

M/S Bling Telecom Pvt Ltd vs Micromax Informatics Limited on 6 December, 2010

Author: S.Ravindra Bhat

Bench: S. Ravindra Bhat

* IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON: 25.11.2010

PRONOUNCED ON: 06.12.2010

+ I.A. Nos. 13938 & 14366/2010 IN CS (OS) 2119/2010

M/S BLING TELECOM PVT LTD

Through: Mr. N.K. Kaul, Sr. Advocate with
Mr. Amit Mehta, Mr. Jayant Kumar and
Mr. Manikya Khanna, Advocates.

versus

MICROMAX INFORMATICS LIMITED

..... Defendant

Through: Mr. Ameet Datta with Mr. Thomas George,
Mr. Sanjeev Narula and Mr. Sunil Dalal, Advocates.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

1.

Whether the Reporters of local papers may be allowed to see the judgment?	YES
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2. To be referred to Reporter or not?	YES
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3. Whether the judgment should be reported in the Digest?	YES
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MR. JUSTICE S.RAVINDRA BHAT

% I.A. Nos. 13938 & 14366/2010

1. The plaintiff in this suit claims a permanent injunction to restrain the defendant from using BLING as a trademark or corporate name or use of the any mark similar to it for any purpose including in its domain name. Other consequential reliefs are also sought.

2. The plaintiff claims to be a design house, manufacturing and selling low end, mid segment, as well as higher end mobile handsets in the Indian market, which was incorporated on 29.07.2009. It is submits that one M.K. Enterprises, its (the plaintiffs') predecessor in interest, had coined and adopted the BLING mark for use of their business of mobile phones and allied IA Nos. 13938 & 14366/2010 in CS (OS) 2119/2010 Page 1 services, for which trademark registrations had been applied for on 07.07.2009. A copy of the application has been placed on the record during the course of the proceedings. It is contended that the plaintiff has adopted a unique market strategy with two layer distribution and e-retail management in nine major cities. Its distribution network includes 76 direct and 123 sub/micro distributors who service over 4000 top retailers in the country. The plaintiff claims that it plans to recruit 2500 in shop promoters to create differentiation at retail points. It is submitted that the BLING is the plaintiff's used mark and was assigned by M.K. Enterprises on 30.07.2009.

3. The plaintiff claims to have extensively advertised the BLING across India; and is alleged to having incurred promotional expenses in excess to `2 Crores. It is also stated that the plaintiff has given wide publicity regarding its products and services in leading newspapers and on different websites. The plaintiff claims that adoption of BLING and association of that mark with its products has resulted in huge revenue generation since July, 2009. The plaintiff claims that its mobile phones have netted the turnover in excess of `15 Crores since their first sale.

4. The plaintiff claims that on 08.10.2010, it received a legal notice dated 04.10.2010 issued on behalf of the defendant asking it to cease and desist using BLING; the notice was replied to on 12.10.2010 by the plaintiff, which claimed prior adoption and use of BLING. The suit alleges that the plaintiff is unaware about whether the defendant has applied for trademark registration. It is stated that even though the defendant alleged in its notice that it had applied for trademark registration BLING in February, 2000, the search in that regard has confirmed that no such application is pending. The plaintiff alleges that the defendant's use of the BLING mark for mobile phones is dishonest and in bad faith. It claims that such use or intended use with full awareness about the plaintiff's prior adoption and use of the mark is with the purpose of appropriating the reputation and goodwill that the plaintiff has acquired ever since its incorporation and use of the mark. On these pleadings, the plaintiff also seeks an ad interim injunction.

5. This Court had, at the stage of issuing summons on 19.10.2010 granted an ex parte temporary injunction restraining the defendant from using the BLING or any other deceptively or confusingly similar mark or logo adopted by it. That injunction has continued and binds the parties till date.

6. The defendant has preferred an application - I.A. No.14366/2010, for vacation of the ex parte injunction. It alleges that the plaintiff cannot claim any exclusivity in respect of the BLING IA Nos. 13938 & 14366/2010 in CS (OS) 2119/2010 Page 2 mark as there is no appreciable reputation or goodwill associated with it. The defendant contends that the plaintiff was as late as in December, 2009, known as MOVIL MOBILE and not by the mark BLING and relies upon the press reports filed in the proceedings. It is contended that the plaintiff made no effort to use, appropriate and benefit (from) the mark BLING till mid 2010 and at any rate starting has been using it only after April, 2010 whereas it (the defendant) had already launched its mobile phones with the mark BLING

MICROMAX/BLING in January, 2010.

7. The defendant contends that the plaintiff later used and attempted appropriation of BLING as evident from the registration of the domain name www.bling.com in May, 2010; even at that time, the plaintiff used the domain name www.movilmobile.com and was referred to as MOVILE MOBILE. The defendant highlights that the plaintiff has failed to produce any credible material or evidence to suggest that it carried on business before mid 2010.

8. Commenting on the plaintiff's reliance on distribution and dealership agreements, which have been placed on the record - claimed to have been executed sometimes during September - November, 2009, it is contended that these do not in any manner support or substantiate assertion of use of the trademark BLING. The defendant emphasizes that all the materials on record relied upon by the plaintiff reveal that the mobile phones marketed by it were under the mark MOVIL. It is argued that mere use of plaintiff's corporate name BLING Telecom in stickers fixed on its packaging do not amount to use in the absence of any attempt to associate that mark (BLING) with the plaintiff's MOVIL mobile phones. It is stated besides that one of the documents, i.e. an agreement of 25.07.2009, relied upon by the plaintiff concededly was executed even before its (the plaintiff's) incorporation, i.e. on 29.07.2009. The defendant urged that plaintiff marketed its products in the public domain and advertised it for the first time on 23.12.2009 under the brand identity MOVIL MOBILE and not as BLING Telecom.

9. The defendant contends that when it applied for trademark registration of BLING MICROMAX, it took care to ensure a prior search, which yielded only three pending applications - all being device marks such as "BLINGZ", "BLINGBEES" and "BLING ATTACHE", none of which were the plaintiff's or its alleged predecessor in interest and certainly none was for mobile phones.

10. It is argued that the defendant has aggressively promoted the BLING MICROMAX trademark in many international events and even manufactured special editions of its mobile phones to highlight its mark, such as IIFA Edition released in June, 2010 during the Micromax IA Nos. 13938 & 14366/2010 in CS (OS) 2119/2010 Page 3 IIFA Awards - Main Event held in Sri Lanka, which was broadcast on the Star Plus channel. It is also stated that the mark was accorded extensive publicity in Micromax Asia Cup held in Sri Lanka and broadcast on Doordarshan, as well as Neo Cricket Channel; French Open, FIFA held in South Africa and broadcast on ESPN and Star Sports channel and the India, Sri Lanka, Zimbabwe ODI series held in Zimbabwe and broadcast on Ten Sports channel etc. The defendant contends that due to extensive promotion and resources by it towards publicity of BLING MICROMAX/BLING marks, it was able to secure the sales approximately in the range of `1600 Crores in the financial year 2009-2010. It claims to have sold more than 2,48,315 mobile phones worldwide under the mark BLING MICROMAX/BLING, aggregating a turnover of `109 crores. The defendant argues that it spent `120 crores towards promotional and advertising expenses for the launch and for popularizing BLING mark.

11. The defendant contends that the BLING MICROMAX/BLING associated with its mobile handsets has acquired distinctive usage in relation to its products and the plaintiff cannot claim any injunctive relief. It is argued alternatively that the defendant is an honest concurrent user of the

BLING mark and having regard to the conspectus of facts in this case, the Court should vacate the interim injunction granted.

12. The plaintiff contends that M.K. Enterprises was the sole proprietorship concern of Mr. Rajiv Khanna who is also its 99% share holder. The plaintiff contends that it is the prior user and had launched BLING in respect of its goods immediately of its incorporation in the end of July, 2009 itself. It is argued that the plaintiff has been using the BLING mark in its websites, which include www.blingtelecom.com. The plaintiff states - in reply to the defendant's application - that it finalized its plan to launch a new mobile phone model directly under the brand in December, 2009 and relies upon press release dated 24.12.2009; a copy of the website has been produced at page 149 of the document where it is stated:

"Bling telecom has a plan to launch a distinct brand „BLING for the CDMA market. Bling Telecom plans to sell 1.5 million phones by the financial year 2010-11."

It is stated that these, as well as invoices filed on the record dated 22.10.2009, 23.10.2009 and 26.10.2009 etc. establish sale of mobile phones (MT1-Black, G+G, T Screen, 3.2 Mpx Cam) carrying the BLING mark on their packaging as well as on the invoices. The plaintiff relies upon the decisions reported in *Kirloskar Diesel Recon v. Kirloskar Proprietary*, 1997 PTC 469 (Bom) and *Laxmi Kant V. Patel v. Chetanbhai Shah & Anr.*, 2002 (24) PTC 1 (SC) and submits that IA Nos. 13938 & 14366/2010 in CS (OS) 2119/2010 Page 4 adoption of a trading style or name or corporate name also amounts to trademark use. It is thus emphasize that the prior registration of Bling Telecom Pvt. Ltd. in July, 2010 and the sale of mobile phones as early as in October, 2010 in packaging containing the company's name clearly amounts to prior trademark usage entitling it (the plaintiff) to confirmation of the temporary injunction granted by the Court.

13. In support of the suit, the plaintiff initially filed documents which inter alia include agreements entered into on 25.7.2009, 20.9.2009 and the third one dated 15.10.2010 for distribution and services etc. Interestingly, the plaintiff also relies upon Annexure-X, as part of the said agreement dated 23.03.2010, which expands the scope of the authorized service provider partner agreement dated 15.10.2009 to include warranty and after sale services for the BLING range of products. The plaintiff has also relied on invoices dated 21.04.2010 and 22.04.2010 for sales of its mobile phones. The plaintiff relies upon advertisements in *Hamara Mahanagar*, New Delhi edition, *Dainik Jagran*, New Delhi edition, *Rashtriya Sahara*, *Punjab Kesri* and *Veer Arjun*, all dated 23.12.2009 and *Sunday Nav Bharat Times* dated 27.12.2009. It also relies upon press clipping in the *Financial Chronicle* of 28.12.2009. In the latter, the plaintiff is described, inter alia, in the following terms: -

"The new entrants into this space include Micromax, Lava mobile, Karbonn Mobell, Videocon, Movil and also some known brands such as Usha, Salora, Onida and Orpat"

14. The plaintiff also relies upon an advertisement dated 18.06.2010 in the *Business Standard* and dated 29.6.2010 stating that it is planning to invest more than `100 Crores and that it eyes revenue of `400 Crores. Similar write-ups in the *Financial World*, Chandigarh edition dated 29.6.2010 is

relied upon. The Hindustan Times, Chandigarh Edition talked of Movil Mobile, of BLING Telecom launching its operations in Punjab with V100 have been filed. Other write-ups in newspapers including the "The Statesman", New Delhi edition of 29.06.2010, "Business Standard", (Hindi edition of Lucknow) dated 29.06.2010 and "Divya Himachal", Chandigarh, also of 29.06.2010 are filed. Other advertisements, clippings of which have been filed include the write-ups in the Business Chronicle dated 23.08.2010 and the Economic Times dated 29.06.2010 and so on. The plaintiff also relies upon its brochures and user manuals sold along with its handsets which contained the Bling mark, as well as the packaging of V22 duo and Q Pad models containing the BLING mark prominently. In the additional set of documents, the plaintiff IA Nos. 13938 & 14366/2010 in CS (OS) 2119/2010 Page 5 has placed on record copies of its web pages/print outs of the domain, invoices issued on various dates between October, 2009 and December, 2009 evidencing sales, salary slips, agreements with other concerns for marketing their products.

15. The defendant produced documents, which include the print out of their website, copies of various websites announcing the launch of Micromax Bling model Q55 in January, 2010. Print outs of similar websites dated 15.02.2010 asking the consumers to log on to Mobile Store to book or purchase the product and outlining the specifications have also been produced. The defendant has placed on record the copy of the advertisement in Jayati Publication Ltd. in Telugu, Hyderabad and Nizamabad edition dated 25.04.2010, as well as advertisements in magazine Hello, Femina, Film Fare and Star Dust, all of August, 2010 with endorsement of the products under the BLING mark by various celebrities have been filed. Similarly, the print outs from Hindustan Times announcing the launch of the world's lightest touch phone by Micromax and its plans to issue shares to the public have been filed. The defendant has relied upon the statement of its advertisement expenses for the period 01.04.2009 - 23.10.2010, which are produced at pages 31-51 of the list of documents entered by it, evidencing expenditure at `120 Crores for the period. The defendant had filed invoices and shipping documents to state that it has been continuously selling its mobile handset products from February, 2010 onwards. These are found at pages 52-66. The defendant further relies upon write-ups in various English newspapers for the period 01.06.2010 onwards in respect of the BLING mobile phones. It has also produced a copy of the trademark registration application made for the BLING mark, in February, 2010.

16. It is clear from the above discussion that this is an injunction action alleging passing off by the defendant, of the plaintiff's mark. Both the rival BLING marks are unregistered, and both are have been recently adopted. Judgments of the Supreme Court in Amritdhara Pharmacy v. Satya Deo Gupta, AIR 1963 SC 449; Kaviraj Pandit Durga Dutt Sharma v. Navratna Pharmaceutical Laboratories, AIR 1965 SC 980; Parle Products v. JP & Co., AIR 1972 SC 1359; Heinz Italia v. Dabur India, (2007) 6 SCC 1 have reiterated the tests which courts should adopt while determining whether the defendant has "passed off" his goods or products as the plaintiff's. The tests broadly indicated are:

- (a) The nature of the marks, i.e., whether they are word, label or composite marks, i.e., both word and label marks.

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(b) The degree of resemblance between the two marks, phonetically similarity and whether they are similar in idea.

(c) The nature of the goods in respect of which they are used as trade-marks.

(d) The similarity in the nature, character and performance of the goods of the rival traders.

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

(f) The mode of purchasing the goods or placing orders for the goods.

(g) Any other surrounding circumstances.

17. As far as word marks go, in *Biswaroop Roy Choudhary v. Karan Johar*, 136 (2006) DLT 458 this Court propounded a rule of caution in the following terms:

"Where words or phrases in common parlance are sought to be used with exclusivity, the Court should take care to determine which of the parties has ended its journey or traversed appreciably longer way in the use of such words as a trademark or as a title. Normally, proprietary or exclusive use of a common word should not be given jural imprimatur."

There is undoubtedly some body of authority supporting protection for word marks, or combination of common words. *Globe Super Parts v. Blue Super Flame*, AIR 1986 Del. 245, was a case where the two common words "Super" and "Flame" joined together were declared as coined words and protection was granted. In *Reddaway v. Banham*, (13) 1896 RPC 218 „Camel Hair“ was concerned with a trademark in relation to belts made out of Camel hairs. Though both are common words yet they were construed as descriptive of the article, denoting the goods of a particular manufacturer, entitling him to restrain others from using them as to deceive purchasers. In *Lakshmikanth v. Patel v. Chetanbhat Shah and Another*, AIR 2002 SC 275, the trade mark of the plaintiff was Mukta Jeevan Colour Lab whereas the defendant adopted the mark QSS Mukta Jeevan. The plaintiff's claim to distinctiveness of the mark, and allegation of deception by the defendant, was upheld.

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18. On the other hand, *W.N. Sharpe LD v. Solomon Bros. LD*, 1915 RPC 15 held that certain words such as "good", "best", "superfine" are incapable of adoption. They cannot have a secondary meaning and are not capable of registration. *Parsons Bros. & Co. v. John Gillespie & Co.*, 1898 15 RPC 57 is a case where the Court held that the "Flaked Oatmeal" must be shown by the plaintiff not to be a part of the common stock of language or the plaintiff must show that the term being originally descriptive of the articles has now come to denote the goods made by the plaintiff. In

Standard Ideal Co. v. Standard Sanitary Mfg. Co., 1910 RPC 789, 'Standard' was held not to be a valid trade mark. Thus, the test in such cases is always subjective to every case and the Court has to determine whether common words having no nexus to the goods or services for which a given mark are used, acquire such a reputation, distinctiveness or secondary meaning as to denote a source specific association. The product, the length of time of its visibility and the length of time of its association with the mark, its association or dissociation with generic terms, etc are all pointers; relevant for judicial determination.

19. For a trader (or manufacturer) in an action for passing off to secure injunctive protection, it is necessary to establish what is now known as the classical trademark "trinity" - a term first used by the House of Lords in Reckitt and Colman Products Ltd. v. Borden Inc and others, [1990] 1 All ER 873. The three elements cited to be established for passing off were summarized as the plaintiff establishing (in relation to the mark) (1) a goodwill or reputation;

(2) demonstration, that the use (trademark use by defendant) will lead the public to believe that the goods or services offered by him are goods and services of the plaintiff; and (3) that he suffers or is likely to suffer damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of his (the defendant's) goods or services is the same as the source of those offered by the plaintiff.

20. The need to establish some goodwill is important, if the wordmark is a common or dictionary word. This was underlined by this Court, in Vijay Kumar Ahuja v. Lalita Ahuja, 95 (2002) DLT 3 in the following terms:

"It is settled law that common language words and names cannot be exclusively appropriated by any trader unless and until such trade names have acquired such a great reputation and goodwill in the market that the common language word has assumed a secondary significance. Secondary significance here would mean that other traders in IA Nos. 13938 & 14366/2010 in CS (OS) 2119/2010 Page 8 that line of trade acknowledge that such common word has come to denote the goods belonging to a particular trader. In this connection reference may be made to a decision of this Court in the case of Globe Super Parts v. Blue Supra Flame Industries AIR 1986 DELHI 245; While dealing with the question of exclusive appropriation of common language word by a trader, Learned Single Judge of this court has held that even a common language word can be exclusively appropriated by a party as a trade mark if the said word has acquired a secondary significance but in the case of a word which is coined, fancy, new or meaningless the claim to exclusive appropriation is sustainable without the need to prove existence of secondary significance.."

21. One of the methods of establishing trademark usage, and acquired reputation or distinctiveness to successfully secure injunctive relief in a suit for passing off, is publicity of the mark. In Jabbar Ahmed v. Prince Industries and Anr., 2003 (26) PTC 576 (Del), thus, it was held that as in the absence of any advertisement of the product it could not be said that the plaintiff was using the said product or had acquired distinctiveness. In that case the plaintiff had filed certain assessment orders

on the basis of which it had claimed use of trademark `BELL' during the concerned period. The Court observed that there was nothing in the assessment orders which remotely indicated that the plaintiff had been manufacturing scissors/nail clippers under the said trademark. By advertising one gains reputation and good will with regard to goods intended to be manufactured and sold in the market. Mere advertising without the existence of goods can be also said to constitute use of the mark provided it is really intended to be used. There are decisions viz. Mahendra and Mahendra Paper Mills Ltd. v. Mahindra and Mahindra Limited, 2002 (24) PTC 121 (SC); Indian Shaving Products Ltd. and Anr. v. Gift Pack and Anr., 1988 PTC (18); A.C. Krishnan v. Nambisan's Dairy Pvt. Ltd., 1997 PTC (17) (DB); Info Edge (India) Pvt. Ltd. and Anr. v. Sailesh Gupta and Anr., 2002 (24) PTC 355 (Del.); Laxmikant V. Patel v. Chetanbhai Shah and Anr (supra); The Berkeley Hotel Company Limited v. Berkeley International (Mayfair) Limited and Anr., 1971 FSR Ch D. 300 which support the proposition that descriptive words used as trade mark/name can be protected if they are shown to have acquired distinctiveness and secondary meaning in relation to the plaintiff.

22. A Division Bench of this court, in Rhizome Distilleries v. Pernod Ricard SA France, 166 (2010) DLT 12, stated the relevant principles, where rival marks are common or dictionary words or common to the trade, in the following manner:

"We are reminded of the decision of the Court of Appeal in McCain International Limited v. Country Fair Foods Limited 1982 PTC 156. The learned Single Judge had granted interlocutory relief in a passing off action. The Plaintiff avowedly was the first to launch 'chipped potatoes' in the market which rather than being fried could be baked in the oven or cooked in a grill. The competing brands were 'McCain Oven Chips' and 'Country Fair Oven Chips'. The Court of Appeal was of the opinion that the case was similar to the term IA Nos. 13938 & 14366/2010 in CS (OS) 2119/2010 Page 9 'Flaked Oatmeal' in Parsons v. Gillespie 1898 AC 239 which was seen as descriptive' Reference was also made to the use of the word "slip-on" which was also found to be descriptive; or Hedley's Malted Milk as against Horlicks Malted Milk. We think it noteworthy that it was reiterated that it was essential for a trader to add a prefix or suffix, preferably showing origins in order to get any protection in respect of a word which is descriptive. Reference was also made to Office Cleaning Service Ltd. v. Westminster Window and General Cleaners Ltd. (1946) 63 RPC 39 where the rivals were using "Office Cleaning Services" and "Office Cleaning Association". The opinion was that where a fancy word has been chosen as a part of the name and if another trader adopts that fancy name that may be seen as inviting confusion. Keeping all these precedents in view, the Court of Appeal concluded that the use of the word 'Oven Chips' was descriptive and the prefix of 'McCain', 'Country Fair' or 'Birds Eye' were sufficient to distinguish the products. We are not faced with the employment of descriptive words but the underlying rationale is apposite, namely, that if words of common parlance are used, exclusivity cannot be claimed "

(emphasis supplied)

23. In *Perkins v. Shone*, 2004 EWHC 2249 (Ch D) the need for a plaintiff to establish goodwill or reputation in the mark, and the relevant factors were emphasized as follows:

"Commercially goodwill is recognised as a form of property, and transactions in goodwill occur constantly in all areas of business. The law also recognises that goodwill exists, and affords it a measure of protection through the law of passing off. However, the degree of legal protection is not as extensive as the factual and commercial content of goodwill. To some extent that is necessarily so given the factors which make up the goodwill of a business or of a particular line of business. The essence of goodwill has been encapsulated judicially in Lord Macnaghten's expression 'the attractive force which brings in custom': *IRC v. Muller* [1901] AC 217 at 223. To a large measure it lies in the de facto expectation that an established line of business will continue: that the customers will carry on purchasing the goods or services and that the suppliers will carry on providing the supplies which enable the goods or services to be provided. But those are not matters which can be given legal protection as some species of property right. The goodwill value of a business can be reinforced by making long term contracts with customers or suppliers, but goodwill can exist and can have a significant value even in the absence of long term contracts. In such cases it exists as a commercial reality although major elements of it do not and cannot receive legal protection."

The relevant public that must be confused are the usual purchasers of the relevant goods or services. Depending on the facts of the case, the relevant public can be a particular section of society. Thus, in *Whirlpool Corp v. Kenwood Ltd.*, (2009) RPC 2 the relevant public were held to be consumers with knowledge about high-end food mixers who would take more care in *IA Nos. 13938 & 14366/2010 in CS (OS) 2119/2010 Page 10* selecting the goods than consumers of less expensive, everyday products. Injunction was consequently, denied.

24. In this case, the rival marks are word marks. The products are mobile phones. As far as the word mark is concerned, "bling" is a common dictionary word with no association to such goods. Apparently bling is an ideophone (word evocative of a vivid sensation or sensory perception) meant to convey the idea (or sound) of the "sound" of light hitting silver, platinum, or diamonds. The specific term bling was first popularized in the hip-hop community, it has spread beyond hip hop culture and into mass culture. It was added to the Shorter Oxford English Dictionary in 2002 and to the Merriam Webster dictionary in 2006. The Merriam-Webster Dictionary (<http://www.merriam-webster.com/dictionary/>) describes bling as "flashy jewelry worn especially as an indication of wealth; broadly: expensive and ostentatious possessions".

The Free online Dictionary (<http://www.thefreedictionary.com>) describes bling as "flashy, ostentatious jewelry; e.g. 'the rapper was loaded with bling'..". An internet (Google) search for "bling" yielded as many as 6,860,000 results:

(http://www.google.co.in/#hl=en&source=hp&biw=1596&bih=675&q=bling+bling&rlz=1R2ADFA_enIN380&aq=f&aqi=g10&aql=&oq=&gs_rfai=&fp=e791fe993fa412ba on 5th

December, 2010 at 11:59 hours). The website <http://www.bling-bling-online.co.uk/> : has been selling HipHop Jewellery, Urban T-Shirts, Replica Jacob & Co watches, Grillz, Hip Hop Belts, Bling Bling Jewellery, Hip Hop Chains, Bling rings, Bling Bling Pendants, Bling bling watches, Hip Hop Watches on line, since 2006. The rock group Juvenile & Lil Wayne's "Bling Bling" was posted in Google (<http://www.youtube.com/watch?v=LXDoxxlNGo>) on 9 Nov 2006.

25. Bling is, therefore, seemingly an arbitrary word mark so far as mobile phones are concerned. However, one cannot at the same time avoid noticing that "bling" as used by both the contesting parties in respect of the product here has an appeal about an attribute (of flashiness or ostentation, or "glitziness") associated with it - perhaps targeted to a segment of the youth- of the mobile phones. So far as the other aspects and the decisions are concerned, the class of purchasers who are likely to buy the goods is the a slightly aware and in all probability a discerning consumer public who purchase these mobile phones, which are priced at about `2500 (in the plaintiff's case) and about `6000/- (in the defendant's case).

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26. Now, on an application of the relevant tests, it would be necessary to analyze the materials placed on record to decide if the plaintiff is entitled to interim injunction. The suit claims is premised on incorporation of the plaintiff, since end July 2009, and use of the mark since October, 2009. No doubt, the plaintiff has placed agreements entered into with dealers and prospective after sales providers, at that time. It has also produced some invoices evidencing sale of its mobile phones. However, none of these disclose that BLING was used (even inconsequentially as a mark) in respect of mobile phones; the earliest advertisements on record are those of 23rd December, 2009; they describe the plaintiff's products as MOVIL mobiles. Annexure X to one of the warranty agreements entered into for the product, is dated 23 rd March; it alludes to inclusion of warranty service, as part of the obligations of the other contracting party, to service the BLING range of mobiles - to be introduced. Therefore, it is clear that there was no BLING mark, in respect of mobile phones, even in March- April, 2010. The defendant, on the other hand, has placed on record, website printouts (duly certified under Section 65-B of the Evidence Act) containing a reference to its BLING mobile phones as of 9th February, 2010; it has also placed on record print media advertisement copies of April, 2010 in respect of the BLING mobile phones marketed by it. It asserts having publicised BLING in advertisements in sporting events, including international football and cricket matches. These are prima facie credible evidence of use. The defendant too relies on copies of invoices in respect of its mobile phones, and advertisements in various magazines, which publicize its BLING range of mobile phones, endorsed by celebrities. The plaintiff's documents containing explicit reference to its BLING mobiles are of 29th June, 2010. The defendant claims to have spent `120 crores towards advertising expenses, and has produced supporting materials in that regard.

27. On a conspectus of and careful analysis of the entire materials on record, this Court is of the opinion that BLING is a dictionary word, apparently having wide usage among the youth and young adults. It connotes flashiness, ostentation, and a desire to show wealth; it has association with glittering or showy jewellery (watches, bracelets, accessories, etc). Coined by hip-hop musicians, it

associates both sound and glitter. In respect of mobile phone, the association unmistakably is to the "Bling" effect; these products are also accessories, and signify a statement by their possessors. Indeed, the use of Swarovski crystals in the defendant's mobile phone precisely evokes this quality. In that sense, the descriptive or attributive association is sought to be conveyed by the parties, in respect of the mobile phones marketed by them. Now, if the previous rulings on the issue are to be considered, it is clear that unless the plaintiff is able to show that there is an element of acquired goodwill or reputation, courts would be shy in protecting the mark, on the mere principle of "first past the post". The evidence on the record do not show that BLING, used as a trade dress or corporate name, was prominently used by the IA Nos. 13938 & 14366/2010 in CS (OS) 2119/2010 Page 12 plaintiff in respect of the products. Such use does not sans any worthwhile or meaningful evidence match up to acquired distinctiveness denoting the goods' origin. The function of every trademark is that it is a "badge of origin" pointing to constancy and assurance of quality of a particular trader or manufacturer. If this foundational element is missing, or the mark is in its infancy, and has no acquired distinctiveness, pointing to goodwill and reputation, the courts would not give it protection. This applies with greater force where the mark is based on a common word, with some attributive characteristics, in relation to the goods, as in this case.

28. In view of the above discussion, the Court is of opinion that the plaintiff has not disclosed a prima facie case for grant of temporary injunctive relief. As a result, its injunction application I.A. Nos. 13938 is rejected; the ex-parte injunction granted on 19th October, 2010 is hereby vacated. For the same reasons, the defendant's application IA 14366/2010 deserves to succeed, and is allowed.

CS (OS) 2119/2010 The parties are directed to complete pleadings in six weeks. List the suit before the Joint Registrar on 24th January, 2011 for admission and denial of documents. List the suit before court, on 28th February, 2011 for framing issues.

S. RAVINDRA BHAT
(JUDGE)

DECEMBER 6, 2010

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