

Delhi High Court

Future Bath Products Private ... vs Corza International & Ors. on 4 November, 2022

Neutral Citation Number: 2022/DHC/004700

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 02.09
Date of decision:

+ CS(COMM) 461/2020

FUTURE BATH PRODUCTS PRIVATE LIMITED Plaintiff
Through: Mr.Umesh Mishra & Mr.Vishal
Patel, Advs.

versus

CORZA INTERNATIONAL & ORS. Defendants
Through: Mr. PPA Sageer, Adv.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

I.A. 9580/2020

1. The present application has been filed by the plaintiff under XXXIX Rules 1 and 2 read with Section 151 of the Code of Civil Procedure, 1908 (in short, „CPC) praying for grant of an ad interim injunction restraining the defendants, their proprietors, partners, agents, assigns, representatives, heirs, servants, dealers, manufacturers, franchisees and/or anyone acting for and on their behalf from selling, marketing, offering for sale, advertising directly or indirectly the goods under the trade mark mark/name which is identical or deceptively similar to the plaintiff s

mark or for „apparatus for lighting generating, cooling, cooking, refrigerating, drying, ventilating, water

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supply and sanitary purposes, etc. included in Class 11 or other similar goods in any manner whatsoever, so as to result in the infringement as also passing off the said registered trade mark and artistic work of the plaintiff.

FACTUAL BACKGROUND

PLAINTIFF:

2. It is the case of the plaintiff that in the year 1996, Mr. Naeem Ahmed and Mr. Wasim Ahmed had entered into a partnership and started a firm, namely „M/s. M.T. Engineering Works , engaged in the business of manufacture and sale/supply of a complete range of bath fittings. On 01.04.1998, Mr. Naeem Ahmed and Mr. Wasim Ahmed conceived and adopted the trade mark and have been using it ever since. They applied for the registration of the trade mark , bearing application no. 1099195 in Class 11, on 26.04.2002. The said application was, however, treated as „abandoned on 30.09.2015 as they failed to file a reply to the opposition filed by one M/s Anchor Kenwood Electricals, under Form TM-6, within the prescribed period of time.

3. It is the further case of the plaintiff that in the year 2004, Mr. Naeem Ahmed and Mr. Wasim Ahmed entered into another partnership and established another firm, namely „M/s. M. Sons Engg. Works , and filed a fresh application on 23.09.0211 bearing no. 2210199 for the registration of the trade mark for goods falling in Class 11 with respect to „apparatus for lighting, heating, steam generating, cooling, cooking, refrigerating, drying, ventilating, water supply and sanitary Signature Not Verified Digitally Signed By:SHALOO BATRA 17:40:33 Neutral Citation Number: 2022/DHC/004700 purposes, etc. , claiming user since 01.04.1998. The said trade mark was registered in the name of the said partnership firm vide Certificate of Registration no. 1873221 in Class 11.

4. The plaintiff asserts that, thereafter, Mr. Wasim Ahmed executed an Assignment Deed dated 21.03.2013, assigning several registered trade marks, including the trade mark , in favour of Mr. Naeem Ahmed, who by then had started a proprietorship-firm under the name and style of „M/s Future Bath Products . Mr. Naeem Ahmed filed an application, under Form TM-16, before the Trade Marks Registry and accordingly, became the registered proprietor of the trade mark claiming user since 01.04.1998.

5. On 17.08.2017, the plaintiff-company was incorporated and by virtue of an Assignment Deed dated 09.08.2018, the plaintiff-company acquired the proprietorship of the said trade mark from Mr.Naeem Ahmed. The plaintiff filed Form TM-P in this regard before the Trade Marks Registry on 09.08.2018, which was allowed and as such the plaintiff became the registered proprietor of the trade mark .

6. The plaintiff further submits that through its predecessor-in- interest, it is engaged in the business of manufacturing, marketing and selling of „apparatus for Lighting, Heating, Steam Generating, Cooling, Cooking, Refrigerating, Drying, Ventilating, Water Supply and Sanitary purposes etc. , included in Class 11 (hereinafter referred to as „the said goods) and other classes as detailed in the Fourth Schedule to the Trade Marks Rules, 2002 since 01.04.1998.

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7. The plaintiff further asserts that the predecessor-in-interest of the plaintiff had also applied for the registration of the mark and other trade marks/labels in other classes as well for the better protection of the said mark under the provisions of the Trade Marks Act, 1999 (in short, „the Act). The details of the registered trade marks of the plaintiff are provided herein below:

S. No.	Trade Mark	Class	Status	A
1.		6	Registered	2
2.		7	Registered	2
3.		8	Registered	2
4.		14	Registered	2
5.		21	Registered	2
6.		35	Registered	2
7.		6	Registered	2
8.		17	Registered	2
9.		11	Registered	2

8. The plaintiff submits that it is the original adopter and user of the artistic work , which has been continuously, extensively, and openly used by the plaintiff. The plaintiff further states that the aforesaid mark has a unique colour combination, layout and lettering style in relation to the said goods and has been in use since the year 1998 through its predecessor-in-interest. The said artistic work falls within the meaning of an „original artistic work under Section 2(c) of the Signature Not Verified Digitally Signed By:SHALOO BATRA 17:40:33 Neutral Citation Number: 2022/DHC/004700 Copyright Act, 1957 (in short, „the Copyright Act). The plaintiff further submits that the plaintiff is the registered proprietor of the artistic work in under the Copyright Act vide Certificate bearing no. A- 106740/2013.

9. The plaintiff submits that it maintains high standards in the field of marketing and sale of the said goods. Due to the high quality and efficiency of the said goods sold by the plaintiff under the said trade marks/label/artistic works, it has acquired enviable goodwill and reputation among the consumers, the general public and the members of the trade.

10. The plaintiff is running its individual website <https://www.corsabath.in>, which comprises of information about the business of the plaintiff and the same is accessible to the consumers and the general public at large. The plaintiff is also promoting and selling its products under the aforementioned marks through different interactive websites such as Amazon India, Facebook, IndiaMart, YouTube and LinkedIn.

11. The predecessor-in-interest of the plaintiff as well as the plaintiff has made substantial investment towards the publicity and advertisement of its mark through different modes, including

print and electronic media. The details of the expenditure incurred on advertising goods bearing the mark by the plaintiff as also its sales figures have been provided in paragraph 16 of the plaint.

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12. The plaintiff further submits that based on the aforementioned facts, it is sufficiently clear that the plaintiff is the original as well as the prior adopter and user of the trade mark(s)/label(s)/artistic work(s) and .

13. The plaintiff submits that in the third week of September 2020, the sales team of the plaintiff informed one of the directors of the plaintiff that an advertisement was displayed/uploaded on the Facebook page of the defendant no. 1, that is, <https://www.facebook.com/corzainternational> which stated that the goods of the defendant no.1, falling in Class 11 such as bath fittings, etc., are coming soon in the market under the trade mark Upon further inquiry, it came to the knowledge of the plaintiff that the defendant no.1 is engaged in the business of manufacturing, marketing and sale of a wide range of sanitary ware products. It also came to the knowledge of the plaintiff that the defendant no.1 is promoting and selling its products bearing the mark through several websites as also social media platforms, including but not limited to Instagram, JustDial, Facebook and IndiaMart; targeting customers of the plaintiff as well as the general public within the territorial jurisdiction of Delhi.

14. Upon conducting a web search on the website of the Controller General of Patents, Trade Marks and Designs, that is, <https://ipindiaonline.gov.in>, it was brought to the notice of the plaintiff that on 16.12.2014, the defendant no.1 herein, through its partner, that is, the defendant no.2, applied for the registration of the mark vide Signature Not Verified Digitally Signed By:SHALOO BATRA 17:40:33 Neutral Citation Number: 2022/DHC/004700 application bearing number 2863414 with respect to goods such as „Hollow Bricks, Inter Lock, Floor, Pavement, Roofing, Ceramic Cement, etc. included in Class 19 and claiming user since 01.11.2014. The same was granted registration vide Certificate of Registration bearing no. 1445104 dated 18.01.2017.

15. The plaintiff asserts that on further inquiries it was revealed that the defendant nos. 2 and 3, may be partners in another firm, namely „M/s Pan India Tiles and Ceramics , which had filed an application seeking registration of the trade mark in Class 11. The same had been published in the Trade Marks Journal No. 1806-0 dated 17.07.2017 and the plaintiff has opposed the same. The plaintiff did not take any action against the said firm as goods under the trade mark were not found to be sold in the open market. In the present suit also, „M/s Pan India Tiles and Ceramics has not been impleaded as no goods bearing the mark from the said partnership-firm are available in the open market, and in fact, the said partnership-firm does not appear to exist.

16. The plaintiff asserts that the adoption of the mark amounts to infringement of the plaintiff s registered trade mark . The defendants are also guilty of passing off their goods as that of the plaintiff s.

DEFENDANT NOS. 1, 2 AND 4:

17. In the Written Statement filed with the Suit, it is asserted that the defendant no. 1 is a partnership-firm, with the defendant nos. 2 and 4 Signature Not Verified Digitally Signed By:SHALOO BATRA 17:40:33 Neutral Citation Number: 2022/DHC/004700 being partners thereof. The defendant no. 3 is not a partner in the defendant no. 1.

18. It is asserted that the defendant no. 2 created the mark along with Mr. K. Hamza and Mr. C.K. Abdul Jabbar and constituted a partnership firm, namely „M/s Pan India Tiles Gallery . The explanation given for adoption of the mark is in paragraph 3 of the „Preliminary Submissions of the Written Statement to the suit and is reproduced as under:-

"3..... They conceived and adopted the trademark CORZA from the grouping of Partner s names of M/s Pan India Tiles. They formed the word KARZA choosing K from Defendant No.2's father's name Kunchalan, last two letters of K.Abdul JabbAR and the last letters of K. HamZA the then Partner and evolved it as CORZA to give a corporate aspect and it is no way connected to the Plaintiffs trademark as alleged."

19. It is asserted by the defendant nos. 1, 2 and 4 that the marks of the plaintiff and the defendants are not similar. The mark of the defendants has been openly, continuously and extensively used since 28.09.1999 by the "predecessor firm of Defendant No. 1 herein" and has become a leader in the South Indian market with regards to its goods- water closets and allied goods. It is asserted that the defendant no. 1 was formed by the defendant no. 2 as a sister concern of „M/s Pan India Tiles , which is the applicant for the trade mark in Class 11. The defendant no. 1 is the registered proprietor of the mark . It is further asserted as under:-

Signature Not Verified Digitally Signed By:SHALOO BATRA 17:40:33 Neutral Citation Number: 2022/DHC/004700 "5.... Thus, the Defendant No. 1 firm is the registered proprietor of the trademark CORZA.As mentioned supra, the predecessor or the earlier user M/s Pan India Tiles (earlier known as M/s pan India Tiles and Gallery) originally designed the trademark CORZA on 28.09 1999 and upon the consent of the same the successor firm Defendant No.1 has started using the mark CORZA as thereon since its formation."

20. It is asserted that the defendant no. 1 and its predecessor sister concern, „M/s Pan India Tiles and Ceramics , together are engaged in the field of manufacture and sale of „water closets, flushing and bath installations, wash basins pedestals, European Indian water closets, urinals closets, cisterns bidets, sinks urinals, bath room accessories, toilet bowls, toilet tanks lavatories for sanitary purpose since the year 1999.

21. The defendants state the defendant no. 1 has a huge sales turnover, the details whereof are given in paragraph 8 of the „Preliminary Submissions to the Written Statement filed in the Suit and has a good market share in its goods and services especially in the State of Kerala.

SUBMISSIONS ON BEHALF OF THE LEARNED COUNSEL FOR THE PLAINTIFF

22. The learned counsel for the plaintiff, while reasserting the submissions as reproduced hereinabove, further submits that the plaintiff being the registered proprietor of the mark , the adoption of a deceptively similar mark by the defendants for the same and allied goods is liable to be restrained.

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23. He submits that the plaintiff is also the prior adopter of the mark as the plaintiff, through its predecessor-in-interest, had adopted the same since 01.04.1998. He submits that on the other hand, the defendant no. 1 claims user of its mark only with effect from 01.11.2014, as would be evident from its application no. 2863413 seeking registration of its mark in Class 19. He submits that the attempt of the defendants to claim an earlier user of the mark through „M/s Pan India Tiles Gallery (hereinafter referred to as „M/s Pan India Tiles) cannot be accepted inasmuch as the defendant no.1 is a separate partnership-firm and the defendant no. 1 has not produced any document of assignment or licence of the mark from „M/s Pan India Tiles in its favour. He submits that, in fact, „M/s Pan India Tiles , as late as 17.02.2018, filed its response to the objection filed by the plaintiff to its application seeking registration of the mark, wherein no reference was made to the use of the mark by the defendant no. 1. The defendant no. 1 in its own application seeking registration of the mark, claimed user only since 01.11.2014.

24. The learned counsel for the plaintiff submits that, in summation, the plaintiff is entitled to an order of ad interim injunction as the marks in question are deceptively similar to each other; the plaintiff is the registered proprietor of the mark for the goods in question; and the plaintiff is also the prior adopter and user of the mark.

SUBMISSIONS ON BEHALF OF THE LEARNED COUNSEL FOR THE Signature Not Verified Digitally Signed By:SHALOO BATRA 17:40:33 Neutral Citation Number: 2022/DHC/004700

25. On the other hand, the learned counsel for the defendant nos. 1, 2 and 4 submits that the defendant no.1, through its predecessor-in-interest- „M/s Pan India Tiles , is the prior adopter and user of the mark , and has been using the mark since 28.09.1999. He submits that a substantial amount has been spent by the defendants for the promotion and expansion of its trade mark, due to which it has generated tremendous goodwill and reputation in South India, especially in the State of Kerala. He submits that on the other hand, the plaintiff has failed to produce any document in support of its alleged claim of user of the mark and . prior to the year 2009. The plaintiff has also failed to implead „M/s Pan India Tiles as a defendant in the Suit.

26. He further submits that as the defendant no. 2 was the Managing Partner of „M/s Pan India Tiles and is also the Managing Partner of the defendant no. 1, he is, therefore, entitled to avail the benefit of the user of the mark by „M/s Pan India Tiles .

27. The learned counsel for the defendants further submits that the present Suit has not been properly instituted inasmuch as there is no valid authorization in favour of the signatory on behalf

of the plaintiff- company. In this regard, he submits that the purported certified copy of the Board Resolution, though it claims itself to be passed unanimously, is signed by only two of the four Directors of the plaintiff-company. He submits that, therefore, the signatory to the Suit has not been authorized by the plaintiff-company.

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28. He further submits that the plaintiff has also intentionally not filed the Legal Proceeding Certificates in support of its registration. The claim of registration of the marks in favour of the plaintiff is, therefore, liable to be rejected as the entry in the Registrar of Trade Marks may change due to assignment, transfer or rectification, etc. He submits that „M/s Pan India Tiles has filed an application seeking rectification of the registration granted to the plaintiff s trade mark.

29. He submits that the plaintiff has itself disclosed the filing of an application by „M/s Pan India Tiles seeking registration of its mark on 01.08.2014. Objections thereto were filed by the plaintiff on 17.11.2017. The present Suit was filed by the plaintiff in or around October 2020, that is, with a delay of more than six/three years, on which ground itself the plaintiff is not entitled to any relief. He submits that the plaintiff is also estopped from laying any claim to injunction against the defendants in terms of Section 33 of the Act.

30. The learned counsel for the defendants further submits that the defendants are operating only in South India, while the plaintiff is operating in Delhi-NCR. The goods of the plaintiff are bath fittings, while those of the defendants are water closets and allied products. He submits that, therefore, the geographical area of operation and the goods being different, no case of an ad interim injunction is made out by the plaintiff. He submits that the plaintiff cannot be permitted to monopolize the mark for goods in which it is not dealing and for which it has no bona fide intention of using the mark. In support, he places reliance on the judgments of the Supreme Court in Vishnu Trading as Vishnudas Signature Not Verified Digitally Signed By:SHALOO BATRA 17:40:33 Neutral Citation Number: 2022/DHC/004700 Kishandas v. Vazir Sultan Tobacco Co. Ltd., Hyderabad & Anr., 1996 SCALE (5) 267 and in Nandhini Deluxe v. Karnataka Co-operative Milk Producers Federation Ltd., AIR 2018 SC 3516.

31. He submits that the defendants, being the registered proprietor of the mark, and that there being no proceedings in challenge to the registration of the defendants filed by the plaintiff till date, an injunction against the registered proprietor of the marks cannot be granted.

32. He submits that even otherwise, the mark(s) of the plaintiff and the defendants, when compared as a whole, are not similar. In support, he places reliance on the judgment of the High of Bombay in International Foodstuff Co. LLC. v. Parle Products Pvt. Ltd. and Ors., 2016 SCC OnLine Bom 2038.

33. He submits that the plaintiff itself has valued its trade mark at only Rs. 4,000/- (Rupees Four Thousand only) in the Assignment Deed dated 21.03.2013. Therefore, it is not entitled to any order of injunction.

ANALYSIS AND FINDINGS:

34. I have considered the submissions made by the learned counsels for the parties.

35. At the outset, I shall first consider the submission of the learned counsel for the defendants that the present suit has not been properly instituted by the plaintiff. As noted hereinabove, this submission is based on the plea that the authorisation in favour of the signatory to the plaint Signature Not Verified Digitally Signed By:SHALOO BATRA 17:40:33 Neutral Citation Number: 2022/DHC/004700 has been signed by only two Directors, one of which is the signatory himself.

36. I do not find any merit in the said submission inasmuch as, as in terms of Section 174 of the Companies Act, 2013, for a Board Meeting, the quorum required is of only two Directors and the extract of the Board Resolution filed on record meets the said requirement.

37. The learned counsel for the defendants has also stated that there is a difference between the address of the plaintiff-company as shown in the Memo of Parties and the Board Resolution, however, I do not find any such difference in the two addresses.

38. The submission of the learned counsel for the defendants that the plaintiff has not filed the Legal Use Certificates of its registrations, can also be of no assistance to the defendants at this stage. I find that the factum of registrations of the mark of the plaintiffs is not contested by the defendants. Merely because „M/s Pan India Tiles has filed an application seeking rectification of such registration, in my prima facie view, cannot come to the defence of the defendant nos. 1, 2 and 4 herein. The defendants herein do not claim to have filed any such rectification petition nor have urged grounds on which they may intend to challenge the registration of the plaintiff. The registration granted to the plaintiff, at least for the present application, therefore, has to be presumed to be valid in terms of Section 31 of the Act.

39. The submission of the learned counsel for the defendants that mere phonetic similarity in the two trade marks is not sufficient, also does not Signature Not Verified Digitally Signed By:SHALOO BATRA 17:40:33 Neutral Citation Number: 2022/DHC/004700 hold much force. The two trade marks in question, that is, and are phonetically and visually similar. As held by the Supreme Court in Corn Products Refining Co.v. Shangrila Food Products Ltd., (1960)1 SCR 968, the test to be applied is of a man of „average intelligence and of imperfect recollection . To such a man, the overall structural and phonetic similarity and the similarity of the idea in the two marks is reasonably likely to cause a confusion between them.

40. The submission of the learned counsel for the defendants that the plaintiff-company, having valued its trade mark at Rs.4000/- only in the Assignment Deed dated 21.03.2013, is not entitled to any relief of injunction, is also liable to be rejected. The statutory and common law right in a trade mark are not dependent on the value ascribed thereto by a party. If the plaintiff is able to make out a case based on the registration of its mark as also a common law right based on the prior adoption and use of the mark, it shall be entitled to an injunction against the third party misusing its mark irrespective of the value ascribed to such mark in an Assignment Deed.

41. The claim of user of the mark since 1999 made by the defendant nos.1,2 and 4 based on the alleged user of the mark by „M/s Pan India Tiles, cannot be accepted in absence of any assignment or license to use the said mark from „M/s Pan India Tiles being produced by the defendants on record. The defendant no.1 is a separate partnership- firm. The defendant no.2, though a partner in „M/s Pan India Tiles and Ceramics cannot, while such partnership is in existence and without any Signature Not Verified Digitally Signed By:SHALOO BATRA 17:40:33 Neutral Citation Number: 2022/DHC/004700 contract to the contrary, claim rights over the trade mark of the firm to its exclusion.

42. Having said the above, it is also to be noted that the defendants are the registered proprietor of the mark in Class 19. The said registration is not only subsisting but has not been opposed by the plaintiff. The defendants have also filed documents in support of their user of the mark since at least the year 2014. This is ignoring the earlier use claimed by them on basis of their association with „M/s Pan India Tiles and Ceramics . It has also been contended that the defendants have their business in South India, especially in the State of Kerala, where the plaintiff has no presence. This has not been disputed by the learned counsel for the plaintiff during his submissions. In fact, the learned counsel for the plaintiff has submitted that the cause of action has arisen when the defendants sought to expand their business to sanitary ware and in which regard, he refers to the Facebook page of the defendants.

43. In a nutshell, what is evident from the submissions of the parties and the documents filed is as under:-

(i) The plaintiff is a registered proprietor of the mark , which it claims to be using for the manufacture and sale of complete range of bath fittings since 01.04.1998, through its predecessor in interest, namely, „M/s. M.T. Engineering Works .

However, as far as documents are concerned, the first document produced is of the year 2009. The plaintiff claims that the documents prior thereto have been destroyed in fire. This claim, Signature Not Verified Digitally Signed By:SHALOO BATRA 17:40:33 Neutral Citation Number: 2022/DHC/004700 however, will have to be tested on evidence being led by the parties;

(ii) The defendants are the registered proprietor of the mark in Class 19 and claim to be using the same for manufacture and sale of water closets and its allied products since the year 1999 (on basis of claim of „M/s Pan India Tiles) and on its own since the year 2014;

(iii) The present suit has been filed in or about October 2020 by the plaintiff, when, according to the plaintiff, the defendants expanded their business into sanitary ware;

(iv) The defendants claim to have their business primarily in South India, especially in the State of Kerala, where the plaintiff has no presence.

44. As the mark of the plaintiff, that is, is registered for goods in Class 11, the use of a deceptively similar mark thereto by the defendants in relation to the same or similar goods would amount to

infringement of the registered trade mark of the plaintiff. Section 29 of the Act spells out the circumstances whereby a registered trade mark is infringed. Section 29(1) and (2) are reproduced herein under:-

"Section 29. Infringement of registered trade marks.---- (1) A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which is identical with, or deceptively similar to, the trade mark in relation to goods or services in respect of which the trade mark is registered and in such manner Signature Not Verified Digitally Signed By:SHALOO BATRA 17:40:33 Neutral Citation Number: 2022/DHC/004700 as to render the use of the mark likely to be taken as being used as a trade mark.

(2) A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which because of--

(a) its identity with the registered trade mark and the similarity of the goods or services covered by such registered trade mark; or

(b) its similarity to the registered trade mark and the identity or similarity of the goods or services covered by such registered trade mark; or

(c) its identity with the registered trade mark and the identity of the goods or services covered by such registered trade mark, is likely to cause confusion on the part of the public, or which is likely to have an association with the registered trade mark."

45. To avail the benefit of the exception to an action of infringement, the defendants have to show "acquiescence" for a continuous period of five years, wherein the registered proprietor was aware of the use of such mark, Section 33 of the Act reads as under:-

"Section 33. Effect of acquiescence. (1) Where the proprietor of an earlier trade mark has acquiesced for a continuous period of five years in the use of a registered trade mark, being aware of that use, he shall no longer be entitled on the basis of that earlier trade mark--

(a) to apply for a declaration that the registration of the later trade mark is invalid, or

(b) to oppose the use of the later trade mark in relation to the goods or services in relation to which it has been so used, unless the registration of the later trade mark was not applied in good faith.

Signature Not Verified Digitally Signed By:SHALOO BATRA 17:40:33 Neutral Citation Number: 2022/DHC/004700 (2) Where sub-section (1) applies, the proprietor of the later trade mark is not entitled to oppose the use of the earlier trade mark, or as the case may be, the exploitation of the earlier right, notwithstanding that the earlier trade mark may no longer be invoked against his later trade mark."

46. In the present case, the plaintiff has asserted that as far as „M/s Pan India Tiles and Ceramics is concerned, on the advertisement of its application in Class 11, the same was opposed by the plaintiff and to the knowledge of the plaintiff, the said partnership firm has not been using the mark " ". The plaintiff has further asserted that it gained knowledge of the use of the mark " " by the defendants only in the third week of September, 2020. It is submitted by the plaintiff that it was not aware of the adoption/registration of the mark of the defendants as such registration was applied by the defendants for the goods in Class 19, that is, for a different class of goods.

47. In view of this stand of the plaintiff, atleast at this stage, it cannot be said that the plaintiff has acquiescence in the use of the mark by the defendants for the goods covered in Class 11, that is, sanitary ware and bathroom fittings. In *M/s Power Control Appliances and Others v. Sumeet Machines Pvt. Ltd.*, (1994) 2 SCC 448, the Supreme Court has held as under:

"26. Acquiescence is sitting by, when another is invading the rights and spending money on it. It is a course of conduct inconsistent with the claim for exclusive rights in a trade mark, trade name etc. It implies positive acts; not merely silence or inaction such as is involved in laches. In *Harcourt v. White*, (1860) 28 Beav 303: 54 ER 382, Sr. John Signature Not Verified Digitally Signed By:SHALOO BATRA 17:40:33 Neutral Citation Number: 2022/DHC/004700 Romilly said: "It is important to distinguish mere negligence and acquiescence." Therefore, acquiescence is one facet of delay. If the plaintiff stood by knowingly and let the defendants build up an important trade until it had become necessary to crush it, then the plaintiffs would be stopped by their acquiescence. If the acquiescence in the infringement amounts to consent, it will be a complete defence as was laid down in *Mouson (J.G.) & Co. v. Boehm*, (1884) 26 Ch D 406. The acquiescence must be such as to lead to the inference of a license sufficient to create a new right in the defendant as was laid down in *Rodgers v. Nowill*. (1847) 2 De GM&G 614 : 22 LJ KCH 404."

48. Equally, the claim of the plaintiff cannot be said to be hit by delay or laches. As noted herein above, the plaintiff has asserted knowledge of the defendants adopting the impugned mark for sanitary goods and bathroom fittings only in September, 2020. The plaintiff filed the present suit in October 2020. In view of the above, therefore, no delay or laches can be alleged against the plaintiff.

49. In view of the above, the defendants are liable to be restrained by way of an ad interim order from using the deceptively similar mark for the goods of the defendants falling under Class 11, that is, bath fittings and other sanitary ware.

50. At the same time, the defendants are admittedly the registered proprietor of the mark for the goods covered in Class 19. The said registration is also valid and subsisting. As highlighted by the learned counsel for the defendants, the plaintiff has not challenged the said registration till date. The defendants have also filed documents on record to show user of the mark for the said goods, especially Signature Not Verified Digitally Signed By:SHALOO BATRA 17:40:33 Neutral Citation Number: 2022/DHC/004700 water closets. Section 28 of the Act vests a right in a registered proprietor to use of the registered mark in relation to the goods or services in respect of which the same is registered. The said mark has been allegedly in use by the defendants atleast from the year 2014.

51. In view of the above, in my opinion, the defendants cannot, at this stage, be restrained from use of the mark for the goods covered in Class 19, for which its marks stand duly registered. The balance of convenience and the test of irreparable damage would warrant any such injunction to be refused to the plaintiff at this stage for such goods.

52. Accordingly, the present application is disposed of restraining the defendants, their proprietors, partners, agents, assigns, representatives, heirs, servants, dealers, distributors, manufacturers, franchisees and/or anyone acting for and on their behalf from selling goods under the trade mark or any other mark/name, which is identical or deceptively/confusingly similar to the plaintiff's registered trade mark or for bath fittings or other sanitary ware or other similar goods in any manner whatsoever, so as to result in infringement of the said registered trade mark of the plaintiff or its passing off, during the pendency of the present suit. The defendants shall, however, be free to use the mark for the goods covered in Class 19. As the defendants own case is that they are confined to the southern states of India, especially in State of Kerala, they shall not expand their area of operation to other parts of the country during the pendency of the present Suit.

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53. It is clarified that the above ad interim arrangement is based on the prima facie findings of the Court, which shall not influence the Court at the final hearing of the Suit on the parties leading their respective evidence.

CS(COMM) 461/2020 List the matter before the Joint Registrar (Judicial) for further proceedings on 16th December, 2022.

NAVIN CHAWLA, J.

NOVEMBER 04, 2022/ab/ais Signature Not Verified Digitally Signed By:SHALOO BATRA 17:40:33