

# amicus

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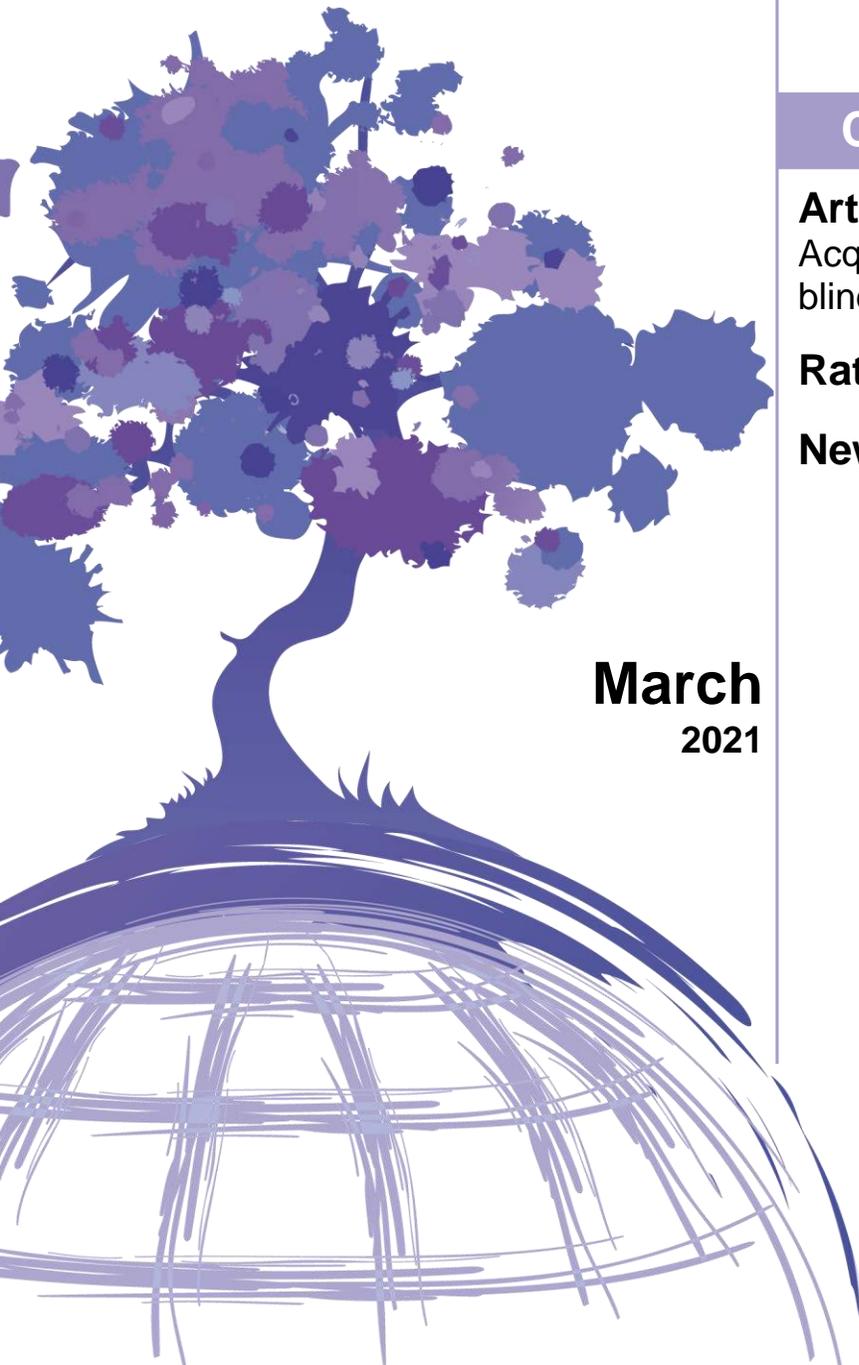
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## Article

### Acquiescence: Being vigilant and not blind sided

By Pulkit Doger, Raghav Sarda and Sidharth Shahi

In these times of globalization, it has become increasingly common for infringers to devise similar/identical trademarks to ride upon the goodwill and reputation which has been painstakingly built by registered proprietors. While, the most common remedy available towards such unauthorized use before a court of law is by way of instituting an infringement and/or passing off action, it is important to bear in mind the limits and extent of the rights of a registered proprietor. A registered proprietor of a trademark is required to remain cautious with respect to misuse of his or her trademark by others, failing which the registered proprietor may be disentitled from taking any legal action against the alleged offenders. Such disentitlement, referred to as 'acquiescence', therefore is a concept that every trademark owner must know and understand.

Acquiescence has been defined under the Trade Marks Act, 1999 as follows<sup>1</sup>:

Section 33:

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.*
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.*

Interpreting the aforesaid provision, it may be ascertained that the proprietor of an earlier trade mark is automatically disentitled from restraining any other user from the use and registration of a later trade mark, similar to the earlier trade mark, if the proprietor of the earlier trade mark fails to take any action against the other user for using the earlier trade mark for a continuous period of five years, despite being aware of such use by the other user. However, the proprietor of the earlier trade mark may be entitled to challenge the use of the later trade mark, if the later trade mark has not been applied in good faith. If the proprietor of the earlier trade mark is able to prove that the later trade mark has been adopted in bad faith to trade upon the goodwill and reputation associated with the earlier trademark, then the defense of acquiescence will not be available to the proprietor of the later trade mark.

<sup>1</sup> Section 33 of the Trade Marks Act, 1999

However, if the proprietor of the later trade mark takes the defense of acquiescence, then the proprietor of the later trade mark is also barred under this provision to challenge the use of the earlier trade mark.

### ***Elements of acquiescence<sup>2</sup>***

In order to successfully establish the defense of acquiescence, the proprietor of later trade mark will be required to establish the following:

1. That the proprietor of the earlier trade mark had prior knowledge of the use of the later trade mark;
2. The proprietor of the earlier trade mark encouraged that course of action, either by statements or conduct. The term ‘encouragement’ here may include inaction on part of the proprietor of the earlier trade mark to send any legal notice to the proprietor of the later trade mark expressing objection towards such use of a similar trade mark or filing of an opposition/rectification before the Trade Marks Registry objecting registration of such trade mark.

The proprietor of later trade mark thus must show that despite the knowledge of such use of the later mark, the proprietor of earlier trade mark chose not to take any action against the proprietor of the later mark for more than 5 years and such inaction by the proprietor of the earlier trade mark encouraged the proprietor of the later trade mark to continue use of such mark. The proprietor of the later mark thus continued to use the mark with the assumption that the proprietor of the earlier trade mark has no objection towards the use of the later trade mark.

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<sup>2</sup> Essel Propack Ltd. vs. Essel Kitchenware Ltd. and Ors. 2016(66) PTC173(Bom)

### ***Burden of proof***

It is well-settled that when a suit of infringement and/or passing off action is instituted before a court of law, the burden of proof towards availing the defense of acquiescence lies on the defendant.<sup>3</sup> In addition, the defendant may also be required to prove that the adoption and use of the later trade mark has been made in good faith and the defendant had no intention to ride upon the goodwill and reputation associated with the earlier trade mark.

### ***Precedents***

The Supreme Court of India in the case of *Power Control Appliances v. Sumeet Machines Pvt. Ltd.*<sup>4</sup>, observed that “*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.*”

Further, the Supreme Court in the case of *Ramdev Food Products (P) Ltd. v. Arvindbhai Rambhai Patel and Ors.*<sup>5</sup> observed that “*Acquiescence is a facet of delay. The principle of acquiescence would apply where: (i) sitting by or allowing another to invade the rights and spending money on it; (ii) it is a course of conduct inconsistent with the claim for exclusive rights for trade mark, trade name, etc.*”

The Apex Court thus clarified that acquiescence is a form of delay where the proprietor of an earlier trademark allows the proprietor of the later mark to build its mark over the course of time by spending money, time, and effort without asserting its exclusive rights

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<sup>3</sup> Ramdev Food Products Pvt. Ltd. vs. Arvindbhai Rambhai Patel and Ors. (2006)8SCC726

<sup>4</sup> 1994 SCC (2) 448

<sup>5</sup> (2006) 8 SCC 726

associated with it and such conduct could also be implied by positive acts.

The High Court of Delhi in the case of *Hindustan Pencils Pvt. Ltd. v. India Stationery Products*<sup>6</sup>, observed that “*there should be a tacit or an express assent by the plaintiff to the defendant's using the mark and in a way encouraging the defendants to continue with the business. In such a case the infringe acts upon an honest mistaken belief that he is not infringing the trade mark of the plaintiff and if, after a period of time when the infringe has established the business, reputation, the plaintiff turns around and brings an action for injunction, the defendant would be entitled to raise the defense of acquiescence.*”

The High Court thus clarified that acquiescence is caused by the proprietor of earlier trade mark when it has encouraged the proprietor of later mark to continue with its business. This leads the proprietor of later mark to believe that it is not encroaching upon the rights of the proprietor of earlier trade mark. However, if over a period of time when the proprietor of the later mark has established a name and business for itself and later, the proprietor of earlier trade mark institutes an action for injunction before a court of law, then the proprietor of later mark is well entitled to raise the defense of acquiescence.

The Delhi High Court in the case of *Jolen Inc. v. Doctor & Company*<sup>7</sup>, observed that “*In trade mark cases the plea of acquiescence is therefore available only if the defendant succeeds in proving that the plaintiff has been not only standing by but also turning a blind eye for a substantial period. If the defendant succeeds in proving the aforesaid conduct of the plaintiff, then*

*the plaintiff cannot be allowed to trample upon and crush the business or the trade set up by the defendant.*”

The High Court emphasized that in order to raise the defense of acquiescence before a court of law, the proprietor of later mark would necessarily be required to show that the proprietor of earlier trade mark has not taken any action or expressed discontent over a substantial period of time.

## Conclusion

The law relating to acquiescence thus serves to safeguard and protect the rights of a trademark user who has invested time, money, and effort in developing a business and a brand in good faith and without the knowledge that the mark is similar to that of an earlier registered mark. The law thus prevents the later user from any injustice that may be caused upon the user by taking away the proprietary rights in the trademark being used for more than five years. The law requires the registered proprietors to be vigilant towards the misuse of their registered trade mark and to timely take action against such misuse or attempts to register a similar mark. It is to be kept in mind that where the intention towards the adoption and use of the trade mark by the later user is genuine and made in good faith, the use of such trade mark by the later user cannot be restrained by the registered proprietor. Further, while the later user is safe from any action by the registered proprietor, the proprietor of later mark is itself barred from restricting the use of the earlier trademark.

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<sup>6</sup> AIR 1990 Delhi 19

<sup>7</sup> 2002 (25) PTC 29 Del



## Ratio decidendi

### **Designs infringement suit to be tried by High Court not having commercial division, by invoking extra ordinary original civil jurisdiction**

In a suit for alleged infringement in designs, where the defendant had in a counter claim sought cancellation of the registered design, the Madhya Pradesh High Court has directed that the suit be tried only by invoking clause 9 of Letters Patent (extra ordinary original civil jurisdiction) read with Rule 1(8) of Chapter IV of High Court Rules, 2008. The High Court observed that peculiar situation arose in this case as no Commercial Division was constituted in High Court of Madhya Pradesh (as the Madhya Pradesh High Court does not exercise ordinary original civil jurisdiction) and Commercial Appellate division being an appellate forum could not try the present suit.

The High Court was listening to the dispute after the Supreme Court had earlier upheld the view that the suit for alleged infringement in designs, where the defendant had in a counter claim sought cancellation of the registered design, is to be transferred to a High Court even if it does not have a Commercial Court Bench [See *December 2020 issue of IPR Amicus for SC decision*]. The Supreme Court had observed that there is no provision in the Commercial Courts Act, 2015 either prohibiting or permitting the transfer of the proceedings under the Designs Act, 2000 to the High Courts which do not have ordinary original civil jurisdiction. The High Court Registry was directed to list the matter before the appropriate Single Bench of the Court. [*Mold Tek Packing*

*Pvt. Ltd. v. S.D.Containers* - Judgement dated 27 February 2021 in C.S. No.1/2021, Madhya Pradesh High Court]

### **Trademark infringement – Delay in instituting suit and suppression when fatal**

The Madras High Court has dismissed the suit alleging infringement and passing of the mark 'Lock Brand' by the defendant in respect of the product 'lungi' sold by both the plaintiff and the defendant. The Court found that there was delay in instituting the suit as the cause for action arose in 1991 but the suit was filed in 2003. It noted that the plaintiff had in 1991 and then in 1993 called upon the defendant to cease and desist from marketing the product but the defendant had refused. The High Court held that there was no *bona fide* in the stand of the defendant when they, in the plaint, stated that the defendant had stopped marketing their products in 1991 and 1993. It noted that the plaintiff suppressed the fact that defendant had in fact replied, in 1991 and 1993, that they would not comply with the demands of the plaintiff.

The Court was hence of the view that the suppression of a material fact and the delay by the plaintiff in instituting the suit were major factors to non-suit the plaintiff. It noted that plaintiff had knowledge about the business of the defendants and of the fact that the defendants were marketing their lungi products under the name 'Lock Brand'. The High Court held that the plaintiff did not take any steps to institute a suit to protect their trade mark.

The Court also observed that there were differences between the two marks. The mark of the plaintiff was red in colour while the mark of the defendants was green and had a picture of Murthy Babu with the company address also been given. It noted that the locks in both the marks were different and that the mark of the plaintiff was also given in Tamil, while the mark of the defendants was given additionally in Hindi. The Court was of the view that there could be no confusion in the minds of anybody over the two marks, if the tests as stated by the Supreme Court in the case of *Parle Products Pvt. Ltd.* [(1972) 1 SCC 618] were applied. The plea of passing off was also dismissed on same grounds. [*Kas Zainulabdin and Company v. Murthy Lungi Company* – Judgement dated 18 January 2021 in C.S. No. 572 of 2003, Madras High Court]

### **Suspension of customs clearance of alleged IPR infringing goods – Customs when cannot continue suspension beyond 14 days**

In a dispute where the clearance of the imported goods alleged to be infringing the copyright in the artwork in the ‘TR’ mark was suspended by the Customs authorities, the Bombay High Court has held that the assertion that remedies under Section 53 of the Copyright Act, 1957 and Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007 (‘IPR Rules’) framed under the Customs Act, 1962, are independent of each other, is fallible. It also rejected the contention that the provisions of the Copyright Act will have to be read de hors the IPR Rules.

The Court noted that the IPR Rules do not confer any new intellectual property rights but, prescribe a remedy to prevent importation of

goods that infringe intellectual property rights recognized and defined under the parent statutes. It also noted that registration of notice for protection of IPR under the IPR Rules with the customs authorities does not *ipso facto* lead to breach of any of the parent statutes, neither does it bring into its ambit any new right which is not provided under the respective statute nor does it extinguish any right, unless protected by an interim order / order of the civil court.

Going through the provisions of the Copyright Act as amended in 2012 and the Copyright Rules, 2013, the High Court observed that the Customs authorities, who were also required to observe the mandate of the Copyright Rules, acted beyond jurisdiction by detaining the consignment beyond the prescribed period of 14 days. It observed that the person giving the notice of system alert under Section 53(1) of the Copyright Act had failed to produce a court order of restraint. The Court also observed that the petitioners and respondent No. 6 were litigating against each other to establish their respective rights and both had been unsuccessful in obtaining any interim order of injunction / restraint, with the *lis* being still pending. [*NBU Bearings Pvt. Ltd. & Anr. v. Union of India & Ors.* – Judgement dated 12 March 2021 in Writ Petition (L) No. 3371 of 2021, Bombay High Court]

### **Copyrights – Reproduction of artistic work in label – Mere use of different trade name not material**

In a case involving alleged substantial and material reproduction of the artistic work of the label of the plaintiff, when the plaintiff and the defendant were using different trademarks, the Gujarat High Court has held that merely having two different ‘trade name’ does not make a strong

defence. The plaintiff was using the trade mark 'Wagh Bakri' while the defendants was using the mark 'Vimal'.

Confirming the interim injunction granted by the Trial Court for copyright infringement, the High Court observed that in addition to the colour (both were using orange, though one darker than other), the tag line of both the trademarks started with 'PREMIUM' (the tagline for defendant was 'PREMIUM CTC LEAF TEA' while that of the plaintiff was 'PREMIUM LEAF TEA'), which was likely to confuse the public at large. It also noted that the cup and plate used as a shape for the trademark were deceptively similar with the white colour and similar shape of green leaves placed on the plate and that the logo of VIMAL was placed in oval shaped circle with a reddish background and that of the petitioner was also similar to it with a reddish background.

The Court rejected the various pleas of the defendant including that the product was a premium variety of the tea targeted towards the middle as well as upper middle class people who will be aware of the brands and hence there would be no confusion. The Court was of the view that it was not required to go in detailed merits of the case at the present stage since it would prejudice the case of the either side, as the trial was yet to commence. It was held that the Trial Court had rightly exercised the discretionary power. [*Vimal Dairy Limited v. Gujarat Tea Depot Company* – Judgement dated 1 March 2021 in R/Appeal from Order No. 2 of 2021, Gujarat High Court]

## Trademark disputes arising from assignments under a family settlement are arbitrable

The Delhi High Court has rejected the argument that the dispute where certain rights to use the trademarks were assigned by the Family Settlement Agreement ('FSA') and the Trade Mark and Name Agreement ('TMNA'), is in *rem* and therefore, not amenable to the arbitral process.

Allowing the prayer for referring the dispute in the suit to arbitration, the Court distinguished the recent Supreme Court decision in the case of *Vidya Drolia v. Durga Trading Corporation* [(2021) 2 SCC 1], which had noted that disputes involving grant and issue of patents and registration of trade marks are not arbitrable as 'they are exclusive matters falling within the sovereign or government functions', having 'erga omnes effect', resulting in conferment of monopoly rights.

Observing that the present dispute was regarding the family group to which the rights to use the 'Hero' trademark, in connection with electric cycles and e-cycles, was assigned by FSA and TMNA, the Court noted that the controversy was not related to grant, or registration, of trademarks. The Court was of the view that the assignment was by contractual, not statutory, fiat and hence does not involve any exercise of sovereign functions. It was also noted that the suit essentially alleged infraction of the terms of the FSA and TMNA, and not the provisions of the Trade Marks Act. [*Hero Electric Vehicles Private Limited & Anr. v. Lectro E-Mobility Private Limited & Anr.* – Judgement dated 2 March 2021 in CS(COMM) 98/2020, Delhi High Court]



## News Nuggets

### Copyright registration is not mandatory for seeking remedy of infringement

Holding the Bombay High Court decision in the case of *Dhiraj Dharamdas Dewani v. Sonal Info Systems Pvt. Ltd. and Others as per incuriam*, the Coordinate Bench of the same Court has held that registration under Copyright Act, 1957 is not mandatory. According to the single-Judge Bench, the earlier decision incorrectly noted that there was no decision of the Bombay High Court directly on this point while there were, in fact, four previous decisions, all to the contrary, each binding on the *Dhiraj Dewani* Court. The Court in the case *Sanjay Soya Private Limited v. Narayani Trading Company* [Judgement dated 9 March 2021] noted that previous judgements of a bench of coordinate strength cannot be ignored as they are fully binding. It was also held that placing registration under Copyright Act on the same pedestal as Trade Marks Act, is incorrect. It noted that the Copyright Act gives a range of rights and privileges to the first owner of copyright without requiring prior registration and that Section 45 of the said Act, relating to entries in register of copyrights, uses the word 'may' while Section 51, which speaks of infringement of copyright, does not restrict itself to works that have been registered. Further, noting that 'registration' of copyright as a mandatory requirement would be in the teeth of the requirement under the Berne Convention of 1886, it was held that protection must be 'automatic', on the coming into existence of the work in which copyright is claimed.

### Service of summons by all modes is not required

The Delhi High Court has rejected the contention that when the Trial Court had issued summons to the defendant by all modes, the Court had to be satisfied that the appellant-defendant had in fact been served by all modes before proceeding *ex parte* against him. The Court observed that since the appellant-defendant was served by one of the modes of service i.e. by way of speed post, he is deemed to have been served in accordance with the Delhi High Court (Original Side) Rules, 2018. It also noted that neither the Code of Civil Procedure nor the Delhi High Court (Original Side) Rules stipulated that the defendant must be served by all modes before he/she is proceeded *ex parte* in the event the summons are issued by the Court by all modes. The Court in the case *Rohit Sharma v. A.M. Market Place Pvt. Ltd. & Ors.* [Judgement dated 3 March 2021] was of the view that the intent behind incorporating different modes of service was to make use of the latest technology to expedite the disposal of suits and to ensure that suits do not drag on for a long period of time on account of lack of service on the defendant and that service by all modes would negate the intent of the Legislature.

### Territorial jurisdiction of High Court – Apprehension of sale by defendant

The Delhi High Court has dismissed the application challenging the territorial jurisdiction of the Court in a case where the petitioner had pleaded that since Delhi was

one of the largest markets for sale and distribution of the plaintiff's products, there was a reasonable apprehension that the defendants would be interested in exploring this market for sale of the goods infringing the mark 'ZYCLEAR'. It was also pleaded that a part of cause of action had arisen in Delhi as the defendants had customers, consumers, buyers etc. in Delhi whom they had approached for the proposed product. Reliance in this regard was placed upon the Delhi High Court decisions in the cases of *Bristol Myers Squibb Company & Anr. v. V.C. Bhutada & Ors.* [2013 SCC OnLine Delhi 4129] and *Shilpa Medicare Limited v. Bristol-Myers Squibb Company & Ors.* [2015 SSC OnLine Delhi 11164]. Decision of the Court in the case of *Allied Blenders & Distillers Pvt. Ltd. v. R.K. Distilleries Pvt. Ltd.*, as relied upon by the defendant was distinguished by the Court in the case *Cadila Healthcare Limited v. Uniza Healthcare LLP & Anr.* [Order dated 22 February 2021]. Noting that detailed reasons were given to elaborate the apprehension, the Court decided the application assuming the averments made in the plaint to be correct.

### Meghalaya – Courts of Deputy Commissioner and Additional Deputy Commissioner are 'District Courts' within the meaning of Trademarks Section 134

The High Court of Meghalaya at Shillong has held that Courts of Deputy Commissioner and Additional Deputy Commissioner are Principal Civil Courts of Original Jurisdiction in the district and hence are 'District Courts' within the meaning of Section 134 of the Trade Marks Act, 1999 and as such are competent to try the suit under the said Act. The Court noted that in tribal areas of Meghalaya, Civil Procedure Code is not applicable though the spirit of CPC is applicable. It observed that

neither the Shillong Civil Courts Act, 1947 nor the Bengal, Agra and Assam Civil Courts Act, 1887 are applicable and administration of justice is regulated under the Khasi and Jaintia Hills (Administration of Justice and Police) Rules, 1937. The Court in the case *B.R.Industries v. State of Meghalaya* [Order dated 11 February 2021] directed the District & Sessions Judge (Additional Deputy Commissioner) to dispose of the suit.

### Trademark 'Nature's Tattva' is visually, phonetically and deceptively similar to 'Nature's Inc.' and conveys deceptively similar idea as 'Nature's Essence'

Relying upon the recent decision of the Court in the case of *FDC Ltd. v. Faraway Foods Pvt Ltd.* [MANU/DE/0230/2021], the Delhi High Court has held that the Plaintiff's mark 

and the mark of the defendant  were *prima facie* deceptively similar. The Court observed that the marks were in identical colours with the placement of words being also similar - both contained the word 'Nature's' in a larger font, above the word 'Tattva' in the case of the defendant's mark, and word 'Inc.', in the case of the plaintiff's mark, below it in smaller letters. It noted that both the marks were green in colour, and used the word 'Nature's' with an apostrophe. It observed that in both the cases, there was the insignia of a leaf over the word 'Nature's' which, even by itself, *prima facie* indicated imitation, by the defendants, of the plaintiff's mark – this being a clearly distinctive feature of the plaintiff's mark.

Further, with regards to the 'Nature's Essence' mark of the plaintiff, the Court held that the 'Nature's Tattva' mark of the defendants was the case of idea infringement as one of the principal meanings of the Hindi (or rather, Sanskrit)

word 'tattva' was 'essence'. It was of the view that this was prima facie an attempt to confuse the customer of average intelligence and imperfect recollection. The High Court in the case *Natures Essence Private Limited v. Protogreen Retail Solutions Private Limited & Ors.* [Judgement dated 9 March 2021] was also of the view that it makes little difference that the products of the defendants were do-it-yourself items while the plaintiff's products were ready to use.

### **Disparagement of product – Bombay HC directs a soap manufacturer to amend advertisements**

Reiterating the law relating to disparagement and denigrating a product through advertisement, the Bombay High Court has recently directed the defendant (USV Private Limited) to modify its certain advertisements in which the defendant while comparing its products with the products of the plaintiff (Hindustan Unilever Limited), had stated that certain soaps of the plaintiff were bad. The Court was of the view that one can say that his product is the best in the world or better than his competitors and also compare the advantages of his product over the product of

others, however, while doing so, he cannot say that his competitors are bad and if he does so, either expressly or by necessary implication, he would be guilty of slandering the goods of his competitors and defaming his competitors and their goods. Further, observing that in a case of disparagement the Court has to identify the parts that belittle the competitor's product and grant an appropriate injunction, the Court held that it would depend on the facts and circumstances of each case, and Court will decide on restraining the entire advertisement or part of it.

On facts, the Court directed the advertisement titled FILM STARS KI NAHI, SCIENCE KI SUNO and TRANSPARENT SOAP KA SACH to be amended to omit the comparison to washing detergent just based on pH value. In respect of the advertisement titled DOODH JAISE SAFED SOAP KA SACH, the Court however in its decision dated 19 January 2021 declined to grant any ad interim injunctive relief. It may be noted that appeal against this decision was dismissed by the Division Bench of the Court on 21 January 2021 and further SLP to the Supreme Court was also dismissed on 15 February 2021.

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