
(2016) 07 MAD CK 0049

In the Madras High Court

Case No : O.A. Nos. 1173 and 1174 of 2015 in C.S. No. 877 of 2015

Banana Brand Works Pvt Ltd.

APPELLANT

Vs

Kavan Antani

RESPONDENT

Date of Decision : 15-07-2016

Acts Referred:

Trade Marks Act, 1999 — Section 29

Citation : (2016) 4 CTC 647 : (2016) 6 MLJ 60

Hon'ble Judges : M.M. Sundresh, J.

Bench : Single Bench

Advocate : M/s. M.S. Bharath of Anand and Anand, Advocates, for the Appellant; Sriram Panchu, Senior counsel for M/s. N.B.N. Suchindran, Advocate, for the Respondent

Final Decision : Allowed

Judgement

M.M. Sundresh, J.—The applicant/plaintiff - M/s Banana Brand Private Limited is a private limited company (registered) engaged in the business of Advertising, Building Brand Strategies, Brand Identity, Digital Marketing, Social Media Marketing, Web Branding, Creative Design, Retail Design, Environmental Graphic Design, Photography, Video Production and other allied services.

2. The applicant has adopted a fanciful and arbitrary mark "BANANA". At the time of its adoption, there was no other mark in the field of operation of the applicant. This mark is used in the service, which has got no connection with banana fruit. Thus, there is no direct or remote connection to the nature of quality of goods. It has registered its logo "BANANA" as a series mark under Classes 35 and 42. The said exercise has been done through multiple applications under Section 15 (3) of the Trade Marks Act, 1999. It started using "BANANA" and its logo from the year 2007 onwards. For such service rendered, it bagged various awards and accolades. It acquires permanent clients, such as, Hyatt, Michelin, VBJ, TVS, Sun TV, Daimler, Pricol, Medimix, Chaitanya, Amrutanjan, etc. It also maintains websites to cater to the needs of its clients.

3. The respondents have come into existence in the year 2014 with its brand name as "Bananabandy" through its website operator from the domain name www.bananabandy.com. It offers a platform to creative professionals to interact with each other apart from satisfy the needs of others, who require their services. These include graphic designers, animators, photographers, architects to a fashion designer, industrial designers etc. Any one from these categories can access the website of the respondents, upload their portfolios and their artistic work. Thus, the respondents act as a facilitator and intermediary. It appears that some of the activities of the members of the respondents overlap with that of the applicant, such as brand creation, animation, graphic design and photography.

4. Inter alia alleging that the respondents have been infringing upon the registered mark of the applicant, apart from committing an act of passing off, the present suit in C.S.No. 817 of 2015 has been laid. Pending suit, these two applications, seeking grant of injunction, are also filed.

5. Submissions of the Applicant:

Mr. M.S. Bharath, learned counsel appearing for the applicant, submits that there is no dispute on the registration and prior user of the mark by the applicant. The documents filed would highlight the goodwill and reputation prevailing in the market for the brand name of the applicant. From the documents filed by the respondents, there is a clear overlapping of some of the activities carried on by its members with that of the brand name of the applicant. The word "BANANA" has been adopted as a fanciful and arbitrary name by applying to the field of operation of the applicant. In such a case, Section 29 of the Trade Marks Act, 1999, will have to be pressed into service against the respondents. There is no honest adoption involved on the part of the respondents. There is no search done before adoption leading to inference qua intention. The name is not generic or descriptive, especially, when adoption is in the different field. The respondents, having filed their mark applications for their alleged trade mark "BANANA BANDY", it does not lie in its mouth to contend to the contrary that the name adopted and registered by the applicant is generic or descriptive. Thus, the respondents cannot be allowed to approbate and reprobate. The mere fact that the applicant has not proceeded against few others who may infringe the mark of the applicant cannot be a ground to escape the rigour of Section 29 of the Trade Marks Act, 1999. Even an innocent adoption by the respondents cannot be a defence. Neither an actual damage nor confusion is required. What is required is a mere likelihood. The reason sought to be assigned by the respondents is only an afterthought.

There is a valid assignment of the mark by the original applicant in favour of the present one as seen from the documents filed. A mere change of class is not sufficient. Obviously, the respondents are trying to take advantage of the reputation of the applicant and therefore, there is a distinct advantage by creating an initial interest confusion. To buttress his submissions aforesaid, reliance has been made on the following decisions.

- (1) Baker Hughes Limited and another v. Hiroo Khushalani and another (1998 (18) PTC 580 Del.);
- (2) Automatic Electric Limited v. R.K. Dgawan and another (77 (1999) DLT 292);
- (3) Anchor Health and Beauty Care Pvt. Ltd. v. Procter & Gamble Manufacturing (Tianjin) Co., Ltd., and ors. (2014 (59) PTC 105(Del));
- (4) Hindustan Pencils (P) Ltd. v. India Stationery Products Co., and another (AIR 1990 Delhi 19);
- (5) Emcure Pharmaceuticals Ltd. v. Corona Remedies Pvt. Ltd., (2014 (60) PTC 332 (BOM.);
- (6) Bal Pharma Ltd. v. Centaur Laboratories Pvt. Ltd., and another (2002(24) PTC 226(BOM.);
- (7) Assam Roofing Ltd., and ors. v. JSB Cement LLP and ors. (AIR 2016 CAL. 410);
- (8) Express Bottlers Services Private Ltd. v. Pepsico Inc. and ors. (1989 (9) PTC 14 (CAL.);
- (9) Jolen Inc. v. Doctor & Company (2002 (25) PTC 29 DEL.)
- (10) Gangotree Sweets and Snacks Pvt. Ltd. v. Shree Gangotree Sweets, Snacks and Savouries (2005 (31) PTC 502 (MAD.);
- (11) Blue Hill Logistics Private Ltd., v. Ashok Leyland Ltd., (2011 (48) PTC 564 (MAD.);
- (12) Ashok Leyland Limited v. Blue Hill Logistics Private Ltd., (2011 (46) PTC 535 (MAD.);
- (13) Yahoo! Inc. v. Akash Arora and anr., (1999 (19) PTC 201(DEL.);
- (14) Crayons Advertising Ltd. v. Crayon Advertising (2014 (57) PTC 446);
- (15) Midas Hygiene Industries P. Ltd., and another v. Sudhir Bhatia and ors., ((2004) 3 SCC 90);
- (16) Caterpillar Inc. v. Mehtab Ahmed and ors. (99 (2002) DLT 678);
- (17) Laxmikant V. Patel v. Chetanbhat Shah and anr.;
- (18) Future Logistics Pvt. Ltd., Rep. By Its Director Mr. S. Edwin Rajamohan v. Future Logistics Solutions Pvt. Ltd.;
- (19) Montblanc Simplo-Gmbh v. New Delhi Stationery Mart and anr.; And
- (20) Himalaya Drug Company v. S.B.L. Limited (2013 (53) PTC 1).

6. Submissions of the Respondents:

Mr. Sriram Panchu, learned Senior Counsel appearing for the respondents

submits that the field of operation of both the parties is different. While the applicant is engaged in the business mentioned above, the respondents merely does the role of a facilitator creating a common platform to be used by its customers/members. The business adopted by the respondents does not form part of classes, in which, the applicant got registered. The words "BANANA" and "BANDI" are generic and descriptive. While the word "BANANA" comes in English, the word "BANDI" is Hindi. Therefore, the applicant cannot claim any exclusivity to it. The applicant cannot choose to take action only against the respondents alone. There is no similarity, such as, font, colour scheme and others. The case of the applicant would not come within the purview of Section 29 of the Trade Marks Act, 1999. Reliance is made by the learned Senior Counsel to the following decisions while praying to dismiss the applications.

- (1) Raymond Limited v. Raymond Pharmaceuticals Ltd;
- (2) Hindustan Unilever Limited v. Ashique Chemicals
- (3) A.D. Phdmasingh Isaac v. Aachi Masala Foods (P) Ltd., (AIR 2014 MAD.2)
- (4) SBL Limited v. Himalaya Drug Company (AIR 1998 DEL. 126);
- (5) Geep Flashlight Industries Ltd. v. The Registrar of Trade Marks;
- (6) ITC Ltd. v. Philip Morris Products SA; and
- (7) Nestle India Limited v. Mood Hospitality Private Limited.

7. Discussion:-

7.1. The narration of facts does not need reiteration in the absence of dispute. The objection raised on the assignment is also negated in view of the documents filed by the applicant along with the plaint, which discloses the applicant as the Proprietor of the Trade Mark. Series of marks have been obtained by the applicants under Section 15(3) of the Trade Marks Act, 1999. Similarly, the factum of overlapping of some of the activities between the applicant and the members of the respondents is also not in dispute, as the source documents are not in dispute having produced by the respondents themselves. However, before going into the contentious issues, let us see the legal position governing them.

7.2. The object and rationale behind the enactment, viz., Trade Marks Act, 1999, (hereinafter referred to as the "Act") is to create a peaceful industrial business environment by protecting the rights of a registered mark holder. Thus, under the Act, in case of infringement of the trade mark, the protection flows by the act of a Court through its order of injunction. The only limitation is under Section 30 of the Act, by which, the effect of a registered trade mark gets restricted. Thus, until and unless a registered trade mark comes within the purview of Section 30 of the Act, the consequences will have to follow. The following passage in *Midas Hygiene Industries P. Ltd., and another v. Sudhir Bhatia and ors.* ((2004) 3 SCC 90) would be fruitful.

"The law on the subject is well settled. In cases of infringement either of Trade Mark or of Copyright normally an injunction must follow".

7.3. Ultimately, the Courts are concerned with the damages or their likelihood. Therefore, absence of intention and the real damage cannot be the factors standing the way of getting an order of protection. Fraud is not an absolutely necessary element and thus, a mere absence of intention to receive is not a defence. In a case of infringement qua identity and similarity with the registered mark, the requisite parameters are the same as passing of.

7.4. As long as the end users of service are one and the same, a mere classification qua the classes under the Act would not ipso facto take away the rights guaranteed under Section 29 of the Act. Otherwise, the very object of the Act itself would get redundant. Therefore, a duty is imposed on a Court to find out the commonality of the service or trade qua the customers. The factors, such as, intention, undue advantage, damage and detriment to the business and reputation are required to be analysed in the proper perspective.

7.5. The law relating to infringement of a registered mark is quite settled by this time. The general principle governing a publici juris, generic and descriptive marks does not have an application when adoption is with respect to a total alien trade and service. In such a case, the protection available under Section 29 of the Act would remain intact despite the mark being generic or descriptive. In this connection, the following passage of the decision in A. Nos. 1554 and 1555 of 2016 and O.A. Nos. 1145 and 1146 of 2015 in C.S. No. 854 of 2015 dated 30.06.2016 would be apposite.

"However, there is a difference between the usage of generic work, which are having direct connection with the product as against the other goods. For example, if the word "Rose" is used involving in a trade dealing with the Roses, then there is a direct connection. In such a case, it may be difficult for the plaintiff being a registered mark holder to success on that score alone de horse other factors. The reason being, the plaintiff might prevent the whole world from using the said name by a sheer act of registration. When once we understand the general principle that a registration is to protect the trade, the protection given would lead to prohibit the others to use a generic word adopting the nature or quality of goods cannot generally be accepted. It is also contrary to the intention of the enactment. On the contrary, if the word "rose" is used in a software business, then it would become a fanciful or arbitrary application. It is for the reason that though the word is generic, the protection comes for the particular business and it is the business that is identified with the name and not otherwise. Therefore, such fanciful or arbitrary words are entitled for protection as a general principle."

8. Intention is not required:-

When we speak about misrepresentation, a narrow interpretation is not required. It has to be seen and understood from the point of view of the protection, such

as, act of misrepresentation, though not necessarily intentional, can be, by any one starting from the manufacturer to the retailer. The reason is that such an act is attached to the goods or services as the case may be. It is also attributable to the last of the transaction and therefore, it should also be seen from the point of view of the end seller.

9. Initial interest confusion:-

9.1. There is always a possibility of confusion and deception, when the parties are involved in overlapping fields of activities.

Therefore, the defence of a sophisticated user cannot be adopted.

This would eventually lead to reputation of one party being affected.

When such a reputation is sought to be pounced upon by another, then such an action would be hit by Section 29 of the Act. The concept of initial interest confusion cannot be restricted to a particular group of consumers alone. It is in human nature to go deep into anything, which creates interest. It takes a conscious effort to come back from the initial interest. In this connection, useful reference can be made to the decision of the Delhi High Court in *Baker Hughes Limited and another v. Hiroo Khushalani and another* (1998 (18) PTC 580 Del.), wherein it has been held as follows:

"48. In several cases it has been held that initial confusion is likely to arise even amongst sophisticated and knowledgeable purchasers under a mistaken belief that the two companies using the same corporate name, trading name or style are inter-related. It is the awakened consumers who are more aware of the modern business trends such as trade mark licensing, mergers, franchising, etc. It is this class of buyers who are likely to think that there is some sort of association between the products of two different companies when they come across common or similar trade names or corporate names or trading styles used by them. The sophistication of a buyer is no guarantee against likely confusion. In some cases, however, it is also possible that such a purchaser after having been misled into an initial interest in a product manufactured by an imitator discovers his folly, but this initial interest being based on confusion and deception can give rise to a cause of action for the tort of passing off as the purchaser has been made to think that there is some connection or nexus between the products and business of two disparate companies."

10. Conduct of the party:-

10.1. While considering this principle, the conduct of the party is very important. Therefore, a party without doing any research should carry the initial transaction/presumption of its knowledge of a registered mark, adopts it, then it has to face the consequences. Its credibility is further eroded, when an application is made seeking registration. Such a party would become amenable to an inference towards deception at the time of its adoption. When deception comes, it is naturally preceded by intention. The conduct of the party in not doing a search

and making an application will not estop him to put forth his case. These factors have to be seen qua the intention and deception. Therefore what is generic and descriptive would not become otherwise merely by the conduct of the party. After all, if the word mark found to be generic or descriptive, then its nature or character cannot be changed depending upon the conduct of a defendant. In *Emcure Pharmaceuticals Ltd. v. Corona Remedies Pvt. Ltd.*, (2014 (60) PTC 332 (BOM.)), the High Court of Bombay has held as follows:

"That is what he is required to do, as a matter of ordinary prudence and elementary precaution. Had the Defendant done so, it would undoubtedly have found the Applicant's mark." However, there is a difference between using the same mark as against the one with similarity and identity. The conduct of a party in the earlier case qua the inference would be more rigorous in comparison to the other two. This is for the reason that though the registered mark might be termed as generic or descriptive, the one adopted by the defendant may being similar or identical could be a ground to contend that it is not identical or similar. In such a case, merely because an application is made subsequently, the right to question the registered mark being in the field of publici juris cannot be taken away. Thus, there lies a subtle difference with reference to the nature of the mark being adopted by the defendant.

10.2. In *Jolen Inc. v. Doctor and Company* (2002) (25) PTC 29 DEL.), the High Court of Delhi has held as follows:

"27. When a party after copying a trade mark comes out with an explanation as to its invention which is unbelievable or may be plausible, its attempt to synchronise combination of words is mere after-thought and is an act of searching excuses and explanation. It is natural for the parties who have copied trade mark to try and explain its conduct and to look out for means to explain derivation of words so adopted if trade mark having element of prior continuance and use has been copied, no amount of explanation even if it is plausible is capable of defending infringement of copyright of such prior user."

10.3. Even in case of sophisticated user of the Internet, a confusion would be very much prevalent which would also include cases of overlapping fields of activities. The said concept would be applicable to the case of passing off as well. It is apposite to refer to the following passage in *Yahoo! Inc. v. Akash Arora and another* (1999)(19) PTC 201(Del.).

"10. Therefore, it is obvious that where the parties are engaged in common or overlapping fields of activity, the competition would take place. If the two contesting parties are involved in the same line or similar line of business, there is grave and immense possibility for confusion and deception and, therefore, there is probability of sufferance of damage...."

".... even if an individual is a sophisticated user of the Internet, he may be an unsophisticated consumer of information and such a person may find his/her way to the defendant Internet site which provides almost similar type of information

as that of the plaintiff and thereby confusion could be created in the mind of the said person who intends to visit the Internet site of the plaintiff, but, in fact reaches the Internet site of the defendant. "

10.4. Similar views also taken in *Crayons Advertising Ltd. v. Crayon Advertising* (2014 (57) PTC 446), which reads thus:

"27. Hence, merely because the parties are in different fields cannot mean or imply that there can be no case of passing off. Even on facts it is noteworthy that both the parties are in the field of advertising. The domain name of the defendant as adopted closely resembles the said domain name of the plaintiff and there is real likelihood of confusion or deception of the public and consequent damage to the plaintiff. "

11. Passing Off:-

The concept of "passing off" has already been dealt with by this Court in A. Nos. 1554 and 1555 of 2016 and O.A. Nos. 1145 and 1146 of 2015 in C.S. No. 854 of 2015 dated 30.06.2016, wherein it has been held as follows.

"8.1. Passing off is a concept in the domain of common law remedy. It offers protection to a party, when the other makes an attempt to pass off his goods through a misrepresentation, as that of the former. What is required in a passing off is the existence of a goodwill, damage or injury to it and through representation. This fundamental principles called as classical trinity has been enunciated in *Jif Lemon's* case (1991 All England Reporter 873), which deduced the larger requirement enunciated in the *Advocate's* case (*Erven Warnink v. Townend & Sons Ltd.*, ((1979) 2 ALL E.R. 927) (See *S. Syed Mohideen v. P. Sulochana Bai* ((2016) 2 Supreme Court Cases 683).

8.2. A party, who comes to the Court, has to establish the three basic requirements as mentioned above, while seeking an order of protection. An actual injury is not a sine qua non and thus, likelihood of damage would suffice. A misrepresentation by the defendant to the public may or may not be intentional. What is sufficient is that an action qua a defendant, which leads or likely to lead a prospective customer to believe that the goods or services offered by it are that of the plaintiff. Such a deception can either be proved on evidence and if not by the decree of probability, of course, to the satisfaction of the Court.

12. Scope of section 29:-

12.1. Before proceeding to consider this provision, let us reproduce the same for better appreciation.

"29. Infringement of registered trade marks.- (1) A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which is identical with, or deceptively similar to, the trade mark in relation to goods or services in respect of which the trade mark is registered and in such manner as to render

the use of the mark likely to be taken as being used as a trade mark.

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

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

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

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

(3) In any case falling under clause (c) of sub-section (2), the court shall presume that it is likely to cause confusion on the part of the public.

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

(a) is identical with or similar to the registered trade mark; and

(b) is used in relation to goods or services which are not similar to those for which the trade mark is registered; and

(c) the registered trade mark has a reputation in India and the use of the mark without due cause takes unfair advantage of or is detrimental to, the distinctive character or repute of the registered trade mark."

12.2. Section 29 of the Act deals with infringement by two sets of entities. Section 29(1) of the Act deals with a case of infringement through a mark, which is identical with, or deceptively similar to, the trade mark in relation to goods or services in respect of which the trade mark is registered. Resultantly, such a mark of the infringer would in all manner likely to be taken as that of a registered one. Thus, Section 29(1) of the Act speaks about the mark being identical or deceptively similar in the same goods or services qua a registered mark. There is no difficulty for a Court to decide an infringement under Section 29(1) of the Act. It has to be seen as to whether the infringing mark is identical or deceptively similar to the registered trade mark in relation to the goods or services. Section 29(1) places on part the word "identical with deceptive similarity". Hence a distinction has to be made between a mere "similarity" and a deceptive one.

12.3. The Courts are faced with more number of cases applicable to Section 29(2) of the Act onwards. Section 29(2) of the Act gives importance to two words. They are, "identity" and "similarity". Though they have to be seen in the

context of the provision by giving a natural and a reasonable interpretation, the word "identity" is placed at a higher pedestal than similarity. It becomes closer to the infringing mark than similarity. It denotes a mark goods or service of a same kind in appearance, character or quantity, without being identical. It is more to do with resemblance of one trade mark to another. However, both cannot be the same and hence, there would be certain independent factors attached to each of them. Thus, there involves some degree of difference between the mark, goods, services of a infringer as against the registered holder.

12.4. Section 29(2)(a) of the Act deals with "identity" with the registered trade mark and "similarity" with the goods or services.

Thus, the word "identity" is attributable to the registered trade mark as against the case of goods or services covered by such registered trade mark. Therefore, a difference is shown between "identity" and the "similarity". Section 29(2)(b) of the Act speaks about similarity to the registered trade mark and identity or similarity of the goods and services. Here, similarity is used with respect to the registered trade mark, whereas both identity and similarity are used with respect to the goods or services. Coming to Section 29(2)(c) of the Act, it deals with identity of the registered trade mark and identity of the goods and services.

12.5. In all these cases mentioned supra, infringement would occur when such acts are likely to cause confusion on the part of the public or which is an act associated with the registered trade marks. Therefore, the basis is likelihood of causing confusion from the point of view of the public in general. Hence, no actual confusion is necessary and it is relatable to an end user. Similarly, with reference to the association with the registered mark also what is sufficient is the likelihood. Therefore, if one reads all the provisions together, then intention of the legislature is very clear that is to protect the registered mark holder even in case of latter as what is sufficient is only likelihood. Coming to sub section 3 of Section 29(2) of the Act, it creates a statutory presumption in view of sub section 2(c) onwards a likelihood of causing confusion on the part of the public. Now this is because the word "identity" has been given more weight-age towards infringement as against "similarity". Therefore, once there is an identity between marks of a registered holder and the other, the statutory presumption would follow the suit.

12.6. Sub Section 4 of Section 29 of the Act mandates compliance of all the three sub clauses viz., a to c to constitute the infringement. Sub section 4 deals with a mark which is identical with or similar as the case of Section 29(1) of the Act, though the said provision deals with deceptive similarity. However, in this case, the other two conditions are also to be satisfied. However, Section 4 deals with goods or services, which are not similar to those, for which, the trade mark is registered. This is subject to the further condition that such a mark has got a reputation in India and the usage is without due care involving undue advantage apart from detrimental to the distinctive character or reputation of the registered trade mark.

Therefore, Section 29(4) of the Act can be pressed into service only when there exists a reputation of the mark holder in India. It does not stop with that, but proceeds to state that the usage of the mark is without "due cause" and by taking "undue advantage of" or "detrimental to the distinctive character or repute". Therefore, there has to be a proof of undue care followed by other facts, such as unfair advantage and being detrimental to the distinctive character or reputation as the case may be. To succeed under these provisions, a registered mark holder has to not only prove its reputation, but the distinctive character followed by undue advantage or detrimental activity without due cause. All these factors are required to be proved by the registered mark holder. This is for the reason that there is no similarity to the goods or services with the registered trade marks.

One can thus safely conclude that the primary intention is to protect a registered trade mark.

13. Conclusion:-

13.1. Having summed up the scope and ambit of Section 29 of the Act, let us go with the facts of the case. The applicant has registered itself as "Banana Brand Works Pvt. Ltd. Its registered trade mark is "BANANA". Its mark is well known as also its reputation. It has applied the words which is fanciful and arbitrary. There is an overlapping between the activities of the applicant and the members of the respondents. The applicant is the prior user.

13.2. With the above said facts, which are not in dispute, this Court is of the considered view that the applicant is entitled to succeed. It is not, as if, both the parties are engaged in totally different fields of activities for which a technical approach is not required. The respondents, having applied for registration, cannot take a contra stand. It did not make any search before adoption. The word "trade mark" of the applicant is fanciful and arbitrary having been applied to the services, which has got nothing to do with it's any business in "BANANA". A mere difference in classes alone would not prevent the applicant from getting the relief. The intention of the respondents is not bona fide. Having subsequently adopted a mark which can be identified with apart from similar to that of the registered one of the applicant, certainly, Section 29 of the Act would entitle the applicant in getting protection. If the mark of the respondents is not identified with that of the applicant, it can be similar. The services of the respondents can also be identified with and if not similar to that of the applicant. The applicant has taken a specific ground in the plaint in respect of applicability of Section 29 of the Act. In fact, it is a fulcrum of the applicant's case. A case of passing off is also made out as the "classical trinity" is available. For the reasons aforesaid, there is no necessity to show the actual damage or loss, when the basic facts are not in dispute. Certainly, the concept of initial interest would come in. It is possible apart from probable that any one who access the website of the respondents would get carried away after the initial interest confusion. There is no difficulty in the respondents carrying on its own activities, but it must not be

allowed to pouch and get into the goodwill and reputation of the applicant to en-cash through the initial interest. The explanation sought to be given by the respondents is thus a clear case of an after thought. It is not in dispute that from the year 2014 only the respondents are available in the field having its undistinctiveness with its own registered mark. Therefore, Section 29(4) also would get attracted, even assuming Section 29(2) and (3) are not available. The mere fact that action is yet to be initiated against some others cannot be a ground to decline the protection sought for. The decisions relied upon by the learned Senior Counsel appearing for the respondents are not applicable to the case on hand. They primarily dealt with the marks, which are in a realm of generic and descriptive.

In some cases, the operation of the business of the parties are totally different. The principle governing fanciful and arbitrary words has not been dealt with in those decisions. The applicant is well known in its own field by its registered name.

14. Considering the above, this Court is of the view that the applicant has made out a case for injunction for infringement and passing off qua against the respondents. Accordingly, the applications stand allowed.