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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on:24th March, 2021
Decided on: 5th April, 2021

I.A. 12115/2020 in
\+ CS(COMM) 553/2020

BRITANNIA INDUSTRIES LTD ..... Plaintiff
Through: Mr. Sudhir Chandra and Mr. Sandeep Sethi, Sr. Advs. assisted by Mr. Sagar Chandra, Ms. Ishani Chandra and Ms. Shubhie Wahi, Advs.

versus

ITC LTD & ORS. ..... Defendants
Through: Mr. Sajan Poovayya, Sr. Adv. with Mr. Saikrishna Rajagopala, Mr. Sudeep Chatterjee, Ms. Nupur Lamba, Mr. Pratibhanu Singh and Mr.Kiratraj Sadana, Advs. for D-1

I.A. 12125/2020 in
\+ CS(COMM) 554/2020

BRITANNIA INDUSTRIES LTD ..... Plaintiff
Through: Mr. Jayant Mehta, Sr. Adv. with Mr. Sagar Chandra, Ms. Ishani Chandra and Ms. Shubhie Wahi, Advs.

versus

ITC LTD & ORS. ..... Defendants
Through: Mr. Sajan Poovayya, Sr. Adv. with Mr. Sudeep Chatterjee, Ms. Nupur Lamba, Mr. Pratibhanu Singh and Mr.

Kiratraj Sadana, Advs. for D-1

CORAM:
HON'BLE MR. JUSTICE C.HARI SHANKAR

% **J U D G M E N T**

I.A.12115/2020 in CS (Comm) 553/2020

The *lis*

1. On 11th September, 2020, the Trademark Registry registered the following trademark in favour of the plaintiff M/s Britannia Industries Ltd., in respect of "biscuits, bread, buns, rolls, bakery products, coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and preparations made from cereals, savouries, snacks, cookies, pastry and confectionary; cakes, ices; honey, treacle; yeast, baking powder; salt, mustard; vinegar, sauces, spices croissants", in Class 30 of the Trade Marks Rules, 2017:

2. The plaintiff manufactures and clears "Nutri Choice Digestive" biscuits, the packing whereof employs the above registered trademark.

The pillow pack, in which the plaintiff "Nutri Choice Digestive" biscuits are packed and sold, looks like this :

3. The plaintiff is aggrieved by the fact that the defendants M/s ITC Ltd. are manufacturing and selling "Sunfeast Farmlite 5-Seed Digestive" biscuits in packing which is, according to the plaintiff, deceptively similar to the packing in which the plaintiff sells its "Nutri Choice Digestive" biscuits. By adopting such confusingly similar packing, it is alleged that the defendants have infringed the registered trademark of the plaintiff. The plaintiff also alleges that the defendants are passing off their "SUNFEAST FARMLITE 5-SEED DIGESTIVE" biscuits as those of the plaintiff. The packing, in which the defendants clear and sell their biscuits, looks like this:

4. Accordingly, the plaintiff has sought an interim injunction, restraining the defendants from manufacturing or selling biscuits in the impugned packing, pending disposal of the present suit.

Proceedings thus far

5. Summons were issued in the suit and notice was issued in the present application, by this Court, on 16th December, 2020. On the said date, this Court recorded the submission, of learned Counsel for the defendants, that the defendants would not release the impugned pack/trade dress in the market, though they would continue to manufacture the same. This Court clarified, however, that the order would not impact those packages of the defendants which were already in the market.

6. This order continues to remain in force till date, as it was extended from time to time. As considerable stocks of the defendants' products have accumulated, awaiting release into the market and sale, the defendants sought modification of the aforesaid order, by permitting the defendants to release, into the market, the goods already manufactured by them. Mr. Rajagopal, learned Counsel for the defendants submitted that, while tendering the aforesaid statement in Court on 16th December, 2020, he did not envisage accumulation of such a huge stock of biscuits. Biscuits being a perishable commodity, Mr. Rajagopal prayed that directions, for release of the biscuits already manufactured, be issued by the Court.

7. Instead of examining the prayer for modification of the statement made by learned Counsel for the defendants on 16th December, 2020, with consent of learned Counsel for both parties, the present application, under Order XXXIX Rule 1 and 2, filed by the plaintiff, was finally heard. The plaintiff was represented by Mr. Sudhir Chandra and Mr. Sandeep Sethi, learned Senior Counsel and the defendants were represented by Mr. Sajan Poovayya, learned Senior Counsel assisted by Mr. Saikrishna Rajagopal.

The legal position

8. Before adverting to the facts of the present case and contentions advanced by learned Senior Counsel at the Bar, it would be appropriate, in brief, to reconnoitre the legal position, insofar as actions for infringement and passing off are concerned.

9. This Court has had occasion, in the recent past, to study various decisions in this regard, and attempt to cull out the principles emanating therefrom, in its judgments in ***FDC Ltd. v. Faraway Foods Pvt. Ltd.***[1]and ***Natures Essence Pvt. Ltd. v. Protogreen Retail Solutions Pvt. Ltd.***[2]. On the aspect of deceptive similarity, this Court, after perusing the decisions in ***Satyam Infoway (P) Ltd. v. Siffynet Solutions (P) Ltd.***[3]***, Cadila Health Care Ltd. v. Cadila***

[1] **MANU/DE/0230/2021**
[2] **MANU/DE/0474/2021**
[3] **(2004) 6 SCC 145**

Pharmaceuticals Ltd.[4]***, Kaviraj Pt. Durga Dutt Sharma v. Navaratna Pharmaceuticals Laboratories***[5]***, National Sewing Thread Co. Ltd. v. James Chadwick & Bros Ltd.***[6]***, Corn Products Refining Co. v. Shangrila Food Products Ltd.***[7]***, Amritdhara Pharmacy v. Satya Deo Gupta***[8]***, K. R. Krishna Chettiar v. Shri Ambal & Co.***[9]***, F. Hoffman-La Roche & Co. Ltd. v. Geoffrey Manners & Co. Pvt. Ltd.***[10]***, Mahendra & Mahendra Paper Mills Ltd. v. Mahindra & Mahindra Ltd.***[11]***, Laxmikant V. Patel v. Chetanbhai Shah***[12]***, Khoday Distilleries Ltd. v. Scotch Whisky Association***[13]***, Nandhini Deluxe v. Karnataka Co-operative Milk Producers Federation Ltd.***[14] and ***Wockhardt Ltd. v. Torrent Pharmaceuticals Ltd.***[15], culled out the following principles:

(i) In assessing deceptive similarity, the class of the customer who would purchase the product is relevant. The look/appearance, and the sound, of the trade marks, as well as the nature of the goods, are all relevant considerations. Surrounding circumstances are also relevant.

(ii) The onus of proof is on the plaintiff who alleges passing off. As against this, in an opposition to the registration of a trade

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[4] (2001) 5 SCC 73
[5] AIR 1965 SC 980
[6] AIR 1953 SC 357
[7] AIR 1960 SC 142
[8] AIR 1963 SC 449
[9] (1969) 2 SCC 131
[10] (1969) 2 SCC 716
[11] (2002) 2 SCC 147
[12] (2002) 3 SCC 65
[13] (2008) 10 SCC 723
[14] (2018) 9 SCC 183
[15] (2018) 18 SCC 346

mark, the onus to prove deceptive similarity is on the defendant who seeks non-registration, or removal of the trade mark from the register.

(iii) "Confusion" refers to the state of mind of the customer who, on seeing the mark, thinks that it differs from the mark on the goods which he has previously bought, but is doubtful whether that impression is not due to imperfect recollection. The question is one of first impression.

(iv) This is especially true in the matter of phonetic similarity. A meticulous comparison of the words, syllable by syllable, is to be avoided. The possibility of careless pronunciation and speech, both on the part of the buyer walking into the shop, as well as the shop assistant, is also required to be factored into consideration.

(v) The matter has to be examined from the point of view of a person of average intelligence and imperfect recollection. It has to be seen as to how such a purchaser would react to the trade mark, the association which he would form and how he would connect the trade marks with the goods he would be purchasing.

(vi) ***The Pianotist*** test[16], postulated over a century ago, has repeatedly been endorsed by the Supreme Court, as the definitive test to be adopted while comparing rival trade marks. According to this test, the Court is required to judge the rival trade marks by their look and sound, and consider,

(a) the goods to which they are to be applied,

(b) the nature and kind of customer who would be likely to buy those goods,

(c) all surrounding circumstances and

(d) the consequences which would follow if each of the marks is used in the normal way as the trade mark for the goods of the respective owners.

While doing so, the common part of the words forming the competing marks may not be decisive. The overall similarity of the composite words is required to be seen, having regard to the circumstance (if applicable) that both are on like goods of similar description. The test to be applied is whether, if the two marks are used in a normal and fair manner, there is likelihood of confusion or deception.

(vii) The whole word/mark is to be considered. An ordinary man would not split a word or name, in a trade mark, into its components, but would go by the overall structural and phonetic similarity of the marks at the nature of the goods previously

[16] Enunciated in **In re. Pianotist Application, (1906) 23 RPC 774**

purchased, or of which he has been told and which he wants to purchase. It has to be examined whether the totality of the trade mark of the defendant is likely to cause deception/confusion or mistake in the minds of the persons accustomed to the existing trade mark of the plaintiff.

(viii) The resemblance may be phonetic, visual or in the basic idea represented by the plaintiff's mark. The Court is, however, required to apply both the phonetic and the visual tests. At times, ocular similarity may be sufficient to find possibility of confusion/deception, even if the marks are visually dissimilar, though ocular similarity, by itself, may not, generally, be the decisive test. Where, however, (i) in all other respects, the marks of the plaintiff and defendant are different, (ii) the word/words, in the marks, which are phonetically similar, cannot be regarded as the dominant word, or essential feature, in the marks, and (iii) the surrounding circumstances also belie any possibility of confusion, it has been held that deceptive similarity cannot be found to exist merely on the basis of phonetic similarity or even identity. The matter, apparently, is always one of fact. The Court would have to decide, on a comparison of the two marks, and the parts thereof which are phonetically similar, as to whether such phonetic similarity is likely, considering all other circumstances, to confuse or deceive a purchaser of average intelligence and imperfect recollection, always bearing in mind the nature of the goods,

and the degree of circumspection which would be expected of the purchasers who would purchase such goods.

(ix) The Court is required to examine whether the essential features of the plaintiff's mark are to be found in the mark of the defendant. Identification of the essential features is a question of fact, left to the discretion of the Court.

(x) No objective standards are possible, regarding the degree of similarity which is likely to cause deception. It has to be seen from the viewpoint of the purchasers of the goods.

(xi) The test to be applied would depend on the facts of the case. Precedents are valuable only to the extent they specify tests for application, and not on facts.

(xii) On the issue of deceptive similarity, and especially with respect to the aspect of phonetic similarity, English cases are not of relevance. English cases are useful only to the extent they aid in understanding the essential features of trade mark law. The tests for deceptive similarity, which apply in other jurisdictions, may not always apply in India.

10. The first aspect to be examined, in any action for infringement or passing off is, therefore, the aspect of deceptive similarity. Infringement is a statutory tort, whereas passing off is a tort relatable

to common law. The circumstances in which a trademark is infringed are to be found in Section 29 of the Trademarks Act, 1999 ("the Trademarks Act")[17]. Under Section 29, an action for infringement can lie only at the instance of the proprietor of a registered trademark. The circumstances in which infringement takes place are to be found in

[17]**"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 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.
(3) In any case falling under clause (c) of sub-section (2), the court shall presume that it is likely to cause confusion on the part of the public.
(4) 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—
(a) is identical with or similar to the registered trade mark; and
(b) is used in relation to goods or services which are not similar to those for which the trade mark is registered; and
(c) the registered trade mark has a reputation in India and the use of the mark without due cause takes unfair advantage of or is detrimental to, the distinctive character or repute of the registered trade mark.
(5) A registered trade mark is infringed by a person if he uses such registered trade mark, as his trade name or part of his trade name, or name of his business concern or part of the name, of his business concern dealing in goods or services in respect of which the trade mark is registered.
(6) For the purposes of this section, a person uses a registered mark, if, in particular, he—
(a) affixes it to goods or the packaging thereof;
(b) offers or exposes goods for sale, puts them on the market, or stocks them for those purposes under the registered trade mark, or offers or supplies services under the registered trade mark;
(c) imports or exports goods under the mark; or
(d) uses the registered trade mark on business papers or in advertising.
(7) A registered trade mark is infringed by a person who applies such registered trade mark to a material intended to be used for labelling or packaging goods, as a business paper, or for advertising goods or services, provided such person, when he applied the mark, knew or had reason to believe that the application of the mark was not duly authorised by the proprietor or a licensee.
(8) A registered trade mark is infringed by any advertising of that trade mark if such advertising—
(a) takes unfair advantage of and is contrary to honest practices in industrial or commercial matters; or
(b) is detrimental to its distinctive character; or
(c) is against the reputation of the trade mark.
(9) Where the distinctive elements of a registered trade mark consist of or include words, the trade mark may be infringed by the spoken use of those words as well as by their visual representation and reference in this section to the use of a mark shall be construed accordingly."

sub-sections (1) to (4) of Section 29. Infringement occurs, under these provisions,

(i) where the defendants' mark is identical with, or deceptively similar to, the plaintiff's trademark and is used in relation to goods or services in respect of which the trademark is registered. [Section 29(1)],

(ii) where the defendants' trademark is identical to the plaintiff's trademark, and the goods or services of the defendant are so similar to those of the plaintiff, as is likely to cause confusion, or association with the registered trademark [Section 29(2)(a)],

(iii) where the impugned trademark is similar to the registered trademark and the goods or services of the defendant are identical to those of the plaintiff, or so similar as is likely to cause confusion, or have an association with the plaintiff's trademark [Section 29(2)(b)],

(iv) where the registered trademark and the goods or services of the defendant are identical to those of the plaintiff, as is likely to cause confusion or have an association with the plaintiff's trademark [Section 29(2)(c)] (in which case Section 29(3) creates a presumptive fiction of likelihood to cause confusion on the part of the public), and

(v) where the defendants' mark, though identical with or similar to the registered trademark of the plaintiff, is used in relation to goods or services *not similar* to those of the plaintiff, if the registered trademark has a reputation in India and use of

the defendants' mark, without due cause, takes unfair advantage of, or is detrimental to, the distinctive character or repute of the plaintiff's registered trademark.

Analysis and Conclusion

Undisputed Facts

11. There is no dispute regarding the following facts:

(i) The plaintiff's trademark was registered on 11th September, 2020, and the plaintiff has been using the said trademark, on its digestive biscuits since 2014. Applying the law laid down by the High Court of Bombay in ***SKOL Breweries Ltd. v. Som Distilleries & Breweries Ltd.***[18]**,** and this Court in ***Radico Khaitan Ltd. v. Brima Sagar Maharashtra Distilleries Ltd.***[19],the plaintiff is deemed to be using the registered trademark since 2014.

(ii) The defendants do not have any registered trademark, in respect of the impugned pack. The defendants' "SUNFEAST", "SUNFEAST FARMLITE" and "5-SEED DIGESTIVE" biscuits were launched, under the impugned pack on 28th September, 2020.

[18] **2012 (49) P.T.C. 231 (Bom.)**
[19] **2014 (60) PTC 405 (Del)**

(iii) Prior to adopting the impugned packing, the defendants were marketing their "digestive" biscuits including their "SUNFEAST", "SUNFEAST FARMLITE" and "5-SEED DIGESTIVE" biscuits, in the following packs:

The plaintiff submits that these packs were not, in any manner, infringing the plaintiff's pack and, in fact, uses this fact as a ground to contend that the defendants deliberately changed their pack to deceptively resemble that of the plaintiff, to encash on the plaintiff's goodwill and reputation.

(iv) The plaintiff does not have any registration for the colour combinations "red and yellow". In this context, I may note that

one of the main contentions advanced by the defendants was that, as the plaintiff does not have any separate registration for the "red and yellow" colour – though colour combinations are individually registrable as "marks" within the meaning of Section 2(m) of the Trademarks Act[20]. The plaintiff has submitted, in response, that it was not claiming any infringement or passing off on the defendants' products because of the usage by the defendants of the red and yellow colour combination on its pack. The plaintiff has also acknowledged the fact that it has not registered the red and yellow colour combination as a registered trademark. Mr. Sudhir Chandra has clarified that the claim of the plaintiff is that the overall appearance of the defendants' pack is confusingly and deceptively similar to the pack of the plaintiff's product, in respect of which it has been granted registration by the Trademark Registry.

Deceptive similarity

12. Confusing or deceptive similarity is the *sine qua non* for any action, alleging infringement or passing off, to succeed. In the absence of confusing or deceptive similarity, other aspects cease to matter.

[20] "(m) "mark" includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof"

13. Rival Contentions

13.1 Mr. Sudhir Chandra and Mr. Sandeep Sethi, learned Senior Counsel for the plaintiff, submitted that the overall trade dress, colour combinations, colour scheme, arrangement of features, get-up and layout of the impugned pack of the defendants were deceptively similar to that of the plaintiff. They, *inter alia*, highlight the following similarities:

(i) use of the colour scheme of red and yellow, with yellow on the left side of the pack and red on the right,

(ii) depiction of the image of the biscuit on the right side,

(iii) embossing of the brand name of the company and of the biscuit on the body of the biscuit in similar font and style,

(iv) use of the word "Hi-Fibre", below the name of the biscuit,

(v) depiction of the words "NUTRI CHOICE" in the case of the plaintiff's pack, and of the words "5-SEED DIGESTIVE" in the defendants' pack, on a white background,

(vi) depiction of two sheaves of wheat below the picture of the biscuit on the right side of the pack along with scattered grains of wheat,

(vii) an orange shading at the intersection of the yellow and the red colour on the pack, and

(viii) depiction of the word "digestive" in red lettering on the pack.

13.2 It was submitted that the defendants had copied the essential elements of distinction in the plaintiff's trademark without any valid reason. In this context, Mr. Sudhir Chandra relies on the fact that the trade mark, of which infringement is being alleged, stands registered in the plaintiff's favour in respect of "biscuits" and would, therefore, cover *all* categories of biscuits. In other words, submits Mr. Sudhir Chandra, it would not be permissible for anyone to use any mark, deceptively similar to that of the plaintiff, in respect of *any* kind of biscuits. He has placed reliance, in this context, on Section 28 of the Trademark Act, apart from Section 29. He submits that the manner in which the defendants' pack infringes the registered trademark pack of the plaintiff directly attracts Section 29(2)(b).

13.3 Mr. Sudhir Chandra also submits that, as the biscuits are normally stocked together in stores, there is also a clear aspect of "initial interest confusion". He further submits that, as the plaintiff's and the defendants' biscuits are both digestive biscuits, the constituents or ingredients of the biscuits are immaterial, in which context Mr. Sudhir Chandra once again invites my attention to the facts that registration has been granted to the plaintiff for "biscuits" as an omnibus class. Mr. Sudhir Chandra relies on the judgment of the Supreme Court in ***Kaviraj Pandit Durga Dutt Sharma v. Navaratna Pharmaceutical Laboratories***[5]***, Parle Products (P) Ltd. v. J. P. & Co.***

Mysore*[21]*, and of this Court in ***Glossy Color & Paints Pvt. Ltd. v. Mona Aggarwal*[22]*.***.

13.4 Mr. Poovayya, learned Senior Counsel for the defendant, submits, *per contra*, that there are any number of distinctive features on the pack of the defendants' products which make the two packs so dissimilar as to obviate any possibility of confusion or deception. He invites attention, in this context, to the fact that

(i) the plaintiff's pack contained two colours, i.e. red and yellow, whereas the defendants' pack contained red, yellow and saffron,

(ii) yellow is the predominant colour in the plaintiff's pack whereas red is the predominant colour in the defendants' pack,

(iii) the plaintiff's pack predominantly displays the brand name of the plaintiff pack "NUTRI CHOICE" in large green letters, whereas the defendants' brand name is "FARMLITE" printed in brown letters on the defendants' pack,

(iv) the defendants' pack contains a vertical curved band towards the centre of the pack, in which the seeds contained in the defendants' biscuits are reflected from top to bottom under the head "Power Seeds", with a picture of each seed, indicating, from top to bottom, flak seeds, chia seeds, watermelon seeds, sunflower seeds and pumpkin seeds and

[21] **1972 SCC (1) 618**
[22] **2015 (64) PTC 316 (Del.)**

(v) the brand name of the defendants', "SUNFEAST FARMLITE DIGESTIVE" is predominantly displayed on the biscuits, in the photograph on the impugned package.

13.5 Mr. Poovayya further submits that etching of the brand name of the biscuits on the body of the biscuits was a common industry practice and that, in fact, this feature would serve to discredit the plaintiff's allegation of deceptive similarity, as the brand name of the defendant company as well as of defendants' biscuits are completely different from those of the plaintiff. He further submits that representing wheat and grains on the pack of digestive biscuits, is also a matter of common practice, as these serve to emphasise the nutritional value of the biscuits and represent their ingredients. In this context, Mr. Poovayya points out that the defendants' pack also shows seeds, raisins and almonds, which are not present on the pack of the plaintiff. Mr. Poovayya also submits that the use of the word "Hi Fiber" was, again, a matter of common industry practice, as it represented the high fiber content in the biscuits, again emphasising their nutritional value. He points out, in this context, that the lettering and the colour of the word "Hi Fiber" as contained on the impugned pack of the defendants, is different from that of the plaintiff.

Analysis

14. Having examined the impugned pack *vis-a-vis* the pack of the plaintiff, I am unable to convince myself that the pack of the

defendant is so similar to that of the plaintiff, as is likely to result in deception or confusion.

15. The definitive test, whether in the case of infringement or passing off, is that of confusing or deceptive similarity. It is true that, in examining this aspect, the court is not expected to ferret out points of dissimilarity between two marks, as absolute identity between marks is rarely, if ever, encountered, except where one makes unauthorised use of the mark of another. The examination by the court is, generally, required to be directed towards assessing whether there is a deceptive *extent* of similarity between the marks irrespective of their individual dissimilar features. It is for this reason that courts have held that the approach should be one of emphasising the similarities, rather than the dissimilarities, between the marks.

16. Having said that, points of dissimilarity between rival marks cannot be regarded as irrelevant. They cannot be ignored. The perception, whether in the case of infringement or passing off, is to be that of a person of average intelligence and imperfect recollection – not of an idiot, or an amnesiac. The average human mind has not been particularly conditioned to observe only similarities, and overlook dissimilarities. Section 29(1) uses the word "deceptive", whereas Section 29(2) uses the expression "cause confusion". Deception and confusion are both states of mind, of which no physically tangible evidence can ever be found. If similarities can cause deception or confusion, *dissimilarities, if sufficient,* can also obviate any such

possibility. At the end of the day, the court is required to come to an opinion as to whether a person of average intelligence and imperfect recollection is likely be deceived, or to confuse the defendants' marks (in the case of infringement) or the defendants' product (in the case of passing off) with that of the plaintiff. If, therefore, between the rival marks, the points of dissimilarity are so stark that they shade or overweigh the points of similarity, the court may legitimately arrive at a conclusion that, irrespective of the points of similarity, no possibility of confusion or deception exists.

17. For this, one of the most important assessments that the court is required to make is as to the features, of the rival marks, which are most prominent. If there is stark dissimilarity in the prominent, or essential, features of the rival marks, as would impress on the mind of the person of average intelligence and imperfect recollection, no finding of confusing or deceptive similarity can be arrived at.

18. The points of similarity, between the plaintiffs' pack and the defendants' pack, as highlighted by Mr. Sudhir Chandra, cannot be gainsaid. It is true that (i) both packs use a red and yellow combination of colors, with yellow on the left and red on the right, (ii) both packs use the words "DIGESTIVE HI-FIBRE", below the brand name, (iii) both packs depict the picture of a biscuit on the right side of the package, with a photograph of sheaves of wheat below the biscuits, and (iv) in both packs, the prominent word on the left side of the package ("NUTRI CHOICE" in the case of the plaintiffs and "5 SEED

DIGESTIVE" in the case of the defendants) are printed out a white background.

19. At the same time, there are also stark and apparent points of dissimilarity which, in my opinion, immediately impress themselves on the mind, even of a person of average intelligence and imperfect recollection. These may be enumerated as under:

(i) The most important distinction between the two packs is the brand. The plaintiff's pack contains the brand "NUTRI CHOICE" in large green prominent letters, on a white background. As against this, the defendants' pack represents the brand name "FARMLITE" in much more muted brown letters, on a yellow background. While the word "FARMLITE" as used on the defendants pack, does not immediately strike the eye, the words "NUTRI CHOICE", as used on the plaintiffs pack, are large and prominent. In my opinion, even a person of average intelligence and imperfect recollection is bound to notice the absence, on the pack of the defendant of the words "NUTRI CHOICE", contained on the pack of the plaintiff. Viewed from the "passing off" angle, once a person has initially bought the plaintiffs "NUTRI CHOICE" product, if, on a later occasion, he comes across the defendants "FARMLITE" biscuits, I find it difficult to believe that he would confuse the defendants' biscuit with the biscuit of the plaintiff which he had earlier bought, purchase the defendants' FARMLITE biscuit confusing it for

the plaintiff's NUTRI CHOICE biscuit, or even mentally associate the latter with the former – unless his recollection is *so* imperfect he forgets the fact that the earlier biscuit was "NUTRI CHOICE". The test, to reiterate, has to be that of the perception of a person of imperfect recollection, and not that of an amnesiac.

(ii) In this context, there is substance in the submission of Mr. Poovayya that a person who is prone to having digestive biscuits and who has bought "NUTRI CHOICE", would normally recollect the brand name of the biscuit which he has bought. It is unlikely, therefore, that he would confuse another package, which does not contain the brand name "NUTRI CHOICE", as being the biscuit which he had consumed on an earlier occasion.

(iii) By the same token, digestive biscuits having watermelon seeds, Chia seeds, flax seeds, pumpkin seeds and sunflower seeds are, clearly, a species of digestive biscuits *sui generis*. Mr. Poovayya submits that there is no other manufacturer of biscuits, digestive or otherwise, making biscuits containing the 5 seeds which are to be found in the defendants' biscuits. The plaintiffs have not disputed this position. While examining the aspect of possibility of confusion or deception, the Court cannot proceed unmindful of the realities of the times. It is a matter of common knowledge that consumption of flaxseeds, watermelon

seeds, Chia seeds and pumpkin seeds have become a matter of daily routine in many households, especially with persons who are health-conscious. Multi grain bread, for example, commands its own distinct clientele. Health-conscious households, who are prone to consumption of such seeds, would certainly prefer the biscuits of the defendants to those of the plaintiff. For them, the biscuits of the defendants would be "non-substitutable". For the average consumer of digestive biscuits, therefore, the biscuits of the defendant would have their own distinct identity, separate from the biscuits of the plaintiff.

(iv) The defendants have also consciously underscored this aspect of their biscuits by prominently displaying, on the package, the words "5-SEED DIGESTIVE", apart from a clear pictorial representation of the five seeds contained in the biscuits. The words "5 SEED" are absent on the plaintiff's pack. As per the submissions of Mr. Poovayya – which is not controverted by learned Senior Counsel for the plaintiffs – the defendants' biscuit is one of its kind, as it contains five distinct seeds, i.e., chia seeds, flaxseeds, watermelon seeds, pumpkin seeds and sunflower seeds, none of which are contained in the plaintiff's biscuits. Clearly, therefore, the defendants' biscuit has a unique identity, which is distinct and different from that of the plaintiffs' biscuit. It is this identity – of being a "five seed biscuit", which is prominently reflected by the use of the words,

"5 SEED", as contained on the defendants' pack. The fact that the words "5 SEED", is in bright red letters on a white background, confers the words additional prominence and render them even more capable of being re-collected by the average consumer. The use of the words "5 SEED", are also capable of acting as a distinctive feature, for the average consumer to distinguish the product of the defendants from that of the plaintiff, and avoid any possibility of confusion or deception. To my mind, any presumption that a customer, who comes across the defendants' biscuits, with the clear words "5 SEED DIGESTIVE" prominently displayed on the package, with photographs of the 5 seeds, contained in the biscuits, in a clear red band across the centre of the package, vertically from top to bottom, the band outlined in gold, is likely to confuse the defendants' biscuits with the "NUTRI CHOICE" biscuits of the plaintiff, would be far-fetched and unrealistic.

(v) A fourth and equally distinctive feature of the defendants' product *vis-à-vis* that of the plaintiff, is the fact that the picture of the biscuit, on the right side of the package, clearly shows, in stark prominence, the words "SUNFEAST FARMLITE DIGESTIVE", with the words "SUNFEAST" and "DIGESTIVE", in curved letterings towards the upper and lower halves of the biscuit, the words "FARMLITE", in a horizontal line towards the center of the biscuit. As against this, the plaintiffs biscuit has the words "BRITANNIA" and

DIGESTIVE" engraved on the face of the biscuit in curved lines towards the top and lower halves and the words "NUTRI CHOICE", embossed horizontally towards the center of the biscuit. The different brands of the biscuit and the different companies manufacturing the biscuits are, therefore, prominently displayed on the pack both of the plaintiff as well as of the defendants. It is only, therefore, if the mythical gentleman of average intelligence and imperfect recollection does not recollect either the brand of the biscuit or the name of the company manufacturing the biscuit, or even the prominent features of the left side of the pack (as emphasized hereinabove), that he is likely to confuse the "FARMLITE 5 SEED DIGESTIVE" biscuit of the defendant for the "NUTRI CHOICE DIGESTIVE" biscuit of the plaintiff.

20. The plaintiff has also enclosed photographs of the manner in which the packs of the plaintiff and the defendants products are stacked in stores, side by side, to submit that they look deceptively similar. Here, again, I am unable to agree with learned Senior Counsel for the plaintiff. If the packs of the plaintiff and the defendants biscuits are stored side by side, then, unless the customer is situated at so great a distance that he can see only the colors of the packs, and not the distinctive features thereof, he is unlikely to be confused between the two. If, on the other hand, he has, before him, the defendants' product, for the reasons already aforementioned, he is equally unlikely, in my view, to be confused or deceived into mistaking the "FARMLITE 5

SEEDS DIGESTIVE" biscuits of the defendants for the "NUTRI CHOICE DIGESTIVE" biscuits of the plaintiff.

21. Apart from all this, the fact that the brand names of the plaintiff and the defendants are prominently displayed on the packs is also, in my view, of no little importance. The plaintiff's and the defendants' brands are both reputed and well-known, enjoying their own niche clientele. I have already found the impugned pack of the defendant not to be confusingly similar to that of the plaintiffs. No case of infringement, therefore, exists, *prima facie*. When it comes to the question of passing off, additionally, the fact that the "SUNFEAST" logo of the defendant and the "BRITANNIA" logo of the plaintiffs are clearly visible on the face of the rival packs, would also minimize the possibility of a consumer mistakenly purchasing the product of the defendant, assuming it to be that of the plaintiff.

22. In this context, I deem it appropriate to emphasize that, before visualizing the consumer of "average intelligence and imperfect recollection", it is necessary for the Court to be conscious of the customer base to which the consumer belongs. It is true that the plaintiff's trade mark is registered for "biscuits" as an omnibus category. Mr. Sudhir Chandra and Mr. Sandeep Sethi are, therefore, correct in submitting (on the aspect of infringement, not passing off), that the legislative proscription contained in Section 29 of the Trade Marks Act, against infringement, would apply to *all* biscuits, and not digestive biscuits alone. For this purpose, learned Senior Counsel for

the plaintiff rely on Section 29(2)(b), to submit that the clause also covers infringement by use of *similar* trade marks on *identical* goods. Therefore, submit learned Senior Counsel, as the goods of the plaintiff and defendants are the same, *viz.* biscuits (in respect of which the plaintiff has an omnibus trade mark registration), mere *similarity* of the impugned trade mark of the defendants with that of the plaintiff would suffice. The difficulty in accepting this submission stems from the simple statutory reality that Section 29(2)(b) does not *end* with the words "by such registered trade mark" but *continues* with the words "*is likely to cause confusion of the part of the public, or which is likely to have an association with the trade mark".* In other words, for infringement to be proved to have occurred, within the meaning of Section 29(2)(b), the plaintiff would have to establish that

(i) the defendant is not the registered owner of the allegedly infringing trade mark, or a permitted user thereof,

(ii) the impugned trade mark is similar to the trade mark of the plaintiff,

(iii) the goods covered by the impugned trade mark are identical or similar to the goods covered by the plaintiff's trade mark, and

(iv) *because of such similarity of trade mark, and similarity or identity of goods covered thereby, the impugned trade mark is*

(a) likely to cause confusion on the part of the public, or

(b) likely to have an association with the registered trade mark of the plaintiff.

Condition (iv) is, in my *prima facie* view, not satisfied in the present case. For the reasons already stated hereinbefore, the similarity in the plaintiff's trade mark/pack and the impugned trade mark/pack of the defendants is *unlikely* to either cause confusion on the part of the public, or lead the public to presume any association between the defendant's pack and the pack of the plaintiffs.

23. Considerable reliance was placed by learned Senior Counsel for the plaintiff on the following passage from ***Parle Products***[21] (para 9 in SCC):

> "It is, therefore, clear 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. In this case we find that the packets are practically of the same size, the colour scheme of the two wrappers is almost the same; *the design on both though not identical bears such a close resemblance that one can easily be mistaken for the other. The essential features of both are that there is a girl with one arm raised and carrying something in the other with a cow or cows near her and hens or chickens in the foreground. In the background there is a farm house with a fence. The word "Gluco Biscuits" in one and "Glucose Biscuits" on the other occupy a prominent place at the top with a good deal of similarity between the two writings. Anyone in our opinion who has a look at one of the packets today may easily mistake the other if shown on another day as being the same article which he had seen before. If one was not careful enough to note the peculiar features of the wrapper on the plaintiffs' goods, he might easily mistake the defendants' wrapper for*

> *the plaintiffs' if shown to him some time after he had seen the plaintiffs'.* After all, an ordinary purchaser is not gifted with the powers of observation of a Sherlock Homes. We have therefore no doubt that the defendants' wrapper is deceptively similar to the plaintiffs' which was registered. We do not think it necessary to refer to the decisions referred to at the bar as in our view each case will have to be judged on its own features and it would be of no use to note on how many points there was similarity and in how many others there was absence of it."
>
> (Emphasis supplied)

24. This passage, if anything, would seem to hold *against* the stand canvassed by the plaintiffs. The only similarity between that case, and this, is that, to some extent, the colour *combination* on the packs of the plaintiff and the defendants is the same. In ***Parle Products***[21], however, the Supreme Court found the colour *scheme* to be the same. That apart, the Supreme Court noted that (i) a girl with one arm raised and carrying something in the other with a cow or cows near her and hens or chickens in the foreground, with a fence in the background, *was the same essential feature* in both packs (in fact, this stark similarity may, even by itself, have been sufficient to justify the finding of likelihood of confusion or deception), (ii) the rival brand names were "Gluco Biscuits" and "Glucose Biscuits" (which are, obviously, phonetically similar) and (iii) these brand names were prominently displayed at the top of the pack *with a good deal of similarity between the two writings*. *None of these similarities – or similarities akin in grade – can be said to exist, between the rival packs in the present case*. The mere representation of biscuits, with sheaves of wheat below them – which, too, as Mr. Poovayya rightly submitted, appears to be a practice in the case of digestive biscuits

made out wheat – is, in my view, totally insufficient to lead to confusion or deception. The judgement of the Supreme Court in ***Parle Products***[21], therefore, if anything, *emphasizes and underscores* the important of the necessity of similar features, *beyond* merely similarity in pack size and colour scheme.

25. It was sought to be contended, by learned Senior Counsel for the plaintiff, that the defendants had, by copying its "essential features", infringed the plaintiff's registered trade mark. The judgement in ***Parle Products***[21] effectively discredits this submission. In the case where the trademark consists of the entire pack, such as the present, identification of one, or the other features, as "essential", is no easy task. Significantly, even in ***Parle Products***[21], the Supreme Court did not rest with the finding that, as the size of the packs and the colour scheme thereon were the same in the rival marks, infringement, or passing off, stood established, but went on to record findings regarding actual copying of the *essential features* of the packs, viz. the picture of the girl with one arm raised and carrying something in the other with a cow or cows near her and hens or chickens in the foreground, with a fence in the background, the words "Gluco Biscuits" in one and "Glucose Biscuits" on the other, and both the names being represented, in similar writings, towards the top of each pack. In the present case, such parallels are absent. As already pointed out, the names of the two biscuits, as also their brands, are totally different. They are prominently displayed in different colours. Both packs contain the photograph of the biscuit, it is true, but, once

the name of the manufacturer and the brand of the biscuit is also prominently visible on the face of each, the allegation of copying of essential features and of possibility of confusion or deception on that score, would not sustain. The sheaves of wheat, submits Mr Poovayya, are not unique either to the plaintiff's packs or the defendants', they are seen in other packs of digestive biscuits as well. All said and done, therefore, it cannot be said, *prima facie*, that the defendants' packs have copied the essential features of the plaintiff's pack and have, thereby, infringed the plaintiff's registered trademark, or that the defendants have sought to pass off their packs as those of the plaintiff.

26. Interestingly, Section 29 of the Trade Marks Act does not use the mere word "similar". It uses, in sub-section (1), the words "identical or deceptively similar". Sub-section (2) conditions all three clauses, thereunder, with the requirement of "confusion" in the mind of the consumer. One may, therefore, say that the similarity must be either "deceptive" or "confusing". The Trade Marks Act does not define either "confusion" or "deception". Etymologically, "confusion" and "deception" are alike, the effect on the mind of the victim being almost the same, the distinction being essentially with respect to the intent of the person who seeks to confuse or deceive. "Deception", in common parlance, involves an element of *mens rea*, or guilty intent. With, or without, intent, however, the tort stands committed.

27. Confusion or deception is, however, not readily to be assumed. The man of average intelligence and imperfect recollection cannot be treated, for the purposes of the Trade Marks Act, as being *easily* confused or deceived. It is for this reason that the legislature has, consciously, used the word "deceptively similar" along with the word "identical". Applying the *noscitur a sociis* principle[23], the similarity, therefore, must be one which *confuses*, or *deceives* one into believing either that *the later product is the same as the earlier*, *or that they are made by the same manufacturer, or that there is an association between them*. In a case such as ***Parle Products***[21], where as distinctive a figure as a girl with arms raised, carrying something in the other with a cow or cows near her and hens or chickens in the foreground, with a fence in the background, is common to the two packs, at the very least, an inference of association of the latter pack with the former is inevitable. Such prominently distinctive features – as impress themselves in the mind's eye, as it were, so as to create an association at a later point of time – are, in my opinion, wanting in the present case.

28. The distinguishing features, in the present case, are, on the other hand, just too many. They more than counterbalance the similarities, and, *prima facie*, negate any possibility of confusion, much less deception.

[23] "The meaning of a word is to be judged by the company it keeps." – Refer **Rohit Pulp & Paper Mills v Collector of Central Excise, (1990) 3 SCC 447**

29. Insofar as the allegation of passing off is concerned, keeping all these factors in mind, it is extremely unlikely that a consumer, howsoever average his intelligence and howsoever imperfect his recollection, would purchase the SUNFEAST FARMLITE DIGESTIVE biscuit mistaking it to be BRITANNIA NUTRI CHOICE DIGESTIVE biscuit, merely because of the perceived similarities between the packs, as argued by Mr. Sudhir Chandra.

30. *Prima facie*, therefore, I am unable to accept the plaintiffs' submission that there is any deceptive similarity between the products of the plaintiffs and the defendants.

31. In view of the aforesaid findings, it is not necessary for me to return, even *prima facie*, any detailed findings regarding the other submissions advanced by learned Senior Counsel, *apropos* priority of user, reputation, goodwill, or the fact that the earlier pack of the defendants, for its FARMLITE 5 SEED DIGESTIVE biscuits was completely different from that of the plaintiffs. It may be true, as submitted by learned Senior Counsel for the plaintiff, that the manner in which the defendant has altered its pack has brought the impugned pack closer, in appearance, to the pack of the plaintiff. Even so, I am of the considered opinion that this closeness has not rendered the pack so proximate, in appearance, as to be confusingly similar to that of the plaintiff, or to result in the plaintiff mistaking the "FARMLITE 5 SEED DIGESTIVE" biscuit of the defendant for the "NUTRI

CHOICE DIGESTIVE" biscuit of the plaintiff, viewed either from the aspect of infringement or of passing off.

32. In view of the aforesaid, I am of the opinion that no case, for granting any interim injunction, against the impugned pack of the defendant, can be said to exist.

33. Accordingly, the application is rejected.

IA 12125/2020 in CS(COMM) 554/2020

34. Here, again, the tussle is between the box packs of the plaintiff and the defendants, in which they clear and sell digestive biscuits. In CS (COMM) 553/2020, the plaintiff was selling "NUTRI CHOICE DIGESTIVE" biscuits, and the defendants were selling "FARMLITE 5-SEED DIGESTIVE" biscuits. In CS (COMM) 554/2020, the plaintiff Britannia sells "NUTRI CHOICE 5 GRAIN DIGESTIVE" biscuits, whereas the defendants sell "SUNFEAST FARMLITE VEDA DIGESTIVE" biscuits. Both are sold in box packs.

35. I may note, here, that the defendants are also selling their "SUNFEAST FARMLITE VEDA DIGESTIVE" biscuits in pillow packs. However, there is no specific challenge, in the plaint, to the pillow packs wherein the defendants sell their "SUNFEAST FARMLITE VEDA DIGESTIVE" biscuits. Though Mr. Jayant Mehta, learned Senior Counsel for the plaintiff, valiantly attempted to envelope, within the challenge in the plaint, the pillow packs wherein

the defendants sell its "SUNFEAST FARMLITE VEDA DIGESTIVE" biscuits, I am not prepared to countenance that submission. The cause of action, in a suit, has to be specifically set out, and the defendants cannot be taken by surprise. The rival packs, as depicted in the plaint, are the box packs, in which the plaintiff and the defendants clear and sell their "5 GRAIN DIGESTIVE" biscuits. As such, this judgment shall be restrained to the aspect of infringement and passing off between the box packs in which "BRITANNIA NUTRI CHOICE 5 SEED DIGESTIVE" biscuits and "SUNFEAST FARMLITE VEDA DIGESTIVE" biscuits are sold.

36. The rival packs are the following :

PLAINTIFF'S NUTRICHOICE DIGESTIVE 5 GRAIN (LEFT) and DEFENDANTS FARMLITE VEDA DIGESTIVE (RIGHT)

37. When compared with the rival packs in CS (COMM) 553/2020, the packs in CS(COMM) 554/2020 are, undoubtedly, more proximate in appearance to each other. The question to be addressed is whether this proximity is such as to result in the pack of the defendants becoming confusingly similar to that of the plaintiff (in which case, *prima facie*, infringement would be made out) and whether a customer of average intelligence and imperfect recollection is likely to confuse the product of the defendants to be that of the plaintiff, on seeing the two packs of the defendants at different points of time (in which case the tort of passing off is made out).

38. The controversy, whether in CS (COMM) 553/2020 or CS (COMM) 554/2020, has to be decided on the anvil of Section 29(2)(b) of the 1996 Act. Under this provision, "a registered trademark 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 its similarity to the registered trademark and the identity or similarity of the goods or services covered by such registered trademark, is likely to cause confusion on the part of the public, or which is likely to have an association with the registered trademark".

39. The factors which convinced me to answer this question in the negative in CS(COMM) 553/2020, were (i) the representation of the words "NUTRI CHOICE" in bold green letters, on the left side of the

packing of the plaintiff, on a white circular background, whereas, in the case of the defendants, there was no green lettering on the package at all and, rather, the brand "FARMLITE" was depicted in muted brown letters on a yellow background, (ii) the fact that the defendants' "5 SEED" biscuits were a specie *sui generis*, as compared to the biscuits of the plaintiff, which were plain digestive biscuits, (iii) the clear depiction of this factual distinction by the words "5 SEED DIGESTIVE" in large red letters on a white circular background on the pack of the defendants, whereas there was no such depiction on the pack of the plaintiff, which did not contain the words "5 SEED", (iv) the depiction of the five seeds contained in the defendants' biscuits, in a maroon semi-circular band running from the centre upper to the lower edge of the pack with photographs of the seeds, one below the other and (v) the words, "SUNFEAST DIGESTIVE FARMLITE", as engraved on the face of the defendants' biscuits, which was prominently displayed on the pack, as compared to the words "BRITANNIA NUTRI CHOICE DIGESTIVE", which were engraved on the face of the biscuits of the plaintiff, which was also prominently visible on the pack of the plaintiff.

40. The reasons why these distinguishing features persuaded me to hold that no confusing similarity, between the packs of the plaintiff and the packs of the defendants, existed in CS (COMM) 553/2020, is apparent from the decision in the said case.

41. When one compares the rival packs in CS (COMM) 553/2020, with the packs in present case, it is apparent that the degree of similarity, between the packs of the defendants and the pack of the plaintiff, in this case, is greater than in CS (COMM) 553/2020. In the present case, unlike CS (COMM) 553/2020, "NUTRI CHOICE", brand of the plaintiff and "VEDA DIGESTIVE", brand of defendants, are both shown in large green letters on a white background. Both the biscuits have five distinct ingredients, with the plaintiff's biscuits being "5 Grain" biscuits whereas the defendants' biscuits contain five Ayurvedic ingredients, i.e. Ashwagandha, Cardamom, Mulethi, Ginger and Tulsi.

42. Having said so, on a plain glance at the two packs, I am unable to convince myself that, even in this case, there is a possibility of a customer of average intelligence and imperfect recollection mistaking the defendant's product for that of the plaintiff, by reason of the similarity between the packs.

43. In this case, too,

(i) the rival brands of the plaintiff and the defendant are distinct and different, the former being "NUTRI CHOICE" and the latter being, "FARMLITE VEDA",

(ii) being in the nature of box packs, the rival brands of the plaintiff and defendant are prominently displayed on the face of the pack ("BRITANNIA", in the case of the plaintiff and "SUNFEAST FARMLITE", in the case of the defendant),

(iii) the brand of the defendant, i.e. "FARMLITE", is shown, as in CS (COMM) 553/2020, in muted brown letters on a yellow background,

(iv) the defendants' biscuits contain five Ayurvedic ingredients, namely, Ashwagandha, Cardamom, Mulethi, Ginger and Tulsi, whereas it is not the case of the plaintiff that its biscuits contain these ingredients,

(v) these five ingredients are, as in the case of CS (COMM) 553/2020, prominently shown in a curved green band running from the top to the bottom of the pack, under the title "5 NATURAL INGREDIENTS" (the shade of green being different from that on the remainder of the pack, thereby lending it clear additional prominence), with photographs of the five natural ingredients one below the other, and

(vi) in the case of the defendants' pack, the face of the biscuit, which is prominently visible to the consumer, has engraved, on it, "SUNFEAST FARMLITE DIGESTIVE" with the words "SUNFEAST" and "DIGESTIVE" in curved letterings at the upper and lower halves of the biscuit and the word, "FARMLITE", in horizontal letters towards the centre of the biscuit, whereas the plaintiffs' biscuits merely contain the words "NUTRI CHOICE", in horizontal letters towards the centre of the biscuit with no brand name or the word "DIGESTIVE" [unlike the situation which obtained in CS (COMM) 553/2020].

44. Mr. Poovayya, learned senior counsel for the defendant, has drawn my attention to the fact that the "VEDA" category of biscuits is a niche category, conceived by and indelibly identified with the defendants. The "VEDA" class of biscuits, submits Mr. Poovayya, are biscuits containing Ayurvedic ingredients, obviously keeping in mind the health benefits of such ingredients. These biscuits, he submits, cater to a very specific class of consumer.

45. In my view, there is considerable weight in these submissions. The pack of the defendants prominently highlights the unique category to which the defendants' biscuits belong. Biscuits containing these Ayurvedic ingredients are not often encountered in the market, and, therefore, a customer of average intelligence and imperfect recollection, who has earlier consumed the plaintiff's "NUTRI CHOICE" biscuits, is in my view, is extremely unlikely to confuse the defendant's "VEDA DIGESTIVE", biscuits containing five distinct Ayurvedic ingredients, prominently displayed on the pack, for the "NUTRI CHOICE", biscuits of the plaintiff. Even more than in the case of the defendants' "5 SEED DIGESTIVE" biscuits forming subject matter of CS (COMM) 553/2020 are, therefore, the defendants' "VEDA DIGESTIVE" biscuits, with these five Ayurvedic ingredients, a specie *sui generis*.

46. Passing off has to be viewed from the perspective of the customer who wants to purchase the product. Is he, having earlier bought the product of the plaintiff, likely, on later coming across the

product of the defendant, likely to confuse it as having been made by the plaintiff? Are the packs *so* similar that the customer, of average intelligence and imperfect recollection may, on later coming across the defendants' pack, associate it with the plaintiff?

47. A prospective customer may come across the product to be purchased through one of three modes. He may either purchase it online, or pick it from the shelf, or be handed it by the shop assistant. Online, the two products are obviously totally different, and there is virtually no likelihood that the customer would confuse the products. Even as displayed on the shelf, as in the case of the packs forming subject matter of CS (COMM) 553/2020, any customer, who is within viewing distance of the details of the packs, is unlikely to confuse them. There is no reason to believe that a shop assistant, even moderately familiar with the difference in the plaintiff's and defendants' products, will provide, to the customer who wants 5 grain digestive biscuits, the defendants' product, containing the 5 Ayurvedic ingredients prominently displayed. Even if he does, it is not possible, *prima facie*, to believe that the customer would, on seeing the pack, link it with the plaintiff, or its "NUTRI CHOICE 5 GRAIN DIGESTIVE" biscuits. There is, on the other hand, every possibility of such a customer, who is *not* looking for biscuits containing Ayurvedic ingredients such as Aswagandha, Tulsi, and the like, *returning* the defendants' biscuits to the shop assistant. Not everyone can be presumed to be an aficionado of biscuits containing Ayurvedic herbs.

48. It is necessary to reiterate, here, that the Court cannot, in a case such as this, gloss over the distinction between plain digestive biscuits vis-a-vis "5 grain", "5 seed" or "Veda" digestive biscuits containing five Ayurvedic ingredients. Each is a distinct specie, with distinct features, and markedly different, and unique, ingredients. These distinctive features *stand prominently reflected on the packs*. The addition of these distinct ingredients are clearly intended at conveying, to the public, the unique health features resulting as a consequence. The Court cannot, therefore, readily presume *the digestive biscuit consumer*, even if of average intelligence and imperfect recollection, to be *unaware* of the difference between these categories of digestive biscuits. It is trite, in law, that, while examining the aspect of deception or confusion, the Court has to identify the precise onsumer base. Digestive biscuit consumers constitute an entirely different category of consumers, from consumers of ordinary biscuits. Whether one applies the "likelihood to cause confusion" test in Section 29(2), or the "deception" test in Section 29(1), one has to examine the possibility of deception or confusion keeping this frank reality in mind. The Court, in my view, would be falling into serious error if it were to assume that digestive biscuit consumers are ignorant of the difference between ordinary, 5-grain, 5-seed and Ayurvedic digestive biscuits, or likely to confuse one for the other, on the basis of the rival packs. The fact that the registration held by the plaintiffs is in respect of biscuits *per se*, as an omnibus class, is *entirely irrelevant* in this

context, once, keeping the purveyors of such biscuits in mind, no possibility of deception or confusion is found to exist.

49. I am willing to go along with Mr. Jayant Mehta in his submission that, in designing the impugned pack of "VEDA DIGESTIVE" biscuits, the defendant may have made a conscious attempt to "copy" the plaintiff's packing. A conscious attempt at copying, however, by itself does not constitute either infringement or passing off. The matter has, in either case, to be examined from the point of view of the customer of average intelligence and imperfect recollection. Unless such a consumer is liable to get confused or deceived, howsoever, questionable the intentions of the defendants may be, no case of infringement or passing off can be said to exist.

50. Though the defendants' packs in the present case are *more similar in appearance* to the plaintiff's packs, vis-a-vis the position which obtained in CS (Comm) 553.2020, these added points of similarity in the present case are also, in my view, insufficient to render the pack of the defendants confusing or deceptively similar to that of the plaintiff.

51. Other salient points of the discussion in CS (Comm) 553/2020 apply, *mutatis mutandis*, to the present case as well. ***Parle Products***[21] cannot help the plaintiff in this case either.

52. For this reason, I am of the opinion, that even in this case, it is not possible to arrive at a *prima facie* finding in favour of the plaintiff

on the aspect of deceptive similarity, and, consequently, infringing or passing off.

53. This application is also, therefore, dismissed.

C. HARI SHANKAR, J.

APRIL 5, 2021
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