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**(2016) 02 DEL CK 0320**

**In the Delhi High Court**

**Case No : FAO (OS) 572/2015 & CM 23119/2015**

Mona Aggarwal and Others

APPELLANT

Vs

Glossy Colour and Paints Pvt. Ltd. and Others

RESPONDENT

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**Date of Decision : 02-02-2016**

**Acts Referred:**

**Citation : (2016) 65 PTC 447 : (2016) 5 RAJ 502**

**Hon'ble Judges : Badar Durrez Ahmed and Sanjeev Sachdeva, JJ.**

**Bench : Division Bench**

**Advocate : Neeraj Grover, Mahir Malhotra and Shankar Sharma, Advocates, for the Appellant; Sagar Chandra, Ishani Chandr, Surabhi Iyer and A. Rastogi, Advocates, for the Respondent**

**Final Decision : Disposed off**

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## **Judgement**

Sanjeev Sachdeva, J.—1. This appeal pertains to a dispute between two rival trademarks:- "1001" versus "6004".

2. The respondent (plaintiff in the suit) claiming to be the registered proprietor of the Mark "1001" filed suit for infringement and passing off against the appellant for using the Mark "6004". The respective marks are used by both the appellant and the respondent on similar goods like paint, distemper, varnish, etc. The rival marks/labels in respect of which the suit was filed are as under: -

3. The respondent claims to have adopted the Trademark "1001" in the year 1946 whereas the appellant has adopted the Mark "6004" since the year 2011.

4. The learned Single Judge by the impugned order has restrained the appellant from using the impugned label and Mark "6004". The learned Single Judge on comparison of the colour scheme, get-up, lay- out and arrangement of features used by the appellant, has come to a prima facie conclusion that the adoption of the impugned label by the appellant was dishonest and the impugned label is deceptively similar to the label of the appellant and was likely to confuse the illiterate and semi-literate purchasers of the goods.

5. Applying the test of a man of average intelligence with imperfect recollection, the learned Single Judge has prima found that the impugned mark of the appellant is likely to deceive and confuse the honest purchaser of average intelligence. The learned Single Judge has prima facie found that the numeral 6004 having the "Eye Device" and distinctive colour combination is similar to the respondent's product having the mark/number "1001" and "Eye Device" with almost similar colour combination, get up and layout.

6. The learned counsel contended that the appellant had not dishonestly adopted the mark and that the respondents' claim was disputed but without prejudice was agreeable to changing the same to avoid protracted litigation. The learned counsel for the appellant, at the outset, contended that since the appellant had recently adopted the mark, the appellant was agreeable to change the layout, colour scheme, get-up of the label in such a manner as to make it completely distinct from the original label as adopted by the appellant so as to obviate any confusion or deception.

7. The appellant during the course of the submission proposed various changed labels and finally the label herein below was proposed by the appellant:-

8. The learned counsel for the respondent contended that though the label in its layout colour scheme, get-up was prima-facie different from the label of the respondent, however, it had objections and reservations to the use of the numeral "6004" in the label. It is contended that the numeral "6004" would still be deceptively similar to the registered trade mark "1001" and was likely to confuse.

9. Though there is no quarrel with the proposition that a trademark can be represented merely by a numeral, however, simply because one party had adopted a numeral as a trademark for its products, it cannot be said that no other party can adopt different numerals as part of a trademark for their similar goods. In such a situation what has to be seen, is whether the mark taken as a whole i.e. combination of numeral, colour scheme, get-up, layout are deceptively similar.

10. We have examined the label now proposed by the appellant and are prima face of the view that the said label as a combination of its colour scheme, get-up and layout and arrangement of features is prima facie distinct from the label as used by the respondent.

11. We are prima facie of the view that the label proposed by the appellant as shown hereinabove would not amount to passing off or infringement of the registered label or trademark of the respondent.

12. In so far as the impugned order restrains the appellant from using the impugned label is concerned, we are not interfering with the same. However, we modify the impugned order to the extent that the appellant may use the proposed label with its colour scheme, get-up, layout and arrangement of

features along with the numeral "6004".

13. The question whether the use of the numeral "6004" per se would still amount to an infringement is left open to be decided at trial. The respondent/plaintiff would be required to lead cogent evidence to establish that the use of the numeral "6004" per se is deceptive, confusing or misleading to the purchaser of average intelligence and imperfect collection.

14. The appeal is accordingly disposed of with a direction that the appellant may use the proposed label and shall not use the label impugned in the suit or any label or mark deceptively similar to the label/mark of the respondent. The appellant shall also keep accounts of all the sales made by the appellant and furnish half-yearly statements to the court in the form of affidavits of all the sales made by it in respect of the said goods bearing the above-referred label. The appeal is accordingly disposed of in the above terms, leaving the parties to bear their own costs.