

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CS(COMM) No.750/2018**

% **2nd April, 2018**

SUPERON SCHWEISSTECHNIK INDIA LIMITED Plaintiff
Through: Mr. Sanjeev Singh, Advocate.

versus

MODI HITECH INDIA LTD. Defendant
Through: Ms. Amita Sehgal Mathur,
Advocate with Ms. Sveta
Khulbe, Advocate.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

I.A. Nos.3994-95/2018 (exemption)

Exemption allowed subject to just exceptions.

I.A.s stand disposed of.

CS(COMM) No.750/2018 and I.A.Nos.3992/2018 (stay) & 3993/2018 (under Order XXVI Rule 9 CPC)

1. This suit comes up for admission today. By the suit plaintiff seeks the reliefs of injunction, delivery, rendition of accounts and damages by pleading that the plaintiff is the owner of the trademark VAC-PAC and that the defendant is using an identical

trademark VAC-PAC and that too with respect to the same goods of the plaintiff being welding electrodes. As per the plaint the plaintiff is engaged in the manufacturing of conventional welding electrodes. Plaintiff is also as per the plaint engaged in the business of repair and reclamation of welding electrodes. The plaintiff is engaged in manufacturing in collaboration with Kjellberg Finsterwalde, Germany. Plaintiff is also engaged in manufacturing of fire suppression systems-coatings, fire barriers, etc and various other products as detailed in para 5 of the plaint.

2(i). As per para 8 of the plaint, the plaintiff company has its well known trademark of SUPERON under which the plaintiff sells its goods, and along with this trademark SUPERON the plaintiff also claims to have adopted from the year 2004 the trademark of VAC-PAC. The trademark VAC-PAC is said to have been coined, conceived and adopted by the plaintiff with respect to its products and which trademark is an arbitrary and fanciful trademark as per the plaintiff. Since the trademark is said to be an arbitrary and fanciful trademark, hence the plaintiff claims that plaintiff is entitled to high degree of protection.

(ii) As per para 9 of the plaint the plaintiff claims that plaintiff is using the trademarks in distinctive and unique get up, set up, lettering style etc. Plaintiff also claims to be the owner and proprietor of artistic work involved in trademark VAC-PAC. Plaintiff claims to be the owner of the trademark VAC-PAC along with its various other features contained in the label on account of prior adoption and continuous user of this trademark VAC-PAC.

(iii) As per para 17 of the plaint, plaintiff claims to be exporting its goods under the trademark VAC-PAC to about 70 countries. Para 17 of the plaint also gives the detail of various dealers appointed by the plaintiff in India which number to 35.

(iv) In para 18 of the plaint the plaintiff has given its year-wise details of sale from year 2004-2005 to the year 2016-2017. The sales of the plaintiff in the year 2004-2005 were said to be Rs.1,76,31,937/- and in the year 2016-2017 the sales became Rs.3,13,14,84,815/-.

(v) Plaintiff pleads that the defendant has dishonestly adopted an identical trademark VAC-PAC for the same goods being welding electrodes sold by the plaintiff and this adoption of the defendant of

trademark VAC-PAC is completely dishonest. Hence, the plaintiff claims the following reliefs in the suit:-

“(a) For a decree of permanent injunction restraining the defendant by themselves as also through their directors, proprietors, partners (if any), agents, servants, assigns, representatives, successors, distributors and all others acting for and on their behalf from using, selling, offering for sale, advertising or displaying directly or indirectly or dealing in any other manner or mode in welding electrodes and all allied and cognate goods/products under the impugned trade mark/label VAC-PAC or any other trade mark/label identical with or deceptively similar to the plaintiff’s trade mark/label amounting to or resulting in passing off and violation of the plaintiff’s said trademark/label VAC-PAC;

(b) For an order for delivery up of all the defendant impugned goods and business bearing the impugned trade mark/label including packing material, pouches, carton boxes, carry bags, finished and unfinished goods, boxes, stickers, or any other incriminating material including display boards and sign boards and trade literature to the plaintiff for the purpose of destruction/erasure.

(c) For an order of rendition of account of the defendant by their aforesaid impugned trade activities and a decree to the plaintiff on the amount so ascertained.

(d) To accounts for a decree for grants of damages of Rs.1,00,00,001/- (Rupees One Crore one) from the defendant, jointly and severally to the plaintiff.

(e) For such further order as this Hon’ble Court may deem fit and proper in the circumstances of the case and in the interest of justice.”

3. Learned counsel for the plaintiff has argued that every manufacturer or seller is entitled besides to have a main trademark also have additional trademarks which are used with the main trademark and once the additional trademarks which are used to acquire distinctiveness *qua* the plaintiff then such additional trademarks used with the main trademark also fall in the ownership of

the plaintiff and no other manufacturer or seller etc can use these additional trademarks. In the present case the main trademark of plaintiff is SUPERON and the additional trademark of which ownership is claimed by the plaintiff is VAC-PAC. Counsel for the plaintiff has also argued that though the word VAC-PAC is no doubt and admittedly derived from the words Vacuum Packaging or Vacuum Pack but the expression VAC-PAC is an original and unique adoption from out of the words Vacuum Pack/Vacuum Packaging, and therefore the plaintiff is entitled to claim the ownership of trademark VAC-PAC. This Court notes that it is an undisputed fact that the welding electrodes are put in vacuum packaging for sale so that the welding electrodes have a longer life. Accordingly, it is argued on behalf of plaintiff that the suit is liable to be entertained and also decreed after trial or at any other appropriate stage.

4. Counsel has appeared for the defendant although the suit is coming up today for admission for the first time. Counsel for the defendant has prayed for dismissing of this commercial suit on the ground that plaintiff has no real prospect of succeeding and in which circumstances the suit can be dismissed in view of Order XIII-A CPC

applicable to commercial suits. In support of her arguments the counsel for the defendant has firstly placed reliance upon a Division Bench judgment of this Court in the case of *Marico Limited Vs. Agro Tech Foods Limited 2010 (174) DLT 279: 2010 (44) PTC 736* to argue that the Division Bench of this Court in the case of *Marico Limited (supra)* has held that abbreviation of descriptive words cannot and should not be given protection as a trademark. It is argued that though the case of *Marico Limited (supra)* dealt with the aspect of disentitlement of use of a descriptive trademark used as a trademark at the stage of interim injunction, however the ratio of the said judgment it is argued will fully apply in the facts of the present case to dismiss the suit of the plaintiff which is a commercial suit filed under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 inasmuch as plaintiff has no real prospect of succeeding. Reliance by the defendant is further placed upon the judgment delivered by this Court in the case of *Godfrey Phillips India Limited Vs. P.T.I Private Limited & Ors.* in CS(COMM) No.851/2017 decided on 22.12.2017 wherein this Court had dismissed the commercial suit even without issuing summons in

the suit to the defendant on the ground that plaintiff did not have the real prospect of succeeding in the suit in terms of the cause of action pleaded in the plaint of that suit. It is argued on behalf of the defendant that whereas ordinary suits which are not commercial suits would require trial if there is a disputed question of fact, but commercial suits because of the provision of Order XIII-A CPC as added in CPC for commercial suits, allows a court to dismiss the suit at the threshold once there is no real prospect of the plaintiff succeeding in the suit.

5. At the outset it is required to be noted that the present suit is not a suit pleading a cause of action of infringement of plaintiff's trademark because the plaintiff has only applied for registration of its trademark VAC-PAC, and which registration is yet not granted. The present suit is a suit therefore seeking the relief of injunction etc by the plaintiff pleading a cause of action that defendant is passing off its goods as that of the plaintiff by use of the trademark VAC-PAC.

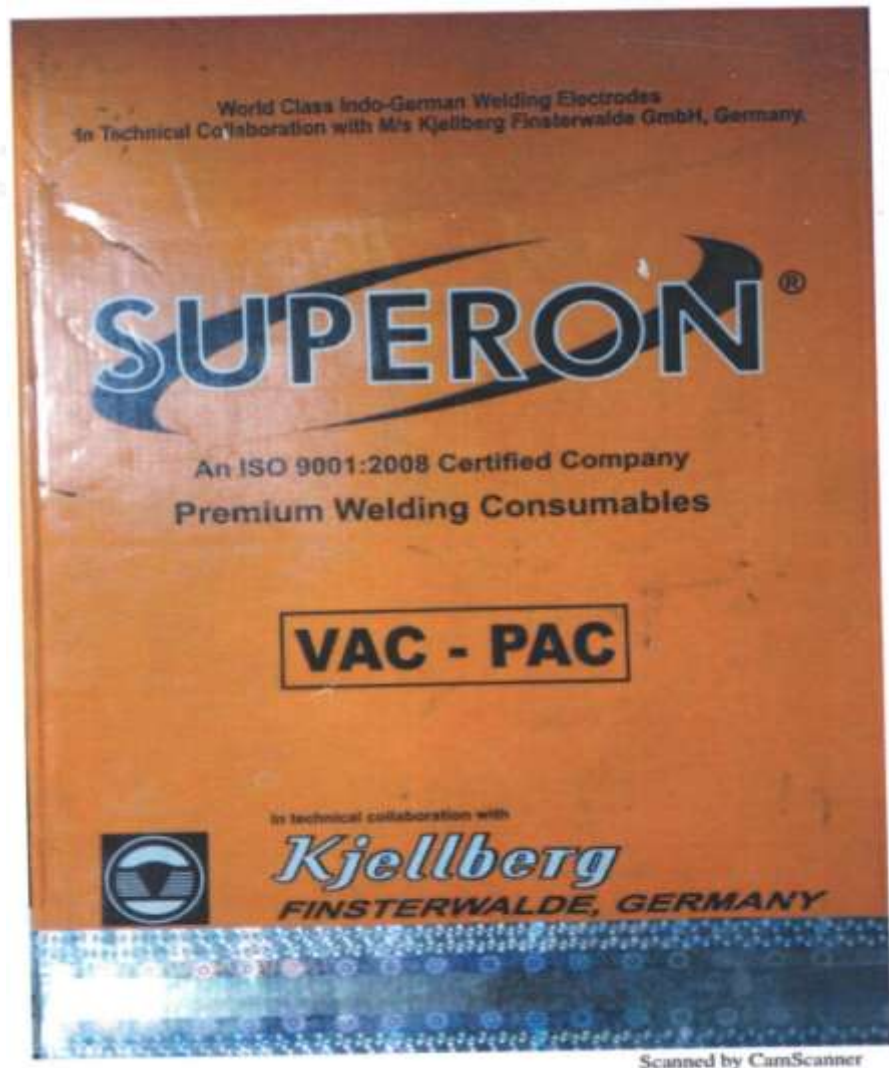
6. The facts of this case show that the plaintiff is selling its goods by using two trademarks SUPERON and VAC-PAC, whereas the defendant is selling its goods by use of its primary trademark

GMM/arc with addition of the words VAC-PAC on the packaging. The colour combination of the packaging of the plaintiff is dark yellow with use of two other main colours being blue and black, whereas the main packaging of the defendant is of blue and white colour with use of the red colour for the words 'arc' which is part of the trademark GMM/arc, and there is also an expression 'Umesh Modi Group' appearing on the packaging of the defendant which is in red colour. We therefore will look at the issue with respect to entitlement of the reliefs claimed by the plaintiff on the ground that whether in the facts of the present case as hereinabove stated, can the defendant be said to be passing off its goods as that of the plaintiff.

7. On the aspect of passing off, in my opinion, the plaintiff has no real prospect to succeed in the suit. This is **firstly** because the main trademark of the plaintiff is SUPERON along with the added trademark of VAC-PAC whereas the main trademark of the defendant is totally different being GMM/arc with the use of VAC-PAC. There is no identity or deceptive similarity *qua* the aforesaid two main trademarks of the parties and the different trademarks are such to

distinguish the goods of the plaintiff from that of the defendant, and hence no case is made out of passing off.

8.(i) **Secondly** the packaging of the plaintiff and defendant are also completely different and which would be seen from the following reproduction by scanning of the packaging of the parties as filed by the plaintiff itself:-





(ii) The law with respect to passing off is well settled and which is different from the law with respect to infringement. If the suit was based on the cause of action of infringement of the trademark of the plaintiff by the defendant then the Court had to essentially see the two trademarks only and not the packaging, whereas since the present suit is for passing off, this Court therefore can examine, besides the

respective trademarks, the other aspects of get up of the packaging of the products of the two parties. Plaintiff in the opinion of this Court in the facts of this case is thus disentitled to the relief on the cause of action of passing off on the ground that the get up and packaging of both the parties are completely different, and which second aspect is to be taken with the first aspect that plaintiff is using its wholly different main trademark of SUPERON with the trademark VAC-PAC as compared to the defendant's main trademark of GMM/arc with the word VAC-PAC.

9. In the case of *Marico Limited (supra)* this Court referred to the observations of the earlier Division Bench judgment of this Court in the case of *Cadila Healthcare Ltd. Vs. Gujrat Co-operative Milk Marketing Federation Ltd. & Ors. 2009 (41) PTC 336: 2009 (8) AD (Delhi) 350* to hold that question of passing off will not arise when the plaintiff was using the trademark "Sugar Free" but the defendant was selling its frozen dessert under the trademark "Amul" besides also using the trademark "Sugar Free", and further that "Sugar Free" being a descriptive word mark it was held that there will not arise the issue of passing off, and finally there is no case of passing off

when along with the trademarks being different the respective packaging is also different. The judgment in the case of *Marico Limited (supra)*, and which judgment on facts is more or less similar, the main trademark of the defendant was “Sundrop” with those of the plaintiff being “Saffola” and “Sweekar”, and on which facts the Division Bench of this Court in the case of *Marico Limited (supra)* held that there could not be a case of passing off, and additionally also on account of clear differences in packaging. The relevant observations in the case of *Marico Limited (supra)* for disentitling the plaintiff to the relief of injunction against alleged passing off, are contained in paras 7 and 5 of the judgment and these paras 7 and 5 read as under:-

“7. An important aspect with respect to the issue of passing off is that the respondent is selling its product with a prominent trademark “Sundrop” and which appears on the packaging of the respondent in a very prominent size, much larger than the size of the expression “LOW ABSORB TECHNOLOGY”. The colour scheme of the respective packaging is also wholly different. Appellant’s colour scheme is orange and the respondent’s blue. Merely because, the consumers are same and the trade channel same, it cannot be said that in the facts and circumstances of the case, there is a possibility of confusion, because there are more than enough differentiating features on the packaging so as to avoid any issue of the respondent passing of its goods as that of the appellant. For the sake of convenience the three packages in colour are reproduced below:-



Thus the conclusion of the above is that, even though the two respective products of the parties are identical viz edible oil, it cannot be said that the respondent is passing off its goods as that of the appellant-plaintiff.

5. Since, the second issue is now almost entirely covered by a decision of a Division Bench of this Court reported as *Cadila Healthcare Ltd. Vs. Gujrat Co-operative Milk Marketing Federation Ltd & Ors 2009 (41) PTC 336: 2009 (8) AD (Delhi) 350* we shall therefore deal with it first. We are consciously using “almost entirely” because there is one major difference in the case of *Cadila Healthcare Ltd. (supra)* and the present case on the issue of passing off being that the products in the case

of *Cadila Healthcare Ltd.* of the two parties were different, but in the present case the products are identical. The Division Bench in the judgment of *Cadila Healthcare Ltd. (supra)* was concerned with a passing off an action with respect to the trademark “Sugar Free” which was used by the plaintiff therein with respect to an artificial sweetener acting as a substitute for natural sugar and the defendant was selling a frozen desert with the Trademark “Amul” and describing its product as “Sugar Free”. The Division Bench has held that expression “Sugar Free” is basically a descriptive and generic expression. The Division Bench has further held that it cannot be said to be a coined word. The Division Bench in effect has held that there cannot an exclusive ownership granted to a person with respect to expression “Sugar Free”, i.e., there cannot be claim of exclusive user of the expression “Sugar Free” as a trademark with respect to all other products which were not artificial sweeteners assuming that the plaintiff may have distinctiveness with respect to its trademark for artificial sweeteners. The relevant paras of the judgment *Cadila Healthcare Ltd. (supra)* which contain the ratio are para Nos.8 to 11 and 14 which read as under:

“8. In our view, at this juncture i.e. at the interim stage, even assuming distinctiveness claimed by the appellant in its favor qua its artificial sweetener, the appellant has rightly been declined an injunction by the learned Single Judge since it is evident and has indeed been found by the learned Single Judge that the use of the term ‘Sugar Free’ by the respondent is not in the trademark sense but as a common descriptive adjective. The learned Single Judge has found and in our view rightly that the respondent has not used the expression in a trademark sense but only in a descriptive sense in the following passage: -

“54. It is important to be borne in mind that use of a descriptive expression as a trademark by a trader, irrespective of the said trademark having acquired a secondary meaning and distinctiveness in relation to the trader's products, does not entitle such trader from precluding other traders from using the said expression for the purposes of describing the characteristic features of their products. I have no hesitation in stating, albeit without prejudice to the rights and interests of the plaintiff in the present suit, that by adopting such a purely descriptive and laudatory expression 'Sugar Free' as its trademark, the plaintiff must be prepared to tolerate some degree of confusion which is inevitable owing to the wide spread use of such trademark by fellow competitors. Simply because the plaintiff claims to be using the expression 'Sugar Free' as a trademark much prior to the launch of the defendant's product Pro Biotic Frozen Dessert in the market does not give this Court a good ground for imposing a blanket injunction on the defendant from using the expression 'Sugar Free', especially when the defendant intends to use this expression only

in its descriptive sense and not as a trademark, and even otherwise, when the use of this expression is widespread in relation to foods and beverages”

We fully agree with and reaffirm the said finding.

9. We are unable to hold that the appellant’s trademark ‘Sugar Free’ is a coined word; at best it is a combination of two popular English words. The mere fact that the appellant’s product cannot be directly consumed or eaten and merely is an additive does not detract from the descriptive nature of the trademark. Once a common phrase in the English language which directly describes the product is adopted by a business enterprise, such adoption naturally entails the risk that others in the field would also be entitled to use such phrases provided no attempt is made to ride on the band wagon of the appellant’s indubitably market leading product ‘Sugar Free’. In this connection, merely because the attributes of ‘sugar free’ can be described by other phrases cannot detract from the common usage of the phrase ‘Sugar Free’ as denoting products which do not contain sugar and any trader which adopts such mark in the market place, does so with the clear knowledge of the possibility of other traders also using the said mark. That is precisely the reason for the denial of protection to such marks by refusing registration as envisaged by Sections 9, 30 and 35 of the Act. The said Sections read as follows: -

“9. Absolute grounds for refusal of registration.—(1) The trademarks—

(a) which are devoid of any distinctive character, that is to say, not capable of distinguishing the goods or services of one person from those of another person;

(b) *which consist exclusively of marks or indications which may serve in trade to designate the kind, quality, quantity, intended purpose, values, geographical origin or the time of production of the goods or rendering of the service or other characteristics of the goods or service;*

(c) which consist exclusively of marks or indications which have become customary in the current language or in the bona fide and established practices of the trade, shall not be registered:

Provided that a trademark shall not be refused registration if before the date of application for registration it has acquired a distinctive character as a result of the use made of it or is a well-known trademark.

30. Limits on effect of registered trademark.—(1) Nothing in Section 29 shall be construed as preventing the use of a registered trademark by any person for the purposes of identifying goods or services as those of the proprietor provided the use—

(a) is in accordance with honest practices in industrial or commercial matters, and

(b) is not such as to take unfair advantage of or be detrimental to the distinctive character or repute of the trademark.

(2) A registered trademark is not infringed where—

(a) *the use in relation to goods or services indicates the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services or other characteristics of goods or services;*

35. Saving for use of name, address or description of goods or services.—Nothing in this Act shall entitle the proprietor or a registered user of a registered trademark to interfere with any *bona fide* use by a person of his own name or that of his place of business, or of the name, or of the name of the place of business, of any of his predecessors in business, or the use by any person of any *bona fide* description of the character or quality of his goods or services. *(emphasis supplied)*

Thus, it is clear that the mark or indication which serves to designate the quality of the goods of the appellant, which indeed the phrase ‘Sugar Free’ does, would be an absolute ground for refusal of registration of a mark unless it has acquired a distinctive character. The expression can at best be said distinctive qua the artificial sweetener of the appellant and mere starting of the marketing of the drink ‘sugar free D’lite’ cannot give the appellant the right to claim distinctiveness in the expression ‘Sugar Free’ in relation to all the food products.

10. The learned Senior Counsel for the appellant has relied upon a plethora of judgments including the decision of the European Court of Justice in *Baby Dry* (supra) to claim that the expression ‘Sugar Free’ is a coined word and is distinctive in nature. Apart from the fact that the law laid down in the case of *Baby Dry* is not binding on us, it is also relevant to notice that in the said case the court permitted the registration on the basis of the categorical findings that the expression ‘Baby Dry’ was a syntactically unusual juxtaposition of two independent English words and was not a familiar expression in the English language. In our view, the expression ‘Sugar Free’ is neither a coined word nor an unusual juxtaposition of two English words especially when such expressions are commonly used, both in written, as well as spoken English, for example, — “hands-free” (for mobile phones) and “fat free” (for food articles) and thus cannot be permitted exclusive use for only the appellant’s product.

11. The appellant has relied upon the case of **Godfrey Philips India Ltd.** (supra) wherein it was held that a descriptive trademark may be entitled to protection if it has assumed a secondary meaning which identifies it with a particular product or has been from a particular source. It is also relevant to mention here the judgment of **Home Solutions** (supra) was also relied upon by the respondents, wherein it

was held that —*the expression “HOMESOLUTIONS” is inherently incapable of becoming distinctive of any single person with respect of any single product or service. It is generic and publici juris. It describes the nature of services offered.*” Thus, in our view, the mark ‘Sugar Free’ is inherently incapable of becoming distinctive of the product of the appellant and hence the ratio of Godfrey Philips would thus not be applicable. Even if it is assumed that the mark of the appellant has become distinctive qua the artificial sweetener, however, the protection to the mark qua the product artificial sweetener cannot be extended to all the food products of any competitor in the market. We also affirm and reiterate the view taken by the learned Single Judge that the appellant’s product is a sweetener/sugar substitute, and sweeteners are generally understood in their functional sense, that is, in terms of utility when added to foods and beverages. To an average consumer, a sweetener is known to exist only when added to food and beverages, and its own identity gets merged in the food and beverages to which it is added. Thus, the expression ‘Sugar Free’ when used in relation to a sweetener may really describe a sweetener in the sense of its generic meaning, and what it connotes is the specific nature and characteristics of the product.

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14. In consonance with the above view we are also not in a position to agree with the appellant that the word ‘Sugar Free’ has become so distinctive of the sugar substitute and has acquired such a secondary meaning in the sugar substitute market that it cannot refer to any other food product except the appellant’s sugar substituted product labelled ‘Sugar Free’. There cannot be any doubt that the word ‘sugar free’ is not inherently distinctive and is clearly descriptive in nature. In fact, the word ‘Sugar Free’ in essence clearly only describes the characteristics of the appellant’s product and therefore, cannot afford it the protection sought in the plaint by restraining the respondent from using the phrase ‘sugar free’. ‘Sugar Free’, *prima facie* has not attained any distinctiveness, as alleged by the appellant outside the field of sugar substitute artificial sweeteners and the appellant would not be entitled to exclusively claim the user of the expression ‘sugar free’ in respect of any product beyond its range of products and the respondent cannot be restrained from absolutely using the expression ‘Sugar Free’, particularly in the descriptive sense. A mere descriptive usage of the expression ‘Sugar Free’ by the respondent may thus blunt the edge of claim of distinctiveness by the appellant. However, we make it clear that if any party enters into the domain of artificial sweeteners with the trademark ‘Sugar Free’ the appellant may have a just cause in seeking restraint.” (Emphasis has been added by us)

(underlining added)

10. In *Marico Limited's* case (*supra*) an issue which was also decided was an issue as to the entitlement of a manufacturer/seller to use the expression “LOSORB”, and this Court held that since “LOSORB” was just an abbreviation of a larger descriptive expression “LOW ABSORB”, therefore the abbreviated form “LOSORB” was such that the abbreviation of the descriptive wordmark-trademark cannot be appropriated by any one manufacturer or seller exclusively for himself. The Division Bench of this Court in para 6 of the judgment in the case of *Marico Limited (supra)* has referred to the fact that merely because a person is first off the blocks in using descriptive words as a trademark or its abbreviation, that will not entitle such person to exclusively use the descriptive wordmark or its abbreviation as a trademark, and for this purpose reference has been made to the provisions of Sections 9, 30 and 35 of the Trade Marks Act, 1999. In fact the Division Bench in the case of *Marico Limited (supra)* has further observed that even if a descriptive wordmark or its abbreviation is got registered, even then such registration can be

sought to be got cancelled. The relevant paras 6, 10, 15 and 19 of the judgment in the case of *Marico Limited (supra)* read as under:-

“6. In view of the judgment of the Division Bench in the *Cadila Healthcare Ltd. (supra)*, and with which we respectfully agree, the appellant in the facts of the present case can have no exclusive ownership rights on the trademark “LOW ABSORB”. The expression “LOW ABSORB” is quite clearly a common descriptive expression/adjective. The expression “LOW ABSORB “ is not a coined word and at best it is a combination of two popular English words which are descriptive of the nature of the product as held by the Division Bench in *Cadila Healthcare Ltd. (supra)* case that such adoption naturally entails the risk that others in the field would also be entitled to use such phrases. Low Absorb is not an unusual syntax and the same can almost be said to be a meaningful part sentence or phrase in itself. The expression “LOW ABSORB” surely and immediately conveys the meaning of the expression that something which absorbs less, and when used with respect to edible oil, it is descriptive in that it refers to less oil being absorbed or low oil being absorbed. Similar to the expression “Sugar Free” being not an unusual juxtaposition of two English words the expression “LOW ABSORB” equally is not an unusual juxtaposition of words in that the same can take away the descriptive nature of the expression. The expression “LOW ABSORB” is used in the functional sense for the character of the product viz edible oil. With respect to the unregistered trademark “LOW ABSORB” we are of the firm opinion that in essence the expression “LOW ABSORB” only describes the characteristic of the product edible oil and ordinarily/ normally incapable of being distinctive.

We are also of the view that it is high time that those persons who are first of the blocks in using a trade mark which is a purely descriptive expression pertaining to the subject product ought to be discouraged from appropriating a descriptive expression or an expression which is more or less a descriptive expression as found in the English language for claiming the same to be an exclusive trademark and which descriptive word mark bears an indication to the product’s kind, quality, use or characteristic etc. This in our view is in accordance with the spirit of various sub sections of Section 9 and Section 30 besides also Section 35 of the Act. The very fact that in terms of Section 9 of the Act, in cases falling therein, there is an absolute ground for refusal of registration of the trademark, the same clearly is an indication of ordinarily a disentitlement from claiming exclusive ownership of a descriptive expression as a trademark. We are in this entire judgment for the sake of convenience only using the expression ‘descriptive expression’ or ‘descriptive word’ or ‘descriptive trademark’ ‘descriptive’ etc. but these expressions are intended to cover cases with

respect not only to a descriptive word mark used as a trademark but to all word marks used as trademarks which refer to kind, quality, intended use or other characteristics etc of the goods, and also other ingredients of Section 9(1) (b) and Section 30 (2) (a).

The aforesaid observations are made by us mindful of the proviso of Section 9 as per which on account of distinctiveness, the absolute bar against registration is removed, but, we are for the present stressing on the intendment of the main part of the Section and which is to basically prevent descriptive terms from being registered as trademarks. The proviso no doubt does state that such marks can be registered as a trademarks, however, the Act itself also contains provisions for cancellation of registered trademarks including Section 57 whereby registration obtained is cancelled being violative of the applicable provisions of the Act. Our belief is further confirmed by the provision of Section 31(1) which clearly states that registration is only prima facie evidence of the validity of registration. It is only when cancellation proceedings achieve finality of the same being finally dismissed can it be said that a mark for which ordinarily there is an absolute ground for refusal of registration that it has acquired a distinctive character i.e. a secondary meaning or is a well known trademark. Section 124 of the Act is also relevant in this regard. Sub section 5 of Section 124 clearly provides that in spite of registration, the Court before which an action is filed seeking protection of the trademark is not precluded from making any interlocutory order it thinks fit in spite of the registration and also the fact that the suit may have to be stayed till decision of the rectification/cancellation proceedings before the Registrar/Appellate Board filed in terms of Section 57 of the Act. This aspect of Section 124(5) and related aspects are dealt in details in the following portions of this judgment. The facts of the present case are not such that a cancellation proceeding has been dismissed and that which dismissal has obtained finality and it cannot be said that the validity of registration has been finally tested.

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10. That takes us to the main issue which was argued in the present case being the first issue of whether the appellant by virtue of the registrations has got an exclusive right to use the expressions “LOSORB” and “LO-SORB” and is thereby entitled to prevent anyone else from using any trade mark which is identical or deceptively similar to the registered trademarks.

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15. Now let us examine the issue of prima facie validity of registrations of the appellant for deciding the aspect of grant of injunction in the facts of the present case. When we look at the facts in the present case, we find that when the application was filed for registration of the

trademarks “LOSORB” and “LO-SORB”, the applications clearly stated “proposed to be used”. Quite clearly therefore on the date of registration there was no user at all of the trademark, much less such use of it so as to give the trademark a distinctive character as a result of use made of it or the same being a well known trademark. Clearly therefore, the registration of the trademark “LOSORB” and “LO-SORB” were prima facie invalid because the said trademarks basically are a minor variation of a descriptive expression “LOW ABSORB” which is not an unusual juxtaposition of words in the English language and no evidence existed before the Registrar of distinctiveness because the marks were sought to be registered not on proof of actual user so as to make the same distinctive on the date of filing of the application for registration but only on ‘proposed to be used’ basis. The expression “LOW ABSORB” conveys the same meaning as “ABSORBS LOW”. Such descriptive word marks are clearly such for which there is an absolute ground for refusal of registration by virtue of Section 9(1) (b) of the Act because clearly the said word marks are in fact clear indications of designation of the kind, quality, intended purpose or other characteristics of the goods of which the trademark is applied. The registrations being prima facie invalid no action for infringement would thus lie. On the issue of acquiring distinctiveness subsequent to the making of the application for registration, we have already dilated at length in the earlier part of this judgment while dealing with the issue of passing off that it cannot be said that the mark “LOW ABSORB” has acquired a secondary meaning by user of a few years.

We will now examine the issue whether the expressions “LOSORB” or “LO-SORB” have achieved a secondary meaning even if “LOW-ABSORB” may not have. On this aspect one immediately feels that it is an aspect of concern with respect to the claim of the plaintiff that if partly tweaked descriptive words and expressions of English language are claimed to be coined words, the same would result in a grave and absurd situation because a non-tweaked word being a completely descriptive word will in fact be deceptively similar to the tweaked descriptive English language word or expression of which registration is obtained. Meaning thereby that because of success in getting registered a minor modification of a descriptive word or expression of the English language, a person who gets registration can prevent a purely descriptive use of a normal word or expression as found in English language dictionary on the ground that it would be identical with or deceptively similar to a registered trademark- a position which is found in the present case. Such a position, in our opinion, cannot at all be countenanced and must be struck down with a heavy hand.

Having expounded on the law as above, we may again add that in a particular case, it is possible that a descriptive word mark on account of its such extensive user over a great length of time, when no other person has been shown to use the same, the same may in fact become a well known

trademark or a trademark which has achieved such distinction by user that it can be registered. Where the combination of words forming a trade mark is an unusual juxtaposition of words or part words the distinction may be achieved more easily than where the user of words put jointly is not an unusual syntax and also especially when the adaption is arbitrary with respect to the goods/trade. There can be a case where a coined word would be entitled to trademark protection where the coined word is the result of joining of one or two or few normal non descriptive English words of the dictionary or one word out of the two or more words forming a coined word is an arbitrary adaption. As already stated, therefore, in trademarks matters, every case necessarily turns upon and is decided on its own facts including but not limited to the trade mark, goods in question, customers, use and all other factors and their intense co-relation in each case.

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19. Our conclusion is that we have in fact totally failed to appreciate the argument as raised on behalf of the appellant. Surely, when rights are claimed over a word mark as a trademark and which word mark is in fact a mere tweak of a descriptive word indicative of the kind, quality, intended purpose or other characteristics of the goods, it is not open to urge that although the respondent is using the descriptive word mark in fact only as a part of sentence as a description (and even assuming for the sake of argument only the descriptive word mark in itself) alongwith another independent trademark, yet the use of descriptive words are to be injuncted against. How can it at all be argued that though the respondent is in fact shown to be using the disputed word(s) only with a descriptive intendment, yet, such use should be taken not in a descriptive manner but as a trademark. If we permit such an argument to prevail then what will happen is that what cannot be directly done will be indirectly done i.e., whereas the appellant is not entitled to succeed in the infringement action because the use by the respondent is in furtherance of its statutory rights of the user of the words which are descriptive of the kind, quality, intended purpose or characteristic of the goods, yet, merely because the appellant states that the respondent is using the same as a trademark, the same should be taken as infringement of the trademark of the appellant. Not only the plaintiff has no exclusive rights whatsoever to the trademarks because they are such which fall within the mischief of Section 30(2)(a), the respondent/defendant is always fully justified and entitled to use the descriptive words in any and every manner that it so chooses and pleases to do. If there are no rights of the plaintiff to exclusive user of the trademark then where does arise the question of disentitlement of a defendant to use the trademark of the appellant inasmuch as any person who adopts a descriptive word mark does so at its own peril in that any other person will also be fully entitled to use the same in view of a specific statutory rights thereto, and there are various other statutory rights

including that under Section 30(2) (a), and which is what is being done by the respondent in the facts of the present case and its rights being further stronger because of the use alongwith the simultaneous use of its trademark “Sundrop”.

In the facts and circumstances of the present case, Section 30(2)(a) clearly applies in entitling the respondent to use the expression “WITH LOW ABSORB TECHNOLOGY” because that is only a descriptive use by normal English words in the English language indicative of the kind, quality, intended purpose of characteristic of the goods. There is no use of the expression “bonafide” in Section 30(2)(a) as is found in Section 35, and we do not propose to import in Section 30(2)(a) the expression “bonafide” because the subject matters of the two Sections i.e. Section 32(a) and Section 35 are though common on certain limited aspects, however the two sections do in fact operate in separate fields. Also looking at the issue in another way, “bonafide” aspect can in a way be said to be very much included in Section 30(2)(a) because the use of words which indicate their relation to the goods for the kind, quality, intended purpose or other characteristics etc. of the goods, is clearly only a bonafide user of the same and which “bonafideness” does not have to be additionally proved. In fact, there is ordinarily not only no lack of bonafides in using the normal descriptive word, and on the contrary there is in fact malafides of a plaintiff in adopting otherwise a descriptive word mark and for which adaption there is ordinarily an absolute ground for refusal of registration of the trademark. There is no malafides of the respondent as alleged by the appellant because the respondent is using the expression “LOW ABSORB” as part of a sentence in a descriptive manner and the respondent is also prominently using its own trademark “Sundrop”, an aspect we have repeatedly referred to otherwise in this judgment. Merely because the respondent used “TM” earlier after the expression “LOW ABSORB TECHNOLOGY” is not such as to wipe out statutory rights/defences of the respondent.

We are also of the opinion that once the person, against whom a suit is filed on the ground of infringement of a trademark which is in fact a descriptive word, then, if a defendant is using his own word mark as a trademark prominently in addition to the descriptive word mark which the plaintiff claims to be his trademark, nothing further is required to show the bonafides of the defendant against whom infringement of a registered trademark is alleged. In the facts of the present case, we have already adverted to in detail the prominent use by the respondent of its independent trademark “Sundrop”, and, the fact that the expression “LOW ABSORB” is being used only as part of the sentence which reads “WITH LOW ABSORB TECHNOLOGY”. (underlining added)

11. At this stage on the aspect that a commercial suit can be dismissed once there is no real prospect of succeeding, it is necessary to refer to the relevant observations made in the case of *Godfrey Phillips India Limited (supra)*. The observations as to when no case of passing off can be said to be made out in the case of *Godfrey Phillips India Limited (supra)* are also relevant and are being referred to. These observations read as under:-

“6. In view of the aforesaid discussion, the following aspects are clear:-

(i) Plaintiff is not suing for infringement of its registered trademark which is a word mark of the plaintiff namely ‘CAVANDERS’ inasmuch as defendants are using a totally separate word mark/trademark ‘FUN GOLD’ for selling their cigarettes.

(ii) The suit also is not one for passing off the word mark which is the trademark of the plaintiff, namely ‘CAVANDERS’, inasmuch the defendants are using the word mark ‘FUN GOLD’ as their trademark.

(iii) Therefore the present suit is neither for infringement or passing off with respect to the use of the trademark ‘FUN GOLD SUPER LEAF’ by the defendants as there is no identity or deceptive similarity of the word mark used by the defendants as their trademark ‘FUN GOLD SUPER LEAF’ as compared to the word mark which is the trademark of the plaintiff viz ‘CAVANDERS GOLD LEAF’.

(iv) The suit though alleges infringement by the defendants of the trademark labels which were got registered by the plaintiff, and as detailed in para 12 of the plaint, however the infringement action against the defendants is not for the infringement of the registered labels of the plaintiff as a whole but that infringement is alleged because of the defendants user of the part of the registered labels of plaintiff being two colours of green and gold, and which colours defendants are also using on their packaging of cigarettes. The plaintiff however in view of Section 17 of the Trade Marks Act cannot plead infringement with respect to only part of the registered labels i.e consisting of two colours appearing on their labels being green and gold, and therefore the present suit alleging infringement of registered trademark label because of only part of the registered trademark use by the defendants, does not lie.

7. We are now therefore left with the issue as to whether defendants are passing off their goods being cigarettes as the goods of the plaintiff. On this issue discussion will take place under two sub-heads. First sub-head will be whether the simple colour combination of two colour shades of green and gold can be at all distinctive of the plaintiff's packaging/getup and the second sub-head will be that even if distinctiveness exists in plaintiff's favour with respect to the two colours of green and gold on its packaging yet whether no case of passing off is made out in the facts of this case. However before discussing the two aspects it is required to be noted that discussion on these two aspects will have to take place keeping in view the parameters as mandated to commercial suits under the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Act, 2015 inasmuch as the subject suit is a commercial suit. Whereas in ordinary suits as per the procedure of the Code of Civil Procedure, 1908 (CPC) when disputed questions of fact arise then trial is mandatory but in commercial suits courts need not hold trial even if there are disputed questions of fact if a court comes to a conclusion that plaintiff lacks real prospect in succeeding in the suit. Commercial suits therefore can be dismissed by adopting the summary procedure and this summary procedure is the subject matter of Order XIII-A of CPC as applicable because of Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act. Order XIII-A Rule (3)(a) as applicable to commercial courts provides that a court can give a summary judgment against a plaintiff when the plaintiff has no real prospect of succeeding in the suit claim. This is also so stated in Rule 6(1)(a) of the said Order XIII-A. These provisions read as under:-

*"3. Grounds for summary judgment-*The Court may give a summary judgment against a plaintiff or defendant on a claim if it considers that— (a) the plaintiff has no real prospect of succeeding on the claim or the defendant has no real prospect of successfully defending the claim, as the case may be; and

6. Orders that may be made by Court-(1) On an application made under this Order, the Court may make such orders that it may deem fit in its discretion including the following:—

(a) judgment on the claim;"

8. The law on the aspect of distinctiveness is encapsulated by the Supreme Court in its judgment in the case of *Laxmikant V. Patel vs Chetanbhai Shah and Another, (2002) 3 SCC 65* as under:-

"12. In *Oertli v. Bowman*, (at page 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.” (underlining added)

9. The basis of the ratio of the Supreme Court with respect to distinctiveness of a trademark or getup or other aspects existing for the plaintiff to succeed in a suit alleging passing off is because of Section 9(1)(a) and Section 11(3)(a) of the Trade Marks Act and these provisions read as under:-

“**Section 9. Absolute grounds for refusal of registration.**— (1) The trade marks-

(a) which are devoid of any distinctive character, that is to say, not capable of distinguishing the goods or services of one person from those of another person;

.....

shall not be registered:

Provided that a trade mark shall not be refused registration if before the date of application for registration it has acquired a distinctive character as a result of the use made of it or is a well-known trade mark.

Section 11. Relative grounds for refusal of registration-

.....

(3) A trade mark shall not be registered if, or to the extent that, its use in India is liable to be prevented—

(a) by virtue of any law in particular the law of passing off protecting an unregistered trade mark used in the course of trade;”

10. The law therefore is that before passing off can be a basis of cause of action for plaintiff to succeed it has to be first shown that the plaintiff has achieved a reputation in the market with respect to its trademark or label or any other aspect, so that the plaintiff can establish that the trademark or other aspects with respect to which passing off is pleaded have become distinctive with respect to the goods of the plaintiff. Putting it in other words, unless the aspects on the basis of which passing off is alleged are such that these aspects are shown to have exclusive co-relation to the goods of the plaintiff, the plaintiff cannot succeed in proving distinctiveness and hence cannot succeed on the cause of action of passing off. This is clearly observed by the Supreme Court in para 12 of *Laxmikant V. Patel's* case (*supra*) wherein the Supreme Court by

reference to the judgment in the case of *Oertli v. Bowman (1957) RPC 388*, has stated that in an action for passing off based on the use of a mark or getup it is necessary that the plaintiff should be able to show that the mark or getup has become by use in the country distinctive of the plaintiff's goods so that use of such mark or getup by the defendant in relation to any goods of the same kind which is dealt by the plaintiff, the same will be understood by the public in that country as relatable to the plaintiff's goods. Meaning thereby that when the goods of the defendant are purchased the customer does so that as if the goods purchased are of the plaintiff. Clearly therefore the issue of an entitlement of a plaintiff to succeed in a suit for passing off is by showing that the getup or trade dress or any other aspect on the basis of which passing off is alleged are such that such getup, trade dress or any other aspect has acquired distinctiveness and the public associates such trade dress or getup or other aspects only and only with the plaintiff's goods.

11. The issue in the present case therefore boils down to whether use of shades of green and golden colour by the plaintiff has made this combination of two colours so exclusive and distinctive that the same can only be associated with the plaintiff so that user by defendants of such colour combination will result in passing off. The aforesaid aspect has to be taken with the fact that while dealing with the issue of passing off, unlike an issue of an infringement of a registered trademark/word mark, there can exist other factors which will result in plaintiff failing to succeed in establishing passing off because such other factors will show that the reasonable customers/consumers will not be deceived while purchasing the goods of the defendant by thinking that in fact they are purchasing the goods of the plaintiff. Such differentiating factors which will result in there not existing passing off can be many with the most important factor being that if the trademark which is the word mark of the defendant is so different than what is used by the plaintiff, then passing off is not established merely because there would be found any other similarity such as of similar colour combination.

12. In my opinion, in the present case, even if all the averments in the plaint are taken to be correct for the plaintiff to plead existence of passing off allegedly on account of use by the plaintiff of two colours green and golden in its packaging, even then the plaintiff does not have a real prospect in establishing a case of passing off because the word mark used by the defendants as their trademark is totally different than the word mark which is used by the plaintiff as its trademark i.e 'CAVANDERS' of the plaintiff as compared to 'FUN GOLD' by the defendants. We have to keep in mind that we are dealing with reasonable customers who purchase cigarettes and not reckless/negligent consumers, and that cigarettes are purchased on the basis of the brand name/trademark of the cigarettes. Also it will be noted that the plaintiff along with word mark 'CAVANDERS' is using an expression 'GOLD LEAF' whereas the defendants are using the

expression 'SUPER LEAF' with the trademark 'FUN GOLD'. Also in any case and ultimately the main word mark which is a trademark of the plaintiff 'CAVANDERS' is so different than the word mark which is the trademark of the defendants namely 'FUN GOLD' that since there is in no manner any identity or deceptive similarity between the two word marks/trademarks of the respective parties, therefore there will not arise at all any issue of passing off simply because of both parties using green and gold colours on their packaging especially because as stated above reasonable consumers purchase cigarettes by their brand name/word mark which is used as a trademark and thus mere existence of similar colour scheme of two simple shades of green and gold in the respective packaging will not cause passing off by the defendants when selling their goods/cigarettes simply because the plaintiff is also using those same two colours in their packaging for cigarettes.

13. A minor aspect to be also noted is that there is considerable difference in the pictorial representations in the respective packaging of the plaintiff and as compared to the packaging of the defendants on account of depicting how the use of cigarettes is injurious to health and causes tumors or diseases in the body. I have already reproduced above the packaging of the respective parties by scanning para 17 of the plaint and it is seen that pictorial representations of both the packaging of the parties are completely different. I may also note that pictorial representation and warning of smoking causing cancer are now required statutorily to be affixed in the packaging and therefore since such warnings are printed in the packaging would not mean that for reasons of these warnings plaintiff can allege any passing off. Therefore though the aspect of pictorial representation is not much relevant however this aspect does have a limited bearing for denying the plaintiff right to succeed on the cause of action of passing off in the facts of the present case.

14. I must note at this stage that in quite a few Intellectual Property Rights (IPR) matters, every plaintiff seeks to throttle competition in order to create a monopoly like situation for the products of the plaintiff so that the profits carved keep on increasing and also do not decrease. It is this tendency in certain manufacturers and litigants which leads to filing of completely misconceived cases, with the present case being one such completely misconceived case having no legal cause of action. It is time that litigants and plaintiffs in suits understand that on any and every averment a legal cause of action is not made out in commercial suits so as to entitle plaintiffs to throttle competing businesses. The law of passing off is essentially the law of business morality i.e defendants cannot use because of the concept of business morality, the trademarks or trade dress or getup or other aspects similar to that used by the plaintiff, however the principle of business morality as stated by the Supreme Court in the case of *Laxmikant V. Patel (supra)* will also equally apply to a plaintiff in a suit that the same business morality also requires freedom of trade and not

filing of misconceived and baseless cases against competitors so that plaintiff enjoy monopoly like situations for their business to make ever increasing profits.” (underlining added)

12. The aforesaid observations in the case of **Godfrey Phillips India Limited** (*supra*) will apply to the facts of the present case where the main trademarks of plaintiff and defendant are found to be vastly different. The ratio of **Godfrey Phillips India Limited's** case (*supra*) will also apply afortiori to the facts of this case as the colour combination/get up of packaging of the two parties are also totally different, whereas in **Godfrey Phillips India Limited's** case (*supra*) the colour combination of packaging of both the parties was same.

13. Therefore, this suit is liable to be and is accordingly dismissed by holding that plaintiff has no real prospect to succeed by alleging that defendant is passing off its goods as that of the plaintiff allegedly because defendant is also using the expression “VAC-PAC” which is used by the plaintiff. The plaintiff cannot succeed on the claim of passing off because of complete difference of the main trademarks of the plaintiff and the defendant which are found to be totally different being SUPERON and GMM/arc, as also the complete

difference in the get up and packaging of the products of the plaintiff and defendant as has been demonstrated above. Independent of the plaintiff having failed in making out a case of passing off for the aforesaid reasons, the suit will also have to be dismissed by applying the ratio of the judgment in the case of *Marico Limited (supra)* that Courts should not and will not allow ordinary descriptive words or their abbreviations to be appropriated, or if I can say so misappropriated, by one or more manufacturer or seller etc. The facts of the present case are more or less identical to the facts of the case in *Marico Limited (supra)* where a manufacturer/seller was held disentitled to use the wordmark “LOSORB” which was an abbreviated form of “LOW ABSORB”, and in the facts of the present case once the plaintiff itself admits/does not dispute that the word VAC-PAC is derived from Vacuum Pack/Vacuum Packaging, and which is a way of packaging of the welding electrodes of the parties so as to give it a longer shelf life, then an abbreviated form of descriptive words Vacuum Pack/Vacuum Packaging by calling it VAC-PAC will not entitle a manufacturer/seller such as the plaintiff to claim exclusive ownership of either the descriptive wordmark/trademark Vacuum

Pack/Vacuum Packaging or its abbreviated form VAC-PAC in view of Sections 9, 30 and 35 of the Trade Marks Act . Also in the opinion of this Court the use of the expression “VAC-PAC” for only about 13 years will not be such a large length of time as to make the abbreviation of descriptive words an exclusive distinctive trademark of the plaintiff. The ratio of the judgment in the case of *Marico Limited (supra)* is to be taken with the fact that the subject suit is a commercial suit and would be governed by Order XIII-A CPC as applicable to commercial cases and as interpreted by this Court in the judgment in the case of *Godfrey Phillips India Limited (supra)*.

14. Section 35 CPC has been amended specifically for commercial cases and courts have been mandated to strictly apply the provision of costs to the commercial cases. Legislature has found that besides wastage of time, money and energy of parties to litigation, there is also wastage of time of the Courts in various litigations which really cannot succeed, and hence Section 35 has been substituted in CPC as regards commercial cases which contains the different aspects of entitlement of a Court to impose costs in a commercial suit. This Section 35 CPC as applicable to commercial cases reads as under:-

“Section 35. Costs. (1) In relation to any commercial dispute, the Court, notwithstanding anything contained in any other law for the time being in force or Rule, has the discretion to determine:

- (a) whether costs are payable by one party to another;
- (b) the quantum of those costs; and
- (c) when they are to be paid.

Explanation.—For the purpose of clause (a), the expression “costs” shall mean reasonable costs relating to—

- (i) the fees and expenses of the witnesses incurred;
- (ii) legal fees and expenses incurred;
- (iii) any other expenses incurred in connection with the proceedings.

(2) If the Court decides to make an order for payment of costs, the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party:

Provided that the Court may make an order deviating from the general rule for reasons to be recorded in writing.

Illustration: The Plaintiff, in his suit, seeks a money decree for breach of contract, and damages. The Court holds that the Plaintiff is entitled to the money decree. However, it returns a finding that the claim for damages is frivolous and vexatious.

In such circumstances the Court may impose costs on the Plaintiff, despite the Plaintiff being the successful party, for having raised frivolous claims for damages.

(3) In making an order for the payment of costs, the Court shall have regard to the following circumstances, including—

- (a) the conduct of the parties;
- (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful;
- (c) whether the party had made a frivolous counterclaim leading to delay in the disposal of the case;
- (d) whether any reasonable offer to settle is made by a party and unreasonably refused by the other party; and
- (e) whether the party had made a frivolous claim and instituted a vexatious proceeding wasting the time of the Court.

(4) The orders which the Court may make under this provision include an order that a party must pay—

- (a) a proportion of another party’s costs;
- (b) a stated amount in respect of another party’s costs;
- (c) costs from or until a certain date;
- (d) costs incurred before proceedings have begun;
- (e) costs relating to particular steps taken in the proceedings;
- (f) costs relating to a distinct part of the proceedings; and
- (g) interest on costs from or until a certain date.”

15. Accordingly, since the present suit is a gross abuse of process of law, and the plaintiff has chosen to file the same in spite of the settled law laid down in the case of *Marico Limited (supra)*, which holds that there does not arise any issue of passing off not only because of use of primary trademarks as wordmarks being different of both the parties but also that there is complete difference in get up and packaging of the products of the respective parties, and finally with respect to disentitlement of any person to claim descriptive wordmarks or their abbreviated forms for their exclusive entitlement in view of provisions of the Trade Marks Act, therefore this suit is dismissed with actual costs. Defendant will file an affidavit of costs incurred by it for engaging its lawyer in the present case and this affidavit of costs supported by the necessary documents will be filed within a period of two weeks from today. Costs stated in this affidavit will be paid by the plaintiff to the defendant within a period of two weeks thereafter.

16. Besides imposition of costs on the plaintiff in favour of the defendant by applying Section 35 CPC, in my opinion since the suit has been found to be an abuse of process of law, this suit is also dismissed with costs of Rs.50,000/- which are to be deposited by the

plaintiff with the website www.bharatkeveer.gov.in. There is no provision in CPC for imposition of costs for abuse of process of law because Section 35 CPC is applicable only for awarding costs in favour of a successful party and hence it is Section 151 CPC which will come into application for imposition of costs upon a litigant who abuses the process of law and unnecessarily wastes judicial time.

17. Suit is accordingly dismissed with costs in terms of aforesaid observations. Decree sheet be prepared.

APRIL 02, 2018
Ne/ns

VALMIKI J. MEHTA, J

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