

Yonex Kabushiki Kaisha vs Phillips International And Anr. on 20 August, 2007

Equivalent citations: MIPR2007(3)228, 2007(35)PTC345(DEL)

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Bench: A.K. Sikri

JUDGMENT

A.K. Sikri, J.

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1. By means of this application filed under Order 39 Rules 1 and 2 of the Civil Procedure Code. The plaintiff is seeking ad-interim injunction whereby the plaintiff intends to restrain the defendant from manufacturing, marketing, advertising and in any manner dealing in goods or services using the mark/name YONEKA or any other mark/name which is allegedly identical or deceptively similar to the plaintiff's trademark YONEX. The plaintiff, M/s. YONEX Kabushiki Kaisha, is a company incorporated under the laws of Japan and claims that it is world leader in the field of manufacturing and marketing of sports equipment primarily Badminton, Tennis and Golf. Yoneyama Company, the plaintiff's predecessors in business, evolved into the manufacturing of badminton racquets in 1957 and attained huge success. In 1969, it diversified into the tennis racquet. In 1973, the plaintiff changed their company and brand name to YONEX and also adopted a unique and distinctive appearance for the goods of their manufacture in order to distinguish their world class products from those of the others, by introducing the new 'YY' logo along with blue and green colour striped background to their products. It is the case of the plaintiff that the label mark consisting of YY YONEX with blue and green striped background instantly became a familiar sight on badminton and tennis courts around the globe. The plaintiff today is the leading worldwide manufacturer and distributor of sports goods equipments and other apparels of their manufacture namely racquets, shuttlecocks, strings, sportswear, apparels including dresses, skirts, blouses, shirts, shorts, jackets, sweaters, pullovers, cardigans, pants, training suits, warm-up suits, sports underwear, head wears, sweatbands, sports shoes, socks for wear and hats, gymnastic and other sporting articles, as also bags, umbrellas and parasols, all under the famous, reputed and well-known trademark YONEX.

2. The plaintiff also boasts of its best distribution network in the sports equipment market across the globe. M/s. Sunrise and Co. (Pte.) Ltd., located at No. 9, Kaki Bukit Crescent, Kaki Bukit Tech Park-I, Singapore - 416 240, Singapore, is the plaintiff's sole distributors for all YONEX products in various Asian countries including India. According to the plaintiff, it has created niche for itself in the sporting world and has been sponsors of major tournaments including Olympics, wherein the

plaintiff has been the Page 2402 games official Badminton Equipment supplier, since introduction of Badminton in 1992, and the All England Badminton Championship, where the plaintiff is the exclusive sponsor of the game since 1984. It is number one brand in Badminton with 80% of the competitive players using the YONEX equipments. Name of various top ranking professionals who have endorsed the plaintiff's product in the game of the badminton are given. These include Indian players like Prakash Padukone and P. Gopichand, winners of All England Badminton Championships and also National Champions who have endorsed YONEX products. For this reason, states the plaintiff, YONEX has become a household name in India. The YONEX products, particularly badminton products, are sold in India through 350 dealers and wholesalers.

3. In the present case, we are concerned with a particular product namely shuttlecocks used in the game of badminton. The plea of the plaintiff is that it produces the technologically most advanced shuttlecocks to benefit and enable the players at every level to play their sports at a higher level. These shuttlecocks are also sold under the trade mark/name YONEX. YONEX feather shuttlecocks demonstrate accurate flight stability over distance under varying environmental conditions. From the careful selection of high quality materials to advanced manufacturing process, meticulous attention as to detail goes into the design and production of YONEX feather shuttlecocks to ensure distance stability. These shuttlecocks are the official shuttlecocks of the leading international tournaments including the YONEX All England Open, the YONEX Open Japan, the YONEX German Open, YONEX-Sunrise Singapore Open, World Championships among others. One of the shuttlecocks brands that has received international reputation is AEROSSENSA (AS). That product is marketed across the globe in different series and AEROSSENSA 2 or AS-2 is the series being made available in India. Turnover of this particular brand of shuttlecock was Rs. 2,22,76,526/- in the year 2000-2001 which rose to Rs. 4,93,61,402/- in the year 2003-2004

4. These shuttlecocks are marketed and sold in a unique and distinctive style and packaging in order to distinguish its merchandise from those of others i.e. YY YONEX with blue and green striped background. It is stated that the plaintiff is the owner of the copyright in the artistic work comprised in the get up, lay out, arrangement and colour scheme of the packaging and also in the logo. The get up, arrangement and colour scheme, logo of the packaging used as trademarks or appearance of the packaging constitute work of artistic craftsmanship and are subject matter of copyright protection. The label used in the packaging is an original artistic work within the meaning of Section 2(c) of the Copyright Act and therefore is subject matter of copyright protection under Section 13 of the Copyright Act. The label has been created for the plaintiff by its employees, in the course of their employment with the plaintiff and both India and Japan being signatories to the Berne Convention as well as the Universal Copyright Convention, the plaintiff's works are protected in India by virtue of Section 40 of the Copyright Act 1957, read in conjunction with the International Copyright Order 1999.

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5. It is further submitted that the plaintiff is also the proprietor of the trademark YONEX by virtue of priority in adoption, long continuous and extensive use and advertising, and the reputation and goodwill consequently accruing thereto in the course of trade. The trademark YONEX is entirely

distinctive of goods manufactured and distributed by the plaintiff and is acknowledged to be a standard bearer of excellence in quality and business ethics. The abovementioned trademark, on sporting equipments, has voluminously, continuously and extensively been used since 1973 by the plaintiff to the extent that the name YONEX has always been perceived as indicative of its source i.e. the plaintiff. Apart from its common law rights, the plaintiff is also the registered proprietor of the trademark YONEX by virtue of trademark registrations in its favor in various classes in India and details of the said registrations are as follows:

TM No.	Class	Goods covered	Registration Certificate No.
362562	28	Games (other than ordinary playing cards) and playthings Gymnastics and sporting articles other than clothing).	154461
Dated: 27th February 1987			
362563	25	Sports wear namely, dresses, skirts, blouses, shirts, shorts, jackets, sweaters, pullovers, cardigans, pants, training suits, warm-up suits, sports underwear, headbands, sweatbands, sport shoes, socks for wear and hats, (all being sports wear).	148967
Dated: 31st December 1983			
362564	18	Bags, umbrellas and parasols	148007
Dated: 18th June 1984			

The abovementioned trademarks are valid and subsisting and have been duly renewed from time to time. Copies of the Renewal Certificates issued by the Registrar of Trademarks, Bombay are filed in the present proceeding. The plaintiff have also applied for the registration of its logo YY and the details of the same are as under:

TM No.	Class	Goods covered	Registration Certificate No.
1044711	18	Leather and imitations of leather and goods made of these materials etc.	
14.09.2001			
1044712	25	Clothing's, shoes and footwears, headgear.	
14.09.2001			
1044713	28	Games and playthings, gymnastic and sporting articles especially Badminton rackets, squash rackets, tennis rackets, badminton shuttlecocks, tennis balls, golf clubs etc.	
14.09.2001			

6. The plaintiff is aggrieved and agitated at the defendants' sale of badminton feather shuttlecock products by the name YONEKA which according to the plaintiff is sold having confusingly identical get up, lay out, arrangement and colour scheme. The plaintiff has, therefore, filed this suit for permanent injunction restraining the infringement of trademark and copyright, passing off, rendition of accounts of profits, delivery up etc. The action is founded on the following premise:

a) Infringement of trademark:- It is submitted that the product marketed by the defendants not only has a deceptively similar mark YONEKA as compared to plaintiff's YONEX but the product packaging of the defendant product is a colourable/slavish imitation and also having a identical colour combination of Blue and Green strip running across cylindrical packaging, similar to that of the plaintiff, having the mark YONEKA written in capital in white colour on the Blue and Green strip along with the logo 'Y'. The defendants have tried to come as close as possible to the plaintiffs and even copied the Y logo of the plaintiff, the only difference being that the defendants product has a single stylized 'Y' as compared to plaintiff's 'YY'. Furthermore, as mentioned earlier, the plaintiff's world class feather shuttlecock AEROSSENSA being available in India under series AS-2, the Defendants have also marked their product as Philips AS-2.

b) Passing off action:- It is stated that the photographs of the comparative packaging of the plaintiff and the defendants are filed in the present proceeding, which clearly establishes the above facts. The said packaging is a handle of fraud in the hands of the defendants by which they are causing confusion in the minds of the purchasing public. It is alleged that there is a great likelihood that the actual or potential customers will be further induced to:

a) believing that the defendant is endorsed by the plaintiff and the products offered by the defendants command the same level of quality and reliability that is synonymous with the goods of the plaintiff company.

b) believing that the defendant company has some connection/association with the plaintiff company, in terms of a direct nexus or affiliation with trademark YONEX, or

c) subscribing to the goods of the defendants or to dealing in some manner with the defendants under the impugned mark believing them to be licensed or authorized by the plaintiff to do the said business.

c) Manner in which the defendant has adopted trade dress, which is slavish imitation of the plaintiff's packaging and trade dress, amounts to violating the plaintiff's copyright in the said trade dress as well inasmuch as the get up, arrangement and colour scheme adopted by the plaintiff constitutes work of artistic craftsmanship and its original artistic work within the meaning of Section 2(c) of the Copyright Act and

entitled to protection under Section 13 of the Copyright Act.

The case of the plaintiff is that the adoption of trademark YONEKA with Page 2405 similar packaging using the identical colour combination of blue and green strip is neither bonafide nor that of an innocent adoption but with the said trade dress is dishonest adoption with sole purpose to ride upon and benefit from plaintiff's hard earned reputation and goodwill.

7. The defendant No. 1 is the manufacturer of the goods and the defendant No. 2 is one of its distributors. The suit is, therefore, contested by the defendant No. 1. In the written statement filed by it, it is claimed that there is no violation of the trade mark inasmuch as various trade marks registrations obtained by the plaintiff are in class 25, 18 and 28. They relate to different sportswear, bags, umbrella, parasols and games and playthings, gymnastic and sporting articles etc. respectively. The specification of goods for which the said registrations are obtained, therefore, do not include the goods in question namely shuttlecocks/racquets which are being manufactured and marketed by the defendants. It is also contended that the trademark YONEKA used by the defendants is neither identical nor deceptively similar to the trademark YONEX and there is no likelihood of confusion and/or deception inasmuch as YONEKA is phonetically, visually and structurally absolutely different and distinct from trademark YONEX. It is also submitted that the mark YONEX is not distinctive of the goods and/or business of the plaintiff. The goods bearing the trademark YONEX with 'R' in a circle are manufactured and marketed by yet another company named YONEX Company Ltd. which is a different and distinct company than the plaintiff and therefore the plaintiff cannot lay its claim of distinctiveness of the trademark YONEX.

8. It is also submitted that the claim of infringement of copyright is equally misconceived as the plaintiff has failed and/or neglected and/or omitted to furnish and/or plead material facts concerning the subsistence and ownership of copyright as per the requirements of copyright law. 9. It is also pleaded that the defendant is one of the leading manufacturers and sellers of shuttlecocks and sports articles. The trade mark YONEKA was adopted by the defendant in the year 2001 and has continuously and extensively been used in the course of trade and said mark has widely been advertised by the defendant by different means and has come about to be identified and recognised by the members of the trade as well as the public with the genuine and quality products of the defendant. The defendant has also established exclusive sales outlets of its goods under the trade mark YONEKA and have also spent substantial amount on the publicity thereof. Following is the year-wise statement of sales effected by the defendant during the past years:

Period Sale	(F.O.B. Value)
01-04-2000 to 31-03-2001	1,33,80,650.57
01-04-2001 to 31-03-2002	1,40,17,294.30
01-04-2002 to 31-03-2003	1,48,99,133.92
01-04-2003 to 31-03-2004	1,73,24,541.00

10. It is also submitted that the plaintiff having known about the adoption and use of the trade mark YONEKA on the part of the defendant at least since 2002 slept over the matter and thus acquiesced in the use thereof. The suit of the plaintiff is thus barred under the principles of delay, acquiescence and laches. On this basis, it is also contended that the plaintiff has made false and misleading statement in relation to material particulars and, therefore, is not entitled to the relief of injunction in equity as well. It is pleaded that in para 21 of the plaint false statement is made alleging that the plaintiff learnt about the availability of the defendant's products only on 16.8.2004 whereas the defendant is continuously, extensively and openly using the trademark YONEKA since the year 2001 and is in the knowledge of the plaintiff since October, 2002. The plaintiff's claim of prior user in India is also disputed.

11. It is pointed out that the defendant is registered proprietor of the trademark YONEKA which is the subject matter of Registration No. 1025732 dated 11.7.2001 in class 28 in respect of sport articles. Being a registered proprietor, the defendant has an exclusive statutory right to use the trademark in view of Section 28 of the Trade Marks Act. Therefore, in view of Section 28(3) of the Trade Marks Act, 1999, the plaintiff is not entitled to sue the defendant for infringement of trade mark.

12. Learned Counsel for the plaintiff, highlighting the features of plaintiff's case note whereof has already been taken above, submitted that the plaintiff was entitled to ad-interim injunction. He countered the plea of the defendant that the plaintiff was not prior user. His submission was that the plaintiff's trademark registration date back to the year 1980 which has been filed and the documents in respect whereof have been filed along with the plaint. The plaintiff had also filed voluminous evidence in the form of invoices relating to the sale of various YONEX products between the years 1997-2003. He also referred to letter dated 6.8.2005 of the Badminton Association of India which had confirmed usage of the plaintiff's shuttlecocks in India from the year 1998. As against this claim of the defendant that it came into market in the year 2001, it was submitted that the plaintiff was clearly prior user and registrant of the mark YONEX in India. He referred to the judgment of the Supreme Court in N.R. Dongre v. Whirlpool Corporation 1996 PTC (16) 583, wherein the Court held that prior user of the mark Whirlpool in India in the form of a spillover was the determining factor and the fact that the defendants enjoy a trademark registration, was of no avail. He also relied upon another judgment of the Supreme Court in the case of Milment Oftho Industries and Ors. v. Allergan Inc. 2004 (28) PTC 585, wherein the Supreme Court held that the ultimate test should be 'who is the first in the market'. He again highlighted the features of the plaintiff's trademark and compared the same with the defendant's trademark and logo along with same colour combination on the basis of which he argued that the defendants have Page 2407 strained their every nerve to come to close to the plaintiff's trade mark and product packaging so as to ride illegitimately and illegally on the reputation and goodwill enjoyed by the plaintiff. It was for the purpose of deceiving the consuming public and pass off and infringe the plaintiff's statutory rights. He submitted that in similar circumstances injunctions were granted by the Courts in the following cases:

1. This Court in Automatic Electric Limited v. R.K. Dhawan and Anr. 1999 PTC (19) 81, held that 'it is undoubtedly true that the first syllable of a work mark is generally the most important and thus, when the defendants are using a similar prefix with

that of the plaintiff with a little variation in the suffix part of it, in my considered opinion the trade marks are deceptively similar and cause of action for prima facie infringement is complete'

2. The Division Bench of the Bombay High Court in *Chimanlal Narsaji Suhan v. Parasmal Mithalal Parmar* 1997 PTC (17) (DB) 729, observed that 'one cannot compare two trademarks by putting them side by side to find out similarities and differences in the two marks. What one has to see the overall impression which the trademark gives'. The Division Bench, under paragraph 6 at page 733, also made a reference to Kerly in *Law of Trade Marks and Trade Names*, 12th Edition paragraph 17-08 which states that 'two marks when placed side by side, may exhibit many and various differences, yet the main idea left on the mind by both may be the same. A person acquainted with one mark, and not having the two side by side for comparison, might well be deceived, if the goods were allowed to be impressed with the second mark, into a belief that he was dealing with goods which bore the same mark as that with which he was acquainted. Thus, for example, a mark may represent a game of football; another mark may show players in a different dress, and in very different positions, and yet the idea conveyed by each might be simply a game of football. It would be too much to expect that persons dealing with trade-marked goods, and relying, as they frequently do, upon marks should be able to remember the exact details of the marks upon the goods with which they are in the bahit of dealing. Marks are remembered rather by general impressions or by some significant detail than by any photographic recollection of the whole. Moreover, variations in details might well be supposed by customers to have been made by the owners of the trade mark they are already acquainted with for reasons of their own.'

3. The Supreme Court in *Parle Products (P) Ltd. v. J.P. and Co. Mysore* PTC (Suppl) (1) 346, held 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. They should not be placed side by side to find out if there are any differences in the design and if so, whether they are of such character as to prevent one design from being mistaken for the other. It would be enough if the impugned mark bears such an overall similarity to the registered mark as would be likely to mislead a person usually dealing with one to accept the other if offered to him.' Page 2408

13. He also argued that the defendants' adoption of the impugned trademark and product packaging was clearly dishonest as no explanation was forthcoming from the defendant to justify such adoptions. In case of malafide and dishonest adoption, the plaintiff should be given injunction as was done by this Court in *M/s. Polson Ltd. v. Polson Dairy Ltd.* and IA No. 1854 and 2761/2005 in CS (OS) No. 309/2005 titled as *Mrs. Ishi Khosla v. Anil Aggarwal* and Anr. decided on 25.1.2007. He further submitted that once it is found that user or adoption by the defendant was dishonest or fraudulent, it was not open to the defendant to raise defense of acquiescence as said defense was in equity arising out of a principle of estoppel and a person who was the guilty of dishonesty and malafide could not raise the plea in equity namely acquiescence, delay or latches as held in *M/s.*

Hindusthan Pencils Pvt. Ltd. v. M/s. India Stationary Products Co. and Anr. 1989 PTC 61 as well as N.R. Dongre (supra). Likewise, merely because the defendant had registration of the trademark YONEKA, would be of no avail once prior user of the trademark and registration is proved by the plaintiff in respect of its trademark. In any case, it was submitted that the suit was for one infringement and passing off and action under passing off was still available in view of Section 28(3) and Section 27(2) of the Trade Marks Act.

14. Learned Counsel for the defendant, per contra, submitted that in view of the fact that the defendant was registered proprietor of the trade mark YONEKA, the plaintiff had virtually conceded that the plaintiff could not sue for infringement of trademark. He also referred to the provisions of Section 30(1)(e) of the Act in view whereof the plaintiff was not entitled to prevent the use of registered trademark YONEKA from the part of the defendant. His submission was that in view of Section 31 of the Act registration of trademark YONEKA in the name of the defendant is prima facie evidence of validity and at the stage of interim application when only prima facie view is to be taken, this factor should prevail in favor of the defendant. He also submitted that merely because the plaintiff had some registrations is no evidence of the use of trademark in the absence of material placed to show the actual use thereof. It was, thus, submitted that the case set up by the plaintiff was primarily of action of passing off for which prior user was to be shown which the plaintiff had miserably failed to show. It was submitted that the plaintiff has also not filed any evidence showing use of the trade mark YONEX prior to the use of the trade mark YONEKA made by the defendant. The defendant has produced on record sufficient documentary evidence in the form of invoices and the earliest invoice being that of 18th May, 2001 to establish prior use. The defendant has also produced on record the documents showing the import of goods bearing the trade mark YONEKA with effect from 17th September, 2001. In addition, the defendant has produced on record various documents establishing the fact that the trade mark YONEKA is being associated, identified and recognised by the purchasing public and members of the trade with the goods of the defendant and none else. As against the above Page 2409 documentary evidence produced on record, the plaintiff has sought to establish the alleged use of the trade mark YONEKA in India on account of the letter dated 6th August, 2005 purported to have been issued by Badminton Association of India. The said declaration also did not prove use of the trade mark on commercial basis in any manner whatsoever. The said letter talks about supply of shuttlecocks 'free of cost'. The question whether any shuttlecocks, as per alleged agreement with Association, were supplied or not remains unanswered on the part of the plaintiff. Furthermore, distribution of free samples does not constitute commercial use of the trade mark.

15. He also submitted that the judgment in the case of N.R. Dongre (supra) was not applicable in this case as no evidence on record to establish any world-wide reputation or spillover of the said reputation in India or use of the trade mark in India on the part of the plaintiff was produced and in the absence of such an evidence injunction could not be granted as held in M/s. Smithkline Beecham Plc. and Ors. v. Hindustan Lever Limited 2000 PTC 83 as well as Gillete Company v. A.K. Stationery 2000 PTC 83 and Veerumal Praveen Kumar v. Needle Industries (India) Ltd. 2001 PTC 889.

16. His last submission was that in any case there was no similarity of the mark YONEX of the plaintiff with the mark YONEKA of the defendant much less deceptive similarity and relied upon the following judgments where competing marks were held to be not deceptively similar:

1. The Singer Manufacturing Co. v. The Registrar of Trade Marks and Anr. .
2. Ramakant Ramchandra Naik v. K.W. Kenny AIR 1973 Goa 31.
3. American Home Products Corporation v. Mac Laboratories Pvt. Ltd. and Anr. .

17. I have given my utmost consideration to the submissions made by both the counsel. I am of the opinion that at this distance of time it would not be appropriate to grant ad interim injunction in the facts and circumstances of this case and in adopting this course of action I am influenced by the following factors and circumstances available on record:

a) The defendant had adopted the trade mark YONEKA in the year 2001. Six years have passed since then and the defendant is having an established business with significant sales. It has created a market of its own and is having wide sales network. The defendant has claimed and filed documents in support thereof to the effect that mark of the defendant is widely advertised by different means and has come about to be identified and recognised by the members of the trade as well as public with the genuine and quality products of the defendant. It has also established exclusive sales outlet of its goods under the trade mark YONEKA and is spending substantial amount on publicity. The sale figures of the defendant have already been taken note of above as Page 2410 per which, in the financial year 2000-01, the sale of the defendant's product was Rs.1.33 crores, which is steadily rising and it went up to Rs.1.73 crores in the financial year 2003-04. Going by the continuous upward trend in the sales, it can be presumed that the sale at present might be much more as sale figures of subsequent period are not given since written statement was filed in October 2004 Therefore, at this juncture it would not be proper to injunct the defendant and inflict a sudden death.

b) The defendant has alleged that the plaintiff came to know about the adoption and use of the trade mark YONEKA by the defendant at least in the year 2002 but the plaintiff slept over the matter and thus, acquiesced in the use thereof. It would be an important factor in the facts of this case. No doubt, in certain circumstances even if the action is delayed, injunction can still be granted, more so when the adoption of trade mark by the defendant is dishonest. However, there is a serious dispute on these issues Thus, where, as in the present case, the plaintiff has allowed the defendant to grow by leaps and bounds and the defendant is not a fly by night company but is a well established industrial house, it may not be proper to pass such an order.

c) This suit was filed in the year 2004, but no ex parte injunction was granted. The suit has reached the stage of framing of issues and three years have passed since then. No doubt, the present application is pending since 2004 when the suit was filed, but record shows that the parties at one stage were attempting to settle the matter amicably and when those settlement talks did not fructify, pleadings were completed and the matter kept pending at the stage of admission/denial of documents etc. and in the meantime, the defendant had also filed application for amendment of the written statement. Because of all these reasons the application for interim injunction was not heard earlier. However, fact remains that we are in the year 2007 and three years have passed since the filing of the suit. In a case like this, it would be more appropriate to expedite the disposal of the suit rather than granting injunction particularly in view of the aforesaid other factors mentioned hereinafter.

d) The trade mark of the defendant is a registered trade mark. It is because of this reason action of violation of trade mark of the plaintiff is not even available to it and the plaintiff has brought up passing off action and infringement of copyright. In this case where the defendant's trade mark YONEKA is registered, coupled with other factors, it would not be a wise step to grant ad interim injunction.

(e) There is a serious dispute as to who is the prior user in India. The documents filed by the plaintiff initially were of the period 2002 onward. No doubt, the plaintiff has filed certain documents during the arguments on the application on the basis of which it claims prior user, it would be appropriate to have this issue thrashed on the basis of evidence.

(e) Since the defendant is not a fly by night company and since it is having large establishment and substantial turnover, in case the Page 2411 plaintiff ultimately succeeds, the plaintiff can always be compensated in terms of damages and it would not be difficult to recover those damages from the defendant.

18. In *Niky Tasha India Pvt. Ltd. v. Faridabad Gas Gadgets Pvt. Ltd.* (1984) PTC (Del HC-DB), this Court refused the injunction at interlocutory stage while observing as under:

I take it to be well settled, both in India and England, that an interlocutory injunction will not normally be granted where damages will provide an adequate remedy should the claim succeed. Furthermore, I have always understood the rule to be that the court will not grant an interlocutory injunction unless satisfied that there is a real probability of the plaintiff succeeding on the trial of the suit; where the design is of a recent date, as in this case, no injunction should be granted. More so, when there is a serious question as to the validity of the design to be tried in the suit and an application for cancellation has been made. Where a person is entered as a proprietor of a registered design, that is under the Act no conclusive proof that the plaintiff is the proprietor of the design, but only a prima facie evidence that he is the proprietor. The plaintiff has this advantage that if no evidence at all is given then the certificate is

sufficient evidence that he is the proprietor.

19. I may also reproduce following observation of Lord Denning in *Hubbard v. Vosper* (1972) 2 WLR 389:

In considering whether to grant an interlocutory injunction, the right course for a Judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defense and then decide what is best to be done. Sometimes, it is best to grant an injunction so as to maintain the status quo until the trial. At other times, it is best not to impose a restraint upon the defendant but leave him free to go ahead. For instance in *Fraser v. Evans* [1969] 1 QB 349 although the plaintiff owned the copyright, we did not grant an injunction, because the defendant might have a defense of fair dealing. The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made a subject of strict rules.

20. I may also clarify that it is the cumulative effect of all the reasons given above which persuade me not to pass any such interim order in favor of the plaintiff. Each individual factor by itself may not have been sufficient but it is the combined effect thereof taking holistic view in so far as the aspect of injunction is concerned, that, in my opinion, does not warrant grant of injunction.

21. For the aforesaid reasons, I am not indulging into the exercise as to whether the defendant's trade mark is confusingly similar with that of the plaintiff or that the adoption of the trade mark YONEKA by the defendant is not bona fide. Both the parties had much to say on this but my reason for refrain is that since the matter has to go for trial and a final view is to be taken after the evidence, I should not make any observations in this behalf, Page 2412 particularly when I am not inclined to grant injunction in view of the circumstances explained above. Application for injunction is accordingly dismissed with the aforesaid observations.

22. Matter be listed before the Regular Bench as per the roster for framing of issues on _____, when after the framing of issues time bound direction can be given to the parties to file their affidavits by way of evidence so that the matter reaches the stage of final arguments within a period of, say, six months and I am hopeful that both the parties shall co-operate in this endeavor.