

(2009) 08 CAL CK 0062
In the Calcutta High Court
Case No : A.P.O.T. No. 203 of 2009

Euro-Solo Energy Systems Limited	Vs	APPELLANT
Eveready Industries India Limited		RESPONDENT

Date of Decision : 19-08-2009

Acts Referred:

Trade Marks Act, 1999 — Section 2(z)(g)

Citation : (2009) 08 CAL CK 0062

Hon'ble Judges : Surinder Singh Nijjar, C.J.; Biswanath Somadder, J

Bench : Division Bench

Advocate : Anindya Kr. Mitra, Mr. S.N. Mukherjee, Mr. Ratnanko Banerjee, Mrs. Moushumi Bhattacharya, Mr. J. Aich and Mrs. Lopita Banerjee, for the Appellant; Pratap Chatterjee Mr. Ranjan Bachawat, Debnath Ghosh, Prithiraj Sinha and Mr. Goutam Banerjee, for the Respondent

Final Decision : Dismissed

Judgement

Surinder Singh Nijjar, C.J.—Euro Solo Energy Systems Limited have filed this Letters Patent Appeal challenging the order of the learned single Judge dated 22.5.2009 by which the learned single Judge has extended the earlier interim orders granted on May 4 and 6, 2009.

2. The appellant and the respondent are both manufacturers of dry-cell batteries. The appellant produces batteries under a trade name "Eurocell" whereas the respondent sells its product under the trade name "Eveready". Both the appellant and the respondent have the aforesaid two names as their registered trade marks.

3. The respondent, Eveready Industries Limited, have filed a civil suit on May 4, 2009 being C.S No. 124 of 2009 alleging, inter alia, that the appellant is infringing the respondent's "trade dress" and/or trade mark. In connection with the aforesaid suit, the respondent also filed an interlocutory application. By order dated May 4, 2009 an ex parte ad interim order in terms of prayer "e" of the Notice of Motion was granted. By the aforesaid order the appellant has been

restrained from selling dry cells, batteries and allied products in any label and/or packaging, bearing the respondent's "trade dresses" or any of them as shown in annexures "B", "B1", "F" and "I". The appellant came to know of the aforesaid order on May 6, 2009, although it was served on 8th May, 2009. A further order dated 6th May, 2009 was served on the appellant on 11th May, 2009. By order dated 6th May, 2009, the ad interim injunction was extended to annexures "G" and "H". By order dated 4th May, 2009, the matter was made returnable on 14th May, 2009, and the interim order was to continue till 18th May, 2009. When the matter came up for hearing on 22nd May, 2009, a prayer was made by the respondent (plaintiff) for extension of the interim order and directions for filing affidavits. Learned counsel for the appellant prayed for vacating of the interim order.

4. After hearing lengthy arguments and taking into consideration the entire matter, necessary directions have been given for filing affidavits. The matter has been directed to appear in the List of August, 2009. This appeal has been filed by the appellant on the ground that it is extremely urgent as the interim injunction order needs to be vacated. The sale of the appellant's batteries has been totally stopped and its factory is facing closure. The jobs of 600 workers are in peril.

5. We have heard the learned counsel for the parties at length. Mr. Anindya Mitra and S. N. Mukherjee, learned senior counsel for the appellant, have submitted that the suit filed by the respondent is mala fide, vexatious and harassing. It has been filed with ulterior purpose to harm the appellant. As a consequence of the interim order the appellant is suffering undue hardship, prejudice and loss. The respondent had failed to make out a prima facie case in the petition for passing the orders dated May 4 and 6, 2009. The respondent has also failed to give any particulars with regard to any infringement of its trade mark or passing-off. The respondent is seeking a monopoly on the colour red. The registration of the petitioner is in the words "Eveready", "Give me Red" and "Eveready 100". It is not registered in the colour combination red and silver and blue and silver. As there is no registration of colour combination, the right to exclusive user of the said colours cannot be availed by the petitioner.

6. Learned senior counsel for the appellant further submit that a manufacturer cannot be held responsible for any acts of the shopkeeper/distributor as the manufacturer in this case is not involved in direct sales to the retail customer. Manufacturer cannot be held responsible for any fraud committed by the shopkeeper upon its customers. The sales are affected through distributors and a network of shopkeeper. According to the learned counsel, the findings of the learned single Judge are contrary to the well-settled law. In support of their submissions, learned counsel rely on a judgment of the House of Lords in the case of *Payton & Co. Ltd. v. Snelling, Lampard & Co. Ltd.*, (1901) AC 308. It is further submitted that the learned single Judge has erred in law in granting injunction on an apprehension of passing-off. The learned single Judge also erred in forming a prima facie opinion that the use of the word "Eurocell" in a straight

line and in bold letters is likely to cause confusion among the unwary purchasers. The test of innocent and unwary purchaser has been held to be invalid since Payton's case (supra). The learned single Judge also erred in holding that the silver band on the two ends of the product is also deceptive and likely to confuse a purchaser. According to the learned counsel, an unwary person would not notice any of the factors pointed out by the trial Court. In case a purchaser notices any of the similarities pointed out by the learned single Judge, he or she would have to be a very alert person. In such circumstances, the approach of the learned single Judge is wrong and inconsistent. It is submitted that almost all branded batteries in the market employ similar "get-up" and "trade dress". The learned counsel have referred to the packaging and the batteries sold by manufacturers viz., "Shakti", "Geep", "Nippo", "Maxwell", "Panasonic", "Powercell" and "Novino". According to the learned counsel the primary colours used in the 'get-up' of such batteries are red, blue, black and gold along with combination of silver. The respondent itself has, apart from red and blue colours, which are subject matter of the suit, black and gold colour combinations for the dry cell "AA" batteries. In other words, these are common colours for pencil batteries. According to the learned counsel, the learned single Judge has erred in law in granting an injunction only on an apprehension of passing-off. In support of the submission, the learned counsel relied on the following commentaries and judgments:

- i) Kerly's Law of Trade Marks and Trade Names (13th Edn.)
- ii) The Common Law Library by Clerk and Lindsell on Torts (19th Edn.).
- iii) Fisons Limited v. E.J.Godwin (Peat Industries) Ltd. [1976 RPC 653].
- iv) Kellogg Co. v. Pravin Kumar Bhadabhai [1996 PTC (16)] and
- v) Imperial Group PLC v. Philip Morris Ltd. [(1984) RPC 293]

7. Relying on the aforesaid commentaries and judgments, the learned counsel submitted that similarity in "get-up" will seldom, give a cause of action for passing-off, when trade names are given with a reasonable prominence on the goods as in this case. The learned counsel submitted that the customers in normal course would ask for the batteries by name and not by the colour scheme. Since the name of the batteries of the respondent is prominently displayed, there is hardly any likelihood of any confusion. In any event, the respondent has not made any statement in the petition, true to knowledge, that there is likelihood of confusion or actual confusion. Statements in the petition have been affirmed as received from records which are believed to be true. The learned counsel further submitted that it is not understandable as to how there can be any record of the sales of the appellant in the records of the respondent. Summing up his submissions, the learned counsel have submitted i) both the products are sold by brand name; ii) there is no instance of any actual deception or passing-off; iii) there is no likelihood of deception. In any even ad interim order ought not to be passed unless some actual incident is cited; iv) it is not the

respondent's case that Eurocell has affected the turn over or sales of Eveready. In fact, the sales figures indicate a steady increase in the market of Eveready; v) balance of convenience is apparently in favour of the appellant as it had suffered huge losses by the grant of interim injunction. At the time of the grant of injunction, the appellant had stocks ready for sale worth Rs.4 crores. The entire stock will be rendered useless unless the interim order is vacated; vi) the respondent had failed to make out a prima facie case; vii) the petition on which the injunction is granted has been verified on the basis of information contained in the record. Deception cannot be seen from the records; viii) in order to succeed the respondent had to satisfy the test as laid down in the case of Imperial Group PLC (supra). The verification of the affidavit being defective, the same cannot be relied on. The learned counsel further relied on the judgments of the Supreme Court in the cases of A.K.K. Nambiar Vs. Union of India (UOI) and Another, and Virendra Kumar Saklecha Vs. Jagjiwan and Others, in support of his submission. On the basis of the above, the learned counsel have submitted that the injunction granted by the learned single Judge deserves to be vacated.

8. On the other hand, Mr. Pratap Chatterjee, learned counsel for the respondent, submitted that the order passed by the learned single Judge is purely discretionary in nature. The Appellate Court ought not to interfere with same unless it is an open and shut case in favour of the appellant. In the facts and circumstances of this case, the appellant cannot possibly argue that there is no case to be tried. The learned single Judge has merely given directions for affidavits. The appellant has still not filed the affidavits. The learned counsel further submits that in cases of this kind, normal practice is to grant a prompt ex parte injunction. The learned single Judge upon consideration of the entire matter has come to the conclusion that the respondent has made out a prima facie case of passing-off. Therefore, the appellate court would only interfere in case it is concluded that the grant of injunction has resulted in failure of justice. In support of this submission, learned counsel relied on the case of Laxmikant V. Patel Vs. Chetanbhat Shah and Another, . It is reiterated by the learned counsel that injunction in these matters is the rule. The learned counsel further submitted that the judgment in Imperial Group PLC (supra) does not lay down what has been argued by the counsel for the appellant. The aforesaid judgment was considered by the Supreme Court in the case of Cadila Health Care Ltd. Vs. Cadila Pharmaceuticals Ltd., . It was held that the principles applicable in England would not always be applicable in India. The Supreme Court had made a reference to the tests laid down in the case of M/S S. M. Dyechem Ltd. Vs. M/S Cadbury (India) Ltd.,] and distinguished the same. The Supreme Court has clearly laid down that what is to be seen in the case of passing-off action is the similarity between competing marks and to determine whether there is likelihood of deception or causing confusion. At the interim stage, there is no necessity for a critical examination of the "get-up" and the "trade dress" to discover any dissimilarities. The Court has to examine the two products for broad similarities. The learned counsel further submitted that the tests as laid down by the House

of Lords in the case of Payton & Co. Ltd. (supra) do not reflect the law in India. The similarity between two competing marks has to be considered as a whole. The word "similar" is not to be equated with identical. It is sufficient if the customer is left wondering as to which product is to be purchased. The learned counsel thereafter submitted that the use of the red colour by the appellant is dishonest. Earlier the appellant was using pre-dominantly black colour which has now been changed to red and silver. This, according to the learned counsel, is only to take advantage of the "trade dress" and "get-up" of the appellant. With regard to the defective verification, the learned counsel submits that the same is curable. In support of his submission, the learned counsel relied on the judgments in the cases of State (Delhi Administration) Vs. Sanjay Gandhi, and Vidyawati Gupta and Others Vs. Bhakti Hari Nayak and Others, .

9. In reply, Mr. Mukherjee has submitted that the judgment in the case of Cadila Health Care (supra) is distinguishable and as it related to a medical product, where a more stringent test is applied. Further, it related to a trade mark and not a "trade dress". It was a case of phonetic similarity. In the present case, the mark of the appellant is registered which was absent in that case. In fact, in that case, no injunction was granted either by the Trial Court or by the High Court. Supreme Court in appeal also did not interfere. The judgment in the case of Laxmikant V. Patel (supra) also relates to a trade name. In that case a strong prima facie case had been made out by the plaintiff. Finally, it is submitted that the learned single Judge erred in law in being influenced by the old website of the appellant as it was no longer in use.

10. We have considered the submissions made by the learned counsel for the parties. Although very lengthy submissions have been made, we are of the opinion that it would be wholly inappropriate for this Court to express any firm opinion on the merits of the case put forward by the parties. The matter is still to be decided by the trial Court upon affidavits being completed. We may, however, briefly notice that the learned single Judge has prima facie come to a conclusion that on a casual inspection by an unwary purchaser of average intelligence and imperfect recollection, the packaging and the batteries of the respondent is likely to cause confusion. The learned single Judge has also observed that the word "Eurocell" used by the respondent is very much in the same way as "Eveready" is used. Both are in a straight line and in bold letters. The silver band on the two ends of the product is also deceptive and likely to confuse the purchaser. In our opinion, this test applied by the learned single Judge is in accordance with the law laid down by the Supreme Court in the case of Cadila Health Care (supra).

11. In paragraph 17 of the judgment, the Supreme Court noticed the test laid down in the case of S. M. Dyechem (supra). Thereafter, it is held as follows:

18. We are unable to agree with the aforesaid observations in Dyechem case. As far as this Court is concerned, the decisions in the last four decades have clearly laid down that what has to be seen in the case of a passing-off action is the similarity between the competing marks and to determine whether there is

likelihood of deception or causing confusion.

12. In paragraph 20, the Supreme Court makes a distinction between the purchaser in India and a purchaser in England in the following words:

"20. Lastly, in Dyechem case it was observed in para 54 as under: (SCC p. 600)

"54. As to scope of a buyer being deceived, in a passing-off action, the following principles have to be borne in mind. Lord Romer, L.J. has said in *Payton & Co. v. Snelling, Lampard & Co.* that it is a misconception to refer to the confusion that can be created upon an ignorant customer. The kind of customer that the Courts ought to think of in these cases is the customer who knows the distinguishing characteristics of the plaintiffs goods, those characteristics which distinguish his goods from other goods in the market so far as relates to general characteristics. If he does not know that, he is not a customer whose views can properly be regarded" by the Court. (See the cases quoted in *National Sewing Thread & Co. Ltd. v. James Chadwick & Bros. Ltd.* which was a passing-off action). In *Schweppes* case Lord Halsbury said if a person is so careless that he does not look and does not treat the label fairly but takes the bottle without sufficient consideration and without reading what is written very plainly indeed up the face of the label, you cannot say he is deceived."

These observations appear to us to be contrary to the decision of this Court in *Amritdhara* case where it was observed that the products will be purchased by though villagers and townsfolk, literate as well as illiterate and the question has to be approached from the point of view of a man of average intelligence and imperfect recollection. A trade may relate to goods largely sold to illiterate or badly educated persons. The purchaser in India cannot be equated with a purchaser of goods in England. While we agree that in trade mark matters, it is necessary to go into the question of comparable strength, the decision on merits in *Dyechem* case does not, in our opinion, lay down correct law and we hold accordingly.

13. In view of the aforesaid clear observations of the Supreme Court, we are prima facie of the opinion that the judgment cited by the learned counsel for the appellant in the cases of *Payton & Co. Ltd.* (supra) and *Imperial Group PLC* (supra) have no relevance. In India, where an overwhelming majority of population is illiterate and rustic, the test of a reasonably informed English customer would hardly be applicable. The judgment of the Division Bench in the case of *Kellogg Company* (supra) has clearly held as follows:

10. The law relating to "trade dress" is very clear. Kerly in 'Law of Trade Marks'(12th Ed, 1986, para 16.67) says that it is usually true in some degree that a trader's goods are recognized by their general appearance, or "get-up". Accordingly, resemblance or "get-up" is not uncommonly an ingredient in passing-off, and it is possible for imitation of get-up alone to amount to passing-off. "Such cases are rare, since few traders rely on get-up alone to distinguish their goods, so that trade names and word trade marks are ordinarily present

too;" and the author says :

and in these days, in this country, a difference in names is enough to warn the public that they are getting one trader's goods and not the others. "(Sapers v. Specters (1953) 70 RPC 173)"

11. In *Fisons Ltd. v. E.J. Goddwin* 1976 RPC 653, the plaintiffs bag displayed the words "Fison's Gro-Bag" while the defendant's bag contained the words "Godwins Crop-Bag; and it was held that the prominence given to the name overshadowed the other similarities in get-up. The plastic bags were peculiar. The plaintiffs were manufacturers of the plastic bag filled with a peat-based compost from which plastic rectangles could be removed thereby exposing the compost beneath the plastic. Seedlings could then be planted in the compost so that the bag could function as containing growing element. The bag was partly over printed with horticultural decoration and instructions and marked "Fisons-Gro? bag". They were in market for 2 years. The defendants were peat merchants and got plastic bags produced with "identical size" and which bore over-printed instructions and decoration somewhat similar to those of the plaintiff's bag. While refusing injunction, Brightman J. observed that even accepting that the plaintiffs had a get-up reputation in their growing bags and though there were obvious similarities between the bags in issue, it was inconceivable that any one seeing the defendant's grow bag could fail to observe that it was a product of the defendants "and that a normal purchaser could not be misled. He further said that "if the Fisons gro?bag had not contained the name "Fisons" or if the name "Godwins" had not been so prominently displayed, by the defendants, he might have reached a different conclusion. He doubted whether they could have done more to signify to a buyer that he was watching at a product of Godwins and not at a product of fisons".

In that case the Division Bench has clearly held as follows:

"24. Having dealt with the contention of imperfect memory of the customer, we shall now deal with the class of purchasers, which is also an important factor. Who are the persons who go to purchase `Kelloggs" Corn flakes? Prima facie, in our upper middle class and above who are fairly educated in English and are able to distinguish "Kelloggs" and what is not "Kelloggs". In American Jurisprudence (2d) (Trade Marks) (Supp) para 19 (page 178) it is said that it is necessary to note the fact:

that customers for fasteners are sophisticated and discerning, that defendant acted with good faith.

25. The case was one where customers were purchasers of fasteners in the automobile industry. (*Standard Pressed Steel Co. v. Midwest Chrome Process Co.* LDC III (US PU 106").) Again Kerly, *Law of Trademarks* (12th ed. 1980) (para 1706) says that:

If the goods are expensive and not of a kind usually selected without

deliberation, and the customers generally educated persons, these are all matters to be considered (Pianolist (1906) 23 RPC 774 : Claudins Ash v. Invica (1911) 28 RPC 597; 29 RPC 465 (CA)(HL) (dentists), Rysta (1943) 60 RPC 87).

26. In Pianolist's case (1906) (23) RPC 774 an "application was made for the registration as a trade mark of the word "Neola" for "piano player, being a musical instrument included in class 9". Coming to know of this application, the registered proprietors of the trade mark "Pianole" who were registered for all goods in class 9, opposed the above application for registration. The Registrar overruled the objection and ordered registration. On appeal, Justice Parker said that having regard to the kind of customers" for such goods and the distinction in the names, there was not likely to be any confusion and dismissed the appeal.

27. If that was so between "Neole" and "Pianole ; the case of Kellog's and AIMS, in our prima facie view, presents no difficulty for distinct identification. Parker, J. in fact observed in the above case:

Of course, one knows that the persons who buy these articles are generally persons of some education, my opinion is, having regard to the nature of the customer, the article in question and the price at which it is likely to be sold, and all the surrounding circumstances, no man of ordinary intelligence is likely to be deceived.....

14. In our opinion, these observations would be applicable only in cases where goods are purchased by sophisticated educated people who are able to discern the difference between one product and another by the trade name. These would not be applicable in cases when goods are sold to a mixture of urban and literate as well as rural, illiterate and unwary customers.

15. The law with regard to concept of passing-off has been re-stated by the Supreme Court in the case of Laxmikant V. Patel (supra) in the following words:

"11.Salmond & Houston in Law of Torts (20th Edn., at p. 395) call this form of injury as "injurious falsehood" and observe the same having been "awkwardly termed" as "passing-off" and state:

"The legal and economic basis of this tort is to provide protection for the right of property which exists not in a particular name, mark or style but in an established business, commercial or professional reputation or goodwill. So to sell merchandise or carry on business under such a name, mark, description, or otherwise in such a manner as to mislead the public into believing that the merchandise or business is that of another person is a wrong actionable at the suit of that other person. This form of injury is commonly, though awkwardly, termed that of passing-off one's goods or business as the goods or business of another and is the most important example of the wrong of injurious falsehood. The gist of the conception of passing-off is that the goods are in effect telling a falsehood about themselves, are saying something about themselves which is calculated to mislead. The law on this matter is designed to protect traders

against that form of unfair competition which consists in acquiring for oneself, by means of false or misleading devices, the benefit of the reputation already achieved by rival traders.

12. In *Oertli v. Bowman* (at p. 397) the gist of passing-off action was defined by stating that it was essential to the success of any claim to passing-off based on the use of given mark or get-up that the plaintiff should be able to show that the disputed mark or get-up has become by user in the country distinctive of the plaintiff's goods so that the use in relation to any goods of the kind dealt in by the plaintiff of that mark or get-up will be understood by the trade and the public in that country as meaning that the goods are the plaintiff's goods. It is in the nature of acquisition of a quasi proprietary right to the exclusive use of the mark or get-up in relation to goods of that kind because of the plaintiff having used or made it known that the mark or get-up has relation to his goods. Such right is invaded by anyone using the same or some deceptively similar mark, get-up or name in relation to goods not of plaintiff. The three elements of passing-off action are the reputation of goods, possibility of deception and likelihood of damages to the plaintiff. In our opinion, the same principle, which applies to trade mark, is applicable to trade name.

13. In an action or Passing-off it is usual, rather essential, to seek an injunction, temporary or ad interim. The principles for the grant of such injunction are the same as in the case of any other action against injury complained of. The plaintiff must prove a prima facie case, availability of balance of convenience in his favour and his suffering an irreparable injury in the absence of grant of injunction. According to Kerly (ibid, para 16.16) passing-off cases are often cases of deliberate and intentional misrepresentation, but it is well settled that fraud is not a necessary element of the right of action, and the absence of an intention to deceive is not a defence, though proof of fraudulent intention may materially assist a plaintiff in establishing probability of deception. Christopher Wadlow in *Law of Passing-Off* (1995 Edn., at p. 3.06) states that the plaintiff does not have to prove actual damage in order to succeed in an action for passing-off. Likelihood of damage is sufficient. The same learned author states that the defendant's state of mind is wholly irrelevant to the existence of the cause of action for passing-off (ibid, paras 4.20 and 7.15). As to how the injunction granted by the Court would shape depends on the facts and circumstances of each case. Where a defendant has imitated or adopted the Plaintiffs distinctive trade mark or business name, the order may be an absolute injunction that he would not use or carry on business under that name (Kerly, ibid, para 16.97)."

16. At this stage it would be necessary to see as to whether the respondent had made necessary averments in the pleadings to fall within the aforesaid definition of passing-off. We may reproduce here some of the averments made in the petition:

"5. The petitioner's batteries, flash lights and other products are well-known and very popular amongst the general public. Even in the deepest nook and corner of

remote villages the batteries and flash lights of the petitioner are sold. It took many years for the company to establish such relationship with their valued consumers.

8. With passage of time, the said red colour came to be identified with the product of the petitioner in relation to dry cells and developed a distinctiveness in favour of the petitioner. The same has become impressed upon mind of several generations of customers and were associated with the petitioner alone. There was no other, manufacturer of batteries marketing and selling such products bearing such a "get-up" and/or colour scheme at the time of adoption of the same by the petitioner.

9. Not only on batteries, the petitioner also applied the said colour red on the flashlights produced by it and also on most of its other products. Due to such long, continuous and extensive use of the colour red on its batteries, flashlights and many of its other products the said colour red has acquired a distinctiveness in favour of the petitioner.

12. The said red and silver "trade dress" as used by the petitioner on its products packaging and other materials constitute the distinctive "trade dress" of the petitioner. Such "trade dress" as a whole is the leading and distinctive feature of the business and the products of the Petitioner and the said "trade dress" has come to be exclusively associated with the Petitioner I respect of its business and products.

22. In the circumstances, in addition to its famous trademark "EVEREADY" the said colour scheme and/or "trade dress" of the Petitioner has attained the status of well-known trademark as defined in section 2(z)(g) of the Trademarks Act, 1999 and are exclusively associated with the Petitioner and none else. The Petitioner is also the owner of copyright subsisting in the said "trade dress".

17. The extract of pleadings reproduced above would indicate that the respondent has made the necessary averments that the batteries are sold to all segments of the Indian population in towns and villages even in the remotest corners of the country. The respondent has also claimed that the colour combination and the "get-up" of the appellant for its batteries is deceptively similar to the colour scheme and "get-up" used by the respondents for packaging of its batteries and other products. As to whether the respondents are able to prove the case pleaded, would have seen at a subsequent stage, when the parties have exchanged the necessary pleadings. At the ad interim stage, the court has to form a prima facie opinion on the uncontroverted pleadings of the plaintiff. Therefore, the prima facie view expressed by the learned single Judge on the basis aforesaid cannot be said to be unjustified.

18. We are also unable to accept the submission of the learned counsel for the appellant that any irreparable loss would be caused to the appellant. Prima facie it appears that the appellant has changed the "trade dress" and the "get-up" since 2007. The present "get-up" and "trade dress" is deceptively similar to the

"get-up" and "trade dress" of the respondent. We also do not find any merit in the submission of the learned counsel that the respondent is seeking monopoly on the use of colour red. The grievance of the respondent is with regard to the "trade dress" and "get-up" of the batteries of the appellant, which according to the respondent is likely to confuse unwary purchasers.

19. Even otherwise, we are of the opinion that at this stage the Appellate Court would not be justified in vacating the interim injunction. In our opinion the view taken by the learned single Judge is just and reasonable. It is a settled proposition of law that the Appellate Court would not interfere with the prima facie view taken by the Trial Court merely because the Appellate Court on the same material would reach a different conclusion. The Appellate Court is not permitted to re-assess the material and seek to reach a conclusion different from the one reached by the Court below, if the discretion has been expressed by the trial Court reasonably and in a judicial manner. The fact that the Appellate Court would have taken a different view may not justify interference with trial Court's exercise of discretion.

20. We find support for this view of ours from the judgments of the Supreme Court in the cases of *Wander Ltd. and Another Vs. Antox India P. Ltd., and N.R. Dongre and Others Vs. Whirlpool Corpn. and Another*, In our opinion, the submissions made by the learned counsel for the appellant based on decisions of the English Courts would not be relevant in the context of Indian customers, who may be urbanite, literate and discerning or illiterate and rustic villagers. For this view of ours, we seek support from the observations of the Supreme Court in the case of *Cadila Health Care (supra)* which are as follows:

33. The decisions of English Courts would be relevant in a country where literacy is high and the marks used are in the language which the purchaser can understand. While, -English cases may be relevant in understanding the essential features of trade mark law but when we are dealing with the sale of consumer items in India, you have to see and bear in mind the difference in situation between England and India. Can English principles apply in their entirety in India with no regard to Indian conditions? We think not. In a country like India where there is no single common language, a large percentage of population is illiterate and a small fraction of people know English, then to apply the principles of English law regarding dissimilarity of the marks or the customer knowing about the distinguishing characteristics of the plaintiffs goods seems to overlook the ground realities in India. While examining such cases in India, what has to be kept in mind is the purchaser of such goods in India who may have absolutely no knowledge of English language or of the language in which the trade mark is written and to whom different words with slight difference in spellings may sound phonetically the same. While dealing with cases relating to passing off, one of the important tests which has to be applied in each case is whether the misrepresentation made by the defendant is of such a nature as is likely to cause an ordinary consumer to confuse one product for another due to similarity of

marks and other surrounding factors. What is likely to cause confusion would vary from case to case.

21. In this view of the matter, the submissions of the learned counsel that since the name of the batteries is displayed in very bold letters, there would be no confusion, cannot be accepted.

22. Therefore, after taking into consideration the entire facts and circumstances of the case, we are of the opinion that the interim order passed by the learned single Judge does not call for any interference.

The appeal is hereby dismissed.

Biswanath Somadder, J.

23. I agree.