

Prem Singh vs Ceeam Auto Industries on 4 May, 1990

Equivalent citations: AIR1990DELHI233, 1990(2)ARBLR357(DELHI), 42(1990)DLT548, AIR 1990 DELHI 233, 1990 (2) ARBI LR 357, (1990) 3 DL 1, (1990) ILR(DEL) 2 DEL 166, (1990) ILR 2 DEL 166, (1990) 2 ARBILR 357

JUDGMENT

Santosh Duggal, J.

(1) This is plaintiff's application under Order 39 Rule 1 & 2 read with section 151 of the Civil Procedure Code, who has brought a suit seeking is licenses of permanent injunction against the defendant, asserting to be a registered proprietor of trade mark "MEXPAL" in respect to goods of car polishes, and also having a copyright in a specific design, get-up, colour scheme etc. in relation to tin boxes in which the said goods are marketed and sold, alleging infringement of the said copyright on part of the defendants, and seeking a restraint order prohibiting them from manufacturing, selling or otherwise dealing in car polishes in the tin boxes identical or deceptively similar to those of the plaintiff.

(2) The area of controversy in the present case is very narrow, being restricted to the copyright in the design, colour scheme. shape and get-up of the tin-boxes, inasmuch as the trade mark of defendant's goods is wholly different for the reason that whereas the plaintiff's trade mark is "MEXPAL", that of the defendant's is "FARISHTA". The plaintiff claims user since the year 1979. and registration of the copyright since 1980, when he got both his trade mark as well as copyright in the design of the tin boxes registered, The allegation is that the defendant is also in the same trade, and earlier in the year 1983 it came to plaintiff's notice that a concern known as M/s. M.K. Aggarwal Auto Industries was using plaintiff's trade mark, namely, "MEXPAL" and marketing the same in containers or tin boxes identical to those of the plaintiff, and for that reason a suit for perpetual injunction for an action for infringement of the trade mark, copyright and pas ing off was brought. It is pleaded that an interim injunction order was issued by the Court in that suit which was confirmed subsequently by order dated 23rd October 1984: which suit was still pending, as the defendant there after having agreed to a consent decree being passed, that he would retrain from infringing plaintiffs trade mark 'MEXPAL, resiled subsequently.

(3) It is alleged that the plaintiff has come to know now that the defendant has adopted a different trade mark namely "FARISHTA", but persists in marketing his goods of car polishes in tin boxes, which are identical or deceptively similar to those of the plaintiff, inasmuch as the entire colour scheme, get up, lay-out, writing style and arrangement of words of the tix boxes as employed by the plaintiff, has been adopted by the defendant. The plaintiff asserting to be the originator and author of artistic work, consisting of the design, shape, get-up and colour scheme of his tin boxes, which he claims to have become distinctive of his goods, besides being a registered proprietor of the copyright. vide registration No. A-26895180, which registration is still subsisting. valid, and effective throughout India contends that the defendant has no right to use similar tin boxes for

marketing his car polishes, even under a different trade mark, and that activities of the defendant were tantamount to infringement of the copyright of the plaintiff in the said tin boxes.

(4) DEFENDANT'S answer is short and simple, consisting of emphatic denial of plaintiff's assertion of being the originator of the design, colour scheme, shape or get-up of the tin boxes, or that the same were distinctive of plaintiffs' goods. The contention is that the tin boxes, and the design and get-up to which the plaintiff claims the copyright, in fact belonged to another party by the name of M/s. Waxpol Industries Ltd., Calcutta under registration No. 208989 granted on 17th. May, 1962 in class 3 in respect of cleaning and polishing preparations and that the said M/s. Waxpol Industries Ltd. has been using this design under trade mark "WAXPOL" on tin boxes of car polish since the year 1950. It is contended that the plaintiff has stolen both the trade mark as well as the copyright of the said M/s. Waxpol Industries by adopting trade mark "MEXPOL" and that on an objection being taken by M/s. Waxool Industries the trade mark has been changed to "MEXPAL", but so far as the design, shape, get-up and general appearance of tin boxes is concerned, that continues to be the same. The defense is that the plaintiff himself is a praetor of this design, and so he cannot be treated to be the proprietor of any valid copyright and is not entitled to bring any action against any one else for infringement thereof or passing off.

(5) There are no doubt other pleas also, namely, that the trade mark being different, and the goods being purchased primarily by people who know them by trade names, and pay no attention to the appearance of the design and thus for that reason also, the plaintiff cannot have any cause of action as no confusion or likelihood of deception was involved. The institution of the earlier suit by the plaintiff is also not denied, but the contention is that the suit relates to only trade mark and that since no question of any infringement or passing off any copyright was involved, as in the present case, the institution or pendency of the earlier suit is of no consequence.

(6) The plaintiff has come up with this application seeking an inter-locutors order to restrain the defendant from continuing the sale of the car polish in the tin boxes of the design, colour scheme or get-up which he claims are identical or deceptively similar to those of his goods, on the plea that the goods being of the same category, namely, car polish and the plaintiff being in the trade since 1979, has acquired reputation and goodwill and in case the defendant is allowed to continue with the alleged infringement of his copyright in spite of this suit, then the plaintiff is bound to suffer irreparable loss and thus it was a case where the defendant should be restrained from continuing with marketing or selling car polish under the trade mark "FARISHTA" in tin boxes which involved infringement of plaintiff's rights.

(7) Mr. Aggarwal, learned counsel for the plaintiff, argued generally as to the rights of the plaintiff being in the market since the year 1979, and having the registration of the copyright in his favor since 1980 and contended that a mere look at the two tin boxes which he has filed along with the plaint, being mark 'A' of the plaintiff and mark 'B' of the defendant, reveals that all the essential features and general appearance and get-up was identical and there was every likelihood of a purchaser or customer to mistake one for the other as there was over all similarity, and it was a case where both infringement and passing off is involved.

(8) The learned counsel placed reliance on Halsbury's Law of England, volume 48 para 168 in support of his contention that in passing of action, similarity of general appearance or get up of goods is the relevant test, and totality of the impression as a whole is to be kept in view. He also argued that although trade mark may be different but wherever it is shown that there was likelihood of confusion or deception by similarity of the containers or cartons or boxes in which the goods were marketed, then an action for passing off would lie, and the court's intervention by interdicting the offending party from continuation of the mischief is very much called for. He further placed reliance on a Supreme Court judgment in the case of Parle Products (P) Ltd. v. J.P. & Co" Mysore , where it was held that in order to come to a conclusion whether one mark is deceptively similar to another, the broad and essential features of the two are to be considered.

(9) In relation to the contention of the defendant that Waxpol Industries was the original owner of the impugned design of the tin boxes, Mr. Aggarwal contended that this fact has no bearing in so far as the disputes between the two parties in this suit inter se are concerned: He relied on a Single Bench judgment of this Court in the case of Kumar Electric Works v. Anuj Electronics 1989 Arbitration Law Reporter 133(2) where in spite of the plea by the defendant therein that the trade mark Olympus in relation to Television sets belonged to one Japanese company which had applied for registration of the said trade mark in the year 1982, it was held that in the absence of any evidence that the said Japanese company had ever used this trade mark in India, the mere fact of its having applied for registration would be of no consequence to the plaintiff's right, in a case alleging infringement of his right by the defendant, in respect to similar or allied goods. Mr. Aggarwal argued that on a parity of reasoning in the present case, when there is no evidence that M/s. Waxpol Industries had actually sold their car polish goods with trade mark WAXPOL in tin boxes or containers similar or identical to those claimed by the plaintiff and there be no evidence that at any stage said M/s. Waxpol Industries had entered any opposition to registration of the trade mark or copyright in plaintiff's name or had applied for rectification or cancellation of the copyright in favor of the plaintiff and thus the judgment in Kumar Electric Works (supra), is on all fours with the present case and plaintiff's prayer for an interlocutory injunction deserves to be allowed.

(10) Mr Aggarwal further placed reliance on a Division Bench' judgment of this Court in the case of Gentry Traders v. Roshan Lal Duggar & Co. and others , to the effect that mere registration of a trade mark or a copyright was not enough to defeat the claim of another party unless there was evidence of actual user. This contention was advanced by the learned counsel to meet the fact of registration of the copyright in favor of M/s. Waxpol Industries, as pleaded in the written statement. He reiterated by relying on the judgment of the Supreme Court in the case of Corn Products Refining Co. v. Shangrila Food Products Ltd. , that the guiding factor in such cases is the overall similarity between the two marks or designs, whether structural or phonetic and where design of one has some common mark or feature with another, then once it is proved that plaintiff's mark has acquired reputation by user in the market, then an action lies and that mere registration of a mark by one party without evidence of actual user cannot be held against the plaintiff. He pointed out that in this case there is prima facie evidence of actual user by the plaintiff since the year 1979-80 as sale figures reproduced in the plaint itself would show. He further answered the contention of the defendant about plaintiff being not the originator of this design but being an imitator of M/s. Waxpol Industries, by relying on a judgment of the (Privy Council in the case of Macmillan and

Company Limited v. K. and J. Cooper. Air 1924 Privy Council 175(5), where a paragraph from a judgment in an English case is extracted to the following effect : "THE word 'original' does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the origin of ideas but with the expression of thought; and in the case of literary work', with the expression of thought in print or writing. The originality which is requires relates, .to the expression of the thought; but the Act does not require that the expression must be in an original or novel form. but that the work must not be copied from another work that it should originate from the author."

(11) He summed up his plea for grant of a temporary injunction relying solely on the fact of plaintiff being a prior user and holder of the copyright in the tin boxes placing reliance on certain judgments of this Court, namely, Eova Ball Bearing Ind. v. Mico Ball Bearing 1980 R.L.R. 683(6): Amar Soap Factory v. Public Gramudyog Samiti 1987 (1) Arbitration Law Reporter 375(7) and Sharp L.P.G. Pvt. Ltd. v. Seiko Engineers 1988(1) Arbitration Law Reporter 72(8).

(12) The contest to this application, on the part of the defendant. as earlier noticed, is wholly on the contention that the plaintiff himself has stolen this design from the tin boxes of Waxpol Industries, who market their goods of car polish in identical tin boxes, under the trade name Waxpol, and as such has no right either under law or equity to claim any relief from this Court, particularly by way of interlocutory injunction.

(13) Mr. Man Mohan Singh, learned counsel for the defendant, argued by extensively relying on the relevant provisions of the Copyright Act, various documents placed on record, and the case law that there is enough material on record to show that Waxpol Industries have been in this business since 1950 and that the trade mark Waxpol in respect to cleaning and polishing preparations is registered under the Trade and Merchandise Marks Act 1958 since 17th May 1962 vide registration No. 208989 and that the design, colour scheme, lettering style, shape along with other distinctive features of the tin boxes is all part of this registered trade mark He went on to argue that at this stage when the prima facie case of the parties is to been; the defendant has shown by abundant documentary evidence, such as photo copies of the registration certificate, that this trade mark Waxpol, with specific style and get-up of the containers is registered since 1962. Photo copies of a petition under section 50 of the Copyright Act 1957 filed by Waxpol Industries Ltd. against the present plaintiff Prem Singh in the year 1981, soon after he claims to have the copyright entered in the Register of Copyright, which he asserts to have done in the year 1980; which petition for rectification makes a positive reference to the registered trade mark of the objector, namely, Waxpol Industries and the challenge is specifically to the. copy right registration claimed by the plaintiff, namely, A-26895i80. ? further submitted that the plaintiff had notice of this petition, inasmuch as the defendant had also placed on record photo copy of the reply filed by the plaintiff to this petition in February 1982. Learned counsel also stated at the Bar that he had knowledge of these proceedings because lie represented Waxpol Industries before the Copyright Board and had placed on record a copy of the letter received by him from the Secretary, Copyright Board in respect to the petition of M/s. Waxpol Industries under section 50 of the Copyright Act.

(14) Mr. Man Mohan Singh countered the plea of the plaintiff's counsel that mere registration was not enough and that the relevant and determining factor was the actual sale and actual user, by contending that there is enough prima facie material on record to show that Waxpol Industries had never abandoned this trade mark and trade design and they actually not only assailed the registration of the copyright in favor of the plaintiff with the impugned design without any delay, but have also ill the replication filed to the reply of the plaintiff in those proceedings given their sale figures right from the year 1968 up to 1981 which was the point of time when they filed this replication and that these figures contained in para 7 of the said replication dated 18th March 1982 not only show extensive sales, but also the expenditure on publicity. He therefore argued that the plaintiff's copyright is under challenge from the very start and that it is a case where he has surreptitiously and furtively got this design entered in the Copyright Register and since there is no evidence that the application for entry in the Copyright Register was published in the Trade Mark Journal or any other material so that Waxpol Industries could enter opposition well within time, a mere grant of copyright in this case would not confer any preferential right on the plaintiff qua the defendant, as even if the defendant's design of the tin boxes may be taken to be consisting of similar or near similar features as that of the plaintiff even then. the originator being Waxpol Industries. the plaintiff cannot claim any right in respect thereto.

(15) The learned counsel further argued that there, is not an iota of evidence that the plaintiff had advertised his goods at all particularly with this design of the tin boxes, so as to claim public recognition or identification of his goods.

(16) Mr. Man Mohan Singh also produced two tin boxes of Waxpol car polish and placed them before the Court for comparison with the tin boxes of the plaintiff of the same goods as also of the defendant. Before proceeding further I must record my observation that the shape (being round), the colour scheme, get-up. lettering style and arrangement are essentially and practically similar rather identical in all three tin boxes. The essential feature of a car being there in the centre in black colour is also common: the only difference being that in one case there is a baby on the top of the car. in the second by the side. and in the third there is a figure of a man standing on one side of the bonnet of the car. Nevertheless the central point in all the three boxes remains that of a car, black: in colour. The actual wording used is a little different, on that of the plaintiff's box from that of the Waxpol, but there is a difference in 'the same manner in the tin boxes of the defendant vis-a-vis the plaintiff. Applying the test as laid down in the case of Parle Products (supra) that in order to come to the conclusion whether one mark is deceptively similar to another. the broad and essential features of the two are to be considered and that for this purpose they should not be placed side by side to find out if there are any differences in the design and further as held in the case of Corn Products Refining Co. (supra) that the standard to be applied is that of a man of average intelligence and of imperfect recollection and then to decide whether such impression is reasonably likely to cause confusion or not: I have .no hesitation in saying that. seeing from this' angle all the three tin boxes can be said to be similar in shape, design, get-up and colour scheme. To that extent defendant's plea that plaintiff's design does not exclusively belong to him, but resembles with that. of Waxpol is prima facie established. In fact, it would be no exaggeration to say, even at this stage, that one is a copy of the other, depending upon, of course, which one is prior in time.

(17) In view of the fact that it is shown on record by documentary evidence, as noticed earlier, that Waxpol trade mark and design was registered in the year 1962, and they have been contesting the registration of copyright in favor of the plaintiff, right from the time it was granted to the plaintiff by filing petition for rectification and inasmuch as plaintiff's trade mark is also visually and phonetically similar to that of 'WAXPOL', being firstly as 'MEXPOL' and now -MEXPAL' and admittedly the plaintiff having entered the market with the tin boxes in the year 1979. as per his own case. it can further be held to have been established prima facie that Waxpol were first in the market and long before the plaintiff started his business, which fact is reinforced also from the sale figures and publicity expenses, extracted in their replication in 'rectification proceedings.

(18) In this backdrop, it would be doubtful to uphold even prima facie the plaintiff's plea as being the originator of this design, nor can any credence be put in his claim that this design is distinctive or exclusive to him. It is true that mere fact that this design was not used exclusively by him may not have been the determining factor, but the core of the whole action, whether infringement or passing off of a trade mark or copyright being the consideration that the plaintiff acquired a certain reputation or goodwill in certain trade mark or trade-in style or design, which if proved to have become distinctive to his goods, shall be protected by process of law, by stopping the infringement; in a case where this basic factor is absent, there can be no foundation for action.

(19) The principle to guide in such cases where both contending parties before the Court are shown to be pirators of a third person's, property in trade mark or copyright has been very succinctly, but pointedly outlined in 'Kerly's Law of Trade Marks and Trade Names, 12th Edn. at page 314 by laying down that the Court may refuse to interfere to protect the use of a deceptive trade mark, on the basis of the maxim *ex turpi causa non orator actio*, i.e. an action does not arise from a base case. According to him, it can be a defense to an action for an infringement, that the mark sued upon is invalid, and that one of the grounds of invalidity is that the mark is "disentitled to protection in a Court of justice....." He has further emphasised under the heading : 'IMITATIONS Of Trade Or Service Mark, GET-UP ETC. that in order to establish passing off of a design or get-up etc.. it must be shown that what a defendant has taken is in itself sufficiently distinctive of the plaintiff.

(20) While tabulating the defenses which are open to a defendant in an action for passing off, at page 411 of the same volume, he recites following amongst others as defense: other than a simple denial of acts', alleged, namely : 1.The design which the plaintiff charges the defendant to have imitated, carries no distinctive reference to the plaintiff's goods, or business; 2. That the plaintiff's use of said trade mark or design is itself deceptive or fraudulent, or 3. That the defendant has otherwise also an independent or a concurrent right to use it.

(21) The instances of cases of concurrent right which are given at pages 418/419 inter alia, are that both the parties are equally unmeritorious, in the sense that the impugned mark or design is neither distinctive of the plaintiff nor of the defendant i.e. not distinctive of either party or that the goodwill which the plaintiff seeks to protect is vested in neither of them. .

(22) The essence of the matter is that the plaintiff himself must be shown to have not been guilty of any fraud, or to use a trite expression, must have come to the Court with clean hands, and his action

should not be tainted with any deception because the foundation of the action in such cases is the right of protection of a person's property consisting of goodwill or reputation in a certain trade name, trade mark or business.

(23) When therefore in a given case it becomes apparent, that plaintiff's own conduct is tainted and he himself is *prima facie* an imitator of another person's design, then the Court would not normally at the pretrial stage, afford him protection. on the mere assertion or averments in the plaint, which the defendant has succeeded in showing to be *prima facie* unfounded or even false.

(24) Mr. Aggarwal's plea that present was a case based on infringement of a copyright cannot carry the plaintiff very far at this stage, because the copyright must also be shown to be a valid one. Where it is under challenge, and that challenge is shown to be *prima facie* tenable and sustainable, and there being no evidence of any publicity having been given either to the application for grant of copyright so as to put the party, who is shown to have already been registered proprietor of the trade mark with the impugned design; on notice, then the fact whether the case is of infringement or passing off would make least difference.

(25) The only evidence at present in favor of the plaintiff is that he did get a certificate from the Copyright Board in the year 1980 for the design of the tin boxes. There is also no doubt of evidence of sale figures in respect of these goods since the year 1981-82 but the fact of there being no evidence of any overt publicity having been given to these goods with this design of tin boxes, or even the trade name becomes very significant in the context of Waxpol Industries having a registered trade mark since 1962 to which plaintiff's trade mark is phonetically and visually similar, and design of the tin boxes. which is also part of the registered trade mark of "WAXPOL" is identical, which the plaintiff has adopted on his on showing from 1979 onwards. Inference cannot be avoided even at this interlocutory stage that the plaintiff is a praetor of Waxpol design and in no manner can be deemed to be an originator of this design which is the *sine qua non* of the definition of a copyright in an artistic work within the meaning of section 13(1)(a) of the Copyright Act, J957.

(26) The intention of the legislature also seems to be that no party should be allowed furtively to have a title or work entered in the Copyright Register maintained under section 44 of the Act. as manifested by an amendment to section 45 of the Copyright Act, brought by Amendment Act 23 of 1983 to the effect that when registration is sought in respect of an artistic work in relation to any goods, the application shall be accompanied by a certificate from the Registrar of Trade Mark that no trade mark identical with or deceptively similar to such artistic work has been registered under that Act in the name of any person, other than the applicant. This amendment is obviously to safeguard against cases such as the present. The bare fact that this amendment has been brought about at a time subsequent to the registration accorded to the plaintiff, doe; not detract from the real legislative intention, which the Court while considering a person's prayer to relief which involves discretion, and which discretion is to be exercised to secure the ends of justice, cannot be over-looked by the Court.

(27) An identical question came up before this Court in the case of Capital Plastic Industries v. Happy Plastic Industries, firstly before a Single Judge of this Court as reported in 1988 Ptc 182(9),

in the matter of Rabber trade mark for 'thermos jugs'. The Court held that the plaintiff himself was shown to be a praetor of the trade name of a party in Karachi. Pakistan, and therefore could not be held entitled to grant of any interlocutory injunction against the defendant who had also adopted similar trade mark in respect of his goods. This decision on appeal, was upheld by the Division Bench of this Court in the judgment delivered on 2nd March 1989, reported with the same title in 1989 Ptc 98. Reliance by plaintiff's counsel on the case of Kumar Electric Works (supra) can be of no avail, firstly for the reason that the judgment in the case of Capital Plastic Industries (supra) confirmed by the Division Bench applies squarely to the facts of the present case. and secondly the consideration which weighed with the learned Single Judge while deciding the case of Kumar Electric Works (supra) was the fact that the Japanese Company owning the trade mark Olympus was not shown to have had any sale in India and the only material was an application by them for registration. It was on that basis, and on the strength of the judgment of the Division Bench in the case of Century Traders (supra), that the Court held that this by itself was not sufficient, and that the plaintiff being the prior user was entitled to protection.

(28) In the present case, as already observed, it has been shown from the rejoinder filed by Waxpol Industries to the reply filed by the present plaintiff to petition under section 50 of the Act that they have had sales of their goods in the Indian Market of considerable value, and in fact in excess to those shown by the plaintiff of his own goods. It is pertinent to note that the plaintiff has not so far placed on record the figures of sale of their products nor of any advertisement or publicity material. Only a reliance has been placed on such record. The extent and quantum of plaintiff's business is therefore not before the Court, even for prima facie assessment. The affidavits produced from different persons cannot be taken into consideration at this stage because that is no evidence unless the persons have been subjected to scrutiny by cross-examination.

(29) The principles as to the rights of a person who comes before the Court with false claim or averment have been very explicitly discussed by the Division Bench of this Court in the case of Prina Chemical 'Works and others v. Sukhdayal and others 2nd 1974 (1) Delhi 545(10), where it was emphasised that the whole action is based on principle of equity. and it is well established that he who comes into equity must come with clean hands and this applies strongly to parties seeking relief against the infringement of trade marks or in passing off action and against unfair competition because one seeking relief against fraud of others must be free from fraud, and that it was essential that the plaintiff himself should not be guilty of any false or misleading representation. and when the plaintiff makes any materially false statement in connection with the property which he seeks to protect, he loses his right to the assistance of a Court of equity.

(30) The principle was very explicitly summed up in a case before the Bombay High Court, which though quite old but lays down such abiding principles that a reference to it is really worth its while. The case is Abdul Cadur Alibhoy v. Mahomedally Hyderally 1901 Bombay Law Reporter 220(11). That was a case relating to trade name in respect of ink, and it was shown that that trade name was originally adopted by a company known as Stephens and Sons of England, a party certainly not before the Court. The claim was dismissed by quoting the following observations from another judgment to the effect: "HE desires to restrain the defendant from selling his own goods as the goods of another person; but if by the use of the trade-mark in question the plaintiff himself is

representing and selling his goods as the goods of another, or if his trade-mark gives a false description of the article, he is violating the rule on which he seeks relief from the defendant" .

(31) Another learned Judge of the same Bench added that the general resemblance of the label in question to M/s. Stephens' labels is of itself alone sufficient to debar it from protection.

(32) It was held that in such cases real question was as to whether the plaintiff was legally entitled to protection of the Court in the use of a given mark or label which he claims to be distinctive, and once it was not found to be so or. facts. no relief could be given.

(33) In another case. a Division Bench of this Court, case : reported as , Gora Mal Hari Ram v. Bharat Soap and Oil Industries(12). held that the action for infringement or passing off was a branch of law of torts, and that it was not based on proprietary interest in the get-up or work but in the business goodwill associated therewith. In that case on the facts that the plaintiff there had not been able to establish that he enjoyed such reputation in relation to the goods which could be said to be distinctive to him, and where it was shown that limited registration had been granted to some other manufactures operating in certain geographical areas, it was held that it was not a fit case to grant interim injunction. .

(34) Even the Privy Council in the case of Macmillan and Company (supra), on which Mr. Aggarwal placed reliance, noted with approval another judgment, where it was held that although the Act does not require that the expression must be in original or novel form, but it was emphasised that: ".....BUTthat the work must not be copied from another work that it should originate from the author." .

(35) The consensus of judicial opinion is thus unmistakably clear to the effect that in order to succeed in an infringement of copyright, or passing off action, a party has to show that he is originator in the sence that the concept emanated from him, and further that the given design or get-up or style has become distinctive of his goods to the extent that the trading public associates his goods exclusively with the given design or get-up. The moment this is established even prima facie, the Courts have never hesitated, in stopping the- opposite party, shown to have adopted by imitation or other deceptive means, the design or get-up of the first party, from continuing with the mischief, because that is treated to be a rank instance of dishonesty by the second party. This was the ratio of the judgment in the case of Munday v. Carey reported in Volume Xxii (1905) Rpc 273(13). But the crucial factor is always a question of fact, and in a case where the first party himself is shown to have adopted or imitated a trade mark or copyright of a third party, then Courts shall resolutely decline to step in aid of this party because honesty of action is the crux of the matter, and court's protection is extended only on the principle that damage to a party who has acquired goodwill or reputation in certain trade-mark or design or trading-style for marketing his goods, should not be allowed to be effected by the dishonest user of the same by another. If this first party himself is shown to be guilty of identically wrongful conduct, then it cannot seek indulgence of the court, particularly" at the initial stage, without even going to trial. None of the judgments relied upon by the learned counsel for the plaintiff, namely, in the cases of Eova Ball Bearing Ind. (supra), Amar Soap Factory (supra) and Sharp L.P.G. Pvt. Ltd. (supra), cover a situation where the plaintiff himself was guilty of piracy

of another party's trade mark or design, which party has been in the market earlier, and thus prima facie do not lend any assistance to the plaintiff at this stage.

(36) For the reasons aforesaid. I am constrained to hold that the plaintiff's application for issuance of Temporary injunction against the defendant has to fail, and is dismissed accordingly. It goes without saying however that the view expressed herein is only tentative, and for the purpose of disposal of the application under Order 39 Rule 21 and 2 Civil Procedure Code and shall not prejudice the plaintiff in his case which he may be able to establish by evidence.

(37) Costs shall abide by result of the suit. Counsel fee assessed at Rs. 3,000.00 .