

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION (L) NO. 1717 OF 2013

IN

SUIT (L) NO. 752 OF 2013

Pidilite Industries Limited

...Applicant

In the matter between:

Pidilite Industries Limited

...Plaintiff

vs.

Jubilant Agri & Consumer Products Limited

...Defendant

Mr. V.R. Dhond, Senior Advocate, along with Mr. Nishad Nadkarni, Mr. Vaibhav Keni and Mr. Sumeet Rane, instructed by M/s. LEGASIS PARTNERS, for the Applicant/Plaintiff.

Mr. Ravi Kadam, Senior Advocate, along with Mr. A.A. Kirpekar, instructed by M/s. MAG LEGAL, for the Defendant.

CORAM: S.J. KATHAWALLA, J.**Order reserved on: 10th October, 2013****Order pronounced on: 13th January, 2014****ORDER:**

1. The above Suit is filed by the Plaintiff against the Defendant on the ground that the Defendant is infringing the registered trademarks of the Plaintiff, infringing the copyrights of the Plaintiff and committing the tort of passing off its goods as the goods of the Plaintiff in the circumstances set out in the Plaint.

2. By the above Notice of Motion, the Plaintiff has sought ad-interim/interim reliefs restraining the Defendant from infringing the trademarks and copyrights of the Plaintiff and/or committing the act of passing off its goods as that of the Plaintiff.



3. By an ex parte order dated 29th August, 2013, ad-interim injunction in terms of prayer clauses (a) and (b) of the Notice of Motion have been granted in favour of the Plaintiff and against the Defendant which prayers are reproduced hereunder:

“(a) That pending the hearing and final disposal of the suit, the Defendants, its Directors, proprietors, partners, owners, servants, subordinates, representatives, stockists, dealers, agents and all other persons claiming under them be restrained by an order and injunction of this Hon'ble Court from infringing the Plaintiff's MARINE Registered Marks bearing registration Nos. 1319822, 1319821 and 1319823 in any manner and from using in relation to Impugned Goods or any other goods for which the MARINE Marks are registered or any goods similar to the goods for which MARINE Registered Marks are registered, the Impugned Mark or any other mark which is identical or similar to MARINE Registered Marks or any essential feature thereof including the mark MARINE or any other marks similar thereto and from manufacturing, selling, offering for sale, advertising or dealing in Impugned goods under Impugned Mark and from manufacturing, selling offering for sale, advertising or dealing in any goods (for which MARINE Registered Marks are registered or which are similar to the goods for which MARINE Registered Marks are registered) bearing the Impugned Mark or any other mark which is identical or similar to MARINE Registered Marks or any essential feature thereof including the mark MARINE or any other marks similar thereto;

(b) That pending the hearing and final disposal of the suit, the Defendants, its Directors, proprietors, partners, owners, servants, subordinates, representatives, stockists, dealers, agents and all other persons claiming under them be restrained by an order and injunction of this Hon'ble Court from infringing in any manner the Plaintiff's copyright in the artistic work comprised in/reproduced on either of the MARINE Artistic Works including in particular the MARINE Artistic Work 2 and MARINE Artistic Work 3 and from reproducing/copying the said artistic works or a substantial part of the said artistic works (including in particular the depiction of the plywood in a slanting manner floating in water which is splashing along with droplets of water) on the Impugned Goods or the Impugned Labels (including those depicted at Exhibit K to the Plaint) or any bottles, cartons, packaging material or advertising material, literature or any other substance and from manufacturing and selling or offering for sale products upon or in relation to which the said artistic works have been reproduced or substantially reproduced or by issuing copies of such works to the public”.

◀The Notice of Motion is now taken up for final hearing.

4. The infringement alleged by the Plaintiff relates to three registered trademarks (two word marks and one label mark), which marks along with their registration numbers are reproduced hereunder as A, B and C respectively.

A	FEVICOL MARINE	Reg. No. 1319822 (Word mark)
B		Reg. No. 1319821 (Word mark)
C		Reg. No. 1319823 (Label mark)

5. The Registration Certificates in respect of the above three registered marks are at pages 58, 61 and 63 of the Complaint. All three registrations are effective since 9th November, 2004. Two registrations (Pages 58 @ 59 and 61 @ 62 of the Complaint) have a user claim of 1st May, 2003. The third registration (Page 63 @ 64 of the Complaint) has a user claim of 1st May, 2003. The Plaintiff has laid stress on the fact that all the three registrations are absolute and unconditional, and in particular the Registrar, although entitled to, did not impose any condition or limitation on the word 'MARINE' whilst granting registration and resultantly registration has been granted

in respect of the entirety of the marks.

6. In addition to the three registered trademarks, the Plaintiff has filed applications for registration in respect of five other trademarks, particulars of which are given hereunder:

Trademark	Reg/Appln. Details	Class	Status
FEVICOL MARINE (label)	2110954	1	Pending
MARINE	1918007	1	Pending
MARINE	1972339	1	Pending
FEVICOL MARINE(Label)	2110954	1	Pending
FEVICOL MARINE(Label)	2425737	1	Pending

As can be seen from the table above, three of the five applications are for label marks and two applications are in respect of the word marks, and that all the five applications are pending registration. The two pending word marks applications are in respect of the word 'MARINE' (by itself/stand alone). These applications have been numbered 1918007 and 1972339. A perusal of the advertisement in respect of Trademark Application No. 1972339 (for the word mark 'MARINE') establishes that the user claimed therein has been since 2003. According to the Plaintiff, due to an inadvertent error, Trademark Application No. 1918007 also for the word mark 'MARINE' wrongly mentioned the user claim as “proposed to be used”. According to the Plaintiff, upon this error being noticed, the Plaintiff filed an application in Form TM-16 for amending the user claim date, copy of which is tendered in Court.

7. According to the Plaintiff, the Defendant by using the mark 'JIVANJOR

MARINE PLUS' is infringing the Plaintiff's registered mark and is also guilty of passing off their goods as that of the Plaintiff.

8. The Defendant contends that the Plaintiff's mark is 'FEVICOL MARINE' and the Defendant's mark is 'JIVANJOR MARINE PLUS' and that both the Plaintiff and the Defendant are using the word 'MARINE' in a descriptive manner. The main defence of the Defendant is that the word 'MARINE' is inherently descriptive, is devoid of any distinctive character, is incapable of being registered as trademark and therefore cannot be claimed to be a trademark of the Plaintiff even though it forms part of the registered trademark/label mark 'FEVICOL MARINE'.

9. As submitted by the Plaintiff it is essential to examine at the outset, whether the word 'MARINE' forms an essential part of each of the three registrations set out as A, B and C in paragraph 4 above. I have perused the three marks set out as A, B and C in paragraph 4 above. As can be seen from the said marks, what is set out at A is the word mark 'FEVICOL MARINE'. The two components of the registered word mark are the word 'FEVICOL' and the word 'MARINE' which are arranged side by side. Both these words are in the same font and of the same size and are therefore of equal prominence. At B, the registered word mark 'FEVICOL MARINE' is set out. This word mark consists of the words 'FEVICOL MARINE' written one below the other. The word 'FEVICOL' is written in a font which is slightly larger than the word 'MARINE'. The word 'MARINE' however, notwithstanding the slight difference in the font size, is very prominent and therefore constitutes a prominent

and essential feature of the registered mark and cannot be regarded as insignificant or inconsequential or non essential or not noticeable. The mark set out at C in paragraph 4 above, is a label mark consisting of the device of two elephants pulling a sphere and the words 'FEVICOL' and 'MARINE' written one below the other. Once again both these parts are of comparable prominence and the word 'MARINE' forms an essential and prominent part of the registered mark as well. The word 'MARINE' therefore cannot be regarded as inconsequential or insignificant or non essential or something that will not be noticed.

9.1 It is also correctly submitted on behalf of the Plaintiff that when comparing two marks (a registered mark and the offending/impugned mark) in an infringement action, the Court will compare the offending/impugned mark with the prominent and essential features of the registered marks and that the Court is not required to only compare the single most prominent feature of the registered mark. In other words, in the exercise of comparing rival marks, more than one prominent and essential feature can exist.

9.2 Therefore upon perusal of all the three registered marks, I am prima facie satisfied that the word 'MARINE' forms a prominent and essential part or feature of all the three registered trademarks set out at A, B and C in paragraph 4 above.

10. The Plaintiff has submitted that the products bearing the Suit marks are promoted and/or advertised and/or bought and/or sold and/or associated with the mark/word 'MARINE' and not merely 'FEVICOL MARINE'. This submission is vehemently denied/disputed by the Defendant.

10.1 As pointed out by the Plaintiff, its business activity extends to manufacture and sale of (i) adhesives; (ii) sealants; (iii) construction and paint chemicals; (iv) automotive chemicals; (v) art material, (vi) industrial and textile resins; and (vii) organic pigments and preparations. This diversity of business and products is carried out by the Plaintiff through various divisions. One such division is the Fevicol Division. The Fevicol Division manufactures and/or markets several products under different brand names such as: (i) MARINE ; (ii) DDL; (iii) SPEEDX; (iv) PL-111, (v) NAIL FREE, etc. These products cater to different segments and/or are for different purposes (e.g. NAIL FREE is an adhesive used in relation to glass and/or mirror; 'MARINE' is an adhesive used in relation to wet and/or humid conditions). These individual products are identified and/or distinguished from one another by using different brand names. These brand names are known as product identification marks/brands. 'MARINE' is one such sub-brand/product identification mark. When used in conjunction with the house mark 'FEVICOL' or independently thereof, the product identification marks/brands indicate and/or connote to the trade and/or members of the public (i) what that product is (e.g. 'MARINE' brand adhesive); and/or (ii) with which house brand (in FEVICOL) the same is associated. This is necessary since the product bearing one product identification mark/brand cannot or may not meet the purpose of another product bearing another product identification mark, even though both products may bear the same house mark 'FEVICOL'. Hence the product identification marks/brands serve to distinguish and/or identify the individual product in question. The product identification marks/brands therefore serve the important purpose of identifying and/or distinguishing one product from

the other. It is for this reason that the Plaintiff had obtained separate trademark registrations and/or filed separate trademark applications for the various product identification marks/brands. The Plaintiff has at pages 41 to 52 of the Plaintiff annexed its catalogue which shows the use of several product identification marks/brands. The Plaintiff is therefore correct in its submission that no one will go to a shop and ask for 'FEVICOL'. If he does so, he will be asked, "what 'FEVICOL' product?".

10.2 The Plaintiff has in support of its contention that in the trade, products are known by, called for and sold with reference to these product identification brands/marks, placed on record some of the bills and/or invoices. Pages 35 to 40 are the invoices which show that individual products are referred to and/or sold and/or purchased with reference to product identification marks/brands. A perusal of the same shows that the invoices issued by the Plaintiff as well as the orders received by the Plaintiff refer to a product only by the different brand names like 'MARINE', 'DDL', etc. (i.e. without use of the housemark 'FEVICOL'). The Plaintiff has in paragraphs 10, 11, 12, 13 and 14 of the Plaintiff referred to: (i) the sale of the Plaintiff's product under the 'MARINE' mark; (ii) the success and popularity of the products bearing the 'MARINE' mark; (iii) the goodwill generated in respect of the 'MARINE' mark/'MARINE' products; and (iv) the efforts made by the Plaintiff to advertise/promote the 'MARINE' products/brand. It is evident from the Certificate of Khanna & Panchmia, Chartered Accountants, dated 17th July, 2013, annexed as Exhibit-H1 to the Plaintiff, that the Plaintiff began the sale of 'MARINE' labelled products/commenced the use of the 'MARINE' brand from the Financial Year 2003-

2004. It is the case of the Defendant that they commenced using the impugned mark in June, 2012. If the sales figures of the Plaintiff upto 31st March, 2012 are considered, the aggregate sales by the Plaintiff till 31st March, 2012, are in excess of Rs. 130 crores. If half of the sales for the Financial Year 2012-2013 (period April to September) are added, the total sales are in excess of Rs. 180 crores. Consequently, by the time the Defendant commenced the use of the impugned mark, the Plaintiff had been in the market for more than nine years and had aggregated sales in excess of Rs. 180 crores.

10.3 The Defendant has submitted that there are several products available in the market containing the mark 'MARINE'. However, the Defendant has been unable to show the sales of the other 'MARINE' products. Therefore, the extensive and continuous sales of the Plaintiff's 'MARINE' products/use of the 'MARINE' mark has to be seen in the backdrop of the fact that the Defendant has been unable to place before this Court sufficient material to show any significant sales of other 'MARINE' products. Consequently as submitted by the Plaintiff, the position that emerges is that the Plaintiff was the only one who was manufacturing and/or selling products (of any significant volume) with the 'MARINE' trademark. Resultantly, a person who wanted the 'MARINE' adhesive would ask for 'MARINE' and not 'FEVICOL MARINE' as there was no other 'MARINE' branded products in the market for him to need the addition of the prefix 'FEVICOL' to distinguish one 'MARINE' from the other. The Plaintiff has also correctly submitted that when a customer goes to a shop to buy biscuits depending on what he wants, he simply asks for them by their product identification mark/brand or sub-brand e.g. 'Marie' or 'Monaco' or 'Goodday' or

'Krackjack' or '50:50' or 'Maska Chaska'. He does not preface it with the name of the manufacturer i.e. Parle or Britannia.

10.4 In the circumstances, it is clear that by reason of open, continuous and extensive sales over a period of about nine years, the mark 'MARINE' either by itself or as a component/constituent of the registered trademark 'FEVICOL MARINE' has acquired a secondary meaning/further distinctiveness and has become exclusively associated with the Plaintiff.

11. It is submitted on behalf of the Defendant that the word 'MARINE' is a common dictionary word and that until the application for the word mark 'MARINE' proceeds for registration, no monopoly in respect thereof can be granted. It is submitted that granting reliefs to the Plaintiff will amount to creating a monopoly in the Plaintiff's favour over a common word in the English language and that the Court should be slow in passing any orders which would have this effect. The Plaintiff has relied upon the judgment of this Court in the case of *I.T.C. Limited Company vs. G.T.C. Industries Ltd. and another*¹ and the decision in the English Law of Joseph Crosfield cited therein to urge that the word 'MARINE' is a “part of the great common of the English language” and/or “devoid of distinctive character” and/or “not capable of distinguishing the goods of one trader from another” and therefore the Court would be in error in granting an injunction.

11.1 As set out hereinafter, the Defendant has itself applied for registration of a mark described by it as the 'MARINE PLUS' (Label) comprising of the words 'MARINE

¹ 2002 (25) PTC 465 Bom.

PLUS' as its leading and essential feature and is therefore estopped from contending that the word 'MARINE' is descriptive or has become *publici juris* or 'common to trade'. By the act/action of making the application, it manifested its own state of mind/understanding that 'MARINE PLUS' used by it was used as a mark. This is not in any way altered/diluted/affected by the subsequent withdrawal of the application (on legal advice) post the filing of the Suit.

11.2 The Defendant itself has contended that the word 'MARINE' is a dictionary word, meaning "of or relating to the sea" (as defined in the Oxford English Reference Dictionary). The dictionary meaning "of or relating to the sea" does not in any manner describe the products of the Plaintiff/Defendant or the characteristics of the products of the Plaintiff/Defendant. The word 'MARINE' is not descriptive of the products of the Plaintiff/Defendant. The Defendant has also relied on the meaning of the word 'MARINE GLUE' as "glue that is not water soluble". The word 'MARINE GLUE' finds no mention in the Oxford Dictionary, but only in an online dictionary, the author, veracity or acceptance of which is not known and which is neither a widely accepted nor a renowned dictionary as the Oxford Dictionary. Added to this, as stated hereinabove, the fact that the Defendant itself applied for registration of the same as a trademark, inherent in which is the admission that 'MARINE' is distinctive and in any event capable of distinguishing the products of one person from those of another and is capable of being registered as a trademark. The contention of the Defendant that the word 'MARINE' is a common, customary term, generic, laudatory or non-distinctive mark within the meaning of Section 9 (c) of the Trade Marks Act, 1999 ("the Act") in relation to "waterproof adhesives" cannot be

accepted. The Plaintiff is correct in its contention that persons purchasing the products of the Plaintiff and the Defendant would normally be carpenters, who would not be necessarily aware of the alleged meaning of the word 'MARINE' and the descriptive nature of the mark, if any, (which is denied by the Plaintiff), and is of no significance to them, and any product bearing the mark 'MARINE' would be associated by them with the Plaintiff and purchased accordingly.

11.3 The Judgment of this Court in I.T.C. Ltd. vs. G.T.C. (supra), or for that matter the English decision of Joseph Crosfield cited therein have absolutely no application or relevance to the present case. The judgment of this Court in ITC, as also the case of Joseph Crosfield makes it apparent that the said case pertain to rectification. In the case of ITC (supra), the Registry had rejected an opposition that the mark applied for was a common word and/or non distinctive and/or descriptive and/or laudatory and granted registration. The grant of registration was challenged before the High Court in a rectification petition. The subject matter of the challenge in the proceedings before this Court was the validity and/or correctness of the registration granted. It is as a part of this inquiry that the Court considered whether the word 'Gutsy' could be registered i.e. whether it was capable of distinguishing goods of the trader or of a non distinctive character. The same inquiry was done in the case of Joseph Crosfield. This inquiry cannot be made or be gone into in the present case. The present action is one of infringement. The correctness of the registration has been conceded. The Registry has held that the marks in question (whose registration has been granted) are fit to be registered. They have been found to be: (i) capable of distinguishing the goods of one trader;

and (ii) not descriptive or of a distinctive character. As submitted by the Plaintiff therefore the correct question to be addressed is what does the registration cover? Does it include 'MARINE' or does it exclude 'MARINE'? If 'MARINE' is included, an action for infringement will lie and the Defendant can only rely upon the statutory defences (Sections 30 and 35 read with Section 17 of the Act). If 'MARINE' is not included, the infringement part of the action will fail. Therefore there cannot be a third option. I have already reached a prima facie finding as set out in paragraph 9.2 hereinabove that the word 'MARINE' forms a prominent and essential part or feature of all the three registered trademarks set out at 'A', 'B' and 'C' in paragraph 4 above.

11.4 In any event, even otherwise there is no substance in the Defendant's contention. This is because there is no absolute and/or total and/or complete bar to the registration of a common word. An ordinary word can become distinctive by use. In the present case, the Plaintiff has been the only user of the 'MARINE' mark in the market since 2003 and has used it extensively and on a pronounced scale for nine years.

11.5 Relying on the decision of the Learned Single Judge of this Court in *Asian Paints Ltd. vs. Home Solutions Retail (India) Ltd.*², the Defendant contended that this decision is an authority for the general proposition that where the Plaintiff's registered trade mark contains descriptive/non-distinctive content, injunction must be refused. The facts of the case were as under:

(i) The Plaintiff was the registered proprietor of the device/label mark "ASIAN PAINT HOME SOLUTIONS". The device/label was an artistic work which depicted a

² 2007 (35) PTC 697

house in the alphabet “O”. The registration covered goods (inter alia paints) under Class 2. The Plaintiff had secured no registration in respect of services.

(ii) The Defendant on the other hand was offering ‘services’ in respect of home care convenience and utility stores offering home products of other manufacturers under their brand name under one roof.

(iii) In relation to these services, the Defendant was using the mark “HOME TOWN” and not “HOME SOLUTIONS”.

(iv) The Defendants contended that the adoption of its corporate name “Home Solutions Retail (India) Ltd.” was bona fide because the corporate name was descriptive of the intended business of the Defendant Company. In this context, the Court made the following observations:

(a) In paragraph 5, the Court concluded that having regard to the fact that the registration covered goods, and the Defendant's mark was used in relation to services. The Court therefore held that, “Thus understood, it will not be a case of infringement of registered trademark as such”;

(b) In paragraph 7 the Court answered the question whether the rival marks were identical or deceptively similar. The Court concluded that there was a marked difference in the rival marks viz. “ASIAN PAINTS HOME SOLUTIONS” and “HOME TOWN”. The Court therefore answered the issue by observing that, “By no standards it can be said that the two marks are identical or similar”. A similar finding is to be found in paragraph 10 of the judgment.

(c) In paragraph 8, the Court noted the Plaintiff's argument that the adoption by the Defendant of the mark “HOME SOLUTIONS” in its corporate name was mala

fide. The Court answered it in the negative, in paragraph 9, by observing that the corporate name of the Defendant was reflective of its intended business namely that of offering services (solutions) in respect of homes. A similar finding is to be found in paragraphs 10 and 13 of the judgment.

(d) It was in this backdrop that the Court accepted the defence based on Section 30 (2) and Section 35 of the Act. Even whilst doing so, the Court caveated it by saying that, “at this stage of the proceedings” and “at least at this ad-interim stage”.

11.6 The observations in the above judgment in the said decision are therefore to be viewed and construed in the context of that matter. They do not lay down any general proposition of law. All that is observed therein is that in that case on the basis of the material before it, at that stage (ad-interim) the court was satisfied that the expression “HOME SOLUTIONS” was *generic* and *publici juris* and inherently incapable of becoming distinctive of any single person. The present case is completely different. In this case the marks are not different or dissimilar; both the parties are using it in relation to goods i.e. there is no goods vs. services issue. The

Defendant's adoption as set out hereinafter is *prima facie* lacking in bona fides and no material has been placed on record to show that the mark is *publici juris*. The Defendant's defence on “descriptive” fails on facts in the present case since ‘MARINE’ is not descriptive and in any case has been used as a trademark. The said judgment is of no assistance to the Defendant.

11.7 The Defendant has also relied on the judgment in the case of *Carew Phipson Ltd. vs. Deejay Distilleries*³ wherein it is held that purely descriptive terms are totally

³ AIR 1994 Bom 231

unregisterable. However this judgment has no application to the present case since the case in question is one of passing off. The Plaintiff therein therefore could claim no statutory monopoly. The principles which govern a case of infringement and those which govern a case of passing off are very different on many issues. In an infringement action, the Defendant must bring itself within the ambit of the statutory exceptions/defences provided in the Act itself (Sections 17, 30, 35, etc.). As set out hereinafter, in the present case it has clearly failed. Hence the judgment is of no relevance. Moreover, as set out above, the word 'MARINE' is not descriptive of the Defendant's product and by reason of open, continuous and extensive sales over 9 years has become distinctive of the Plaintiff and its products.

11.8 I am therefore prima facie of the view that the submissions of the Defendant as recorded in paragraph 11 hereinabove cannot be accepted.

12. The Defendant has also submitted that the Plaintiff has been using the word 'MARINE' in a descriptive manner and in fact the Plaintiff has never used and/or promoted the stand alone word 'MARINE' as a trademark. It is submitted that it is amply clear from the Plaintiff's product specifications, product features and benefits, label highlights, tag lines of the Plaintiff's promotional material etc. that the term 'MARINE' is used by the Plaintiff to designate the characteristics and quality and intended purpose of its products. It is submitted that the Defendant is also using the word 'MARINE' in a descriptive manner to describe that the water insoluble adhesive is to be used for 'MARINE PLY' and the said adoption is therefore honest and bona fide.

12.1 The Learned Senior Advocate appearing for the Plaintiff has in response submitted that the manner in which the Plaintiff is using the word 'MARINE' is to be judged primarily from the product of the Plaintiff. Additionally, reference can be made to: (i) the manner in which the word 'MARINE' is shown in advertisements; and (ii) the manner in which products bearing the mark 'MARINE' are purchased and sold in the trade. If any one of the above is considered, it will immediately become apparent that the Plaintiff is using the word 'MARINE' as a mark and not in a descriptive sense.

12.2 I have in the earlier paragraphs of this order already recorded my prima facie finding that the word 'MARINE' forms a prominent and essential part or feature of all the three registered trademarks set out at A, B and C in paragraph 2 above and that the mark 'MARINE' in relation to the business of adhesives has come to be exclusively identified and/or associated with the Plaintiff alone. I have also perused the advertisements of the Plaintiff's products depicted at pages 92, 93 and 94 of the Plaintiff and have noted that as submitted by the Plaintiff the containers bearing the Plaintiff's products have the entirety of the registered trademark of the Plaintiff together with an additional feature of the device of a plank being immersed in the water. If the trade dress of these containers is seen, it is obvious that the Plaintiff has applied to the container, the entirety of the registered trademark at page 63 of the Plaintiff. The Plaintiff is therefore using in relation to its goods and on them its registered trademark as registered. It is therefore clear from the said advertisements that the word 'MARINE' is used by the Plaintiff as a trademark and not in a descriptive sense.

12.3 Again, if the advertisements at pages 92 to 94 of the Plaintiff are seen, they also show that in between the registered trademark (as registered) and the image of a wooden plank being immersed in water, are the words “Waterproof Adhesive”. These are descriptive words and indicate the quality, characteristic or intended use of the product. This further reinforces the Plaintiff's submission that it is using the word 'MARINE' as a mark and not in a descriptive sense. It is correctly submitted on behalf of the Plaintiff that had the word 'MARINE' being used in a descriptive sense, there was no need or warrant to add the description “Waterproof Adhesive” as has been done by the Plaintiff. It is therefore apparent that 'MARINE' is the trademark and “Waterproof Adhesive” is the description.

12.4 Consistent with this, the representative invoice (page 35 of the Plaintiff), purchase orders (pages 36, 38 to 40 of the Plaintiff) and the Plaintiff's product guide (page 39 of the Plaintiff) clearly indicate that the word 'MARINE' is used as a mark and not in a descriptive sense. The Defendant has relied on the items at pages 65 to 87 of the Plaintiff and the reference to the description 'FEVICOL MARINE' therein.

However, the same does not assist the Defendant since as submitted by the Plaintiff the documents at pages 65 to 87 of the Plaintiff are not invoices which show how the product is sold in the market or associated with the public. These documents on the face thereof state that they are “DEPOT CHALLAN-CUM-BILL” and “NOT AN INVOICE”. They are internal documents between the Plaintiff and its Dealers.

12.5 As submitted by the Plaintiff, the fact that the Plaintiff is using the word 'MARINE' as a mark is further reinforced from the extract of the Plaintiff's product guide which is at pages 41 to 52 of the Plaintiff. This extract refers to 11 products of

the Fevicol Division of the Plaintiff and contains a photograph of the actual container in which the products are sold. It can be seen from the product guide that for all the products Fevicol is used as a house/umbrella mark in conjunction with individual product identification marks/brands like SPXPRESS; PL 111; PL 222; 707FW; DDL; SR998; 998FW; SR 50. If the Defendant's argument is to be accepted, each of the above products identification marks/brands will have to be regarded as descriptive. As correctly submitted by the Plaintiff, how such alpha numeric can be regarded as descriptive defies logic and that this reinforces the fact that these descriptions are product identification marks/brands which are used in conjunction with the house/umbrella marks/brands.

12.6 The Plaintiff has filed a Trademark Application No. 1918007 seeking registration of the word mark 'MARINE'. In respect of this application, the Registrar of Trademarks while advertising the same has imposed the condition *"This is subject to association with registered/pending Registration No. 1319821"*. Trademark No. 1319821 is the registered trademark (word mark 'FEVICOL MARINE' and the registration certificate in respect thereof is at page 61 of the Plaintiff). Section 16 of the Act contains provisions for registration of a trademark as an associated trademark. A reading of Section 16 of the Act makes it clear that for the applicability thereof, it is essential that, (i) there are two marks; (ii) there is a common owner/proprietor; and (iii) the two marks must be identical or so resemble one other as to be likely to deceive or cause confusion (deceptively similar). In other words, association can only be ordered between two trademarks when they are identical or deceptively similar. In ordering association between the two, the Registrar obviously

concluded that there was identity/deceptive similarity between the two. It is obvious that there can be no identity/deceptive similarity between 'FEVICOL' and 'MARINE'. The question of identity/deceptive similarity could only arise if the Registrar compared 'MARINE' and 'FEVICOL MARINE' (and not 'MARINE' and Fevicol only). The Plaintiff is correct in its submission that the Registrar treated the word 'MARINE' forming a part of 'FEVICOL MARINE' as a trademark, since in the absence thereof, there could never be an order of association. To put it differently, the Registrar accepted that the word 'MARINE' (which formed part of the registered trademark 'FEVICOL MARINE') was very much a trademark. Though it is true that it is this Court which has to decide whether the word 'MARINE' is used by the Plaintiff as a trademark or in a descriptive sense, the Plaintiff has correctly tried to draw support from the aforesaid condition imposed by the Registrar of Trademarks in order to submit that even the Registrar of Trademarks was of the view that the word 'MARINE', in the registered trademark 'FEVICOL MARINE', is a trademark (and not descriptive) and considered 'MARINE' and 'FEVICOL MARINE' as identical/deceptively similar.

12.7 As submitted by the Plaintiff, there is yet another fundamental fallacy in the argument of the Defendant viz. the assumption that the word 'MARINE' is descriptive of the use to which the Plaintiff's product is put. As set out in the Plaintiff and on the products themselves, the Plaintiff's product is a water resistant synthetic adhesive which is used for conditions where the product will be exposed to water or high humidity. The Defendant has assumed that 'MARINE' is synonymous with and/or indicative of water. This is not the case, as the Defendant itself has disclosed

at page 83 of its reply affidavit, by relying on the Oxford Dictionary that the word 'MARINE' is understood as indicative of matters pertaining to the sea.

12.8 For the aforesaid reasons, I am of the view that the Plaintiff is using the word 'MARINE' as a trademark and not in a descriptive sense.

13. The Defendant has strenuously contended that the Defendant itself is using the word 'MARINE' in a descriptive sense. This contention of the Defendant is denied and disputed by the Plaintiff. The Plaintiff has drawn the attention of this Court to the photograph at page 99 of the Plaint. This photograph shows that in addition to the words "JIVANJOR" and the words 'MARINE PLUS', the Defendant has also used the words " 'MARINE' PLYWOOD SPECIAL ADHESIVE" & "HEAT AND WATERPROOF ADHESIVE". As submitted by the Plaintiff, this makes it clear that where the Defendant wishes to use words which are descriptive of its product, it has used the words " 'MARINE' PLYWOOD SPECIAL ADHESIVE" & "HEAT AND WATERPROOF ADHESIVE". Hence it is this description which is descriptive. The words "MARINE PLUS" are not descriptive but are used as a mark. In other words, what the Defendant is trying to convey to the members of the trade and the public is that the product in question is sold under the 'MARINE' brand/sub-brand.

14. The Defendant has further contended that the adoption of the word 'MARINE PLUS' by the Defendant is honest and bona fide.

14.1 As stated above, the Plaintiff adopted its trademark in 2003 and has since then been using the same openly, continuously and on an extensive scale. By June

2012, when the Defendant purportedly started the use of the impugned mark, the Plaintiff had been in the market for nine years and had sales in excess of Rs. 180 crores. Again, as already held hereinabove, the word 'MARINE' forms an essential part of the Plaintiff's trademark/brand and the products of the Plaintiff were sold and purchased with reference to the word 'MARINE'. The trade packaging/dress of the containers in which the Plaintiff's products were sold contained a pictorial depiction of a plank of wood dipping into the water and water being splashed in the process. The Plaintiff's product containing the pictorial depiction of a plank of wood dipping into water with water being splashed (at pages 92, 93 and 94 of the Plaintiff) is reproduced hereunder:



A picture of the very same pictorial depiction on the product of the Defendant (page 99 of the Plaint) is reproduced hereunder:



If both the pictorial depictions are compared it becomes instantly apparent that the Defendant when it entered the market, not only copied the Plaintiff's mark 'MARINE' but even the artistic work comprising the device of a wooden plank being dipped into the water, and the water splashing. The statement now made by the

Defendant that they have since 2013 stopped using the said pictorial depiction of a plank of wood dipping into water with water being splashed in the process, does not in any way help the Defendant's contention that their adoption is honest and bona fide.

14.2 Further, the Defendant also filed a Trademark Application No. 2456946 for the label mark 'MARINE PLUS' which label mark is reproduced hereunder.



Had the Defendant not been using 'MARINE'/'MARINE PLUS' as a trade mark it would have never applied for registration of the label mark titled 'MARINE PLUS' (label) containing the words "MARINE' PLUS" as its leading, prominent and essential feature. The Defendant has now contended that the Trademark Application No. 2456946 for the label 'MARINE'/'MARINE PLUS' has been withdrawn by them.

14.3 As laid down in several decisions of this Court as well as other Courts, the

Defendant who seeks registration of a mark is estopped from urging that the mark is incapable of registration. Faced with the said judgments, the Defendant has borrowed the language used by a Learned Single Judge in his decision in *Hem Corporation Private Limited and Ors. vs. ITC Limited*⁴ and has come up with an argument that the rule of estoppel does not apply to the present case because the Defendant had applied for a label mark registration for the entire get up for packaging including the descriptive words 'MARINE PLUS'. In the said decision the Learned Judge has held, *“The Reliance upon the Defendant's application for registration of the label mark is, however, of no assistance in considering this aspect. The application for registration was not of the word mark “MADHUR”. The label contains the entire get up of the packaging including the words “MANGALDEEP MADHUR 100”. The label by itself only begs the question viz. whether the word MADHUR is used as a mark or not.”*

14.4 In my view, as submitted by the Plaintiff, this attempt to distinguish itself, now belatedly made by the Defendant in the written submissions does not withstand scrutiny for the reasons mentioned hereinbelow:

(i) The mark applied for by the Defendant is reproduced hereinabove. It is true that it is a label mark. However, if the mark is seen, the most prominent and noticeable part/feature of the mark is the word 'MARINE PLUS'. The mark has been described in the column “TM Applied for” as 'MARINE PLUS' - Label”. The word 'MARINE' therefore forms a prominent and/or essential feature of the mark applied

⁴ Notice of Motion No. 3940 of 2009 in Suit No. 2808 of 2009

for. More importantly, the Defendants understood the trademark applied for as “
'MARINE' PLUS”.

(ii) The Defendant was therefore attempting to obtain a monopoly over the words 'MARINE' PLUS' and 'MARINE' and in view thereof, the rule of estoppel stated above will apply. The question to be asked is, “Had the Defendant's mark been registered, would it have objected and/or been entitled to object to 'MARINE PLUS' or 'MARINE' being used by someone else?” The answer is obvious.

(iii) The Defendant understood this to mean exactly what the Plaintiff asserts, as is clear from its own assertion and actions. It is an admitted fact that, after the Plaintiff pointed out the said application, the Defendant withdrew the same. The Defendant (at page 26 of its Written Submissions) has at several places accepted that the application made was a mistake [“mistaken application”, “mistaken advice received”; “realizing its mistake”, etc.]. The Plaintiff has correctly raised a question, “If the label mark application was for the entire get up for packaging including the descriptive words 'MARINE PLUS', then why did the Defendant withdraw it and why does the Defendant still continue to call it a mistake?” The answer is self-evident.

The Defendant itself considered the application as made, a source/cause for concern and therefore not only withdrew it but asserted that the very making of it was a mistake.

(iv) The applicability of the principle and/or rule of estoppel is not restricted to cases where the mark objected to and mark applied for are identical, but covers cases where there is identity of the prominent and/or essential features, as is evident from

the decision of this Court in *Ultratech Cement Limited vs. Alaknanda Cement Pvt. Ltd.*⁵, decided on 28th June, 2011, where the doctrine/principle was applied. In that case, the Plaintiffs' mark was "Ultratech Cement. The Engineers Choice" and the Defendant had sought registration of a label containing the word "Ultra Tuff".

(v) The decision of the Learned Single Judge in *Hem Corporation* (supra) extracted in clause 13.3 is not in any manner inconsistent with the Plaintiff's submission. In the facts of that case, the Learned Judge did not consider the label mark application sufficient to attract the test/principle. This was on the facts of that particular case. The case at hand has to be decided on its own merits and the facts of the present case. On the present facts, the principle/test is squarely applicable.

I am therefore *prima facie* satisfied that the adoption of the word 'MARINE PLUS' by the Defendant is neither honest nor bona fide.

15. The Defendant has next contended that the Suit is liable to be dismissed under Section 35 of the Act, since the purpose of using the word 'MARINE PLUS' on the Defendant's label is to educate or inform the customers that the products offered by the Defendant are heat and water proof, and the word 'MARINE PLUS' is a bona fide description of the character of the Defendant's product offered under the mark 'JIVANJOR MARINE PLUS'. The Defendant also contends that the use of the word 'MARINE PLUS' is protected under Section 30 (2) of the Act.

⁵ 2011 (5) BCR 588

15.1 The aforesaid conduct on the part of the Defendant in copying the label of the Plaintiff; using the mark 'MARINE' and applying for the registration of the label titled 'MARINE PLUS' (label) makes it abundantly clear that the adoption of the mark 'MARINE PLUS' is as a trademark and is with a view to encash upon the significant goodwill and reputation acquired by the Plaintiff's 'MARINE' marks. The word 'MARINE PLUS' is not descriptive, and in any event is not used by the Defendant as a bona fide description of the character of the product of the Defendant. The case of the Defendant that the use of 'MARINE PLUS' is to indicate to the customers that its product is "heat and water proof" is contrary to its own case that 'MARINE' means "of or relating to the sea" and not "heat and water proof". Furthermore, the product of the Defendant depicted at Exhibit-E to the reply at page 80, specifically bears the legend "Heat & water proof adhesive" and hence the use of 'MARINE PLUS' to communicate the same to the customer was not even necessary. The Defendant is obviously using 'MARINE PLUS' as a trademark and not in the descriptive sense. Since the Defendant is using 'MARINE'/ 'MARINE PLUS' as a trademark, Sections 35 and 30 (2) of the Act cannot be resorted to. In any event, the additional requirement of bona fide use is lacking for the purpose of Section 35. The defence sought to be raised is clearly an afterthought. The Defendant has admitted that 'JIVANJOR MARINE PLUS' (and in effect 'MARINE PLUS' which is a leading and essential feature thereof) has been adopted and is being used as a trademark by the Defendant.

16. The Defendant has also relied on Section 17 of the Act in support of its

contention that the Plaintiff cannot restrain the Defendant in any manner from using the word 'MARINE'. In this context, the arguments of the Defendant are as follows:

(i) Section 17 (1) of the Act prescribes that, in the case of a 'composite mark' (namely a mark consisting of several matters), the exclusive right conferred by registration, is on the trademark taken as a whole;

(ii) Section 17 (2) (b) of the Act expressly prescribes that where a composite mark contains matter which is common to the trade or is otherwise of a non-distinctive character, registration of the composite mark shall not confer any exclusive rights in the matter forming only a part of the whole of the registered mark;

(iii) In other words, the statute does not grant protection (exclusivity) over such parts or constituents of a composite mark, which are 'common to the trade' or of a 'non-distinctive character';

(iv) The word 'MARINE' forms a part or constituent of the composite mark "FEVICOL MARINE". In relation to the goods to which it is applied/used, the word 'MARINE' is common to the trade and/or of a non-distinctive character. Consequently, by reason of Section 17 (2) (b), the Plaintiff cannot claim any exclusivity;

(v) The Plaintiff's reliance on the fact that the Registrar whilst granting registration, did not impose a condition or limitation (qua the word 'MARINE') is of no assistance, since the provisions relating to "disclaimer" (existing in the 1958 Act) have been deleted in the 1999 Act. The reason for the deletion of the provisions

relating to disclaimer is because Section 17 explicitly clarifies the legal position that there is no exclusivity in respect of descriptive or non-distinctive constituents or parts of a registered mark. Therefore, the requirement of a disclaimer provision is unnecessary. Reliance in this behalf is placed on the Statement of Objects and Reasons of Section 17, which are extracted at page 17 of the Defendant's submissions; and

(vi) If this test is applied, then the marks to be compared are "JIVANJOR MARINE PLUS" and "FEVICOL MARINE". These are not deceptively similar.

16.1 The Defendant has sought to suggest that by reason of the deletion of provisions relating to disclaimer, the Registrar cannot impose any conditions or limitations whilst granting registration. As correctly submitted by the Plaintiff, this suggestion is contrary to the provisions of the 1999 Act i.e. Sections 18 (4), 20 (1) and 23 of the Act which expressly authorise and empower the Registrar, at the stage of acceptance and advertising of applications, to impose, inter alia conditions or limitations on the mark applied for. The submission relating to disclaimer by the Defendant is therefore of no substance.

16.2 It is true that the registration of a composite mark confers upon the registered proprietor a monopoly over the trademark taken as a whole. It is not the Plaintiff's contention that the registration of a composite mark confers upon the registered proprietor exclusivity over each and every constituent part thereof (no matter how minuscule or insignificant it may be in relation to the mark considered

as a whole). The Court therefore has to examine the mark as a whole. As a part of this evaluation process, the Court is required to determine what is/are the prominent and/or essential features of the mark taken as a whole. The protection and/or exclusivity will be conferred on these features and not on insignificant trivia. This Court has therefore at the outset after considering the relevant factors prima facie come to the conclusion that the word 'MARINE' forms a prominent and/or essential feature of the registered trademark (considered as a whole) . If the Defendant's arguments are accepted, the consequences will be startling. Composite marks will become useless. The same will be infringed with impunity by the simple expedient of using a trademark which has, as its essential or prominent feature(s), the essential and prominent feature of the registered mark with the addition of other matter. The mandate of Section 17 (1) will be totally frustrated.

16.3 Again, in my view, nothing in Section 17 (2) of the Act bars the Plaintiff's entitlement to the relief as claimed. Section 17 (2) (a) is plainly not applicable . The defendant does not even claim so. The Defendant's only claim that Section 17 (2) (b) of the Act bars the grant of relief in the Plaintiff's favour. The Defendant's claim in this behalf is premised on the assumption that the word 'MARINE' is ' common to the trade' and/or 'of a non-distinctive character'. For this plea to succeed, the Defendant must establish that the word 'MARINE' is either 'common to the trade' or 'of a non-distinctive character'. The onus to do so is entirely on the Defendant. As set out herein, the Defendant has failed to discharge the burden or onus upon them.

16.4 The aforestated reliance on Section 17 of the Act and the submissions made in regard thereto by the Defendant therefore cannot be accepted and are rejected.

17. The Defendant has contended that there are some other entities across India and internationally that are using the word 'MARINE' as a part of their label and the word 'MARINE' has become *publici juris/common to trade*. The Defendant has also set out in a tabular format the labels inter alia containing the word 'MARINE' which it claims are in use. The Defendant contends that the Plaintiff therefore has no exclusive rights/monopoly over the word 'MARINE'. The Defendant has also produced copies of four invoices as evidence of sale of two other products under the mark 'MARINE'.

17.1 It is a settled legal position that the use of a registered mark or the essential feature thereof by others is not a defence available to the Defendant in an action for infringement and passing off. Merely because the Plaintiff has chosen to sue one infringer first and has not at such time sued others for infringement is also no defence in an action for infringement and passing off and it is settled law that it is the prerogative of the Plaintiff/registered proprietor/owner of a mark whom to sue so as to protect its rights. Furthermore, it is essential for the Defendant to demonstrate substantial and continued use over a period of time of the mark by others failing which no defence of common to the trade/*publici juris* can be set up. (*Corn Products Refining Co. vs. Shangrila Food Products Ltd.*⁶; *F.D. Diesel vs. S.M.*

6 AIR 1960 SC 142

*Diesel*⁷; *Ultratech Cement Ltd. vs. Alaknanda Cement Pvt. Ltd. (supra)*; *Shaw Wallace and Company Ltd. and another vs. Mohan Rocky Spring Water Breweries Ltd.*⁸. The Defendant has failed to prove that there are a number of entities over India or internationally that are using the word 'MARINE', or that such use is substantial or continuous over a period of time. As submitted by the Plaintiff, let aside proof, there is not even a pleading to this effect. The four invoices produced by the Plaintiff are insufficient and deserve to be disregarded. They do not satisfy the test of extensive, actual and continuous use in the market. The Defendant has tried to take advantage of the reputation of the Plaintiff not only by the use of the mark 'MARINE'/'MARINE PLUS' but also by the use of the copied impugned label and hence cannot be allowed to rely upon the alleged use of the mark 'MARINE' on other grounds. The submissions advanced by the Defendant to distinguish the above judgments are unconvincing and of no assistance to the Defendant.

18. The Defendant has submitted that the Plaintiff has not disclosed that their application for the mark 'MARINE' are under opposition and not pending as claimed by the Plaintiff and that the Plaintiff has concealed the fact that the trademark Application Nos. 2110954 and 1918007 for the marks 'FEVICOL MARINE' and 'MARINE' are opposed by Blue Coat Pvt. Ltd.

18.1 The Plaintiff has stated in paragraph 9 at page 8 to the Plaintiff that the trademarks 'FEVICOL MARINE' (Label) and 'MARINE' under application Nos.

⁷ 1994 PTC 75

⁸ 2006 (33) PTC 180 (Bom)

2110954 or 191 8007 are pending and the same is true. The Plaintiff has correctly submitted that the marks are /will be pending until they proceed to registration and the Plaintiff has rightly stated that the trademarks 'FEVICOL MARINE ' (Label) and 'MARINE' under Application Nos. 2110954 or 1918007 are pending. The oppositions are proceedings between the Plaintiff and another entity and do not in any manner impact nor bear significance for the purpose of the present Suit and the issues raised in the present Suit. The proceedings filed by Blue Coat Pvt. Ltd. will be decided on its own merits. The question of disclosing the same or suppressing the same does not and cannot therefore arise.

19. The Defendant has further contended that the Plaintiff has concealed the fact that the Plaintiff's trademark registrations under Nos. 1319821, 1319822 and 1319823 for the mark 'FEVICOL MARINE' are under rectification before the Intellectual Property Appellate Board and hence the Plaintiff deliberately did not file the legal proceedings certificate.

19.1 The Plaintiff is correct in its submission that the Plaintiff has specifically craved leave to refer to and rely upon the entries of the Register of Trademarks in relation to the registration of the Plaintiff referred to in the Plaint and hence the question of suppression of the said document does not arise. In any event the records of the Registry are public documents and can be accessed by the Defendant at any given point of time. The said rectification proceedings are pending and the Plaintiff is and continues to be the registered proprietor of the trade marks under 1319821,

1319822 and 1319823 and the registrations as on the date of filing the Suit were and continue to be valid and subsisting. The said rectification proceedings filed by a third party are irrelevant in so far as the present proceedings are concerned. The question of disclosing the same or suppressing the same does not and cannot therefore arise.

20. The Defendant has next contended that the Plaintiff had issued a legal notice to Blue Coat Pvt. Ltd. on 28th June, 2010, and that the said Blue Coat Pvt. Ltd. had responded to the said legal notice on 3rd August, 2010, and filed oppositions/rectifications against the trademarks 'FEVICOL MARINE'/'MARINE' of the Plaintiff. The Defendant contends that despite the same, the Plaintiff has not taken any action against Blue Coat Pvt. Ltd. and that Blue Coat Pvt. Ltd. continues to use the label mark inter alia containing the words 'BLUECOAT MARINE'. The Defendant submits that the Plaintiff has concealed and suppressed this material fact in the Plaint. The Plaintiff has correctly submitted that the aforesaid alleged facts have no bearing whatsoever on the present Suit and the question of suppression does not arise. It is settled law that the Plaintiff is not obliged to take action against every small infringer (assuming that Blue Coat Pvt. Ltd. is still using the mark).

21. The Defendant has lastly contended that the Plaintiff has obtained trademark registration for the mark 'FEVICOL MARINE', wherein the essential feature of the mark is "FEVICOL". The Defendant contends that it is using the word 'MARINE PLUS' in combination and conjunction with its house mark 'JIVANJOR' and that the

deciding factor for determining the difference between both the marks is the presence of 'FEVICOL' and 'JIVANJOR' which are the essential and distinguishing features of the rival marks and have co-existed for years without any confusion or deception. The Defendant contends that there is no likelihood of confusion or wrong/mistaken association of the Defendant's mark and the Plaintiff's mark.

22. As held hereinabove, the Defendant has adopted an essential feature of a registered trademark of the Plaintiff. This by itself is actionable. Actual confusion need not be proved for infringement. It is required for passing off. Secondly, even for passing off, there is a clear case of deception and/or confusion. The contention of the Defendant is not tenable since the Defendant itself states that 'JIVANJOR' is the housemark of the Defendant. It is evident that the product identification mark used by the Defendant is 'MARINE PLUS' and that the same is being used as a trademark. The consumers can never identify the product only by the house mark and it is inevitable that the products are referred to and called out only by their product identification marks. It is the settled position that the use of a mark as a sub-brand also amounts to infringement and an injunction ought to follow. As pointed out by the Plaintiff, the products bearing the housemark 'FEVICOL' have achieved a turnover close to around Rs. 1000 crores, out of which the turnover of the products bearing the mark 'MARINE' (which is only one of the products of the many products bearing the house mark 'FEVICOL') has exceeded Rs. 100 crores. The mark 'MARINE' by itself has gained tremendous reputation and goodwill and further distinctiveness and secondary meaning which is associated by the consumers, trade and public at

large with the Plaintiff alone. The invoices produced by the Defendant themselves show that the products of the Defendant are also referred to as 'MARINE PLUS COP', 'JJ MARINE PLUS', 'JJ MARINE PLUS CLP', 'J MARINE PLUS COP', i.e. 'MARINE PLUS' being the leading and essential feature and not 'JIVANJOR'. Furthermore, the fact that the Defendant refers to its 'mark' as 'JIVANJOR MARINE PLUS' itself is an admission on the part of the Defendant that 'MARINE PLUS' is being used as a trademark/part of its trademark. Whether the rival marks are similar or not will have to be approached from the point of view of average intelligence and imperfect recollection of consumers who would normally be carpenters or such similarly literate persons and are bound to get confused.

23. For the aforesaid reasons, the Notice of Motion is allowed in terms of prayer clauses (a), (b) and (c). The Defendant shall pay cost of the Notice of Motion to the Plaintiff.

24. The hearing of the Suit is expedited. Defendant to file written statement on or before 27th January, 2014. Place the Suit for framing of issues on 29th January, 2014.

(S.J. KATHAWALLA, J.)