

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**APPEAL FROM ORDER No. 414 of 2007****With****CIVIL APPLICATION No. 14502 of 2007****In****APPEAL FROM ORDER No. 414 of 2007****For Approval and Signature:****HONOURABLE MR.JUSTICE DN PATEL**

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1 Whether Reporters of Local Papers may be allowed
to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy
of the judgment ?

4 Whether this case involves a substantial question
of law as to the interpretation of the
constitution of India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to the civil judge
?

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VIKRAM STORES & 1 - Appellant(s)**Versus****S N PERFUMERY WORKS & 1 - Respondent(s)**

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Appearance :

MR Mihir Thakore, Senior Advocate with Mr.Y.J.TRIVEDI,
Mr.Jatin Trivedi, Mr.Harshit Tolia and Mr.Tejas Trivedi
for the Appellants.

MR Sunit Shah with Mr.Premal Joshi and Mr.Kapil K.Acharya
for the Respondents.

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CORAM : HONOURABLE MR.JUSTICE DN PATEL**Date : 30/11/2007****ORAL JUDGMENT**

The present Appeal from Order has been preferred against the order dated 5th November, 2007 below Notice of Motion exhs. 6 and 7 in Civil Suit no. 2175 of 2007 passed by the Judge, City Civil Court, Court no. 6, Ahmedabad, whereby the Notice of Motion filed by the present appellants (original plaintiffs) was rejected and therefore, the appellants (original plaintiffs) have preferred the present Appeal from Order.

FACTS

2. RANGOLI is a registered trademark of the petitioner (plaintiff), whereas the defendant is using predominantly word RANGILI for sale of same product viz. Essence stick. The present appellants have instituted Civil Suit No.2175 of 2007 for infringement of copyright, infringement of trade mark and for passing off and to restrain the present respondents (original defendants) from printing, publishing and using the label RANGILI and/or any other label which is identical and/or deceptively similar to the plaintiffs' RANGOLI Agarbatti (Essence stick) label. Defendants are apparently using words '**SAI RANGILI**', but a word 'SAI' is having different colour and smaller size than eye-catching and predominant word 'RANGILI'. And size and colour of word 'RANGILI' and 'RANGOLI' (trade mark of the plaintiffs) are very much similar, difficult to be distinguished by a man of average intelligence or a man of imperfect recollection.

2.1. It is also stated by the appellants (original plaintiffs) that their trade mark RANGOLI was registered in the year 1990 and the same has been extended or renewed from time to time.

2.2. The original defendants are trying to pass off the goods Agarbattis (Essence sticks) by making/using similarly deceptive trade mark. The label used by the defendants is RANGILI. The plaintiffs have exclusive right to use the label RANGOLI and the word RANGILI is deceptively similar looking to the label used by the original defendants. Both the words RANGOLI and RANGILI are of similar colour, size-wise, also there is similarity, in words RANGOLI and RANGILI and apparently customers will not be able to make a difference between to packets of RANGOLI and RANGILI Agarbatti (Essence stick).

2.3. Few years before, the original defendants were also using the said label of the original plaintiffs RANGOLI. Therefore, a criminal complaint was filed. A panchnama was drawn and as per the said panchnama, the defendants were manufacturing Agarbattis with an outer label of RANGILI, but when the said packets were opened, from the said packet, 10 or 12 small packets of RANGOLI agarbattis were found. Thus, ostensibly, they were using the word RANGILI on a wrapper of a bigger packet, but, inside the said bigger packet, there were small packets of Agarbatti having label of RANGOLI agarbatti. RANGOLI is a trade mark of the original plaintiffs. Ultimately, the

defendants stopped using label RANGOLI.

2.4. Now, defendants started using modified version of Trademark of plaintiffs, which is bone of contention between the parties. Looking to the present label used by the original defendants, it is deceptively similar to the trade mark and label used by the plaintiffs. The original packets have been presented before this Court. Looking to the colour and the size of the words RANGOLI and RANGILI, they are very much similar to each other. Therefore, the civil suit has been instituted for passing off action as well as for infringement of trademark and copyright.

ARGUMENTS:

3. It is contended by the learned advocate for the appellants (original plaintiffs) that the plaintiffs are having a registered trade mark RANGOLI in English, Hindi, in label, in box label. They are manufacturing Agarbattis (Essence sticks) in the name and style of RANGOLI since the year 1978. They have adopted trade mark RANGOLI in respect of their product since 1984. The said trade mark is registered in the year 1990 and it has been renewed/extended from time to time. The original defendants are using label SAI RANGILI. Looking to the label used by the original defendants, it is visually and phonetically similar and deceptive and, therefore, the same is an act of passing off as well as breach of trade mark and copyright. It is further submitted by the learned advocate for the appellants that if one or more of the **essential features** of the label is used by others,

there is an infringement of the trade mark. In the facts of the present case, it is submitted by the learned advocate for the appellants that the word RANGOLI is an essential feature of the label used by the original plaintiffs. They have also given their figures of sale of all these Agarbattis. They ran into lacs of rupees. The original defendants have started manufacturing of RANGILI Agarbattis and looking to the Hindi version of RANGOLI in Devnagri script and looking to the Hindi version of the word RANGILI used by the original defendants, the label used by the defendants is deceptively similar, phonetically as well as visually. It is also submitted by the learned advocate for the appellants that on earlier occasion also, a criminal complaint was filed against the defendants as they were using the trade mark of the original plaintiffs. A panchnama was also drawn at the relevant time, by the police at the site of manufacturing of the original defendants and it was found that bigger size packets of Agarbattis manufactured by the defendants, though they were using the label RANGILI Agarbatti and when bigger size packets were opened, there were small size of packets of RANGOLI agarbattis. Thus, the defendants were using the trade mark of the plaintiffs. Because of the criminal complaint, ultimately this practice of using trade mark RANGOLI was stopped by the original defendants. It is also submitted by the learned advocate for the appellants that whenever there is a prima facie case in favour of the original defendants, in a trade mark case, stay ought to be granted by the trial court because infringement of trade mark causes

irreparable loss to the original plaintiffs which cannot be compensated in terms of money. The learned advocate for the appellants (original plaintiffs) have relied upon the following decisions:

- (1) AIR 1953, SC 357
- (2) AIR 1965 SC 980
- (3) AIR 1970 SC, 1649
- (4) AIR 1960 SC 142
- (5) AIR 1963 SC 449
- (6) AIR 1970 SC 146
- (7) (2001) 5 SCC 73
- (8) (2006) 8 SCC 726
- (9) (2007) 6 SCC 1
- (10) (1997)1 SCC 99
- (11) (2004) 3 SCC 90
- (12) AIR 1998 Guj.247

From the above judgments, he has pointed out that whenever the defendants are using one or more essential features of the trade mark or label, there is an infringement of trade mark. The learned advocate for the appellants has taken this Court to fine niceties, distinction between action of passing and action of infringement and submitted that in the facts of the present case, passing off action can be considered at the time of final hearing of the suit. But so far as infringement is concerned, stay ought to have been granted by the trial court looking to deceptively similar trade mark being used by the original defendants, and therefore, the impugned order deserves to be quashed and set aside and the stay as prayed for is the Notice of Motion exhs. 6 and 7 may

be granted.

3.1. It is vehemently submitted by the learned advocate for the respondents that phonetical similarity has never been averred in the whole suit. In fact, the defendants' label and the trade mark of the original plaintiffs are quite different from each other. They are visually not similar and neither phonetically they are similar. It is also submitted by the learned advocate for the respondents (original defendants) that they are using the words SAI RANGILI since 2002. The colour combination and the use of words SAI are quite distinct visually and phonetically from the trade mark of the original plaintiffs. This aspect of the matter has been correctly appreciated by the trial court while dismissing the Notice of Motion preferred by the original plaintiffs and so this Court may not interfere with the impugned order passed by the trial court. It is also submitted by the learned advocate for the respondents that earlier usage of word RANGOLI by the defendants cannot be considered in the present suit. Today, the defendants are not using the word RANGOLI for the marketing and selling of Agarbattis (Essence sticks). The learned advocate for the respondents has also relied upon the following decisions:

- (1) AIR 1996 HP 70
- (2) 2003(26) PTC 145(Mad)
- (3) AIR 1977 Madras 105
- (4) AIR 1967 Madras 186
- (5) AIR 1965 Calcutta 417

and pointed out that in fact, there is no similarity between the trade mark of the original plaintiffs and the mark used by the defendants. Nonetheless, it is fairly submitted by the learned advocate for the respondents that they are ready and willing to change the colour of their label and the size of the word SAI can be increased so as to match with the words and size of the words RANGILI alongwith colour of the word RANGILI. Thus, there shall be a word of eleven letters in Hindi and in different colours, viz. 'SAI RANGILI'.

4. Having heard the learned advocates for both the sides and looking to the facts and circumstances of the case, the impugned order passed by the trial court is hereby quashed and set aside mainly for the following facts and reasons:

(i) It prima facie appears from the facts of the case that the present appellants (original plaintiffs) have instituted Civil Suit no. 2175 of 2007 in the City Civil Court for passing off action as well as for infringement of trade mark and of copyright. There is a registered trade mark in favour of the original plaintiffs, namely RANGOLI in English, Hindi, in label and in box label since 1990 which has been extended/renewed from time to time for the State of Gujarat.

(ii) It also prima facie appears looking to the packets of the RANGOLI agarbattis and SAI RANGILI Agarbattis that predominant words RANGOLI and RANGILI

are visually, structurally and phonetically similar in nature. Both the packets have been presented before this Court.

(iii) Looking to the trade mark of the original plaintiffs and looking to the label which the plaintiffs are using, the word RANGOLI is an essential feature and predominant part. This essential feature and predominant part of the label namely word RANGOLI is an eye catching so far as customer is concerned. This eye catching, apparent and therefore, predominant part or essential feature of the label or predominant part of the trade mark with practically no change has been used by the defendants as RANGILI. Both colour as well as size of the words RANGOLI and RANGILI are deceptively similar. Even style of writing of these two words is deceptively similar for a man of imperfect recollection and of an average intelligence.

(iv) Whenever there is an action of infringement, it ought to be kept in mind that surrounding of the label, packing size, price, general get up, difference in physical appearance are not to be seen, meaning thereby that the colour combination of the label might have been slightly varied or changed. But the word RANGOLI has been used or deceptively similar word has been used by the defendants or by other party, even with different colour combination of surrounding, there is an infringement of trade mark. Whereas in the action of passing off, surrounding of the label, difference in physical appearance, variation in colour, general get up are to be seen. This difference

between infringement case and passing off case has not been properly appreciated by the trial court. There is a vast difference between action of passing off and action of infringement of trade mark. In the facts of the present case, prima facie, there is an infringement of the trade mark registered in favour of the original plaintiffs by the defendants. It has been observed in para 11 of the impugned order as under:

"11. Thus, prima facie, the label of plaintiffs and label of defendants are totally different and distinct phonetically as well as visually. Even the works printed on the packets of the defendants are different and distinct from that of the plaintiffs. Even the mark used by the plaintiffs and the defendants are not deceptively similar or identical or so nearly resemble and likely to deceive or cause confusion in the course of trade."

Thus, as per para 11 of the impugned order, trial court has held that label used by plaintiffs and defendants are different and printing work is also different. This comparison by the trial court of label is an error, apparent on the face of the record. There is also an allegation of infringement of trademark. Trial court has equated essential of passing off action with essential of infringement action. Similarity of label (like colour-combination, price etc.) can be seen to check whether there is passing off, whereas, if registered trade mark word or deceptively similar word is used by another with any colour combination, there will be infringement of Trademark.

(v) Distinction between action of passing off and action for infringement, has been held by the Hon'ble Supreme Court in the case of **Kaviraj Pandit Durga Dutt Sharma vs. Navaratna Pharmaceutical Laboratories reported in AIR 1965 SC, 980**, especially in paragraph 28 thereof as under:

"28: The other ground of objection that the findings are inconsistent really proceeds on an error in appreciating the basic differences between the causes of action and right to relief in suits for passing off and for infringement of a registered trade mark and in equating the essentials of a passing off action with those in respect of an action complaining of an infringement of a registered trade mark. We have already pointed out the suit by the respondent complained both of an invasion of a statutory right under section 21 in respect of a registered trade mark and also of a passing off by the use of the same mark. The finding in favour of the appellant to which the learned counsel drew our attention was based upon dissimilarity of the packing in which the goods of the two parties were vended, the difference in the physical appearance of the two packets by reason of the variation in their colour and other features and their general get up together with the circumstances that the name and address of the manufactory of the appellant was prominently displayed on his packets and these features were all set out for negating the respondent's claim that the appellant had passed off his goods as those of the respondents. These matters which are of the essence of the cause of action for relief on the ground of passing off play but a limited role in an action for infringement of a registered trade mark by the registered trade mark by the registered proprietor who has a statutory right to that mark and who has a

statutory remedy in the event of the use by another of that mark or a colourable imitation thereof. While an action for passing off is a Common Law remedy being in substance an action for deceit, that is, a passing off by a person of his own goods as those of another, that is not the gist of an action for infringement. The action for infringement is a statutory remedy conferred on the registered proprietor of a registered trade mark for the vindication of "the exclusive right to the use of the trade mark in relation to those goods" (Vide S.21 of the Act). The use by the defendant of the trade mark of the plaintiff is not essential in an action for passing off, but is the sine qua non in the case of an action for infringement. No doubt, where the evidence in respect of passing off consists merely of the colourable use of a registered trade mark, the essential features of both the actions might coincide in the sense that what would be a colourable imitation of a trade mark, in a passing off action would also be such an action for infringement of the same trade mark. But there the correspondence between the two ceases. In an action for infringement, the plaintiff must, do doubt, make out that the use of the defendant's mark is likely to deceive, but where the similarity between the plaintiff's and the defendant's mark is so close either visually, phonetically or otherwise and the court reaches the conclusion that there is in imitation, no further evidence is required to establish that the plaintiff's rights are violated. Expressed in another way, if the essential features of the trade mark of the plaintiffs have been adopted by the defendant, the fact that the get-up, packing and other writing or marks on the goods or on the packets in which he offers his goods for sale show marked differences, or indicate clearly a trade original different from that of the registered proprietor of the mark would be immaterial; whereas in the case of passing off, the defendant may escape liability if he can show that the added matter is sufficient to distinguish his goods from

those of the plaintiff."

From the aforesaid judgment, the difference between action of passing off and infringement of a registered trade mark has been made clear. In no uncertain terms, it has been decided by the Hon'ble Supreme Court that use of the trade mark of the plaintiff by the defendants is not essential in an action for passing off, but, is the sine qua non in the case of action for infringement. Thus, in the facts of the present case, it is submitted by the learned advocate for the respondents (original defendants) that their colour combination for surrounding is different and apparently two labels of the plaintiffs as well as of the defendants are not similar. This argument may be good, for defending passing off action, but so far as action for infringement is concerned, the trial court ought to have considered whether apparent, eye-catching and predominant word RANGILI used by the defendants, is deceptively similar to the word RANGOLI which is registered trademark of the plaintiffs. This aspect of the matter has not been at all appreciated by the trial court. Looking to the packet of SAI RANGILI Agarbatti used by the defendants, an essential feature of trade mark of the plaintiffs has been used by the defendants. The colour and the size of the word RANGILI is similar to that of word RANGOLI. The words SAI RANGILI the defendants are using, but in fact, the word SAI is a different word written slightly at distance from the word RANGILI having different colour and having smaller size. Thus, the defendants are using phonetically and visually similar mark with that

of registered trademark of the original plaintiffs and therefore, prima facie, the plaintiffs have established their case in their favour for infringement of the trade mark.

(vi) It is also held by the Hon'ble Supreme Court in the case of **Rustom and Honrby Ltd. vs. Zamindara Engineering Co. reported in AIR 1970, SC, 1619,** especially in paragraphs 4 and 5 as under:

"4. The distinction between an infringement action and a passing off action is important. Apart from the question as to the nature of trade mark the issue in an infringement action is quite different from the issue in a passing off action. In a passing off action the issue is as follows:

"Is the defendant selling goods so marked as to be designed or calculated to lead purchasers to believe that they are the plaintiff's goods ?"

5. But in an infringement action the issue is as follows:

"Is the defendant using a mark which is the same as or which is a colourable imitation of the plaintiff's registered trade mark ?"

It very often happens that although the defendant is not using the trade mark of the plaintiff, the get up of the defendant's goods may be so much like the plaintiff's that a clear case of passing off would be proved. It is on the contrary conceivable that although the defendant may be using the plaintiff's mark the get up of the defendant's goods may be so different from the get up of

the plaintiff's goods and the prices also may be so different that there would be no probability of deception of the public. Nevertheless, in an action on the trade mark, that is to say, in an infringement action, an injunction would issue as soon as it is proved that the defendant is improperly using the plaintiff's mark."

(Emphasis supplied)

Thus, from the aforesaid judgment, again distinction has been made clear about infringement action and passing off action and which question ought to be addressed as a test, has also been pointed out in no uncertain terms. In the facts of the present case, if the question is asked "is the defendant using mark which same as or which is a colourable imitation of the plaintiff's registered mark, prim facie, looking to the manner in which word 'RANGILI' is used, of similar in colour, size and script with registered Trademark of the plaintiffs 'RANGOLI', there is overall structural and phonetic similarity and there is similarity of idea and the answer of the aforesaid question is in the affirmative. If this answer is prima facie in affirmative, then the stay as prayed for ought to have been granted by the trial court. The aforesaid aspect of the matter i.e. difference between infringement action and passing off action has not been appreciated by the trial court.

(vii) It has been held by the Hon'ble Supreme Court in the case of **Corn Products Refining Co. vs Shangrila Food Products Ltd., reported in AIR 1960 SC, 142,**

especially in paragraphs 17 and 18 as under:

"17. We think that the view taken by Desai, J is right. It is well known that the question whether the two marks are, likely to give rise to confusion or not is a question of first impression. It is for the court to decide that question. English cases proceeding on the English way of pronouncing an English word by Englishmen, which it may be stated is not always the same may not be of much assistance in our country in deciding question of phonetic similarity. It cannot be overlooked that the word is an English word which to the mass of the Indian people is a foreign word. It is well recognised that in deciding a question of similarity between two marks, the marks have to be considered as a whole. So considered, we are inclined to agree with Desai, J that the marks with which this case is concerned are similar. Apart from the syllable "co" in the appellant's mark, the two marks are identical. That syllable is not in our opinion such as would enable the buyers in our country to distinguish the one mark from the other.

18. We also agree with Desai, J that the idea of the two marks is the same. The marks convey the ideas of glucose and life giving properties or vitamins. The Aquamatic case (Harry Reynolds vs. Laffeaty's Ld) 1958 RPC 887 is a recent case where the test of the commonness of the idea between two marks was applied in deciding the question of similarity between them. Again, in deciding the question of similarity between the two marks we have to approach it from the point of view of a man of average intelligence and of imperfect recollection. To such a man the overall structural and phonetic similarity and the similarity of the idea in the two marks is

reasonably likely to cause a confusion between them."

(Emphasis supplied)

Thus, from the aforesaid judgment, it is clear whether the trade marks are likely to create confusion or not is a question of first impression. It is for the Court to decide that question. Looking to the similarity between marks used by the plaintiffs and the original defendants, they are likely to create confusion at first impression. The manner in which mark RANGOLI is written which is a trade mark of the original plaintiffs which is a Hindi version in Devnagri script, is overall structurally (colour, size, length, breadth and scriptwise) and phonetically similar to the mark RANGILI used by the original defendants. The person who is going to purchase Agarbatti (essence stick) will be prima facie deceived by the mark used by the defendants. Thus, from the view point of the consumer, of an imperfect recollection and of an average intelligence, there will be a confusion, if the defendants are allowed to use the mark RANGILI which is visually, structurally and phonetically much similar to the trade mark RANGOLI used by the original plaintiffs.

(viii) The learned counsel for the respondents submitted that there is a delay in preferring Civil Suit. In fact, the respondents (original defendants) are using the words SAI RANGILI for their label or for sale of Agarbatti since 2002. The suit is instituted in the year 2007 and therefore, the stay has rightly not been granted by the trial court. This contention

is not accepted by this Court for the reason that if there is infringement of trade mark, prima facie, looking to the facts and circumstances of the case, delay is no bar for institution of a suit and for grant of stay. It has been held by the Hon'ble Supreme Court in the case of **Midas Hygiene Industries P Ltd. and another vs. Sudhir Bhatia and others, reported in (2004) 3 SCC, 90** , in para 5 as under:

"5. The law on the subject is well settled. In cases of infringement either of trade mark or of copyright, normally an injunction must follow. Mere delay in bringing action is not sufficient to defeat grant of injunction in such cases. The grant of injunction also becomes necessary if it prima facie appears that the adoption of the mark was itself dishonest.

(Emphasis supplied)

Thus, normally, an injunction must follow in case of infringement of trade mark, when prima facie established. Mere delay in bringing action is not sufficient to defeat the grant of injunction in such cases.

(ix) It is also contended by the learned counsel for the respondents that others are using the word RANGOLI for selling of their Agarbattis and no action has been initiated by the present appellants (original plaintiffs). This contention is also not accepted by this Court. The defendants cannot say that they should be prosecuted lastly in point of time. If others are using trade mark, the plaintiffs can institute a suit against the person who has committed breach of trade

mark. It has been held by the Delhi High Court in the case of **Madhuban Holiday Inn vs. Holiday Inn Inc. reported in 2003(1) Recent Arbitration Judgments 28 (Delhi)**, in para 37 as under:

"37. In reply to the other submissions of the appellants that so many other people are using the trade name "Holiday Inn", Mr.Chawla cited a Division Bench judgement of this Court in Jagan Nath Prem Nath vs. Bhartiya Dhoop Karyalaya, AIR 1975 Delhi 149. In this case the Court held that the mere fact that the other manufacturers had the numerals in question in their trademarks does not furnish a sufficient ground to discharge the interim injunction because of Section 28(3). In law, even though the appellant might not be in a position to enforce any right against the other registered holders of the trademarks using the numerals of 555 yet against every third person (including the respondent) who was not a registered holder of the trademark he was entitled to enforce his rights as registered holder of the trademark.

(Emphasis supplied)

Thus, even if the plaintiff is unable to institute a civil suit against other persons, who are using trade mark, suit for infringement of trade mark can be filed by the plaintiffs against defendants if the defendant is infringing the trade mark of the plaintiff.

(x) Previously also, original defendants were using exactly the similar mark RANGOLI which is a registered trade mark of the original plaintiffs. A criminal case was instituted by the original plaintiffs, where the police had drawn a panchnama of factory premises of defendants, in pursuance of the investigation to be

carried out in the said case. The said panchnama is the part and parcel of the trial court's record. Looking to the said panchnama, it appears that the original defendants were using bigger packets which contained one dozen small packets of Agarbatti. On the outer cover of the bigger size packet, they were using the word SAI RANGILI, whereas upon opening of the said bigger packet, police found out that there were 12 small size packets. They all were RANGOLI Agarbattis. Thus, the defendants were apparently using on outer side of the cover the word SAI RANGILI, whereas inside therein, there were 12 packets of Agarbattis of RANGOLI. RANGOLI is a trade mark of the original plaintiffs. These facts have been recorded in the panchnama made on 2nd October, 2003 by the Police Inspector, Naranpura police station, in connection with the offence registered with Naranpura police station bearing Cr. No. II/3295 of 2003 for the offences under section 19 of the Trade Marks Act, as well as for the offences punishable under sections 103, 104 and 105 of the Trade Marks Act as well as for the offence under Copy Rights Act. It is submitted by the learned counsel for the original defendants that they have now stopped using the mark RANGOLI for label and selling of their Agarbattis (essence sticks).

(xi) Both the learned counsels have argued at length, their case and cited several judgments. However, all of them are not referred by this Court in this judgment, so as to lessen the burden of this judgment. The aforesaid judgments are sufficient to arrive at a conclusion of Notice of Motion. This Court

is not going much in the details of facts and fine nicety of evidence. Suffice it to say that the mark RANGILI used by the defendants is structurally and phonetically similar, apparent, eye-catching and predominant and carrying similarity of idea and deceptively similar with the registered trade mark of the original plaintiffs. In the first instance, confusion will be created in the mind of the consumer (of average intelligence and of imperfect recollection) who are purchasing Agarbatti. Thus, there is a prima facie case, in favour of the plaintiffs, balance of convenience is also in their favour and irreparable loss will be caused, if the stay is not granted to the plaintiffs.

(xii) In view of these facts, prima facie, there is an infringement of the trade mark. So far as action of passing off is concerned, the suit is already pending and this Court is not going much in detail. As stated hereinabove, the action for passing off and the action for infringement are absolutely different. The tests are different. In detail, guidelines have been framed in judicial pronouncements to arrive at a prima facie conclusion as to the passing off action and infringement action. This aspect of the matter has not been appreciated by the trial court.

(xiii) It is contended by the learned counsel for the respondents that phonetical similarity has never been alleged in the whole plaint by the plaintiffs and therefore, the said argument cannot be canvassed before this Court. This contention is not accepted by

this Court, mainly for the reason that looking to paragraphs 6,13 and 16 of the plaint, there are averments to the effect of the word RANGOLI, registration of trade mark is a word per se and also label of RANGOLI Essence sticks. I para-13 of the plaint, it has been referred as under:

"13. The plaintiffs submit that by using the said RANGOLI Agarbatti label, the defendants have infringed the plaintiffs' registered label registered under no. 549966 and registered trademark RANGOLI word per se registered under no. 531471B, 531472B and 531473B registered in Class-3 and therefore, the defendants are liable for infringement of above registered trade mark."

Over and above these averments in the plaint, it has also been observed by the trial court in para-11 of the impugned order as under:

"Thus, prima facie, the label of the plaintiffs and the label of the defendants are totally different and distinct phonetically as well as visually."

Thus, phonetical similarity was alleged and it has been decided by the trial court and therefore, the contention raised by the original defendants that phonetical similarity cannot be argued by the present appellants before this Court is not accepted. On the contrary, injunction ought to have been granted, looking to the mark RANGILI, which is structurally and phonetically similar to registered Trademrk of plaintiffs viz. 'RANGOLI'. Mark 'RANGILI' is deceptively similar to registered Trademark RANGOLI. A

man of imperfect recollection and of average intelligence will be deceived by mark used by the defendants.

5. As a cumulative effect of the aforesaid facts, reasons and judicial pronouncements, this Appeal from Order is allowed. The order dated 5th November, 2007 below Notice of Motion exhs. 6 and 7 in Civil Suit no.2175 of 2007 passed by the learned Judge, City Civil Court, Court no. 6, Ahmedabad is hereby quashed and set aside. The respondents (original defendants), their servants, agents, dealers, distributors, stockists, publishers and printers are hereby restrained from using any label, packing materials, advertisement materials, the mark RANGILI, on and after a period of eight weeks from today. Appeal From Order is allowed. Civil Application No. 14502 of 2007 stands disposed of.

6. The learned counsel for the respondents (original defendants) pray for stay of operation of this judgment, which is opposed by learned counsel for the petitioner (original plaintiff). Looking to the aforesaid facts, reasons and judicial pronouncements, stay against operation of this judgement is not granted. Trial is expedited, so as to complete the same, as early as possible and practicable, preferably on or before 30th August, 2008. Trial Court shall decide the case, on the basis of evidence and without being influenced by observations made in the order below Notice of motion Exh-6 and 7 in suit as well as without being influenced by order in this Appeal from

Order.

(D.N.Patel,J)

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