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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.11.2023

CORAM :

THE HON'BLE MR.SANJAY V.GANGAPURWALA,
CHIEF JUSTICE
AND
THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

O.S.A.(CAD).Nos.134 to 138 of 2023

ITC Limited
Virginia House,
37, J.L. Nehru Road, Kolkata - 700 071.
And also at
69, Chambers Road, Chennai - 600 018.

And also at
69 Pasumpon Muthuramalinga Thevar Road,
(Chamiers Road), Austin Nagar,
Nandanam, Chennai - 600 035.

And also at
ITC Limited
Education & Stationary Products Business
ITC Centre, 4th and 5th Floor,
760 Anna Salai,
Chennai - 600 002. ... Appellant
(in all appeals)

Versus

Britannia Industries Ltd.,
rep by its Authorized Representative,
Ravichandran Rajagopal ... Respondent
(in all appeals)

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Prayer in O.S.A(CAD).No.134 of 2023 : Original Side Appeal - Commercial Appellate Division filed under Section 13 of the Commercial Courts Act, 2015 read with Order XXXVI Rule 9 of the Original Side Rules of the High Court of Madras, 1956 to allow this appeal and set aside the common order, dated 10th October, 2023 passed in O.A.No.551 of 2023 in C.S. (comm) No.153 of 2023.

Prayer in O.S.A(CAD).No.135 of 2023 : Original Side Appeal - Commercial Appellate Division filed under Section 13 of the Commercial Courts Act, 2015 read with Order XXXVI Rule 9 of the Original Side Rules of the High Court of Madras, 1956 to allow this appeal and set aside the common order, dated 10th October, 2023 passed in O.A.No.552 of 2023 in C.S. (comm) No.153 of 2023.

Prayer in O.S.A(CAD).No.136 of 2023 : Original Side Appeal - Commercial Appellate Division filed under Section 13 of the Commercial Courts Act, 2015 read with Order XXXVI Rule 9 of the Original Side Rules of the High Court of Madras, 1956 to allow this appeal and set aside the common order, dated 10th October, 2023 passed in O.A.No.554 of 2023 in C.S. (comm) No.153 of 2023.

Prayer in O.S.A(CAD).No.137 of 2023 : Original Side Appeal - Commercial Appellate Division filed under Section 13 of the Commercial Courts Act, 2015 read with Order XXXVI Rule 9 of the Original Side Rules of the High Court of Madras, 1956 to allow this appeal and set aside the common order, dated 10th October, 2023 passed in O.A.No.553 of 2023 in

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C.S. (comm) No.153 of 2023.

Prayer in O.S.A(CAD).No.138 of 2023 : Original Side Appeal - Commercial Appellate Division filed under Section 13 of the Commercial Courts Act, 2015 read with Order XXXVI Rule 9 of the Original Side Rules of the High Court of Madras, 1956 to allow this appeal and set aside the common order, dated 10th October, 2023 passed in O.A.No.555 of 2023 in C.S. (comm) No.153 of 2023.

For Appellant	: Mr.A.L.Somayaji, Senior Counsel, for Mr.Arun C.Mohan (in O.S.A.(CAD).No.134 of 2023)
	: Mr.Vijay Narayan, Senior Counsel, for Mr.Arun C.Mohan (in O.S.A.(CAD).No.135 of 2023)
	: Mr.Arun C.Mohan (in O.S.A.(CAD).Nos.136, 137 and 138 of 2023)
For Respondent (in all appeals)	: Mr.P.S.Raman, Senior Counsel Mr.Satish Parasaran, Senior Counsel for Mr.M.S.Bharath, Mr.Reshma Raj, Mr.Preethi Jhabakh, Mr.V.S.Krishna, for M/s.Kria Law

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COMMON JUDGMENT

(Judgment made by the Hon'ble Mr.Justice D.Bharatha Chakravarthy)

A. The Appeals:

These Original Side Appeals are directed against the order of the learned Single Judge, dated 10.10.2023 in O.A.Nos.551 to 555 of 2023 in C.S.(Comm Div).No.153 of 2023.

1.1. In the above applications, the respondent herein has prayed for interim injunction restraining the appellant herein from (i) indulging in unfair competition; (ii) infringement of their registered trademarks, (iii) passing off their goods as that of the plaintiff; (iv) infringement of copyright in the original artistic work in the wrapper; and (v) from diluting the goodwill and reputation of the plaintiff's trade dress and colour scheme. In this judgment the parties are referred to as per their array in the suit.

B. The Case of the Plaintiff :

2. The plaintiff, *Britannia Industries Limited*, filed the above suit pleading that it was established in the year 1892, from which date, it has been manufacturing biscuits in India. It started from a small house in Central Kolkata and now, it is a leading food Company with approximately

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Rs.13,000 crores as revenue. It's name itself has gained high reputation and goodwill and it has several products in the market which are very well known among the consuming public. While so, it has also adopted the mark '*GOOD DAY*' in the year 1986 and by virtue of continuous extensive use, advertisement and maintenance of high quality, *GOOD DAY* biscuits is a well known trademark throughout the country. Under the said umbrella mark, they are making and selling *Butter Cookies*, *Cashew Cookies*, *Nut Cookies*, *Pista Badam Cookies*, *Choco Chunkies* etc.

2.1. The plaintiff has been spending huge amounts for advertisements and sales promotion. For the year 2022-2023, it had spent Rs.255 crores for advertisement of the said brand. It has specifically designed and adopted the trade dress / wrapper for packaging the biscuits with distinct style, colour scheme and getup. The colour scheme, style and getup are adopted with variations in respect of the different flavours.

2.2. As far as the *Butter Cookies* are concerned, the petitioner uses the trade dress / wrapper in blue colour with the brand name '*GOOD DAY*' and the other devices contained therein. The plaintiff's mark has been registered in different combinations *vide* Application Nos.4182344, 5186937,

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5186938, 5186939, 5186940 in respect of Clause - 30. The consuming public connect the very trade dress, colour dress and getup with that of the plaintiff and the plaintiff's product namely, *Good Day Butter Cookies. Good day Butter Cookies* alone was sold for a total sum of Rs.1,889 crores in the year 2022-2023 and the plaintiff has spent a sum of Rs.137.27 crores for advertisements and sales promotion for its product *Butter Cookies* alone.

2.3. The plaintiff's mark, along with colour scheme, getup and style, has been recognised as well known mark by the Intellectual Appellate Board and also by the Delhi High Court in the connected litigations.

2.4. The defendant is selling their similar products under their brand name '*SUNFEAST*' by adopting the trademark *Mom's Magic*. Whileso, with a dishonest intention to cash in on the goodwill and reputation of the plaintiff and to pass off its products as that of the plaintiff, suddenly, in the month of March, 2023, started selling their products also in an identical blue colour trade dress / wrapper. If the products are placed side by side, it would be difficult to differentiate even with a careful observation. When the products are in shelves of various supermarkets and shops, they are absolutely bound to create confusion and even though the defendant was

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selling their product in red colour wrapper, only recently, in respect of South India alone, with a dishonest intention to cause confusion among the consuming public and to get unlawful gain from and out of the goodwill and reputation of the plaintiff, the defendant has adopted the blue colour wrapper with their brand and devices. Its action amounts to infringement of the plaintiff's mark, passing off its goods as that of the plaintiff, violation of the copyright of the plaintiff in their artistic works, dilution of the goodwill and reputation of the plaintiff's trade dress and amounts to unfair competition and hence, the suit is filed for permanent injunction praying for the above reliefs and for a decree for delivery of the offending materials and for rendition of accounts and for damages to a tune of Rs.65,00,000/-. Pending the above appeal, the above interim injunctions were prayed for.

C. The Case of the Defendant :

3. The applications for injunctions were resisted by the defendant by filing a common counter-affidavit. It is the case of the defendant that it is one of the India's leading private sector Companies having formidable presence in diversified fields. Its branded packaged food business is one of the fastest growing food businesses in India and it has several leading brands including that of '*SUNFEAST* '. The defendant had a total income of

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Rs.62,336 crores for the financial year 2021-2022 and its market capitalisation as on 31.03.2022 was about Rs.3,08,882 crores. It is into foods business from the year 2001. The biscuits under the brand name '*SUNFEAST*' were started in the year 2003 and it is one of the top brands in India.

3.1. The present mark in question namely, *Mom's Magic* was adopted in the year 2014 under the Umbrella mark *Sunfeast*. It has also obtained the registration of its trademark *Mom's Magic vide* registration No.1062044 in respect of Clause – 30. The defendant is the proprietor of the registered mark in No.2934217 in respect of *Mom's Magic Butter*, in No.2934214 in respect of *Mom's Magic Cashew and Almond*, in No.3550265 in respect of *Mom's Magic Fruit and Milk*. The registrations are valid and subsisting.

3.2. It has adopted the visual elements and packaging in tune with its consumer preferences over a period of time and such modifications were made lastly in the year 2020. The defendant, with the same visual elements, has been selling the product in red based wrapper from the year 2020. Without altering the lay out or getup and packaging and not modifying the trade dress in any manner whatsoever, the defendant merely and simply

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changed the packaging colour of *Sunfeast Mom's Magic Butter Cookies* to blue in line with the packaging colours of its *Butter Cookies.*

3.3. As per the common industrial practice blue colour is commonly used for butter and diary derivative products, more specifically, for *Butter Cookies*. It has no necessity to cash in on the reputation and goodwill as that of the plaintiff. A comparison of the products would show that both the wrappers are not at all similar in any manner whatosever. Majority of the diary products of all the manufacturers and market players are blue in colour only. While so, just because the defendant's rival product in the market was getting more sales instead of genuinely facing the market competition, the suit is filed to scuttle the sales of the defendant's product.

3.4. The defendant's use of its trade dress is neither similar nor it will dilute the plaintiff's mark and customers will not be confused and the adoption of the defendant of its mark, colour scheme, getup is not dishonest and therefore prayed for dismissal of the applications for injunction.

D. The Order of the Learned Single Judge :

4. The learned Single Judge considered the case of the parties and found that the plaintiff has been using the trade dress with elements and

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colour combination since 1997 for its *Butter Cookies* and has built a considerable consumer base. Though the arguments relating to monopoly over a colour are raised by the defendant at the first blush appears to be correct, since the product has been sold in the said colour combination for over two decades, the same has to become associated with that of the plaintiff's product and therefore, the plaintiff is entitled to protect its trademark. The defendant started selling *Butter Cookies* in the year 2014, but it has been selling only in red wrapper.

4.1. There is no explanation as to why they suddenly adopted the blue colour and the adoption appears to be dishonest with an intention to infringe trade mark of the plaintiff and pass off their goods. The defendant even now continues to pack its product in red wrapper in North India, but, the blue colour has now been introduced only in South India. The argument that the blue colour is common for the trade is not proved by them and the plaintiff has demonstrated that the other popular brands are selling in different shades. *Prima facie* case is made out on behalf of the plaintiff and finding so, the learned Single Judge injuncted the defendant from marking its product *Sunfeast Mom's Magic Butter Cookies* in the blue colour wrapper and allowed the applications in O.A.Nos.551 to 555 of 2023. The aggrieved

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defendant is on appeal before us.

E. The Submissions:

5. Heard *Mr.A.L.Somayaji* and *Mr.Vijay Narayan*, learned Senior Counsels appearing on behalf of the appellant / defendant and *Mr.P.S.Raman* and *Mr.Satish Parasaran*, learned Senior Counsels appearing on behalf of the respondent / plaintiff.

5.1. *Mr.A.L.Somayaji*, learned Senior Counsel appearing on behalf of the defendant took this Court through the wrappers used in respect of both the products and submitted that the defendant has clearly pointed out the differences between both the products by a tabular column in their counter-affidavit which is extracted hereunder for ready reference :-

	APPLICANT'S BRITANNIA GOOD DAY BUTTER COOKIES	**RESPONDENT'S SUNFEAST MOM'S MAGIC BUTTER COOKIES**
I.	If the pack is divided vertically into two halves, the left side as well as the right side halves would remain predominantly blue.	If the pack is divided vertically into two halves, the left side half is predominantly blue and the right side half is pictorial depiction of butter.
II.	The Applicant's alleged well-known mark GOOD DAY is written on the left side.	The Respondent's registered trademark MOM'S MAGIC is written in a distinctive font towards the left side but closer to the centre of the pack.

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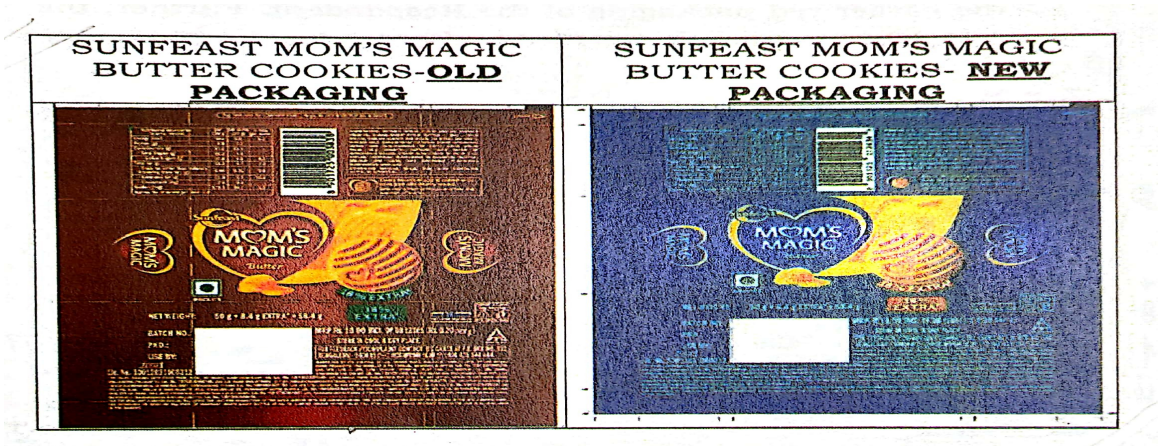
III.	A device of smiley is placed beneath the words GOOD DAY.	A distinctive device of golden heart is placed on the left side encircling the words MOM'S MAGIC.
IV.	Applicant's house mark BRITANNIA is written in white colour within a red oblong device right above the words GOOD DAY.	Respondent's umbrella brand SUNFEAST is written in gold colour at the left top corner of the golden heart device.
V.	The packaging includes an image of a single biscuit placed at the middle of the packaging in a straight position. The biscuit design contains the image of a smiley on its lower half and has three butter shavings/dollops placed below/beside the single biscuit.	The packaging contains a distinctive device of a biscuit placed on the right bottom corner in an angular position leaning against the swoosh of butter. The biscuit design contains an image of hear towards the left side of the biscuit in the middle portion.
VI.	The device of single biscuit has two radiating circles in two different shades of blue containing the statement "Many Smiles Make a Good Day!"	The device of biscuit with a heart shape is leaning on a swoosh of butter flowing and forming a butter shaving at the bottom of the golden heart device.

5.2. He would submit that the defendant itself is leading manufacturer for popular brands and there was no need for it to imitate or copy the plaintiff and it is also spending huge amount by way of advertisements and sales promotion in popularising its brand *Sunfeast Mom's Magic*. That being the situation, the alleged dishonest adoption and passing off on the part of the defendant is too far-fetched. As a matter of fact, with the same

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devices, pictures, logos and in an identical combination, the plaintiff has been selling the products all along from the year 2020. He would submit that the following picture would depict that the defendant did not make any alteration whatsoever of the product.



5.3. He would submit that the learned Single Judge erred in finding that there was no explanation on behalf of the defendant in adopting the blue colour in the year 2023. As a matter of fact, it has been specifically pleaded that as far as the *Butter Cookies* are concerned, in consonance with the common practice of depicting the diary products in blue colour, the same was adopted. Several examples of various diary products being sold in blue colour packaging are brought to our notice including *Milk*, *Milk Chocolates*, *Butter*, *Butter Cookies*, *Butter Biscuits* etc. There are various other leading brands having considerable market share who are also using the blue colour wrapper. Therefore, there is absolutely no *prima facie* case

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and the learned Single Judge ought not to have granted the interim reliefs. He would submit that this is an attempt to avoid genuine competition in the market. Finally, he would submit that with the sudden grant of interim order, at present, the defendant has a stock of its products already wrapped in the blue colour wrappers and a huge amount of blue colour wrappers which are already printed by the defendant would also lying waste.

5.4. *Mr.Vijay Narayan*, learned Senior Counsel also appearing on behalf of the defendant, carrying the arguments further, would submit that the entire crux of the claim of the plaintiff was in respect of the blue colour. They cannot claim any right over blue colour either under the *Trade Marks Act, 1999* or the *Copyright Act, 1957* or in common law. Nobody can claim any proprietary right over the colour blue. The learned Senior Counsel pointing out to the following picture, would submit that the various components used in the wrappers of the defendant and plaintiff is compared without the colour back ground, it can be seen that the plaintiff and the defendant are totally different.

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S.NO.	SUNFEAST MOM'S MAGIC	BRITANNIA GOOD DAY
1.	 SUNFEAST MOM'S MAGIC BUTTER COOKIES **WITHOUT BLUE** COLOUR	 BRITANNIA GOOD DAY BUTTER COOKIES **WITHOUT BLUE** COLOUR
2.	 SUNFEAST MOM'S MAGIC BUTTER COOKIES	 BRITANNIA GOOD DAY BUTTER COOKIES

5.5. The use of butter in the background or foreground in respect of *Cookies* is common to the trade. The defendant is only portraying its Umbrella mark *Sunfeast* and the well known mark *Mom's Magic* and a picture of its *Cookies*. Thus, it can be seen that the only grievance which can be portrayed by the plaintiff is that of the colour. The law does not confer exclusive use of a particular colour on the plaintiff. Therefore, he would also submit that the order of the learned Single Judge requires interference.

5.6. Both the learned Senior Counsels appearing on behalf of the appellant / defendant would rely upon the following judgments :-

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Sl. No.	Description	Para Nos.	Proposition
1.	Re Christiansen's Trademark – ***(1886) 3 RPC 54***	--	(i) The trade mark is to be looked at not simply as it appears on the Register, but with reference to the evidence which shows how it is going to be used in the trade. (ii) The trademark herein is common to trade.
2.	Colgate Palmolive Company Limited & Anr. Vs. Patel & Anr. ***2005 (31) PTC 583 (Del) MANU / DE / 1000 / 2003***	29, 31, 33, 36, 37, 39, 40, 42, 58	One cannot acquire a trade mark by colour alone and it cannot be monopolized by any party.
3.	Cadila Healthcare Vs. Cadila Pharmaceuticals Ltd., ***(2001) 5 SCC 73 MANU / SC / 0199 / 2001***	16	If overall there is no similarity, comparison of some parts is not correct
4.	Cipla Ltd. Vs. M.K.Pharmaceuticals ***2008 (36) PTC 166 (Del) MANU/DE/1938/2007***	5	Plaintiff does not get monopoly over colour and shape so that no one else can use that colour & shape. Depending on the product, colour, shape etc., will not amount to passing off.
5.	Godfrey Philips India Ltd. Vs. P.T.I. Private Limited and Ors., ***2018 (73) PTC 178 (Del) MANU/DE/5812/2017***	11 & 12	As per Section 17 of the Trademarks Act, the applicant can seek infringement of their mark as a whole and cannot dissect the elements more particularly usage of

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			colour combination or scheme in the respective packaging will not cause passing off by the defendants.
6.	ITC Limited Vs. N. Ranga Rao & Sons Private Ltd., ***2021 SCC Online Mad 5807***	7	There is no element of any copyright infringement as copyright primarily exists in any literary, dramatic or artistic work; or in any cinematograph film; or any musical work. There is no form or shape to the colour combination for the plaintiff to insist on any copyright in any artistic material. Any artistic material, by its very nature, would have a form or a shape and the colour scheme in the plaintiff's packaging cannot be regarded as any artistic work.
7.	Britannia Industries Limited Vs. ITC Limited ***240 (2017) DLT156***	15, 16, 17, 18, 21 & 23	Exclusivity claimed vis-à-vis a get-up and particularly a colour combination stands on a different footing from a trade mark or a trade name because colours and colour combinations are not inherently distinctive.
8.	Indian Performance Rights Society Vs. Sanjay Dalia ***(2015) 10 SCC 161***	18, 19 & 21	Hon'ble Supreme Court (SC) dealt with the extent to which section

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			62 of the Copyright Act,1957 and section 134 of the Trademark Act, 1999 provide the entitlement to the Plaintiff in terms of instituting suit for infringement.
9.	A.V. Rajadurai Nadar Vs. P. Ayya Nadar, ***MANU/TN/0241/1977***	4	When one looks at a product to use a particular brand, if it appears that the difference is prominent and it cannot lead to any similarity or a deceptive similarity or confusion, then there could be no objection to the two different trademarks.
10.	Britannia Industries Ltd., Vs. Parle Biscuits P. Ltd., ***2022 SCC OnLine Del 1114***	9	Packaging has to be considered with a different perspective.
11.	Imperial Group PLC & Anr. Vs. Philip Morris Limited & Anr. ***(1984) RPC 293***	--	When the plaintiff has adopted things which are common in the market, it cannot claim distinctiveness or exclusivity
12.	Jewsbury and Brown Vs. Andrew and Atkinson and Ormerod Bros. [Reports of Patent, Design and Trade Mark Cases Vol. XXVIII No. 13 page 293]	--	When the trade dress is common to the trade, there will not be confusion.

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13.	Reckitt & Colman Products Ltd Vs. Borden inc., & Ors. ***(1990) RPC 341 MANU/UKHL/0012/1990***	--	The plaintiff has to establish the elements of passing off, namely, misrepresentation, confusion and the consequent loss.
14.	Kaviraj Pandit Durga Dutt Sharma Vs. Navaratna Pharmaceutical Laboratories ***AIR 1965 SC 980 MANU / SC / 0197 / 1964***	28 & 29	When the defendant is prominently displaying its brand and conveying that it is manufactured by it, there cannot be passing off.
15.	King & Co. Ld. Vs. Gillard & Co. Ld. [Reports of Patent, Design and Trade Mark Cases Vol. XXIL No.13 page 327]	--	There can be no special rights in respect of the characteristics which are common to the trade
16.	National Bell Co. Ltd Vs. Metal Goods Mfg. Co. Ltd ***1970 (3) SCC 665***	16	The blue colour, swoosh of butter etc are public juris and no exclusivity can be claimed
17.	Payton & Co., LD Vs. Snelling, Lampard & co., LD [Reports of Patent, Design and Trade Mark Cases Vol. XVII No.2 page 48]	--	Unless the plaintiff has adopted things which not not common to the trade, no right can be claimed
18.	Wander Ltd., and another Vs. Antox India P. Ltd., ***1990 (Suppl) SCC 727***	14	It the trial court had exercised its discretion erroneously appellate court can interefere
19.	Shree Vardhman Rice and General Mills Vs. Amar	2 & 3	In the facts of the case, it would be better to

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	Singh Chawalwa ***(2009) 10 SCC 257***		expeditiously decide the main suit itself.
20.	Silvermaples Healthcare Services P. Ltd., and Ors. Vs. Dr. Ajay Dubey and Ors. ***2023 SCC Online Del 5294***	22, 23 & 37	Due opportunity should be given to the defendant even at the time of passing interlocutory orders
21.	Southern California Fish Co. v. White Star Canning Co., 45 Cal.App. 426, 432-33 (Cal. Ct. App. 1920)	429-435	A comparison of the labels used by plaintiff and defendant shows that the only features that possibly can give rise to any similarity are those that are common to the trade, size and shape of the cans and general similarity of color scheme and the fish symbol & a design that serves to indicate the nature of the article packed in the cans or containers. Hence there can be no infringement or passing off
22.	Dabur India Ltd. Vs. Emami Ltd., ***2023 SCC Online Del 5824***	14, 15 & 16	Due opportunity has to be given to the defendant even that the interlocutory stage.
23.	Walmart Stores Inc. Vs. Samara Brothers Inc. ***529 U.S.205 (2000) MANU/USSC/0027/2000***	--	Product design can never be inherently distinctive because consumers do not typically associate a product design with its

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			source, and confirming its prior ruling in Qualitex that a colour trademark, whether applied to a product or its packaging, cannot be inherently distinctive.

5.7. Per *contra*, *Mr.P.S.Raman*, learned Senior Counsel appearing on behalf of the respondent / plaintiff would submit that if the products are kept together, even from a shorter distance, it would take some effort on any person to find out which is that of the plaintiff and which is that of the defendant. When the products are kept in shelves of stores, shops etc., there can be no two arguments that there will be absolutely confusion and the defendant's products are deceptively similar than that of the plaintiff. Each and every component in the defendant's wrapper though poses to be different, it is crafted carefully so as to imitate the product of the plaintiff.

5.8. Admittedly, the plaintiff is the prior user, using the current wrapper in its form from the year 1997. Admittedly, the defendant started using the current scheme of things from the year 2020. Even though the same is similar to that of the plaintiff, in view of the colour of the wrapper being red in colour, the same reduced the mischief and therefore, the

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plaintiff did not sue the defendant. But, now, intentionally, it is adopting some shade of blue colour and the only reason is to encash on the good will and reputation of the plaintiff. He would submit that the learned Single Judge has rightly considered the issue and granted the interim order. As a matter of fact, the injunction is granted only with the blue colur wrapper and the defendant can very well sell its products with the red colour wrapper which was all along used by them. As far as the existing products, which are already packed by the defendant, are concerend, he would submit that the same can be considered by this Court if the defendant has to be permitted to sell the said products. But, however, he would submit that merely because the wrappers have been printed, the defendant cannot be further permitted to use the same for packaging their products and further sale of their products.

5.9. *Mr.Satish Parasaran*, learned Senior Counsel, also appearing on behalf of the plaintiff, would submit that when the plaintiff is crying foul of the blue colour, it is not by way of claiming exclusive use of the colour by itself, but, the colour forms a unique scheme along with the other devices and depiction in the wrapper so as to create an unique artistic copyright and distinctive trade dress in the combination of the registered marks of the

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plaintiff. The tabular column demonstration on behalf of the defendant has been decried by the Hon'ble Supreme Court of India and this Court repeatedly. He would submit that the test for deceptive similarities cannot be the kind of comparison as advocated on behalf of the defendant. He would therefore submit that the order of the learned Single Judge does not need interference.

5.10. Both the learned Senior Counsel would also point out to the various judgments relied upon by them before the learned Single Judge in support of their propositions.

F. The Discussion & Findings :

6. We have considered the rival submissions made on either side and perused the material records of the case. The parties are contesting the suit and the rights of the parties have to be finally determined in the main suit. The question that arises is that whether or not interim protection need to be granted to the plaintiff pending the suit and if so, on what terms ?

6.1. On a perusal of the decisions cited on either side, for the limited purpose of deciding the appeals, the law on the point can be summarised as

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follows :-

(i) In cases of this nature complaining infringement of proprietary rights in the trademark and passing off etc., whenever a *prima facie* case is made out, interim injunction should normally follow;

(ii) To satisfy as to the *prima facie* case of infringement or passing off, it has to be decided as to whether there is deceptive similarity between the products of the plaintiff and the defendant and if so, whether the plaintiff is the prior user and whether *prima facie*, the adoption of the mark by the defendant is dishonest;

(iii) In order to arrive at a conclusion as to whether the products are deceptively similar or not, it cannot be from the view point of a reasonable man but, by adopting the standard of an ordinary gullible customer;

(iv) The similarity or otherwise cannot be determined by factor-wise comparison or by forensic analysis, but, by wholesome consideration of the offending marks / labels / trade dress in question and the test varies upon the nature of the marks, its use etc.,

6.2. Thus, the point to be considered is that whether the defendant's trade dress / wrapper is deceptively similar to that of the plaintiff. The picture of the product of the plaintiff as well as the defendant is shown in

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paragraph 5.4 above.

6.3. Even on a careful consideration thereof, it can be seen that though the brand name, trademark, device of the biscuit, swoosh of butter are portrayed to be different, yet, it is carefully and meticulously designed and combined at appropriate place in the wrapper so as to absolutely to be similar than that of the plaintiff. Admittedly, the plaintiff is the prior user of the present colour scheme, getup, combination of the picture of biscuit, butter etc. One would be too naive to believe that this is just a coincidence. Even the manner in which the defendant's mark, *Mom's Magic* which appears on both the ends of the wrapper clearly resembles that of the plaintiff's depiction of its mark '*GOOD DAY*' at the same place. Thus, even though from the picture portrayed in the paragraph No 5.4 above, the learned Counsel for the defendant would demonstrate that each and every component is different, yet, they are very similar even on a careful comparison.

6.4. On a casual look or glance, there can be no doubt whatsoever that both the products are absolutely similar to each other. There will be confusion in the market. Especially, in the nature of the product being

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Cookies, being sold in the shelves of supermarkets, shops etc., any ordinary customer looking at the shelf is bound to be deceived and therefore, the product of the defendant is deceptively similar than that of the plaintiff. Admittedly, the plaintiff is the prior user and logically copying and dishonest adoption can only be attributed only to the defendant.

6.5. The arguments of the learned Senior Counsel on behalf of the defendant in demonstrating as to each and every component and stating that the plaintiff cannot claim the exclusively use of the picture of the biscuit, swoosh of butter, the colour of butter, the colour of wrapper, the roughly heart shape pattern of the mark *GOOD DAY* is written, the place in which the trademark umbrella mark is placed, the place in which the trade mark is placed in the middle and side words etc., is like a person after copying a story claiming that his story is made up of alphabets a,b,c,d, etc., and the other side cannot claim exclusivity of usage of those letters. The fact of the matter is that its use in such a combination forms words and sentences that it shows the same story as that of the plaintiff. Similarly, the copyright in the artistic work lies in the effort to put in each and every element together in a particular manner and style. The trademark and the trade dress get distinctiveness in the combination of the colour scheme, getup thereof and

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not in individual bits and pieces. Therefore, we reject the submissions of the learned Senior Counsel appearing on behalf of the defendant in this regard.

6.6. The next point for consideration is that since the plaintiff is not aggrieved by using the same set of devices, pictures and combinations in red colour wrap, whether the plaintiff's claim is to be rejected as claiming exclusivity of blue colour? The submission on the part of the defendant that the plaintiff is claiming exclusivity to blue colour is unacceptable to us as the said contention does violence to the context in which the claim is made. It is the colour per se alone but the colour scheme and getup which gives rise to the proprietary right of the exclusive use.

6.7. When the other similarly coined and adopted devices of the defendant used in red wrapper, it would still pass the test of distinctiveness and identifiability by the customer by a casual look or in racks and shelves of supermarkets and shops etc. Only in that context, the claim of the plaintiff is in respect of injuncting the defendant from selling its product as depicted above in blue wrapper. Use of blue colour as the back ground in wrapper is the last straw on the camel, and make the defendant's product

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offending the proprietary rights of the plaintiff to their trademarks and trade dress and their copyright. The same also leads to the inference of dishonest adoption on the part of the defendant in order to pass off its goods so as to unjustly enrich itself.

6.8. Under the said circumstances, we are in agreement with the findings rendered by the learned Single Judge, *prima facie* for consideration of the grant of interim injunctions as prayed for by the plaintiff. When the learned Single Judge has taken into account the relevant factors for consideration and has exercised the discretion to grant interim reliefs pending trial, the same cannot be interfered with merely because there is a possibility for the Appellate Court to take another view. However, we are inclined to grant the prayer of the learned Senior Counsel appearing on behalf of the defendant that the existing stock which is already packed in the offending blue colour wrappers alone, can be permitted to be sold.

G. The Result:

7. In the result, the Original Side Appeals in O.S.A.(CAD).Nos.134 to 138 of 2023 shall stand partly allowed on the following terms :-

(i) The order of the learned Single Judge, dated 10.10.2023 in

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O.A.Nos.551 to 555 of 2023 in C.S.(Comm Div).No.153 of 2023 shall stand confirmed;

(ii) However, the defendant is permitted to sell existing stock of their products packed in offending blue colour wrap and the status of the current stock, their movement and sale thereof shall be informed in writing and the exemption is only in respect of current stock of the quantity of 23.7 tonnes as prayed by the learned Senior Counsel and nothing more or further;

(iii) However, there will be no order as to costs;

(iv) Consequently, C.M.P.Nos.24144, 24146, 24148, 24147 and 24151 of 2023 are closed.

(S.V.G., CJ.) (D.B.C., J.)
08.11.2023

Index : yes
Speaking order
Neutral Citation : yes
grs

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THE HON'BLE CHIEF JUSTICE
AND
D.BHARATHA CHAKRAVARTHY, J.

grs

O.S.A.(CAD).Nos.134 to 138 of 2023

08.11.2023

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