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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 24th February, 2021
Date of decision: 9th March, 2021

+ CS(COMM) 581/2020 & I.A. 12750/2020

NATURES ESSENCE PRIVATE LIMITED Plaintiff
Through: Mr. C. M. Lall, Sr. Adv.
assisted by Ms. Nancy Roy, Ms. Palak
Arora, Mr. Sanjay Aggarwal, Ms. Vasvi Jain
and Ms. Radhika Arora, Advs.

versus

PROTOGREEN RETAIL SOLUTIONS PRIVATE
LIMITED & ORS. Defendants
Through: Mr. Sumit R. Sharma, Mr.
Aakarshan Aditya, Mr. Gaurav Dhwaj,
Advs. for Defendant Nos.1 & 2

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

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

1. This order disposes of I.A. 12750/2020 in CS(COMM) 581/2020, preferred under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 (CPC).

Facts

2. The plaintiff alleges infringement, by the defendants, of the plaintiff's registered trademarks "NATURE'S" "NATURE ESSENCE" and "NATURE'S ESSENCE". The prayer, in the plaint, is specifically for an injunction, against the defendants, from making

I.A. 12750/2020 in CS(COMM) 581/2020

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or dealing in any goods (particularly cosmetics), using any mark/name identical or deceptively similar to the aforesaid registered trademarks of the plaintiff.

3. I may observe, even at this point, that in the list of registered trademarks of the plaintiff, provided in para 7 of the plaint, there is no registration of the word or mark “NATURE’S”. The mark “NATURE’S INC.” and “NATURE’S ESSENCE” are, however, registered in favour of the plaintiff, and the logos of the plaintiff, relating to the said marks, appear thus:



4. The trademark of the defendants, with which the plaintiff is essentially aggrieved, appears thus:



5. The case set up by the plaintiff in the plaint may be explained as under:

(i) Since 1998, the plaintiff has been carrying out its business under the aforesaid trademarks, in respect of goods and services included in Classes 03, 05 and 35 of the Schedule to the Trade Marks Rules, 2002. These trademarks stand renewed

from time to time and are presently valid, subsisting and in existence.

(ii) The trademarks being registered in the plaintiff's favour, exclusive right to use the trademarks vests in the plaintiff. The registrations also constitute *prima facie* evidence of the validity of the marks, in view of Section 31 of the Trade Marks Act, 1999 (hereinafter referred to as "the Act"). By dint of long user, valuable goodwill has been created in the aforesaid marks of the plaintiff. The plaintiff's products have attained national recognition, being widely advertised in the print as well as online portals, and publicised through the websites of the plaintiff. As a result, it is asserted that the aforesaid trademarks have, by long, open, extensive, continuous and exclusive use, coupled with large scale publicity, acquired secondary meaning and distinctiveness, and have become identified and recognised with the products of the plaintiff. The plaintiff has also provided details of its turnover, from 2007-2008, till the date of filing of the plaint. The turnover has increased from ₹ 12,94,349/- in 2007-08 to ₹ 122,97,32,824/- in 2019-2020.

(iii) As against this, it is alleged that the defendant adopted the trademark "NATURE'S TATTVA", in respect of essential oils and cosmetics, in respect of which the defendants have applied for registration in Class 3. Defendant No. 1 has applied for registration of the said trademark in respect of goods which are manufactured by Defendant No. 3 and marketed by

Defendant No. 2. The plaint alleges that the trademark “NATURE’S TATTVA”, of the defendants, is closely identical and deceptively similar to the registered trademark “NATURE’S ESSENCE” of the plaintiff, and is inevitably likely to convey an impression, in the minds of the purchasing public, that the products of the defendants emanate from the plaintiff. This, it is alleged, would result in tarnishing of the reputation and goodwill amassed by the plaintiff over the years. Resultantly, it is alleged that the defendants have infringed the registered trademark of the plaintiff, and are also passing off their goods as those of the plaintiff.

(iv) The plaint also contains a tabular depiction, intended at comparing the product of the plaintiff with that of the defendants, thus:

Plaintiff’s Trademark



Defendant’s Trademark






6. Predicated on this submission, the plaintiff prays for

“i. an order of permanent injunction restraining the Defendant(s), their principal officers, directors, partners, agents, franchisees, servants, licensees and all others acting for and on their behalf, from making, selling, offering for sale, advertising and in any manner dealing in “Cosmetics, (non-medicated-cosmetics), Herbal Cosmetics, (non-herbal-cosmetics) Skin Care Cosmetic Preparations, Hair Lotions, Perfumery, Essential Oil, Soaps Included, Cosmetic Preparations Being Facial Cream, Body Lotions, Cleansing Lotion, Face Wash Soaps, Bleach Cream, Fairness Cream, Shampoo, Hair Oil, Massage Cream, Color Cosmetics, Dentifrices, Toiletries, Henna, Mehendi, Hair Dye” or any goods using the trademark “NATURE’S TATTVA” (word/device) or any other mark/name which is identical or deceptively similar to the Plaintiff’s registered trademark “NATURE’S”, “NATURE ESSENCE” and “NATURE’S ESSENCE” (word/logo/label/device) and from doing any other thing, whereby directly or indirectly infringing the Plaintiff’s registered trademarks, “NATURE’S”, “NATURE ESSENCE” and “NATURE’S ESSENCE” (word/logo/label/device), whereby directly or indirectly passing off its goods as and for the goods of the Plaintiff inter alia by use of the “NATURE’S”, “NATURE ESSENCE” and “NATURE’S ESSENCE”.”

ii. An order for rendition of accounts of profits illegally earned by the Defendants by reason of infringement and passing off their goods and/or business as the goods and business of the Plaintiff and a decree be passed against the Defendants in the sum of the amount so ascertained

iii. An order for recovery of damages for breach of arrangement/settlement made through one settlement, more elaborated in the plaint, mutual understanding and by the acts of the parties along with all future interests and consequential relieves.”

Case of the defendant

7. The defendants have filed a written statement, in response to the plaint, in which the defendants assert that their trademark  is completely distinctive and different from the plaintiff's trademarks, with no phonetic or visual similarity between them, as is likely to create confusion or deception in a customer of average intelligence and imperfect recollection. A Google search of the expression “NATURE’S ESSENCE”, it is pointed out, does not throw up any site reflecting the defendants’ products. The defendants points out that their products are DIY (Do It Yourself) cosmetics, in which the product to be applied has to be prepared by the customer using the ingredients provided by the defendants. Though the products of the plaintiff and defendants are acknowledged as belonging to the same Class in the Schedule to the Trademarks Rules, it is submitted by the defendants that they are different and dissimilar in nature and cater to distinct categories of consumers, between which there is no overlap.

Being in the nature of DIY products, which have to be prepared by the customers, the defendants state that the shelf life of their products is also considerably lesser than that of the plaintiff's products, especially after the products are prepared by the customer(s). The defendant has provided screenshots to highlight the difference in the categories of products manufactured by them *vis-a-vis* those manufactured by the plaintiff.

8. Additionally, the defendants submit that there is no likelihood of any confusion or deception between the defendants' products and those of the plaintiff, as their packaging and presentation are totally dissimilar.

9. Mr. Sumit R. Sharma, learned counsel for the defendants, submitted that, of all the products of the defendants, the only products which were also being made by the plaintiff were Hand Sanitizer and Active Charcoal Face Pack. A tabular comparison of the said products has been provided, thus, to indicate that, as presented to the customer, they are entirely different and dissimilar in appearance:

Plaintiff's Products	Defendants Products
	



10. The written statement further asserts that the defendant has been continuously and uninterruptedly using its “NATURE’S TATTVA”

mark since 2015. Annual sales figures of the defendant business have also been provided. It is asserted that the defendants' products constitute the only DIY cosmetic segment in India and have, over the years, gained immense popularity, goodwill and reputation amongst their customers. The defendants have referred to encomiums paid to their products in articles in the print media as well as on YouTube.

11. The plaintiff cannot, assert the defendants, claim any exclusive proprietary rights over the word "NATURE", whether in the form of a word mark or a trademark, as the word is purely generic and descriptive, with no secondary meaning. Used in the context of beauty and cosmetics products, it is asserted that the expression "NATURE" is *publici juris*, as is apparent from a search of the database of the Registrar of Trademarks, which reveals more than 1100 trademarks in Class 03 which commence with the word "NATURE". In the context of cosmetics and beauty products, it is submitted by the defendants that the word "NATURE" describes the character and quality of the goods, indicating that they are prepared out of natural/organic substances, providing natural glow to skin.

12. The defendants placed reliance on Section 17(2) of the Act which reads thus:

"17. Effect of registration of parts of a mark. –

(2) Notwithstanding anything contained in sub-section (1), when a trade mark—

- (a) contains any part--
 - (i) which is not the subject of a separate application by the proprietor for registration as a trade mark; or
 - (ii) which is not separately registered by the proprietor as a trade mark; or
- (b) contains any matter which is common to the trade or is otherwise of a non-distinctive character, the registration thereof shall not confer any exclusive right in the matter forming only a part of the whole of the trade mark so registered.”

13. In view of Section 17 of the Act, it is submitted by the defendant that the plaintiff cannot claim any proprietary rights in the word “NATURE” or “NATURE’S” as the right of the plaintiff, if any, can only be for the entire trademark “NATURE’S ESSENCE”.

14. The written statement also avers that, prior to the “NATURE’S TATTVA” mark, the defendants were successfully marketing their goods on the “EcoTokri” website, which is stated to be India’s first online marketplace for eco-friendly food, cosmetics and stationery products. The “EcoTokri” brand of the defendants is also stated to be extensively covered and reviewed in the print media.

15. It is stated, in the written statement, that the defendants’ sales are exclusively online, and that, therefore, given the dissimilarity between the overall product appearances of the defendant and the plaintiff, there is no likelihood of confusion or deception. On the other hand, the defendant submits that the plaintiff’s claims to being a well-

established or well-known brand are merely empty statements, with no supportive evidence. It is also pointed out, in the written statement, that the Registry of Trademarks has, in respect of some applications for registration filed by the plaintiff, specifically clarified that registration of the mark would not confer a right on the plaintiff to exclusive use in respect of the descriptive words contained in the mark. All assertions, in the plaint, regarding the purported goodwill accumulated by the plaintiff and its products over time, have been flatly denied in the written statement. It is also denied that the words “NATURE’S ESSENCE”, have, by use thereof, by the plaintiff, acquired any secondary meaning, identifying them as relating to the plaintiff’s products.

16. The written statement reiterates the contention that there is no visual or phonetic similarity between the marks of the plaintiff and the defendants or any likelihood of confusion or deception amongst prospective customers, seeking to purchase their products. It is pointed out that the defendants’ mark “NATURE’S TATTVA” is a coined and unique mark, combining an English word “Nature” with the Sanskrit word “Tattva”, meaning “elements”. The defendant has asserted the popularity of its products among its target customer segment.

17. In sum, the defendant has questioned the entitlement, of the plaintiff to any of the reliefs sought by it and has, therefore, prayed that the plaint be dismissed.

Replication filed by the plaintiff

18. The plaintiff has filed a replication, in response to the written statement of the defendants. In the replication, the plaintiff has contended that, in law, priority in adoption and use is pre-eminent in trademark jurisprudence, and takes precedence even over registration. In other words, submits the plaintiff, the rights of the prior user of an unregistered trademark are superior to the rights of a subsequent user of the same trademark, even if registered in favour of the subsequent user. The claim, of the defendants, of use of its trademark since 2015, has been categorically denied by the plaintiff in its replication. It is submitted that Defendant No. 2 was incorporated only in 2018, so that there could be no question of use of the impugned marks of the defendants from 2015. The sales figures of the defendants, as provided in the written statement, too, it is pointed out, are with respect to the Defendants' "business", with no sub-division of the figures relating to Defendant No. 1 and Defendant No. 2, or any indication that these figures relate to the mark in controversy in the present case. The plaintiff has relied on the following documentary material, to bear out its allegation that the claim of user, by the defendants, from 2015, is unacceptable:

- (i) A news report from "Yourstory.com", contained in the list of documents filed by the defendants, specifically reflects the following statement:

"Founded in *October 2018* (emphasis supplied), beauty startup Nature's Tattva will use the news funds to scale

operations, acquire talent and for branding building activities.....”

On the basis of this Report, it is alleged that sales of products under the mark “NATURE’S TATTVA”, prior to October 2018, could only have been effected by Defendant No. 2 and that the claim of sale of products by Defendant No. 1 from 2015 was completely frivolous and untrue.

(ii) Eighteen of the invoices/tax invoices of Defendant No.1, filed by the defendants, did not bear the mark “NATURE’S TATTVA”, and pertained to sales by Ecotokri.com, with no brand mentioned on the invoices. The remaining ten invoices, in the name of Defendant No. 1, bearing the words “NATURE’S TATTVA”, related to the year 2019-2020. There was not a single invoice, submits the plaintiff, filed by the defendants, reflecting sale of products under the brand “NATURE’S TATTVA”, prior to 2018.

(iii) The three invoices filed by the defendants, bearing the words, “NATURE’S TATTVA”, were unsigned invoices generated from a computer system. The words, “NATURE’S TATTVA”, have apparently been added therein only to cause deception. A perusal of these invoices reveal that they were three copies of the same invoice, with the same invoice number “[INV-2015-1689]”, being the copies meant for the supplier, the transporter and the recipient. There was no explanation as to how the defendants were in possession of all three copies.

(iv) The defendants have also placed on record an article from the Economic Times dated 19th October 2014, reflecting “EcoTokri” as a online store for organic and green products, with no mention of the mark “NATURE’S TATTVA”.



(v) The user documents filed by the defendants with the application filed with the Registry of trademarks, for registering the mark “NATURE’S TATTVA”, contained invoices only from 2018. The affidavit, filed by Defendant No. 1, accompanying the application, too, asserted sale of products under the “NATURE’S TATTVA” mark only from 2018-2019. On the basis thereof, the plaintiff alleges that, while the plaintiff was using its mark since 1998 interruptedly, Defendant Nos. 1 and 2 started using a deceptively similar mark only in 2018, so as to encash on the goodwill and reputation of the plaintiff.

(vi) The website of the defendants contained a categorical admission to the effect that “after running India’s largest online store for everything eco-friendly, organic and green, successfully for five years, (they) ventured into (their) own home-grown brand “NATURE’S TATTVA”.

(vii) Though the defendants had placed, on record, an article from the Femina magazine, the replication points out that, in the said article, published on 17th July, 2020, the defendants are referred to as a “start-up”. Had they been using their mark since

2015, it is submitted that, they could not have been treated as a “start-up” in 2020.

(viii) The plaintiff has also contested the defendants’ claim of hundreds of registrations being present under the database of the Registrar of trademarks in which the word, “NATURE” or “NATURE’S” is used. No evidence, to the effect that this data pertains to actual user of products bearing the said marks has, it is pointed out, been placed on record by the defendants. Even otherwise, the mere presence of third party products in the market can be no defence to adoption, by the defendants of a mark which is deceptively and confusingly similar to that of the plaintiff.

19. The goodwill and reach of the plaintiff’s products, it is submitted, is apparent if a Google search of the words “NATURE’S COSMETICS”, were to be conducted, which leads directly to the plaintiff’s mark and the plaintiff’s company, and not to the defendants’ mark or any other third party marks. It is submitted that the mark  is a slavish imitation of the mark .

20. Insofar as product comparison is concerned, the plaintiff submits that the products of the defendants are same as to those of the plaintiff, or, at any rate, allied or cognate in nature, with every likelihood of deception amongst customers of the products. Even the

packaging of the product, submits the plaintiff, is not entirely dissimilar.

21. The contention, of the defendants that the plaintiff cannot claim any exclusive monopoly over the word “NATURE” or “NATURE’S” is contested on the ground that the word “NATURE’S” in the plaintiff’s mark “NATURE’S ESSENCE” has acquired a secondary meaning and distinctiveness, owing to interrupted use since 1998. Any goods or products, in the market, sold using brands containing the word “NATURE’S” and “NATURE’S ESSENCE”, asserts the plaintiff, are necessarily associated with the plaintiff alone and not with anyone else. In view thereof, the plaintiff disputes the defendants’ contention that the word “NATURE” being *publici juris*, the plaintiff has no exclusive right over the said expression can be claimed by the plaintiff.

22. In fact, submits the plaintiff, the defendants have deceptively coined their trademark “NATURE’S TATTVA”, by borrowing the word “NATURE’S”, from the plaintiff’s mark “NATURE’S ESSENCE”, and the word “TATTVA” from the plaintiff’s mark, “NATURE’S PANCHTATTVA”, (which is still unregistered). The invocation, by the defendants, of Sections 9 and 11 of the Act is, therefore, alleged by the plaintiff, to be misguided. Having entered the market barely two years ago, it is contended that the defendants are seeking to encash on the reputation of the plaintiff developed over 22 years as on date.

23. In view thereof, the plaintiff has reiterated its prayers in the plaint.

Rival Submissions

Submissions of Mr. Chander Lall, learned Senior counsel for the plaintiff

24. Arguing for the plaintiff, Mr. Lall submits that the “triple test”, applicable in infringement claims, stands satisfied in the present case, as the impugned trademark of the defendants is deceptively similar to that of the plaintiff, the products are identical, and they are available through identical trade channels. He also submits that, having itself applied for registration of the “Nature’s Tattva”, it was not open to the defendant to urge that the word “Nature’s” was descriptive in character.

25. Adverting to the evidence produced by the defendants regarding usage, Mr. Lall submits that, of the invoices produced by the defendant, the only invoice, prior to 2018, which contained the words “Nature’s Tattva” was the invoice dated 3rd December, 2015, of which the defendant had produced all copies, including the copies for the buyer and the transporter. This, submits Mr. Lall, itself throws into doubt the veracity of the invoice. Other pre-2018 invoices filed by the defendants, he submits, do not make any reference to “Nature’s Tattva”. Mr. Lall also draws attention to the fact that the seller, in the Invoice dated 3rd December, 2015, is “Protogreen Retail Solutions Pvt

Ltd (EcoTokri.com)”, with the “EcoTokri” logo at the upper right corner of the invoice. For ready reference, a copy of the invoice may be provided thus:

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Pragathi Medical Solutions Pvt. Ltd. (EcoTokri.com)
 C-47, 1st Floor, West of Metro,
 Gurgaon, Haryana 122002
 contact@ecotokri.com
 EcoTokri.com

Invoice

EcoTokri.com

BILL TO

Pragathi Medical Solutions Pvt. Ltd.
 C-47, 1st Floor, West of Metro,
 Gurgaon, Haryana 122002
 contact@ecotokri.com
 EcoTokri.com

SHIP TO

Pragathi Medical Solutions Pvt. Ltd.
 C-47, 1st Floor, West of Metro,
 Gurgaon, Haryana 122002
 contact@ecotokri.com
 EcoTokri.com

PRODUCT CODE	DATE	TOTAL DUES	DATE DUE	STATUS	AMOUNT
PRG-001-1000	08/12/2020	215.00	08/12/2020	Current Invoice	

TERMS & CONDITIONS

30 DAYS

ITEM	DESCRIPTION	QTY	UNIT	PRICE	TOTAL
1	Pragathi Medical Solutions Pvt. Ltd. Pragathi Medical Solutions Pvt. Ltd.	1		215.00	215.00

Pragathi Medical Solutions Pvt. Ltd. (EcoTokri.com) and its subsidiaries shall be responsible for the accuracy of the data and the quality of the products.

NO. OF ITEMS: 1

DATE: 08/12/2020

TOTAL: 215.00

AMOUNT: ₹215.00


Pragathi Medical Solutions Pvt. Ltd.

26. Mr. Lall has also referred to an item on the “YourStory” website, titled “Beauty startup Nature’s Tattva raises \$ 150K from singer Sukhbir Singh, others”, and to the caption, below the photograph of the defendant’s product in the same item, reading “Founded in October 2018, beauty start-up Nature’s Tattva will use the new funds to create operations, acquire talent, and for brand building activities”, and an article from “BW Businessworld”, titled “Green Products: How Can They Provide Competitive Advantage”, which contains the recital “Fab India, EcoTokri, Organics India, Natural Mantra and many such organizations are riding the wave of this movement in India, making the best of this opportunity”, to discredit the assertion, of the defendants, that they were marketing their “Nature’s Tattva” products since 2015. In the same context, he refers to a statement of Mr. Karnesh, Director of EcoTokri, thus reproduced in an article in The Economic Times titled “Green Diwali options: Upcycled candle moulds, sandstone diyas”:

“Karnesh, Director of EcoTokri, says his company has come up with a wide range of eco-friendly products this Diwali that have a local flavour to them. “We have incorporated Indian elements into our products.””

Mr. Lall submits that, apart from belying the contention, of the defendants, that they have been marketing their “Nature’s Tattva” brand since 2015, the above material also indicates that they have, in fact, a major brand “EcoTokri”, under which they had been marketing their products and which, in fact, constitutes their main brand. As such, he submits, no irreparable loss would ensue to the defendant,

were injunction to be granted, as prayed by his client. He reiterates that, in fact, EcoTokri was the defendant's flagship brand, and "Nature's Tattva" was a mere disingenuous attempt to capitalise on his client's goodwill.

27. Mr. Lall also refers, in the same context, to the application, dated 26th April, 2018, filed by the defendant to register its  mark, and the affidavit, filed by the Director of the defendant, before the Registry of Trade Marks, to the effect that the total sales of the defendant, till 2018, was only ₹ 40 lakhs. This, he submits, was not believable, if the defendant had, in fact, been in the market, with its "Nature's Tattva" mark since 2015. Mr. Lall also points out, in this context, that the registration of the word Mark "Nature's Essence", as granted by the Registry of Trade Marks to his client on 12th March, 2020, did not make any reference to the existence of the Mark "Nature's Tattva". There was, therefore, submits Mr. Lall, no marketed "Nature's Tattva" product till 2018 and, during the period 2015 to 2018, the defendant was marketing its products only under the brand "EcoTokri". In fact, points out Mr. Lall, the invoice dated 3rd December, 2015, filed by the defendant, was never filed with the Trade Marks Registry, at the time of applying for registration of the "Nature's Tattva" mark, indicating that the invoice had been manufactured only for contesting the present suit. Mr. Lall has also referred, in this context, to the publicity literature of the defendant, titled "About Us – Nature's Tattva", particularly to the following recitals therein:

“After running India’s largest online store for everything Eco-friendly, Organic and Green, successfully for 5 years, we ventured into our own home-grown Brand – Nature’s Tattva.

With Nature’s Tattva, we want to solve 3 basic problems with Beauty today:”

(Emphasis in original)

In this context, Mr. Lall has also pointed out that, on the defendant’s “Naturestattva.com” website, activity was apparent only w.e.f. March, 2018.

28. In view of the submissions of Mr. Lall, regarding the priority of user as claimed by the defendant, and the veracity of the invoices filed by the defendant with its written statement, the defendant chose to place several additional documents on record, along with IA 2748/2021, under Order XI Rule 1(10) of the CPC, including invoices and other documents which, according to learned Counsel for the defendant Mr. Sumit Sharma, indicate priority of user of the “Nature’s Tattva” brand by the defendants. While I have issued notice on the said application, learned Counsel for both sides were permitted to address arguments on whether it would be proper for me to refer to the said documents, while considering the plaintiffs application under Order XXXIX Rules 1 and 2, CPC. Mr. Lall, needless to say, emphatically contended in the negative, drawing attention, *inter alia*, to the following recital, contained in the Statement of Truth, filed with the Written Statement by the defendants:

“I say that all documents in my power, position, control or custody, pertaining to the facts and circumstances of the proceedings initiated against Defendants No 1 and 2 have been disclosed and the copies of the same has been filed

along with the written statement and that I do not have any other document in my power, possession, control or custody which to my knowledge are relevant to the present suit.”

Having thus solemnly affirmed, in the Statement of Truth filed with the Written Statement, that it had filed all documents which were relevant and which were in its power, position, control or custody, with the written statement, the defendant, on the plaintiff discrediting the invoices filed by it with its written statement, chose to execute a *volte face* and introduce over 100 pages of additional documents, averring, in the application under Order XI Rule 1(10), as under:

“The Defendants however filed all documents which were relevant for the matter *and readily available* within the power and possession. More specifically the Defendants filed invoices to establish and substantiate their continuous use of the mark ‘Natures Tattva’ since the year 2015.”

(Emphasis supplied)

By adding the words “and readily available” in its application, therefore, submits Mr. Lall, the defendant was trying to wriggle out of the solemn affirmation contained in its Statement of Truth filed with the written statement. This, he submits, is not permissible at all. In any event, he submits, these additional documents cannot, at any cost, be taken into consideration by this Court, while adjudicating on the plaintiff’s application under Order XXXIX. While so protesting the defendants’ attempt to introduce these additional documents, Mr. Lall submits that a glance at the documents reveal that almost all of them are forged. He submits that, for the same product, invoices, on one day and the next, reflected widely varying prices and even widely varying GST rates. Moreover, he submits, all the invoices are

recipients' copies, with no explanation as to how the plaintiff was in possession thereof. Mr. Lall specifically relies on the guiding philosophy behind the Commercial Courts Act, 2015, which abhors such attempts at embellishing the record with additional documents, from time to time.

Submissions of Mr Sumit R. Sharma, learned Counsel for the defendants

29. Addressing, first, the objection, of Mr. Lall, to the additional documents, filed by the defendants with IA 2748/2021 being taken into account while adjudicating on the present application under Order XXXIX of the CPC, Mr. Sharma draws attention to the fact that the necessity of filing such additional documents arose because of the emphatic discrediting, by the plaintiff, in its replication, of the invoices filed by the defendants with the written statement as "fabricated and concocted to mislead the Hon'ble Court". In such circumstances, Mr. Sharma submits that he was well within his right in placing additional documents on record, which this Court ought to take into consideration while adjudicating on the plaintiffs interlocutory injunction application. He relies, for the said purpose, on the judgement of the Supreme Court in *Sambhaji v. Gangabai*¹ and of a learned Single Judge of this Court in *Mahesh Chaudhri v. IMV India Pvt Ltd*².

¹ (2008) 17 SCC 117

² 2019 SCC OnLine Del 9813

30. Adverting, thereafter, to the plaint, Mr. Sharma draws my attention to the prayer clause therein, which merely seeks to protect the “NATURE’S”, “NATURE ESSENCE” and “NATURE’S ESSENCE” marks, with no reference to “Panchtattva”. The pleas regarding goodwill, in the plaint, are also confined to the “Nature’s Essence” mark of the plaintiff. Sales figures, in the plaint, are also with respect to the said mark. Moreover, though the plaintiff pleads user, of the Panchtattva Mark, since 12th November, 2009, sales figures are provided only from 2014. Invoices, too, reflecting the “Nature’s Essence” products, are also w.e.f. 2014.

31. Apropos the application filed by his clients before the Trade Marks Registry for registration of the “Natures Tattva” mark, Mr. Sharma refers to the “Statement as to Use of Mark”, as submitted by his client, in which it was clearly stated “The mark is used by the applicant or its predecessor in title since 10/05/2015 in respect of the goods and services mentioned in the application”. Insofar as the invoices, filed by the defendants with the written statement, were concerned, Mr. Sharma points out that no credible challenge had been raised, by the plaintiffs, regarding the invoice dated 3rd December, 2015 which, at any rate, referred to “Nature’s Tattva Pure Natural Beeswax Shreddings” and which, according to him, was sufficient to evidence the usage, by the defendants, of their “Natures Tattva” Mark, commercially, at least since December 2015. Mr. Sharma also referred to invoices issued by Amazon.in on their website, for the defendant’s “Nature’s Tattva” product, reflecting the “date first

available” as 30th March, 2016 and 19th April, 2016, as reflected from the following screenshots:



Mr. Sharma also relied on the registration details of the domain name naturestattva.com, as available on the Internet, which indicated that the domain name was registered on 22nd February, 2017. As against this, he points out that, even as per the case of the plaintiff, it is using its “Nature’s Essence” mark only since 2018.

32. Even on merits, submits Mr. Sharma, the marks of the plaintiff and the defendants are totally dissimilar, with no scope of deception or confusion. The product range of the plaintiffs and defendants, too, he would submit, are different. The only two products which are common are the hand sanitiser and charcoal facemask, which are easily distinguishable from each other. He has also invited my attention, in this context, to the websites of the plaintiff and the defendants, which set out their products thus, and which underscore the difference in the product range:

Categorization of Plaintiff's categorization



Categorization of Defendant's products



The defendant's products, submits Mr. Sharma, are DIY (Do It Yourself) products, unlike the plaintiffs, which are ready to use. As such, the shelf life of the defendant's products is also less than that of the plaintiffs. Moreover, submits Mr. Sharma, the customers of the plaintiff and the defendants are niche clientele, who would be aware of the difference between DIY kits and ready to use products.

33. Mr. Sharma has further submitted that there can be no monopolistic right over the use of the word "Nature's", as it is descriptive and is, therefore, *publici juris*. Over 100 marks, he submits, are registered in the Trade Marks Registry, starting with the word "Nature's", with a list of actual products having been filed with the written statement.

34. Finally, Mr. Sharma has sought to highlight the reputation and length of usage of the defendant's trademarks. He submits that, at the stage of argument of the interim injunction application of the plaintiff, under Order XXXIX of the CPC, the evidence of usage, since 2015, as produced by the plaintiff, could not be disputed, for which purpose he places reliance on the judgements of Division Benches of this Court in *Marico Ltd v. Agro Tech Foods Ltd*³ and *Rhizome Distilleries P. Ltd v. Pernod Ricard S.A. France*⁴. He submits that the defendants have, in the written statement, submitted their sales figures from the year 2014-2015 onwards. He has also referred me to various paras of the written statement, in which the defendants have

³ 174 (2010) DLT 279 (DB)

⁴ 166 (2010) DLT 12

sought to highlight their goodwill and reputation in the DIY cosmetics segment.

Mr. Lall's submissions in rejoinder


35. Responding to the submissions of Mr. Sharma, Mr. Lall, in rejoinder, once again invited attention to the website article, titled “Beauty start-up Natures Tattva raises \$ 150 K from singer Sukhbir Singh, others”, with the note, below the photograph on the said page, “*Founded in October 2018*, beauty start-up Natures Tattva will use the new funds to scale operations, acquire talent, and for brand building activities”. Similarly, on the very next page in the said article, Mr. Lall invites attention to the recital that, “in the first full year of operations, the start-up has clocked sales of ₹ 1.6 crore and is looking to grow at 20% month on month in the second year of operations”. Mr. Lall further points out that there is contradiction between the sales figures, as provided in the affidavit filed with the application for registering the trademark, in which the sales figures have been shown as ₹ 40 lakhs whereas, in the written statement, it is averred that, during the year 2017-2018, the defendants had sales of ₹ 59 lakhs. He submits that, prior to 2018, the DIY kits of the defendant were obviously being sold under the brand “EcoTokri”. He has invited attention, in this context, to the following recital, in the written statement of the defendants:

“Even prior to ‘Nature’s Tattva’, the Defendants have successfully established, built and run its brand ‘EcoTokri’ which was India’s first online marketplace for green, eco-friendly and natural products in organic food, natural

cosmetics, solar products and eco-friendly stationery segments. The Defendant's brand 'EcoTokri' owing to its high-quality products, has achieved similar success and created incomparable goodwill and reputation for itself which is clear from the fact that it has been extensively covered and reviewed by the Economic Times."

As such, submits Mr. Lall, the sales figures provided in the written statement filed by the defendants, stated to be of their "business", were apparently under the brand 'EcoTokri'.

36. With respect to the additional documents, filed by the defendants under cover of IA 2748/2021, Mr. Lall submits that, apart from the fact that the said documents cannot be taken into account, the invoices filed therein are all photo copies, and bear the "EcoTokri" logo at the head. He has also sought to point out other infirmities in the said documents. However, as I am not inclined to take the said documents into account, in order to decide the present application under Order XXXIX, it is not necessary to refer to the other submissions of Mr. Lall, questioning the documents.

37. Mr. Lall further submitted that the defendant had applied for registration, with the Trade Mark Registry, of its  mark, only on 26th April, 2018, even though it was claiming user since 2015. This, he submits, further discredits the defendants claim of prior user, *vis-à-vis* the plaintiff.

38. Insofar as the aspect of deceptive similarity was concerned, Mr. Lall relies on Section 29(2) of the Trade Marks Act, which reads thus:

“(2) 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 –

- (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 of similarity of the goods or services covered by such registered trade mark; or
- (c) its identity which 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, all of which is likely to have an association with the registered trade mark.”

Mr. Lall submits that the present case falls within clause (b) of Section 29(2), as the defendants’ mark is being used on the same, or similar, goods. In such circumstances, Mr. Lall submits that the burden would be on the defendants to show that the marks of the plaintiff and the defendant are so dissimilar that there is no likelihood of confusion or deception. Mr. Lall also relies on Section 29(4), which includes, within the ambit of “infringement”, usage by a person who is not its registered proprietor, of a mark which is identical with, or similar to, the registered trade mark, and is used in relation to goods or services which are not similar to those for which the trade mark is a registered, provided the registered trade mark has a reputation in India, and the use, by the defendant, without due cause, takes unfair advantage of, or is detrimental to, the distinctive character or repute of the registered trade mark. As such, submits Mr. Lall,

even in the case of dissimilar goods, infringement can take place. The test, in such cases, he submits, is only whether an unwary customer would wonder at the association between the item before him, and that manufactured by the proprietor of the registered trade mark.

39. Mr. Lall further asserts that the defence, regarding “Nature’s” being a descriptive word, and commonly used, is not available to the defendants, in view of the assertion, in the written statement, that “the defendants mark ‘Nature’s Tattva’ is a coined and unique mark combining the word Nature with a Sanskrit word ‘Tattva’ which means ‘Elements’, thus showing its honest and *bona fide* adoption. To support his submission that the defendant cannot plead that the plaintiff’s mark is not unique, Mr. Lall relies on ***Procter & Gamble Manufacturing Co. Ltd v. Anchor Health & Beauty Care Pvt Ltd***⁵, for the proposition that the defendants cannot be permitted to approbate and reprobate, and are estopped from pleading lack of distinctiveness, in view of the averments contained in the written statement. Mr. Lall further places reliance, on the aspect of deceptive similarity, on the judgements of the Supreme Court in ***Kaviraj Pt. Durga Dutt Sharma v. Navratna Pharmaceutical Laboratories***⁶, of a learned Single Judge of this Court in ***Baker Hughes Ltd v. Hiroo Khushlani***⁷ and the judgement of the Supreme Court, on appeal therefrom, as reported in ***Baker Hughes Ltd v. Hiroo Khushlani***⁸.

⁵ 211 (2014) DLT 466

⁶ AIR 1965 SC 980

⁷ (1998) 74 DLT 715

⁸ (2004) 12 SCC 628

The *prima facie* case, submits Mr. Lall, is always in favour of the registered proprietor of the trademark.

Analysis

40. An interlocutory injunction can be granted, by a Court, only if three factors coalesce; a *prima facie* case in favour of the applicant seeking injunction, the balance of convenience being in favour of grant of injunction, as opposed to the refusal thereof and the likelihood of irreparable loss or prejudice being suffered by the applicant, were injunction not to be granted. The existence of one, or more, of these three factors, would by itself be insufficient to justify grant of injunction; all three must coalesce. Howsoever cast iron the case for the plaintiff may appear to be, a court would not grant an injunction unless it is manifest that such grant is necessary to avoid irreparable loss or prejudice to the plaintiff, and the balance of convenience warrants grant of injunction. To these, the Supreme Court has, in *Mahadeo Savlaram Shelke v. Pune Municipal Corporation*⁹, added the consideration of public interest; however, in private intellectual property disputes, this factor may not be of much significance.

41. A manifestation of the “irreparable loss” and “balance of convenience” concepts – which, by their very nature, overlap to some extent – in the context of intellectual property injunctions, is the consideration of the longevity of usage, by the defendant, of the

allegedly infringing trademark or other intellectual property.¹⁰ The right to carry on legitimate and lawful trade and business is a fundamental right under the Constitution, and, while interdicting, by grant of injunctive relief, the business of the defendant, the Court has to be acutely conscious of the time from which the defendant has been carrying on such business. Evaluation of the competing considerations of the alleged infringement of the plaintiff's intellectual right, and the prejudice that would result to the defendant if its business is brought to a halt at an interlocutory stage of the proceedings, is an exercise in tightrope walking, and it is for the Court to undertake the exercise with the requisite skill and experience. A mere *prima facie* view that the trademark used by the defendant appears to be infringing in nature, is not sufficient, by itself, to grant an injunction as sought, though it is an overwhelming consideration. The Court, while granting injunction, has to bear in mind the serious prejudice that may result to the defendant's business, as well as all others who may be dependent on that business, such as its employees, if the business is brought to a halt. That the defendant may continue to carry on his business under a non-infringing trade mark, is not a complete answer. Oftentimes, considerable goodwill may have been generated, over the course of time, even by the usage of an infringing trade mark. It is for this reason that the Court also examines the promptitude with which the plaintiff has approached the Court. If the allegedly infringing trademark has been in use for a number of years,

⁹ (1995) 3 SCC 33

¹⁰ *Wander Ltd. v. Antox India P. Ltd.* (1990) Supp SCC 727; *Mahendra & Mahendra Paper Mills Ltd. v. Mahindra & Mahindra Ltd.* (2002) 2 SCC 147; *Goenka Institute of Education & Research v. Anjani Kumar Goenka*, 2009 SCC OnLine Del 1691

for example, the Court would be more circumspect in granting interlocutory injunction against the defendant. At such times, the Court may balance the equities by requiring the defendant to furnish accounts of the earnings made by using the allegedly infringing trade mark so that the plaintiff could, if it succeeds in the suit, be monetarily recompensed. Whether such monetary recompense would be sufficient to offset the prejudice caused to the plaintiff as a result of continuous usage of infringing trademark is, however, also a competing consideration, given the fact that intellectual property is a sanctified Constitutional asset of the citizen, and infringement thereof ordinarily is not to be tolerated. At the end of the day, the Court has to make a conscious and judicious determination to examine exactly which pan of the equitable scale is heavier, and decide accordingly. By its very nature, this exercise cannot be circumscribed by any strict or definitive guidelines.

42. The onus, to prove the existence of a *prima facie* case, balance of convenience, and irreparable loss, as would justify grant of injunction, is always on the plaintiff, and never shifts even if, on the aspect of consideration of the material on record, the onus may shift this way or that.

43. One more consideration that the Court is required to bear in mind, while dealing with applications for interlocutory injunction against usage of infringing intellectual property, is the somewhat *sui generis* nature of such proceedings. More often than not, intellectual property infringement litigation survives, or perishes, depending on

the grant, or refusal, of interlocutory injunction. If interlocutory injunction is granted, the defendant's business, at least under the allegedly infringing trademark or other intellectual property, is brought to a halt. If, on the other hand, interlocutory injunction is refused, the allegedly infringing trademark or other intellectual property, to use a cliché, "floods the market", resulting in the grant of any injunction, at a later point of time, becoming largely an exercise in futility, and the litigation getting reduced to a claim for damages. Applications for interlocutory injunction in intellectual property disputes have, therefore, to be treated with, and accorded, greater respect; the consequence of grant, or refusal, of injunction being, in almost all cases, irreversible at any later point of time.

44. The injunction Court is required to be suitably sensitised of these aspects, before embarking on the exercise of examination of the merits of the plea for injunction.

45. In the present case, there are, quite obviously, only two issues which arise for consideration. The first is whether the defendants have, *prima facie*, infringed the plaintiff's trademark, or not. The second is whether, if they have, grant of injunction, against their continuing to infringe the plaintiff's trademark, would be justified.






46. Is there a *prima facie* case of infringement?

46.1. Two factors are required to be borne in mind, at the very outset. First, that the prayer in the plaint is restricted to the marks

“NATURE”, “NATURE ESSENCE” and “NATURE’S ESSENCE”. There is no prayer relating to any mark of the plaintiff which uses, as a whole or part thereof, the word “Tattva”. Though the plaintiff avers that it had started using the “Nature’s Panchtattva” mark in 2018, there is no relief sought, with respect to the said mark. The allegation of infringement is, therefore, required to be examined, in respect of the defendants trademarks, *vis-à-vis* the marks “NATURE”, “NATURE ESSENCE” and “NATURE’S ESSENCE”, of the plaintiff. The second aspect, to be borne in mind, is that there is no prayer, in the plaint, against alleged passing off, by the defendant, of its products, as those of the plaintiff. The prayer relates only to infringement. Mr. Lall, with the candour expected of Senior Counsel, acknowledged that this appears to have been a lapse. Be that as it may, I do not propose, in this order, to examine whether the defendants are, or are not, passing off their products as those of the plaintiff, in the absence of any prayer predicated on such a plea.

46.2 In order to establish a case of infringement, the plaintiff has to make out a clear case of deceptive and confusing similarity, between the marks of the defendant, and its own registered trade marks, as there can be no infringement with respect to an unregistered trademark¹¹.

¹¹ Ref. Section 27(1) of the Trade Marks Act, 1999 which prohibits any person from instituting “any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark.”

46.3 The plaintiff has placed, on record, certificates of registration, issued by the Trade Marks Registry, with respect to its various marks. They pertained to the word Mark “NATURE ESSENCE” and “NATURE’S ESSENCE”, and the trademarks , ,  and . Though applications, for registration of other marks, have also been placed on record, it does not appear that any other trademark has been registered in favour of the plaintiff. I am required, therefore, to examine the allegation of infringement, with respect to the aforesaid trademarks, *vis-à-vis* the mark of the defendants which is .

46.4 On the aspect of deceptive similarity, this Court has, in its recent decision in *FDC Ltd v. Faraway Foods Pvt Ltd*¹², culled out the following principles from, *inter alia*, the judgements in *Satyam Infoway (P) Ltd v. Siffynet Solutions (P) Ltd*¹³, *Cadila Health Care Ltd v. Cadila Pharmaceuticals Ltd*¹⁴, *Kaviraj Pt. Durga Dutt Sharma*¹⁵, *National Sewing Thread Co. Ltd v. James Chadwick & Bros Ltd*¹⁶, *Corn Products Refining Co. v Shangrila Food Products Ltd*¹⁷, *Amritdhara Pharmacy v. Satya Deo Gupta*¹⁸, *K. R. Krishna Chettiar v. Shri Ambal & Co.*¹⁹, *F. Hoffman-La Roche & Co. Ltd v. Geoffrey Manners & Co. Pvt Ltd*¹⁹, *Mahendra & Mahendra Paper*

¹² MANU/DE/0230/2021

¹³ (2004) 6 SCC 145

¹⁴ (2001) 5 SCC 73

¹⁵ AIR 1953 SC 357

¹⁶ AIR 1960 SC 142

¹⁷ AIR 1963 SC 449

¹⁸ (1969) 2 SCC 131

¹⁹ (1969) 2 SCC 716

Mills Ltd v. Mahindra & Mahindra Ltd²⁰, Laxmikant V. Patel v. Chetanbhai Shah²¹, Khoday Distilleries Ltd v. Scotch Whisky Association²², Nandhini Deluxe v. Karnataka Co-operative Milk Producers Federation Ltd²³ and Wockhardt Ltd v. Torrent Pharmaceuticals Ltd²⁴:

(a) In assessing deceptive similarity, the class of the customer 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.

(b) The onus of proof is on the plaintiff who alleges passing off. As against this, in an opposition to the registration of a trade mark, the onus to prove deceptive similarity is on the defendant who seeks non-registration, or removal of the trade mark from the register.

(c) "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.

²⁰ (2002) 2 SCC 147

²¹ (2002) 3 SCC 65

²² (2008) 10 SCC 723

²³ (2018) 9 SCC 183

²⁴ (2018) 18 SCC 346

(d) 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.

(e) 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.

(f) ***The Pianotist*** test²⁵, 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,

- (i) the goods to which they are to be applied,
- (ii) the nature and kind of customer who would be likely to buy those goods,
- (iii) all surrounding circumstances and

²⁵ Enunciated in **In re. Pianotist Application (1906) 23 RPC 774**

(iv) 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.

(g) 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 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.

(h) 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.

(i) 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.

(j) 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.

(k) 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.

(l) 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.


46.5 That the application of the aforesaid tests, in any given case, is purely a question of fact, involving exercise of judicial discretion by the Court, and that no objective or preset standards could be stipulated in that regard, may be apparent from the fact that, applying these tests,

- (i) "Sify" and "Siffy" were held to be phonetically and visually similar, with the addition of the suffix "net" after "Siffy" being found to be insufficient to tide over the similarity,
- (ii) "Gluvita" and "Glucovita" were found to be phonetically similar, with the syllable "co" in the latter name being regarded as insignificant,
- (iii) "Amritdhara" and "Lakshmandhara" were found to be deceptively similar, and
- (iv) "Sri Ambal" was found to be phonetically similar to "Sri Andal"¹⁶, but






(v) on an intricate and microscopic comparison of the competing words, it was held that "Protovit" and "Dropovit" were dissimilar, with no possibility of confusion.

46.6 Applying the above tests, the conclusion that the marks



and  are deceptively similar is, in my view, *prima facie* undisputable. The marks are in identical colours with the placement of words being also similar. Both contain the word “Nature’s” in a larger font, above the word “Tattva” in the case of the defendant’s mark, and “Inc.”, in the case of the plaintiff’s mark, below it in smaller letters. Both marks are green in colour, and use the word “Nature’s” with an apostrophe. In both cases, there is the insignia of a leaf over the word “Nature’s” which, even by itself, *prima facie* indicates imitation, by the defendants, of the plaintiff’s mark, this being a clearly distinctive feature of the plaintiff’s mark.




46.7 *Vis-à-vis* the “Nature’s Essence” mark of the plaintiff, the “Nature’s Tattva” mark of the defendants also appears to be a case of “idea infringement”, as one of the principal meanings of the Hindi (or, rather, Sanskrit) word “tattva” is “essence”. (The suggestion, by the defendants, that “tattva” means “elements”, though etymologically also correct, is an apparent attempt to obfuscate this issue.) This appears, *prima facie*, to be an attempt to confuse the customer of “average intelligence and imperfect recollection”.

46.8 The contention, of Mr. Sharma, that the plaintiff cannot claim any trademark rights over the word “Nature”, as it is descriptive in nature, is neither here nor there. In the first place, the plaintiff’s trademark, of which it alleges infringement, is not “NATURE” *per se*, but “NATURE’S INC.” or “NATURE’S ESSENCE”. As I have already held hereinbefore, the defendant’s mark is, visually and phonetically, deceptively similar to the plaintiff’s “NATURE’S INC.” mark, and conveys a deceptively similar idea to that conveyed by “NATURE’S ESSENCE”, as has the potential of confusing a customer of average intelligence and imperfect recollection. Whether an intellectual property monopoly can be claimed in respect of the word “NATURE” is, therefore, really off the mark. It would be totally antithetical to all canons of trademark jurisprudence to question the validity of the  or  marks because “Nature” is a descriptive word. Once “Nature’s” is used in conjunction with “Inc.”, or “Essence”, it assumes a definite and distinct – as well as distinctive – connotation and meaning, which is totally different from “Nature” *per se*. Even if “Inc.” were to be treated as an acronym for “Incorporated”, the  mark has a distinctive identity all its own, immediately apparent to the naked eye. Once, therefore, deceptive similarity is established, violation of the proprietorial right, of the plaintiff, over the  or  trademark, stands made out. Infringement being in the nature of a violation of the proprietorial right of the owner of a registered trade mark, a case of infringement stands, thereby, *prima facie* established.

46.9 In *Kaviraj Pt. Durga Dutt Sharma*⁶, the Supreme Court held that the “resemblance may be *phonetic, visual or in the basic idea represented by the plaintiff’s mark*”. Any one of these similarities would, therefore, be sufficient to make out a case of infringement. In the present case, the defendants’ mark is, at least visually as well as qua the basic idea thereof, starkly similar to the plaintiff’s marks. Even phonetically, it cannot be said that “Nature’s Essence” and “Nature’s Tattva” are wholly dissimilar, especially given the fact that the opening word of both expressions is the same.

46.10 Mr Sharma, on behalf of the defendant, sought to contend that there was no overlap in the goods on which the defendant used its mark and those on which the plaintiff did so, as the products of the defendant, except for Hand Sanitizer and Charcoal Face Pack, were DIY items, whereas the plaintiff’s products were ready to use. To my mind, this makes little, if any, difference. Both make cosmetics and toilet preparations. The “do-it-yourself” aspect of the defendant’s products pertains to the *mode of use* of the product, and not to the *nature* of the product itself. In any event, both the products being cosmetics, and the marks being similar visually as well as by idea association, the existence of infringement cannot be gainsaid merely because the defendants’ products are DIY and the plaintiff’s ready to use. With the expansion of product portfolios in nearly every stream of business, such diversity is often encountered in different products of the same manufacturer. For example, it is a matter of common knowledge that the same pharma company may be manufacturing syrups both as ready solutions or emulsions, or as suspensions which

have to be prepared by mixing the medicine, in powder form, with water. That factor, in my *prima facie* view, cannot overwhelm the essentially infringing nature of the defendants' marks, vis-a-vis those of the plaintiff.

46.11 *Prima facie*, therefore, the essential features of the plaintiff's mark, including (i) the colour, (ii) placement of the words "Nature's" and "Inc.", in the case of the  mark, and of the words "Nature's" and "Essence" in the case of the  mark of the plaintiff, vis-à-vis the words "Nature's" and "Tattva" in the case of the  mark of the defendants, (iii) the use of the leaf insignia over the word "Nature's", and (iv) the idea conveyed by the words "Nature's Essence" (vis-à-vis "Nature's Tattva"), have deliberately been adopted and imitated, by the defendants, making out a *prima facie* case of infringement. Viewed from the perspective of a person of average intelligence and imperfect recollection, the marks, in my view, are confusingly similar.

47. Is the plaintiff entitled to interim injunction?

47.1 Once a case of *prima facie* infringement is established, ordinarily, the plaintiff would be entitled to injunction, in view of the trespass, by the defendants, into its valuable proprietary domain. The Court is also required, however, to consider the longevity of use, by the defendants, of the allegedly infringing trademark, as part of the twin considerations of balance of convenience and irreparable loss. In

this exercise, however, the general principle is that injunction follows infringement. In cases where the infringement appears to be deliberate, injunction must follow suit. This position of law is thus pithily, and unequivocally, stated, by the Supreme Court, in ***Midas Hygiene Industries (P) Ltd v. Sudhir Bhatia***²⁶:

“The law on the subject is well settled. In cases of infringement either of trademark or 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)

There are decisions, of this Court as well as of other High Courts, on similar lines; however, given the categorical exposition of the legal position by the Supreme Court, in the afore-extracted passage, it is not necessary to advert thereto.





47.2 The similarity in design and idea identity between the expressions “Nature’s Essence” and “Natures Tattva”, and usage of the “leaf insignia”, *prima facie* lead me to believe that the infringement, by the defendants, of the plaintiff’s trademark, was not innocent or coincidental. A deliberate attempt to encash on the goodwill and reputation of the plaintiff appears to have been made by the defendants. Though, as already noticed at the commencement of this judgement, no relief, qua passing off, has been sought in the plaint, this factor becomes relevant when one assesses whether the imitation, by the defendants, of the plaintiff’s mark, was unintentional


²⁶ (2004) 3 SCC 90

or deliberate. I am inclined to hold in favour of the plaintiff , rather than the defendants, on the facts before me.

47.3 In view thereof, the plaintiff cannot be regarded as is entitled to interim injunction, on the ground of longevity of user, by the defendants, of the infringing trademark.

47.4 To turn, now, to the plea, of the defendants, of priority of user.

47.5 The submissions, of Mr. Lall, regarding the defendants having produced only one solitary invoice, dated 3rd December, 2015, referring to any “Nature’s Tattva” product, with their written statement, to claim user since 2015, with no explanation as to how all three copies of the invoices were in the possession of the defendants, also merits consideration. In any event, the plaintiff has a valid registration, of the  mark since 24th November, 2009, and of the  mark at least since 27th October, 2016, being the dates of the Certificates of Registration issued by the Trade Marks Registry in respect of the said marks. As against this, the defendant had applied for registration of their  mark only on 26th April, 2018. Till date, the mark remains unregistered. No credible evidence of prior user, by the defendants, of their  mark is forthcoming on the record, as all invoices, save and except for the single invoice dated 3rd December, 2015, which make reference to any “Natures Tattva” product, are of 2018, 2019 and 2020. I may note, in this context, that, while the prayer, in the plaint, does not refer to the “Nature’s Inc.”

mark, it does seek protection against infringement of the “Nature’s” mark of the plaintiff. Besides, there is a categorical allegation, in the plaint, regarding infringement, by the defendants, of the  mark of the plaintiff.

47.6 I am not inclined to take, into consideration, the documents filed by the defendants with IA 2748/2021, for adjudicating the present application, by the plaintiffs, under Order XXXIX of the CPC. The Statement of Truth, filed by the defendants with the written statement clearly avers that “all the documents in (their) power, possession, control or custody, pertaining to the facts and circumstances of the proceedings initiated against Defendants No 1 and 2 have been disclosed in the copies of the same has been filed along with the written statement and that (they) (did) not have any other document in (their) power, possession, control or custody which to (their) knowledge are relevant to the present suit”. This declaration, having been tendered under the Commercial Courts Act, has to be accorded enhanced solemnity, is a complete answer to the request, of Mr. Sharma, for the additional documents, filed with IA 2748/2021, to be taken into account while deciding the present application. It is also difficult to comprehend how, when the defendants have filed, with the written statement, as many as 14 invoices, with the lone “Nature’s Tattva” invoice being of 3rd December, 2015, they failed to file all other invoices of the said period. All invoices now filed with IA 2748/2021 being merely printed copies, with no signature or other insignia of genuineness, I


am not inclined to take them into consideration while considering the application of the plaintiff under Order XXXIX of the CPC.

47.7 Besides, if the defendants were, in fact, selling their products, with the “NATURE’S TATTVA” mark, prior to 2018, it defeats comprehension, *prima facie*, that they would have filed, with their written statement, only one solitary invoice, dated 3rd December, 2015.

47.8 Even on the basis of the consideration of priority of user, therefore, the plaintiff is, *prima facie*, entitled to interlocutory injunction as sought.

Conclusion

48. In view of the aforesaid discussion, the plaintiff is found entitled to the prayer for interlocutory injunction, as contained in the present application.

49. Pending disposal of the suit, therefore, the defendants, as well as their servants, agents, dealers, representatives and all other persons acting on their behalf, shall stand restrained from dealing in/making, selling, offering for sale or advertising, in any manner, cosmetics and toiletries products or any allied goods, bearing the impugned  mark, or any other mark, confusingly or deceptively similar to the

registered “NATURE’S INC.” and “NATURE’S ESSENCE” trademarks of the plaintiff.

50. The application stands allowed accordingly.

51. Needless to say, all observations in this order are merely *prima facie*, intended to aid disposal of the plaintiff’s application under Order XXXIX Rules 1 and 2, CPC, and would not inhibit the Court from taking a different view, at any later stage or at the final hearing of the suit.

MARCH 9 , 2021
dsn/ss

C. HARI SHANKAR, J.

