From the documents, which are available on record, it reveals that Pride is publici juris common to trade and there are 48 variants of trade mark in class 32 and 33 with the word 'Pride' and many of them are registered with the Excise Authority as well for sale and purchase of liquor. Plaintiff's stand of claiming exclusivity in respect of 'PRIDE' part of its 'BLENDERS PRIDE' mark, alleging infringement on

the ground that defendant is using a mark including 'PRIDE' as a part thereof, hence cannot be accepted.

24. The trade mark of the parties are in respect of 'premium' or 'ultra premium' whisky. It can be safely presumed with a sufficient deal of certainty that the consumers of such products would be mostly literate and having reasonable intelligence to distinguish between the bottles of Blenders Pride/Imperial Blue and that of London Pride. Even if they are of average intelligence with imperfect recollection, they would be able to differentiate between the rival competing brands. The Supreme Court has held that the test of deceptive similarity to be applied would be different and each case and would depend upon nature and kind of customers who are likely to buy those goods. Liquor consumers of scotch whiskey are educated and discerning type. They are literate persons belonging to the affluent class of society. In *Khoday Distilleries Limited vs. The Scotch Whisky Association 2008 (10) SCC 723*, it was held as under:

72. We may also notice some Indian decisions operating in the field. In *Carew Phipson Ltd. v. Deejay Distilleries (P) Ltd.* [AIR 1994 Bom 231] the Bombay High Court stated the law thus : (AIR p. 234, para 6)

“6. Even on comparison of the trade mark of the plaintiffs with the defendants' trade mark, it is difficult to hold that the two marks are deceptively similar and are likely to create any confusion in the minds of the customers.”

It was furthermore observed : (AIR pp. 234-35, para 6)

“6. ... On comparison of the two marks bearing the aforesaid principles in mind, it is difficult to appreciate as to how there is even a remote possibility of any customer being misled. In my opinion, when a customer goes to a shop to buy the plaintiffs' product, he will not ask for 'Duet' or 'Gin N Lime' or 'Gin N Orange' but he will ask for a 'Blue Riband Gin N Lime' or 'Blue Riband Tango Gin N Orange'. Further having regard to the fact that the customer who is likely to buy the products of the plaintiffs

and the defendants will be normally educated and discerning type, it is impossible to hold that there is any likelihood of confusion. It is pertinent to note that the plaintiffs have failed to cite even a single instance showing that there was confusion in the minds of the customers. The absence of evidence of actual deception is a circumstance which definitely weighs in favour of the defendants. It is also necessary to mention that the defendants have produced on record voluminous evidence showing that such premixtures are sold by several other companies under the names 'American Extra Dry Gin with Lime Duet Plus', 'Forbes Two in One Dry Gin and Lime', 'Rainbow Gemlet Gin and Lime', etc. In my opinion, there is no possibility of any confusion in this case at all.

73. Yet again in *Diageo North America, Inc. v. Shiva Distilleries Ltd.* [(2007) 143 DLT 321] a learned Single Judge of the Delhi High Court held as under : (DLT pp. 326-27, para 14)

“14. So much for the second syllable. As regards the first syllable, I find that there is no similarity between SMIR and BRIS. Although the learned counsel for the plaintiffs had submitted that all the letters are common except the letter and M in SMIR and the letter B in BRIS, this, to my mind, is of no consequence because the arrangement of the letters is entirely different, as is the phonetic and visual result. I also agree with the submission made by the learned counsel for the defendant that the intending purchasers of the competing products are literate persons belonging to the affluent class of society and who would be in a position to easily distinguish SMIRNOFF from BRISNOFF particularly when the eyebrow device and the colour combination is sought to be given up by the defendant. The average person with imperfect recollection would have to be from amongst the subset of such persons i.e. discerning consumers of vodka. My prima facie view is that the trade mark BRISNOFF is not deceptively similar to, nor can it be confused with the plaintiffs' trade mark SMIRNOFF.”

74. This Court in *Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd.* [(2001) 5 SCC 73] inter alia laid down the law in the following terms : (SCC p. 95, para 35)

“35. Broadly stated, in an action for passing off on the basis of unregistered trade mark generally for deciding the question of deceptive similarity the following factors are to be considered:

(e) The class of purchasers who are likely to buy the goods bearing the marks they require, on their education and intelligence and a degree of care they are likely to exercise in purchasing and/or using the goods.”

75. The tests which are, therefore, required to be applied in each case would be different. Each word must be taken separately. They should be judged by their look and by their sound and must consider the goods to which they are to be applied. Nature and kind of customers who would likely to buy goods must also be considered. Surrounding circumstances play an important factor. What would be likely to happen if each of those trade marks is used in a normal way as a trade mark of the goods of the respective owners of the marks would also be a relevant factor. (See *Pianotist Co.—s Application, Re* [(1906) 23 RPC 774] .)

77. Where the class of buyers, as noticed hereinbefore, is quite educated and rich, the test to be applied is different from the one where the product would be purchased by the villagers, illiterate and poor. Ordinarily, again they, like tobacco, would purchase alcoholic beverages by their brand name. When, however, the product is to be purchased both by villagers and town people, the test of a prudent man would necessarily be applied. It may be true that the tests which are to be applied in a country like India may be different from the tests either in a country of England, the United States of America or Australia.

82. But then we are concerned with the class of buyer who is supposed to know the value of money, the quality and content of Scotch whisky. They are supposed to be aware of the difference of the process of manufacture, the place of manufacture and its origin. Respondent 3, the learned Single Judge as also the Division Bench of the High Court, therefore, failed to notice the distinction, which is real and otherwise borne out from the precedents operating in the field. (See *Kerly's Law of Trade Marks and Trade Names*, 13th Edn., p. 600)”

25. In *Amritdhara Pharmacy (Supra)* it has been laid down that two important questions while examining the issue of deceptive similarity would be : i) the persons whom the resemblance must be likely to deceive

or confuse, and (ii) the rules of comparison to be applied. It was held in paragraph No.6 as under:

“6.

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“You must take the two words. You must judge them, both by their look and by their sound. You consider the goods to which they are to be applied. You must consider the nature and kind of customer who would be likely to buy those goods. In fact you must consider all the surrounding circumstances; and you must further consider what is likely to happen if each of those trade marks is used in a normal way as a trade mark for the goods of the respective owners of the marks.”

For deceptive resemblance two important questions are : (1) who are the persons whom the resemblance must be likely to deceive or confuse, and (2) what rules of comparison are to be adopted in judging whether such resemblance exists. As to confusion, it is perhaps an appropriate description of the state of mind of a customer who, on seeing a mark thinks that it differs from the mark on goods which he has previously bought, but is doubtful whether that impression is not due to imperfect recollection. (See Kerly on Trade Marks, 8th Edition, p. 400.)”

26. The nature of the consumers who would be purchasing the goods has been held to be a relevant consideration also in *J.R. Kapoor Vs. Microlx India, 1994 Supp (3) SCC 215, Cadila Health Care vs. Cadila Pharmaceuticals (2001) 5 SCC 73* and *Kaviraj Pandit Durga Dutt Sharma (Supra)* in which it was held that the class of purchasers who are likely to buy the goods bearing the marks they require, their education, intelligence and the degree of care they are likely to exercise in purchasing and/or using the goods would be a relevant factor for deciding the question of deceptive similarity.

27. In view of the aforesaid discussion, we are of the considered opinion that the trial Court has not committed any error in holding that no similarity is found in the defendant's mark which can be said to be such imitation of plaintiff's trade mark which could deceive the consumers of plaintiff's products. The findings arrived at by the Trial Court are just and legal and call for no interference. As a result, the appeal is found to be devoid of any merits and is hereby dismissed.

28. Looking to the facts and circumstances of the case and as has been directed by the Supreme Court in a number of decisions in respect of suits arising out of infringement of registered trade mark, we direct the Trial Court to proceed with the matter on merits and to ensure that the same is concluded expeditiously and preferably within a period of nine months from the date of receipt of certified copy of this order. It is hereby made clear that the trial Court shall not be influenced with the observations as made in the impugned order or by this Court in this order.

(S. A. DHARMADHIKARI)
JUDGE

(PRANAY VERMA)
JUDGE

jyoti