
(2001) 06 AP CK 0053

In the Andhra Pradesh High Court

Case No : LPA No"s. 12 and 13 of 2001

Ushodaya Enterprises Limited

APPELLANT

Vs

T.V. Venugopal and another

RESPONDENT

Date of Decision : 15-06-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 1, 26
Copyright Act, 1957 — Section 13, 13(1), 14, 17, 2
Specific Relief Act, 1963 — Section 41(1)
Trade and Merchandise Marks Act, 1958 — Section 105, 106, 21, 27, 81

Citation : (2001) 4 ALD 723

Hon'ble Judges : Motilal B. Naik, J; Ghulam Mohammed, J

Bench : Division Bench

Advocate : M/s. N.A.K. Sharma, B. Nalinkumar, for the Appellant; Mr. K.N. Srinivasan and Mrs. Kalpana Ekbote, for the Respondent

Final Decision : Allowed

Judgement

Motilal B. Naik, J

1. These two letters Patent Appeals arise out of a common judgment in CCCA Nos.178 and 180 of 2000 dated 28-12-2000 rendered by a learned single Judge of this Court.
2. For the purpose of convenience, the parties are referred to as the plaintiff and the defendants.
3. Appellant in these two appeals is the plaintiff - M/s. Ushodaya Enterprises Limited, a Public Limited Company, represented by its Senior Law Officer G. V.S. Jagannadha Rao, instituted the suit in OS No.555 of 1999 u/s 26 and Order VII, Rule 1 CPC and Sections 55 and 62 of the Copyright Act and Sections 27, 105 and 106 of the Trade and Merchandise Marks Act, 1958, on the file of the II Additional Chief Judge, City civil Court, Hyderabad against the defendants 1 and 2 seeking the following reliefs, viz.,

"(a) a permanent injunction restraining the defendants, their servants, agents or anyone claiming through any of them from passing off their Agarbathis business as the business of the plaintiff by using the expression Eenadu or any other expression phonetically and/or visually similar or deceptively similar to the plaintiff's mark, and/or by applying artistic script Eenadu annexed to the plaintiff either as part of their Corporate name or using the name otherwise in the course of their business transaction viz., in their correspondence, letterheads, name boards, sign boards, advertisements in print and electronic media and in such other business/ trade literature in conducting their business, thereby pass off their business and service as the business and service of the plaintiff and/or enable others to pass off.

(b) for a direction to the defendants, their men. agents, representatives, servants or any one claiming through them to surrender all printed matter lying with them or in their custody, including wrappers, cartons, packing material, name boards, banners, business forms, letterheads, visiting cards and other articles of stationery containing or consisting the offending trademark Eenadu and copyright Eenadu together with all block, dies, rubber stamps, photo negatives and the like containing or consisting the offending Trademark Eenadu and Copyright Eenadu, "

4. The averments of the plaint, in brief, are traced hereunder:

The plaintiff is the publisher of the Telugu daily newspaper, Eenadu. Sri Ramoji Rao, Chief Editor of Eenadu is the Founder - Chairman of Eenadu-Margadarsi group of companies which have varied business interests of considerable magnitude in publications, foods, television broadcasting, chit funds, Hotels, Financial Services, Film production and distribution.

5. Plaintiff submitted that the newspaper Eenadu was started in the year 1974 after obtaining all statutory permissions and the first issue of the newspaper was published on 10th August, 1974 at Visakhapatnam. The Newspaper Eenadu was registered with the Registrar of Newspapers for India under Press and Registration of Books Act. The said newspaper is currently being published simultaneously from 12 centres, namely, Visakhapatnam, Hyderabad, Vijayawada, Tirupati, Anantapur, Karimnagar, Rajahmundry, Suryapet, Guntur, Nellore, Kunrool and Srikakulam. Eenadu has become a household name among the people of Andhra Pradesh and the Telugu-speaking public in other States and the rest of the world and is one of the largest circulated Telugu Daily newspapers.

6. It is further averred in the plaint that the plaintiff company also owns Eenadu Television, the most popular Satellite Television Channel in Telugu, which is being broadcast in 34 countries. The newspapers and television channel of the plaintiff use the name Eenadu written in a distinctive and novel artistic design, which is identified by one and all with the newspapers Eenadu and Sri Ramoji Rao, its Chief Editor. The distinctive name Eenadu chosen by Sri Ramoji Rao as early as in the year 1974 has earned enviable reputation, commercial goodwill and rapport

with the public of Andhra Pradesh and Telugu-speaking public of other States and those who are residing in other countries. Eenadu is the Trademark of the plaintiff whose artistic script was created in the year 1974 by one Mr, N. Swamy, during the course of his employment with the plaintiff for being used as the masthead of the newspaper Eenadu and satellite television channel Eenadu Television. The plaintiff company also owns the copyright in the distinctive and novel artistic script Eenadu.

7. Plaintiff claimed that the massive trusts and confidence reposed by the public in Eenadu - Margadarsi group and particularly in Eenadu newspaper and Eenadu Television is immeasurable. The plaintiff has built up such trust, goodwill and confidence of the public by their dedicated and qualitative services. Apart from publishing the daily newspaper Eenadu, the plaintiff also published informative books on education, medicine, literature, agriculture on a non-profit basis. Most of these books which were published under the trademark Eenadu using the distinctive and novel artistic script underwent several reprints.

8. Plaintiff alleged that the first defendant who is doing business under the name and style of Ashika Insence Inc. has been applying the plaintiff's trademark Eenadu fraudulently on the Agarbathis manufactured and sold by him. The first defendant has also been infringing the copyright of the plaintiff in respect of the artistic script Eenadu, which according to the plaintiff is deliberate, conscious and dishonest use of the plaintiff's established and popular trademark Eenadu obviously with a view to confuse and mislead the consumers and pass off the first defendant's goods as a product from the house of Eenadu-Margadarsi group and emanating from the same source as of Eenadu and Eenadu Television.

9. According to the plaintiff, a legal notice dated 27-2-1995 has been issued to the first defendant demanding to cease and desist from using the plaintiff's trademark Eenadu. The first defendant issued a reply notice dated 8-3-1985 asking for a copy of the Copyright Registration Certificate only, without disputing the material allegations contained in the plaintiffs notice dated 27-2-1995. The plaintiff has also published a caution notice in all the editions of Eenadu dated 23-7-1995. Thereafter, the defendant No.1 has given up the sale of agarbathis with the Trademark Eenadu of the plaintiff.

10. However, it is alleged by the plaintiff that the first defendant had resumed the illegal activity of the manufacture and sale of agarbathis with the trade mark Eenadu using the distinctive and artistic script of Eenadu. The Trademark Eenadu appearing on the carton is exactly the same as the Trademark Eenadu of the plaintiff and defendant has also infringed the copyright of the plaintiff in the artistic script. Plaintiff submits that a comparison of the artistic script Eenadu of the plaintiff and the first defendant clearly shows that they are same and the defendants have copied the artistic script in all respects and thus infringed the copyright of the plaintiff. Plaintiff contended that the first defendant in passing off his product as the product of the plaintiff by deceiving and causing confusion among the minds of the consumers.

11. According to the plaintiff, the investigations made by it revealed that the first defendant has obtained fraudulent registration of the Copyright in the artistic work Eenadu without any manner of right in the said artistic work i.e., the logo Eenadu scripted in Tetugu. The second defendant is said to be the artist of the said work. The first defendant declared that the artistic work was first published in September, 1993 knowing fully well that the plaintiff is the owner of the artistic work ever since 1974. The first defendant has also floated a company called Eenadu Agarbathi Company. Plaintiff alleged that the first defendant has obviously selected the name Eenadu for his company to exploit the goodwill created by the plaintiff for the name Eenadu. The second defendant is not the original author of the artistic work as the name Eenadu is its distinctive artistic script had been the name of the most successful and largest circulated newspaper published by the Plaintiff since 1974. The plaintiff submits that the claim of the first defendant that the Trademark in respect of his product has been registered, is false as is evident from the statement on the wrapper/package/ carton of the agarbathis, name, design, colour scheme and Trademark Registration No.APN 619177. Plaintiff submits that the number mentioned on the wrapper/package/ carton of the agarbathis is only a serial number of the Trademark application filed by the first defendant and as such it amounts to false representation punishable u/s 81 of the Trade and Merchandise Marks Act, 1958.

12. According to the plaintiff, the mark Eenadu has acquired distinctiveness by long, extensive and continuous use by the plaintiff and has acquired a secondary meaning to denote the goods and services of the plaintiff. The first defendant is describing his goods in such a manner that there is likelihood of confusion that the goods emanate from the plaintiff's house. Plaintiff alleged that the first defendant has adopted the name Eenadu for his Agarbathis business to appropriate the success, commercial goodwill, reputation and familiarity of the name Eenadu by confusing and misleading the public that his product i.e., Agarbathis is connected with the business of Ecnadu-Margadarsi group promoted and headed by Sri Ramoji Rao knowing fully well that the trademark Ecnadu and the Copyright in the artistic script of Eenadu exclusively belong to the plaintiff. The first defendant has also made wrongful gain by infringing the copyright of the plaintiff and by passing off his goods as the plaintiff's by the use of the plaintiff's trademark Eenadu with dishonest and fraudulent intention and has in fact pirated the mark of the plaintiff. Plaintiff asserted that the first defendant has no right to use the plaintiffs trademark Eenadu and to infringe their copyright in respect of the artistic script Eenadu, which are the exclusive properties of the plaintiff.

13. With these pleadings, the plaintiff instituted the suit seeking the reliefs as indicated above.

14. The first defendant filed his detailed written statement, inter alia, denying the plaint allegations, contending that there is absolutely no balance of convenience in favour of the plaintiff in seeking the suit reliefs. It is averred in the written

statement that the plaintiff has not been in the business of manufacture and/or sale of incense sticks either under the name Eenadu or under any other name at any point of time. The first defendant contended that the plaintiff has stood over silently well over a period of five years even after coming to know about the defendant's establishment and business in the manufacture and sale of incense sticks under the name Eenadu, and having been passive over the growth of the defendant's business and acquiescing the fact of the growth of the defendant's business from strength to strength, all of a sudden, filed the suit by suppressing the material information. It is submitted that the plaintiff has no grievance for the manufacture and sale of incense sticks under the name Eenadu by the defendant as the plaintiff is in the business of newspaper, food products and television broadcasting and has nothing to do with the manufacture and sale of incense sticks/agarbathis. Even in respect of food business, the plaintiff is using the name Priya as the trademark, particularly for pickles. It is averred in the written statement that the word Eenadu has a dictionary meaning in Telugu and Kannada to mean "This Time" and "This Land", respectively as such the plaintiff cannot claim any monopoly over such general descriptive names or words. It is nextly averred that the plaintiff has not registered any trade mark for the name Eenadu in any manner and particularly in Class-3 of the Schedule to the Trade and Merchandise Marks Rules, 1959 in which the incense sticks are included. According to the defendant, the copyright registration said to have been obtained by the plaintiff for the artistic work Eenadu is subsequent to and much later than the defendant had obtained the copyright registration. The defendant denied that Eenadu is the trademark of the plaintiff and that it owns the copyright for the artistic work Eenadu. While the defendant's own application for registration for the trademark Eenadu in Class-3 for incense sticks is pending and is in an advanced stage of registration, the plaintiff at no point of time has made even an application for registration of the trademark Eenadu let alone in class-3 but also in Class-16 where the newspapers are included. It is also denied that the defendant is fraudulently applying the trademark Eenadu on its agarbathis. It is submitted that the defendant has been doing the business for agarbathis under the name Eenadu for the last more than six years widely and openly and very much to the knowledge of the plaintiff and the plaintiff has acquiesced to the same and there can be no question of the defendant causing any confusion or misleading the consumers since the defendant is doing business only in agarbathis under the name Eenadu prominently displaying its name and address on the carton.

15. The defendant No.1 admitted having received the notice dated 27-2-1995 from the plaintiff, and also sending a reply notice on 8-3-1993 asking the plaintiff certain particulars including the copyright registration certificate since the plaintiff had claimed that it owned a copyright for Eenadu. However, according to the defendant, the plaintiff did not furnish the same and subsequently, the plaintiff seems to have woken up and taken steps to register a copy right for the artistic work Eenadu behind the back of the defendant. The defendant denied the

allegation of the plaintiff that he resumed the manufacture and sale of agarbattis under the name Eenadu. On the other hand, the defendant contended that the business of manufacture and sale of agarbattis continued without any break and the plaintiff having slept over all the years in acquiescence has now approached the Court at a very belated stage. It is also denied that the defendant has floated any company called Eenadu Agarbatti Company. The defendant is not doing any business under the said name or has any intention to start any business under the name. It is further averred in the written statement that whether the second defendant is the original author of the artistic work Eenadu is a matter for evidence and to be determined at the time of trial only and the plaintiff cannot claim any injunction on that ground on its mere statement. It is denied that the defendant has falsely represented that the trade mark Eenadu as registered. It is clearly mentioned on the carton itself that the number indicated is that trademark application number and nowhere the defendant has claimed that the trademark Eenadu has been registered as a trademark and the defendant is banking on its Common Law Rights for this purpose . It is averred that there is no question of the defendant infringing the copyright of the plaintiff when the defendant itself is a registered owner of the copyright having registered the copyright earlier to the registration claimed to be obtained by the plaintiff. There is no intention or necessity for the defendant to pirate the mark of the plaintiff, when the defendant itself has built up reputation as applicable to agarbathis manufactured and sold by it. It is further submitted that there are several distinct and distinguishing features and added matters on the cartons to separate the business of the defendant from that of the plaintiff and there can be absolutely no cause for any confusion. On the cartons of the defendant, predominantly, there appears a house mark of the defendant of two lighted incense sticks appearing in a circle. The defendant is invariably associating the word Ashika as a prefix to Eenadu and it is called Aashika's Eenadu. The defendant has also taken an objection [hat the Court has no jurisdiction to try the suit and prayed for dismissal of the suit filed by the plaintiff.

16. The second defendant filed a memo adopting the written statement filed by the first defendant.

17. On the basis of the above pleadings, the trial Court framed the following issues for trial, viz.,

(1) Whether the plaintiff company owns the copyright in the distinctive and novel artistic script " Eenadu" ?

(2) Whether the distinctive and novel artistic script Eenadu of the plaintiff company is the trade mark of the plaintiff?

(3) Whether the defendant is passing off their agarbathi (incense stick) business as the business of the plaintiff by using the expression Eenadu or any other expression phonetically and/or visually similar or deceptively similar to plaintiff's mark Eenadu and or applying the artistic script as depicted in para 3 of page 3 of

the plaint and as annexed to the plaint ?

(4) Whether this Court has got territorial jurisdiction to try this suit?

(5) Whether the defendant has adopted the artistic script of the plaintiff in Eenadu and their trade mark to pass off his Agarbathi business as that of the plaintiffs goods?

(6) Whether the plaintiff is entitled for permanent injunction as prayed for?

(7) Whether the plaintiff is entitled for a direction as prayed for ?

(8) Whether the defendant is the owner of the copy right in the work as appearing on defendant's agarbathi cartons along with the word Eenadu?

(9) To what relief?

18. To substantiate their respective pleadings, on behalf of the plaintiff, PWs.I to 5 were examined and Exs.AI to A72 were marked. On behalf of the defendants, DWs.I to 6 were examined and Exs.BI to B67 were marked. Exs.XI to X8 were also marked through the witnesses appearing on behalf of the defendants.

19. On a consideration of the oral and documentary evidence, the trial Court decreed the suit filed by the plaintiff by judgment and decree dated 24-7-2000 in the following terms, viz.,

"In the result, the suit is decreed with costs granting permanent injunction in favour of the plaintiff restraining the defendants, their agents, servants or anyone claiming through the defendants from passing off the defendants Agarbattis business as business of the plaintiff by using the expression Eenadu or any other expression phonetically and/ or visually similar or deceptively similar to the plaintiff's mark or by applying the artistic script Eenadu annexed to the plaint either as a part of their corporate name or using the name otherwise in the course of their business transaction viz., in their correspondence, letterheads, name boards, signboards, advertisements etc., in print and electronic media and in such other business/trade literature in conducting their business thereby passing off their business and service as the business and service of the plaintiff in Andhra Pradesh.

The defendant is also farther directed to surrender all printed matter lying with them including wrappers, cartons, packing material, name boards, banners, business forms, letter heads, visiting cards and other articles of stationery containing or consisting the offending trademark Eenadu in Telugu letters together with all blocks, dies, rubber stamps, photo negatives containing or consisting the offending trademark Eenadu and the copyright Eenadu in Telugu letters. "

20. Aggrieved by the said judgment and decree, the defendants filed CCA No. 178 of 2000. As the trial Court confined the relief of injunction in favour of the plaintiff only to the State of Andhra Pradesh, assailing the same , the plaintiff

also filed CCCA No. 180 of 2000.

21. A learned single Judge of this Court before whom both the CCCAs fell for consideration, framed the following issues for adjudication, viz.,

(1) Whether the defendants infringed the copyright registration obtained by the plaintiff?

(2) Whether the plaintiff has been able to establish the infringement of copyright under the provisions of the Copyright Act?

(3) Whether the plaintiff has established passing off goods by the defendant as if they are the goods of the plaintiff ?

(4) If so, to what relief, the plaintiff is entitled ?

22. Having regard to the issues framed and in the light of the evidence on record, after referring to various case laws cited on behalf of the plaintiff as well as defendants, the learned single Judge by a common judgment dated 29-12-2000, set aside the judgment and decree of the trial Court in OS No.555 of 2000. Consequently, the appeal in CCCA No. 178 of 2000 filed by the defendants was allowed and the appeal filed by the plaintiff in CCCA No.180 of 2000 was dismissed. It is this judgment of the learned single Judge which is challenged before us by the plaintiff in these two LPAs, on various grounds.

23. On behalf of the appellant-plaintiff, Sri N.A.K. Sliarma, learned senior counsel along with Sri B. Nairn Kumar, submitted that the learned single Judge though framed four issues for consideration, but without giving appropriate reasons for differing with the findings of the trial Court and without regard to the evidence on record, set aside the judgment and decree of the trial Court, which is unsustainable. Learned senior Counsel submitted that the learned single Judge was deciding the CCCAs which are first appeals and therefore, the first appellate Court being the final fact finding authority is entitled to re-appreciate the evidence in proper perspective and ought to have decided issues in the light of the evidence on record. Learned senior Counsel also submitted that the learned single Judge failed to appreciate that the resignation of a copyright is not a condition precedent for availing of a remedy for an injunction for infringement of copyright and the learned single Judge also failed to appreciate that a copyright exists whether registration is made or not and mere registration of a copyright does not confer any right.

24. According to the learned senior Counsel, the assumption of the learned single Judge that both the parties are holding registered copyright in the same artistic work and that the defendant having registration first, is the first owner and therefore, the plaintiff cannot complain against the defendant is an erroneous view. Learned senior Counsel contended that the registration by the two parties relates to two different works and that it is only after receipt of Ex.A61 notice dated 27-2-1995 from the plaintiff calling upon the first defendant not to infringe the artistic work of the plaintiff, the defendant proceeded to apply for the

copyright registration of the agarbathi carton in which the plaintiff's artistic work Eenadu in Telugu script was predominantly displayed. Learned senior Counsel further stated that the learned single Judge failed to appreciate the fact that the first defendant mischievously and illegally incorporated in his carton the identical artistic work Eenadu in Telugu script over which the plaintiff has copyright. It is nextly submitted that the learned single Judge grossly erred in holding that the plaintiff cannot successfully raise a plea of infringement of copyright before the civil Court but have to initiate the proceedings u/s 50 of the Copyright Act, 1957 for rectification of the copyright. It is alleged that the learned single Judge overlooked the legal position that the grant of relief u/s 55 read with Section 62 of the Copyright Act, 1957 for infringement of a copyright is not dependant on prior registration of the copyright. Learned senior Counsel further submitted that the learned single Judge has erroneously held that neither deceptive similarity nor likelihood of confusion has been established by the plaintiff with reference to the passing off action alleged the plaintiff. It is also submitted that the learned single Judge failed to look into the evidence on which basis the trial Court has given a positive finding, and without giving any reasons the learned single Judge could not have differed with the findings of the trial Court. Under these circumstances, learned senior Counsel urged this Court to set aside the impugned common judgment passed the learned single Judge and to decree the suit as prayed for.

25. On the contrary, the learned senior Counsel Sri K.N. Srinivasan, along with Smt Kalpana Ekbote appearing on behalf of the defendant strongly supported the impugned common judgment. It is submitted that the learned single Judge has formulated four issues and each issue has been properly dealt with and decided on merits with reference to the evidence and decided case laws. Learned senior Counsel concentrated on four facets of arguments, viz., (1) the plaintiff is not the owner of the copyright of the artistic script Eenadu; (2) the defendant never tried to pass off his goods as that of the goods of the plaintiff; (3) the defendant being an honest and concurrent user of the artistic script Eenadu is entitled to sell the agarbathis as "Aashika Vari Eenadu Agarbathi"; and (4) the plaintiff has acquiesced his right to question of the defendant for using the artistic script Eenadu. Learned senior Counsel also submitted that there is no similarity in the business activity undertaken by the plaintiff and the defendant as the plaintiff is engaged in newspaper publishing and the defendant is manufacturing agarbathis and therefore, when the plaintiff and defendant are trading in unrelated goods, the question of infringement of copyright or trademark by the defendant does not arise. Learned senior Counsel submitted that the well-considered impugned judgment of the learned single Judge needs no interference.

26. In the light of these submissions, we shall now proceed to discuss as to whether the learned single Judge was justified in setting aside the judgment and decree of the trial Court in OS No.555 of 1999 dated 24-7-2000 ?

27. As indicated above, the learned single Judge has formulated the following

issues, viz.,

- (1) Whether the defendants infringed the copyright registration obtained by the plaintiff?
- (2) Whether the plaintiff has been able to establish the infringement of copyright under the provisions of the Copyright Act ?
- (3) Whether the plaintiff has established passing off goods by the defendant as if they are the goods of the plaintiff?
- (4) If so, to what relief, the plaintiff is entitled?

28. The learned single Judge while deciding issue Nos.1 and 2 together has mainly observed that "the defendant had registered the artistic work on the entire carton of agarbathi containing the work "Ashika Vari Agarbathi" on 14-3-1997 with registration No.A-53813/97 i.e., under Exs.B10 to B14. The applicant's name was mentioned as T. V. Venugopal, a subject of Indian Republic solely trading as Ashika incense Inc. at Bangalore, Karnataka State. In the extract from the Copyright Register, the name of the author was mentioned as R. Lokesh (Suji Designs), Bangalore, India. The entire carton containing the artistic work of the logo Eenadu in Telugu and English was registered. It was also mentioned there as Ashikavari Eenadu Agarbathi. The left side of the wrapper contained as two-in-one. There is also a logo representing A.I.I, in an artistic design."

29. On the basis of this observation, the learned single Judge held that the entire artistic work on the wrapper is registered under Copyright Act in 1997. It is further held that the Eenadu emblem is in Telugu as well as in English. On one side it is in Telugu and on the other side it is in English egg shape design in tri-colour, red, white and green. The learned single Judge also felt that in respect of the copyright registered under the Copyright Act by the plaintiff, it is only in Telugu version Eenadu and the artistic work is not similar in design. However, in respect of defendant, the entire carton containing Ashikavari Eenadu Agarbathis was registered with various other artistic work including logo whereas the copyright of the plaintiff is only Eenadu in Telugu script. Then the learned single Judge proceeded to examine the provisions under Sections 2, 13, 14, 44, 45, 50, 51, 55 and 72 of the Copyright Act and also referred to various decisions. The learned single Judge tracing the principles laid down in various decisions and placing strong reliance on the decision of the Supreme Court in S.M. Dyechem Limited v. M/s. Cadbury (India) Limited AIR 2000 SC 2114, held thus:

"The Supreme Court observed that in determining the essential features, dissimilarities take priority over similarities. In the instant case, according to the plaintiff, the essential feature of the copyright is the artistic work of Eenadu in Telugu script. But the defendant's contention is that there are many dissimilarities, essential features, more especially in a case of unrelated goods. It is in evidence that as per Ex.A43, the word Eenadu was registered as copyright

whereas the entire carton with inscription Ashikavari Eenadu Agarbathis with colour scheme was registered in 1997. An overall comparison of the artistic work on the carton and the sole word Eenadu one would come to inescapable conclusion that dissimilarities are in abundance. The carton on its one side the words Ashikavari Eenadu Agarbathis was printed in artistic design, on the reverse side it is printed in English language as "Ashika"s Eenadu incense sticks". The most important crucial document for the purpose of comparison is the artistic work of word Eenadu in Telugu script. In Ex.A43 the work was registered in 1999 vide registration No.A-5 6447/99, dated 9-7-1999. In the remarks column, it is stated "The copy of the work is annexed." But, this vital document had not been filed. This document is the only document which builds the foundation for the entire case of infringement of copyright. Non-filing of this document is fatal to the case of plaintiff. The onus is on the plaintiff to establish and exhibit the work that was registered. When such document is not brought into evidence, it must be held that the plaintiff failed to discharge its burden."

The learned single Judge further held thus:

"The learned trial Court failed to consider this aspect and proceeded as if there was a registered artistic work under the Copyright Act. The words "two in one" and logo are in yellow colour with fed stripes. On the side flaps the word Eenadu was printed in three languages viz., Tamil, Hindi and Malayalam. In the evidence also it was accepted that the vertical lines in the registered copyright of Plaintiff Eenadu Telugu script are not there on the carton containing the word Eenadu. Thus, I find that the plaintiff has not been able to establish that the defendant has infringed the copyright of the plaintiff. The finding of the lower Court accordingly set aside."

30. Coming to this finding of the learned single Judge, without any hesitation, we must say that in a case for infringement of copyright, registration is not required at all. Section 2(c) of the Copyright Act defines an "artistic work" which means-

- (i) a painting, a sculpture, a drawing (including a diagram, map, chart or plan) an engraving or a photograph, whether or not any such work possesses artistic quality;
- (ii) an architectural work of Art; and
- (iii) any other work of artistic craftsmanship."

Section 2(d) defines "author". Section 2(d)(iii) lays down that an author means in relation to an artistic work other than a photograph, the artist. Chapter III deals with Copyright. Section 13 provides thus:

Works in which the copyright subsists :-- (1) Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say-

- (a) original literary, dramatic, musical and artistic works;

(b) cinematograph films; and

(c) sound recording;

(2) x x x x

31. Section 14 further clarifies the meaning of copyright which says that for the purposes of the Copyright Act, "copyright" means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the acts in respect of a work or any substantial part thereof. Sub-section (c) of Section 14 mentions about the artistic work. Chapter IV deals with the ownership of copyright and the right of the owners. Section 17 of Chapter IV provides the first owner of copyright which says that subject to the provisions of this Act, the author of a work shall be the owner of the copyright therein :

Provided that-

(a) in the case of a literary, dramatic or artistic work made by the author in the course of his employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship, for the purpose of publication in a newspaper, magazine or similar periodical, the said proprietor shall, in the absence of any agreement to the contrary, be the first owner of the copyright in the work insofar as the copyright relates to the publication of the work in any newspaper, magazine or similar periodical, or to the reproduction of the work for the purpose of its being so published but in all other respects the author shall be the first owner of the copyright in the work;

(b) subject to the provisions of clause (a), in the case of photograph taken, or a painting or portrait drawn, or an engraving or a cinematograph film made, for valuable consideration at the instance of any person, such person shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein;

(c) in case of a work made in the course of author's employment under a contract of service or apprenticeship, to which clause (a) or clause (b) does not apply, the employer shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein;

(cc) xxx

(d) xxx

32. From a reading of the aforesaid provisions, one would reach to an inescapable conclusion that whoever is the first owner of the copyright is the owner of that copyright and his copyright shall subsist throughout India.

33. It is the case of the plaintiff all through that the artistic script Eenadu in Telugu is a creative work done by PW2, an employee of the plaintiff at the instance of the Chairman of the Eenadu group of companies and the same is being used as Masthead of Eenadu Telugu daily right from 1974. PW2 was

examined by the plaintiff who deposed to the fact of creating this artistic work at the instance of Ramoji Rao, the Chief Editor of Eenadu publications. As provided u/s 17(a) of the Copyright Act, the first owner of the copyright insofar as it relates to the publication of the work in any newspaper, magazine or similar periodical in all respects, the author shall be the first owner of the copyright in the work. As is reflected in the evidence, PWs 1 and 2, the owner of the copyright in the artistic script Eenadu undoubtedly is Ramoji Rao who being the Publisher of Eenadu Telugu daily right from the year 1974 which fact has not been controverted by the defendant.

34. Under the provisions of the Copyright Act, nowhere it is provided that such a copyright shall be registered and then only one shall be entitled to claim copyright over the artistic work. Under Sections 44 and 45 of the Register of Copyright, entries of Register of Copyright is provided, and rectification u/s 50 and certain other actions. Section 51 provides instances of infringement in copyright. Section 55 of the Copyright Act provides civil remedies to the owner of the copyright which reads thus:

55. Civil remedies for infringement of copyright :--(1) Where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by this Act, be entitled to all such remedies by way of injunction, damages, accounts and otherwise as are or may be conferred by law for the infringement of a right :

Provided that if the defendant proves that at the date of infringement he was not aware and had no reasonable ground for believing that copyright subsisted in the work, the plaintiff shall not be entitled to any remedy other than an injunction in respect of the infringement and a decree for the whole or part of the profits made by the defendant by the sale of the infringing copies as the Court may in the circumstances deem reasonable.

(2) Where, in the case of a literary, dramatic, musical or artistic work, a name purporting to be that of the author or the publisher, as the case may be, appears on copies of the work published, or in the case of an artistic work, appeared on the work when it was made, the person whose name so appears or appeared shall, in any proceeding in respect of infringement of copyright in such work, be presumed, unless the contrary is proved, to be the author or the publisher of the work, as the case may be.

(3) The costs of all parties in any proceedings in respect of the infringement of copyright shall be in the discretion of the Court.

35. The plaintiff, as indicated above, has been claiming that he is the owner of the copyright of the artistic script Eenadu specially created through PW2 right from the year 1974. The plaintiff also has claimed in the year 1995, on knowing about its artistic work deceptively being used by the defendant for his agarbathi with prefix of some other word as "Ashikavari" on the carton Ex.A.59, the plaintiff issued a notice to the defendant whose area of operation is restricted to

Karnataka State, to desist from using the word Eenadu. The defendant no doubt gave a reply seeking some clarification from the plaintiff. The plaintiff also made yet another effort by issuing caution notice (Ex.A63) in the newspapers cautioning the general public that the product Ashikavari Eenadu Agarbathi is not a product from the house of Eenadu. Thus, it is clear that the plaintiff has taken sufficient care even to warn the first defendant against using the Eenadu artistic work over which it has copyright.

36. The defence offered by the defendant is that he got the artistic work Eenadu created through the second defendant Lokesh way back in 1995. However, none was examined on behalf of the defendant to say that the said artistic work Eenadu is the creation of said Lokesh. For the reasons best known to the defendant, the said Lokesh has also not been examined when it is claimed that he is the creator of such artistic work. The defendant has taken a definite stand that in his business of agarbathi, he has used various names as Ashikavari Agarbathi, Eenadu Darbar Bathi, Eenadu Sandal etc. Though on the carton the logo is also inscribed as Aashikavari on the top, but on the bottom right side multi coloured Telugu word Eenadu is inscribed. On the back of the carton, in English, the Eenadu word is inscribed. It is also inscribed as "Ashika Original Incense Sticks" giving the registration number which was registered in the year 1997. The first defendant has also stated, he got the entire carton registered in the year 1997 whereas the plaintiff registered the Eenadu artistic work under the Copyright Act only in the year 1999 and he being the first registered user, the plaintiff cannot prevent him from using the artistic work Eenadu.

37. This stand of the defendant that having obtained registration of this mark earlier than the plaintiff the plaintiff cannot allege infringement by the defendant in our view, is unsustainable. Even if the defendant has registered the artistic work earlier than the plaintiff, the plaintiff can still maintain action for infringement of copyright. The grievance of the plaintiff is about the infringement of his copyright of his Eenadu artistic work and not infringement of his Trademark.

38. The learned single Judge while examining whether there is any infringement of copyright of the plaintiff by the defendant has referred to the following decisions submitted by the Counsel appearing for both the parties in The Daily Calendar Supplying Bureau, Sivakasi Vs. The United Concern, ; Kaviraj Pandit Durga Dutt Sharma Vs. Navaratna Pharmaceutical Laboratories, ; Ruston and Hornsby Ltd. Vs. The Zamindara Engineering Co., and in S.M Dyechem Limited v. M/s. Cadbury (India) Limited (AIR 2000 SC 2114). However, the learned single Judge has mainly relied upon the decision of the Supreme Court in Dyechem's case (cited supra) and following the ratio laid down therein held that when dissimilarities are more than similarities, it is not a case of infringement.

39. However, this decision of the Supreme Court in Dyechem's case (supra) fell for consideration before the Supreme Court in another case in Cadila Health Care Ltd. Vs. Cadila Pharmaceuticals Ltd., and the learned Three-Judge Bench of the

Supreme Court held that the earlier view taken by Supreme Court in Dyechem's case does not lay down correct law. By holding so, the Supreme Court at para-19 of its judgments held thus:

"With respect, we are unable to agree that the principle of phonetic similarity has to be jettisoned when the manner in which the competing words are written is different and the conclusion so arrived at is clearly contrary to the binding precedent of this Court in Amritdhara 's case (supra) where the phonetic similarity was applied by judging the two competing marks. Similarly, in Durga Dutt Sharma 's case (supra), it was observed that "in an action for infringement, the plaintiff must, no doubt, make out that the use of the defendant's mark is likely to deceive, but where the similarity between the plaintiff's and the defendant's mark is so close either visually, phonetically or otherwise and the Court reaches the conclusion that there is an imitation, no further evidence is required to establish that the plaintiff's rights are violated.

40. Applying this ratio of the Supreme Court to the facts of the case, on a comparison between the carton of the defendant Ex.A59 and Ex.A8 which is the artistic work Eenadu belonging to the plaintiff, it would appear to us that both visually and phonetically the words appearing on Ex.A59 are similar to Ex.AS. May be the defendant has registered the entire carton Ex.A59 for his business trademark which is "Ashikavari Eenadu Agharbathi". But, however, a look at the entire carton Ex.A59, the artistic Telugu script Eenadu is inscribed in the middle of carton in bold letters and the word "Ashikavari" is inscribed in small letters on the left side of the carton, whereas the word "Agarbathis" are inscribed on the right bottom of the carton with a logo appearing on the left side parallel to Telugu Artistic script and down below left side, again the word Eenadu in Telugu is inscribed in small letters with a different colour combination. On a comparison, the other inscriptions on Ex.B59, in our view, are so insignificant, and the words Eenadu inscribed on the carton would glaringly appeal to every purchaser to believe that the said agarbathis are the product of Eenadu group of companies - the plaintiff.

41. There is no doubt in our minds to hold that the plaintiff is the owner of the artistic work Eenadu as it has been using the same as a Masthead of the newspaper right from the year 1974 and it owns the copyright throughout India. Any attempt made by the defendant with a slightly changed version suffixing and affixing anything to the Eenadu artistically created word which resembles the plaintiff's artistic work, cannot enure to the benefit of the defendant and the defendant cannot lay a claim for ownership of the said artistic work. As held by the Supreme Court in Cadila's case (supra), if the Court comes to the conclusion that there is a similarity between the marks of both the plaintiff and defendant, the dissimilarities assume insignificance. As indicated above, though there are dissimilarities between Ex.A8 and A59, but phonetically and visually the inscription Eenadu artistic work is one and the same. Thus, having regard to this fact and in the light of the decision of the Supreme Court in Cadila's case

(supra), the plaintiff is entitled to claim that the defendant has infringed his copyright. Even though the defendant has registered the carton under Ex.A59 earlier under the Trademark Act, that may not come to the aid of the defendant as the case of the plaintiff is that it owns a copyright on the artistic work Eenadu right from the year 1974 and under the Copyright Act, no registration is required and therefore, the plaintiff is justified in alleging infringement of his artistic script Eenadu. In the absence of the defendant satisfactorily proving through evidence before the trial Court that he is the first owner of the artistic work Eenadu and in the light of the overwhelming evidence which the plaintiff has adduced which is reflected through Exs.A1 to A63, we have no hesitation to hold that it is the plaintiff who is the owner of the copyright of the artistic script Eenadu. Insofar as the infringement is concerned, we have discussed elaborately in the foregoing paragraphs and we have no hesitation to hold that the defendant has infringed the copyright of the artistic work Eenadu held by the plaintiff. We, therefore, hold that the finding of the learned single Judge that both the plaintiff as well as the defendant have registered the artistic work Eenadu and there is no infringement by the defendant is unsustainable and is accordingly set aside.

42. The third issue formulated by the learned single Judge in the impugned judgment is "Whether the plaintiff has established passing off goods by the defendant as if they are the goods of the plaintiff." The learned single judge while deciding this issue considered several submissions made on behalf of the defendant that the defendant is an honest bona fide concurrent user, delay and laches on the part of the plaintiff to take action in time, the defence of the defendant that he is dealing in unrelated goods, absence of similarities, visual, phonetic and other circumstances, has referred to several decisions viz., Shanmugavel v. Associated Publishers (Madras) Limited (1997 IPLR 82), Amritdhara Pharmacy Vs. Satyadeo Gupta, ; Park Products Limited v. Bakemans Industries Limited (IPLR 1999 Jan 81); Sony Corporation v. Elite Optical Company, (1987 IPLR 98); Associated Electronic and Electrical Industries (Bangalore) Pvt. Ltd. Vs. M/s. Sharp Tools, Kalapatti, ; R.G. Anand Vs. Delux Films and Others, ; Kenrick and Company v. Lawrence and Company (1891 Q8D 99); M/s. Cadila Laboratories (P) Ltd., Ahmedabad and another Vs. M/s. Kamath Atul and Co., Nellore, ; Teju Singh Vs. Shanta Devi, ; Hindustan Radiators Co. Vs. Hindustan Radiators Ltd., ; Vishnudas Trading v. The Vazier Sultan Tobacco Company Limited (1997 IPLR 1); Corn Products Refining Co. Vs. Shangrila Food Products Ltd., ; Syed Nizamuddin v. Golden Tobacco Company Private Limited IPLR 1978 AP 135); Ellora Industries Vs. Banarsi Das Goela and Others, ; Simatul Chemical Industries Pvt. Ltd. Vs. Cibatul Ltd., ; Astra-IDL Limited Vs. TTK Pharma Limited, ; Daimler Benz Aktiengesellschaft and another Vs. Hybo Hindustan, ; Aktiebolaget Volvo of Sweden v. Volvosteels Limited of Gujarat (India) (1998 (Suppl.) ARB LR 627); Coromandel Fertilizers v. Coromandel Cements Limited (1989 IPLR 105); Relaxo Rubber Limited v. Aman Cable Industries (1998 (2) ARB 709); Victory Transport Co. Pvt. Ltd., Ghaziabad Vs. The District Judge, Ghaziabad and Others, ; Indopharma Pharmaceutical

Works Limited, Mumabi v. Citadel Fine Pharmaceuticals Limited, Madras (1999 (1) Arb.LR 227); R.S.K.V. Raghavan trading as R.S. Krishna and Co., Mayuram Vs. G. R. Gopal and Co. and Others, ; Hindustan Pencils (P) Ltd. Vs. India Stationery Products Co. and Another, ; Kirloskar Proprietary Limited v, Kirloskar Dimensions Private Limited (1LR 1996 Kar 2957); Power Control Appliances and Others Vs. Sumeet Machines Pvt. Ltd., J and W Harsdie Limited v. Joseph E. Seagram and Sons Inc. (1991 IPLR 2555); Maekawa Bearing Manufacturing Co. Ltd. Vs. Onkar Bearing Industries and Others, ; Kirloskar Diesels! Recon Private Limited v. Kirloskar Proprietary Limited, (1997 PTR 147); Reliance industries Limited v. Reliance Polycrystalline Limited (1997 IPLR 418); Proctor and Gamble Company USA v. Procter and Gamble Godrej Limited, Mumabi (1997 IPLR 53); and in Cotton Corporation of India Limited Vs. United Industrial Bank Limited and Others, . After referring to various decisions, the learned single Judge came to the conclusion thus:

"In the case on hand, the plaintiff has been using the mark Eenadu from 1974 on the Telugu newspaper. The name of Eenadu is a common word unless it becomes household name, it cannot successfully establish passing off action. The plaintiff deals in newspaper, T.V./ Hotel/Chit Funds etc., whereas the defendant deals in agarbathis only. Therefore, it is not a case of similar goods. The principle of deceptive similarity and likelihood of confusion in this case is too remote. The name Eenadu may be common phonetically. But, visual similarity and the type of goods are quite different and distinct. The word Eenadu is being claimed as trademark of plaintiff. But, it is to be noted that the Agarbathis sachet contained Aashikavari Eenadu incense sticks and in fact number of other names are being used by the defendant. Even though the newspaper and the incense sticks are sold at the same counter it is improbable that the purchaser would be under the impression that the agarbathis are that of plaintiff. The person who purchase the newspaper are literate and there will not be any scope of confusion. There is no evidence that the consumer was misled or misrepresentation was made. On the other hand, the carton itself speaks the truth. The defendant neither suppressed any information nor made any attempts to confuse public. Moreover, the mark of plaintiff and the mark on the agarbathis carton are quite dissimilar. The reputation and good will earned was only for the newspaper and it cannot be linked to the unrelated goods. Thus, I find neither the deceptive similarity nor likelihood of confusion is established. The trademark of both the plaintiff and defendant are dissimilar and there is no iota of evidence that the plaintiff suffered loss of goodwill or reputation apart from financial loss. Further, the plaintiff has not established that the defendant has been playing fraud on the other hand the relief of plaintiff is liable to be rejected on the question of acquiescence and laches. Admittedly, a notice was issued in 1994 calling upon the defendant to desist from using mark Eenadu and according to the plaintiff the defendant stopped marketing the agarbathis after receipt of notice. But there is no evidence on this aspect, on the contrary the sales of defendants were increasing year by year as per the sales particulars filed by him. The plaintiff

knowingly kept quiet for nearly five years before filing the suit. Further, the word Eenadu is a general word and there is no evidence that the plaintiff became the exclusive user of the mark. It is also not established that On account of use of mark on agarbathis, the plaintiff incurred substantial loss. Eenadu is not an inventor name and the mark was designed only for use as masthead of the newspaper. The dictionary meaning of Masthead as per Concise Oxford dictionary 8th edn. Is title of a newspaper etc., at the head of the front or editorial page. Thus, the very name was conceived for the newspaper. At the most the name Eenadu could be a household name of newspaper, but we are dealing with agarbathis. Even though it was in evidence that word Eenadu is being used by various other persons including a Co-operative Bank, but that cannot be a ground to non-suit the plaintiff. Thus, it is established that the plaintiff acquiesced his right to restrain the defendant from using the mark Eenadu u/s 41(g) and (l) of Special Relief Act. It is not the case of the plaintiff that the defendant has been selling the agarbathis surreptitiously without the knowledge of the plaintiff. The ingredients required for successfully establishing the passing off action are not established in this case by the plaintiff."

43. The learned single Judge thereafter held that the trial Court was under the mistaken impression that the plaintiff got the trademark of Eenadu Telugu and English version for the goods falling in class 16 and 26 and completely misdirected itself on the facts of the case. While reaching to such conclusion, the learned single Judge set aside the judgment and decree of the trial Court made in OS No.555 of 1999 dated 24-7-2000 and allowed CCCA No.178 of 2000 without costs and dismissed CCCA No.180 of 2000.

44. The Supreme Court in a latest decision in Cadila's case (supra), while referring to passing off action, categorically held thus:

"...the plaintiff's right is "against the conduct of the defendant which leads to or is intended or calculated to lead to deception. Passing off is said to be a species of unfair trade competition or of actionable unfair trading by which one person, through deception, attempts to obtain an economic benefit of the reputation which other has established for himself in a particular trade or business.....

....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."

45. The Supreme Court at Para-33 of the said decision, has further held thus:

"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 trademark 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 plaintiff's 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 trademark is written and to whom different words with slight difference in spelling 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."

46. In *Kaviraj Pandit Durga Dutt Sharma Vs. Navaratna Pharmaceutical Laboratories*, , the Supreme Court while distinguishing the difference between the action for passing off and action for infringement of trademark, at page 990 held thus :

"While an action for passing off is a common law remedy being in substance an action for deceit, that is, passing off by a person of his own goods as those of another, that is not the gist of an action for infringement. The action for infringement is a statutory remedy conferred on the registered proprietor of a registered trade mark for the vindication of "the exclusive right to the use of the trade mark in relation to those goods" (vide Section 21 of the Act). The use by the defendant of the trade mark of the plaintiff is not essential in an action for passing off, but is the sine qua non in the case of an action for infringement. No doubt, where the evidence in respect of passing off consists merely of the colourable use of a registered trademark, the essential features of both the actions might coincide in the sense that what would be a colourable imputation of trademark in a passing off action would also be such in an action for infringement of the same trademark. But there the correspondence between the two ceases. In an action for infringement, the plaintiff must, no doubt, make out that the use of the defendant's mark is likely, to deceive, but where the similarity between the plaintiff's and the defendant's mark is so close either visually, phonetically or otherwise and the Court reaches the conclusion that there is an imitation, no further evidence is required to establish that the plaintiff's rights are violated."

47. Thus, in a passing off action, what is to be seen is whether the misrepresentation made by the defendant is of such a nature as is likely to cause confusion in the mind of an ordinary consumer to mistake the goods of the defendant as that of the plaintiff due to similarity of marks and other surrounding factors. Even if the plaintiff is not trading in similar goods as that of the

defendant, in trading and business activities, certain business houses have earned good will and reputation as a result of their maintaining superior quality of goods and products. The goodwill earned by such business houses have long lasting impact on the consumers of such goods. The very name of a particular business house would induce the buyer to go for those goods which have a label of such business house. In other words, a business house becomes a household name to the buyers. In a passing of action, what is to be seen is whether the defendant has made efforts to encash the name of the popular business house with a view to improve his sales deceptively.

48. It is the case of the plaintiff right through that it owns copyright on the artistic work Eenadu from the year 1974 which has become the trademark under which several activities are undertaken such as newspaper, films, pickles, chitfund, television, hotel business etc. As held by us, the plaintiff has been successful in proving that he is the owner of the copyright of artistic work Eenadu script under the Copyright Act. The plaintiff has been claiming that the defendant has infringed its copyright over the artistic work Eenadu and deceptively adopted the same on the carton of his product (Ex.A59). The plaintiff has also been claiming that the name of Eenadu has been a household name over the State of Andhra Pradesh and Eenadu Margadarsi group of companies have adopted this Eenadu artistic work as a trademark also for a variety of activities including its TV channel. Plaintiff complained that the defendant though started his business from Karnataka in agarbattis, initially under different names to his agarbattis but ultimately fixed the name as Ashikavari Eenadu Agarbathis and inscribed the artistic work of Eenadu of the plaintiff on his cartons (Ex.A59) with the deceptive motive to pass off his goods as that of the plaintiff and misleading the consumers to believe that the agarbathis are the products of Eenadu group of companies.

49. On the contrary, the defendant has pleaded that he is in agarbatti business for more than 18 to 20 years and has extended his business activity in the State of Andhra Pradesh right from the year 1997 onwards. The first defendant himself has admitted in his evidence as DW1 that his business of agarbathis has increased several fold in the State of Andhra Pradesh though the said business was running on an average right upto 1997.

50. It is necessary for us to examine whether there is any attempt made by the defendant to mislead the ordinary consumers by passing off his goods as that of the goods of the plaintiff. In the evidence, on behalf of the defendant, it has come on record that the cartons of Ashikavari Eenadu Agarbathis are kept in the sale counters of Eenadu Newspaper agents. On behalf of the plaintiff, it has also come on record that the defendant has deliberately chosen to keep the cartons containing Ashikavari Eenadu Agarbathis at the sale counters of Eenadu Newspaper agents with a view to confuse the ordinary customers that the said agarbathis are the products of Eenadu group. It is but natural that when an ordinary customer goes to the Eenadu Newspaper agent's counter to purchase

the Eenadu Newspaper and he sees the Ashikavari Eenadu Agarbathi cartons which are placed there, he is undoubtedly get misled by the fact that the said agarbathis are also from Eenadu group. The fact that the said agarbathi cartons are placed in the Eenadu Newspaper agents counters further strengthens the case of the plaintiff. Thus, the intention of the defendant seems to be to reap benefit from out of the goodwill and reputation of Eenadu products. The fact that the sale of agarbathis of the defendant have increased manifold right from the year 1997 bears testimony to the fact that the ordinary consumers are being misled and were tempted to purchase the said agarbathis believing them to be the product of the Eenadu group. Having regard to the voluminous evidence adduced on behalf of the plaintiff which is discussed by the trial Court, and the in the light of the decision of the Supreme Court (*supra*), we are inclined to hold that the defendant is guilty of passing off action.

51. In regard to the specific plea taken by the defendant that there is a delay on the part of the plaintiff to take action and on account of laches, the plaintiff has acquiesced his right to question the defendant as such, he is not entitled to seek injunction against the defendant, we are not inclined to accept the said submission. In *Hindustan Pencils (P) Ltd. Vs. India Stationery Products Co. and Another*, , it is held thus:

"Even though there may be some doubt as to whether laches or acquiescence can deny the relief of permanent injunction, it has been consistently held that if the defendant acts fraudulently with the knowledge that he is violating the plaintiff's rights, then in that case, even if there is an inordinate delay on the part of the plaintiff in taking action against the defendant, the relief of injunction is not denied. Where there is an honest concurrent user by the defendant, then inordinate delay or laches may defeat the claim of damages or rendition of accounts but the relief of injunction should not be refused. This is so because it is the interest of the general public, which is the third party in such cases, which has to be kept in mindNevertheless if the Court comes to the conclusion that prejudice is likely to be caused to the general public who may be misled in to buying the goods manufactured by the defendant thinking them to be the goods of the plaintiff, then an injunction must be issued."

52. Thus, what emerges from the above decision is that when it is proved by the plaintiff that the defendant acts fraudulently with the knowledge that he is violating the plaintiff's rights, i.e., passing off his goods fraudulently and deceptively with that of the goods of the plaintiff, then in the interest of the general public, which is the third party, the plaintiff is entitled for injunction, despite there being inordinate delay or laches on his part. In this case, the office of the plaintiff is located in Hyderabad in the State of Andhra Pradesh. The plaintiff has various business activities, which include newspaper, television channel, film production, pickles, chit fund etc., spread throughout the country. The defendant's area of business initially was in the State of Karnataka. The plaintiff on coming to know that the defendant is using the artistic work Eenadu,

issued a legal notice (Ex.A61) in the year 1995 calling upon the defendant to desist from using the said Eenadu artistic work on the cartons of agarbathis. The defendant issued a reply under Ex.A62 seeking some clarifications. Thereafter, the plaintiff issued a caution notice (Ex.A63) in the newspapers warning the general public that it has in no way connected with the Ashikavari Eenadu Agarbathis and it is not a product of Eenadu group. It is case of the plaintiff that soon after the publication of the said notice, the defendant has stopped using the artistic work Eenadu. It is only in the year 1997 onwards, he has once again started using the artistic script Eenadu for which the plaintiff is the copyright owner. The plaintiff after gathering material, has instituted the suit in the year 1999. Thus, in view of the factual circumstances, we do not agree that there are any laches on the part of the plaintiff. Even if it is to be accepted that there are laches on the part of the plaintiff, yet, in the light of the decision (*supra*), as long as the defendant indulges in the act of infringement of copyright of the artistic work Eenadu inscribed on his carton Ex.A59, the plaintiff cannot be denied the relief of injunction against the defendant in the interest of the general public who are the purchasers of the goods as they shall not be allowed to be misled. Therefore, we are inclined to hold that the plea of acquiescence is not available to the defendant.

53. Similarly, the defendant also cannot be permitted to raise the pleas of honest concurrent user and the goods are unrelated. As already discussed above, the plaintiff issued Ex. A61 calling upon the plaintiff to desist from using the artistic script Eenadu for his agarbathis. Later, the plaintiff also issued Ex.A63 - caution notice in the newspapers warning the general public that the Aashikavari Eenadu Agarbathis are not their products. In spite of the fact that the plaintiff being the owner of the copyright Eenadu artistic script and despite receiving a notice from the plaintiff, the defendant continued to indulge in the business of passing off his agarbathi business as that of the plaintiff by using the plaintiff's artistic work Eenadu. Thus, under these circumstances and in view of our discussion in the foregoing paragraphs, the plea of honest concurrent user is not available to the defendant.

54. Insofar as the plea of unrelated goods raised by the defendant is concerned, no doubt, the plaintiff is not manufacturing agarbathis. However, the main grievance of the plaintiff is that the defendant by fraudulent means and in a deceptive manner has adopted the artistic work Eenadu on his agarbathi carton (Ex.A59) and passing of the same as that of the product of Eenadu group. The case of the plaintiff is that the ordinary consumer is likely to be misled by seeing the visually and phonetically similar artistic work Eenadu on the carton of agarbathi and believe that the said agarbathi is a product of Eenadu group. According to the plaintiff, the defendant is taking undue advantage of the reputation and goodwill commanded by the Eenadu group which has become a household name, is indulging in passing off action and therefore, the defendant has to be enjoined from using the artistic work Eenadu. Though the defendant has taken a ground that his trading activity is in unrelated goods, having regard

to our discussion in the foregoing paragraphs, we are convinced that the defendant has been passing off his goods as that of the goods from Eenadu group of companies. Therefore, the defendant has to be enjoined from using the artistic work Eenadu for which the plaintiff has a copyright.

55. Having regard to our discussion in the foregoing paragraphs, we are of the view, the learned single Judge is not justified in setting aside the judgment and decree of the trial Court in OS No.555 of 1999 ignoring the evidence let in by the plaintiff which has been discussed by the trial Court at length. Thus, the impugned judgment rendered by the learned single Judge in CCCA Nos. 178 and 180 of 2000 dated 29-12-2000 is unsustainable and accordingly, we set aside the same.

56. The next question is what is the relief for which the plaintiff is entitled to?

57. The plaintiff instituted the suit against the defendant for the following reliefs, viz.,

"(a) a permanent injunction restraining the defendants, their servants, agents or anyone claiming through any of them from passing off their agarbathis business as the business of the plaintiff by using the expression Eenadu or any other expression phonetically and/or visually similar or deceptively similar to the plaintiff's mark, and/or by applying the artistic script Eenadu annexed to the plaint either as part of their Corporate name or using the name otherwise in the course of their business transaction viz., in their correspondence, letterheads, name boards, sign boards, advertisements in print and electronic media and in such other business/trade literature in conducting their business, thereby pass off their business and service as the business and service of the plaintiff and/ or enable others to pass off.

(b) for a direction to the defendants, their men, agents representatives, servants or any one claiming through them to surrender all printed matter lying with them or in their custody, including wrappers, cartons, packing material, name boards, banners, business forms, letterheads, visiting cards and other articles of stationery containing or consisting the offending trademark Eenadu and copyright Eenadu together with all blocks, dies, rubber stamps, photo negatives and the like containing or consisting the offending Trademark Eenadu and the Copyright Eenadu."

58. The trial Court on the basis of the oral and documentary evidence adduced on behalf of both the parties and in the light of the ratios laid down by various Courts including the Supreme Court, partly decreed the suit by granting the following relief, viz.

"In the result, the suit is decreed with costs granting permanent injunction in favour of the plaintiff restraining the defendants, their agents, servants or anyone claiming through the defendants from passing off the defendants agarbattis business as business of the plaintiff by using the expression Eenadu or

any other expression phonetically and/or visually similar or deceptively similar to the plaintiff's mark or by applying the artistic script Eenadu annexed to the plaint either as a part of their corporate name or using the name otherwise in the course of their business transaction viz., in their correspondence, letterheads, name boards, signboards, advertisements etc., in print and electronic media and in such other business/trade literature in conducting their business thereby passing off their business and service as the business and service of the plaintiff in Andhra Pradesh.

The defendant is also further directed to surrender all printed matter lying with them including wrappers, cartons, packing material, name boards, banners, business forms, letter heads, visiting cards and other articles of stationery containing or consisting the offending trademark Eenadu in Telugu letters together with all blocks, dies, rubber stamps, photo negatives containing or consisting the offending trade mark Eenadu and the copyright Eenadu in Telugu letters."

59. As seen from the above prayer of the plaintiff and the relief granted by the trial Court, though the plaintiff has sought a permanent injunction against the defendant, the trial Court has confined the relief of grant of permanent injunction in favour of the plaintiff to the Andhra Pradesh State only.

60. Counsel for the plaintiff contended that when the trial Court has come to the conclusion that the plaintiff is the owner of the copyright of the artistic script Eenadu as reflected under Ex.AS, as provided u/s 13(1) of the Copyright Act, the trial Court ought to have held that the said copyright of the plaintiff subsists throughout India and restricting the relief of grant of injunction in favour of the plaintiff to Andhra Pradesh State is erroneous. We agree with the submission of the Counsel for the plaintiff in this regard. We do not find any justifying reasons for the trial Court to restrict the relief of grant of injunction in favour of the plaintiff to the State of Andhra Pradesh only. The plaintiff has successfully proved that there is an infringement of the copyright of the artistic work Eenadu by the defendant. Therefore, as provided u/s 55 of the Copyright Act, the plaintiff is entitled for a permanent injunction against the defendant as prayed for and there is no rationale for restricting the grant of the relief of permanent injunction to the State of Andhra Pradesh only. We, accordingly, hold that the plaintiff is entitled for the relief of permanent injunction as prayed for. We confirm the judgment and decree of the trial Court in all other respects. Consequently, the suit in OS No.555 of 1999 is decreed as prayed for with costs throughout, as indicated above.

61. In the result, both these LPAs. are accordingly allowed with costs.