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**IN THE HIGH COURT OF DELHI AT NEW DELHI***Reserved on: 15<sup>th</sup> December, 2023**Date of decision: 15<sup>th</sup> January, 2024*

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**CS(COMM) 274/2021 and I.As. 7301/2021 & 4441/2023****ALLIED BLENDERS @ DISTILLERS PRIVATE  
LIMITED**

..... Plaintiff

Through: Mr. Pravin Anand, Mr. Shrawan  
Chopra and Mr. Achyut Tewari Advs.  
(M. 8604633567)

versus

**HERMES DISTILLERY PRIVATE LIMITED** ..... Defendant

Through: Mr. J. Sai Deepak, Mr. N. K.  
Bhardwaj, Ms. Anju Agrawal, Mr.  
Bikash Ghorai, Mr. Avinash Kumar  
Sharma, Advs. (M. 9773981580).

**CORAM:****JUSTICE PRATHIBA M. SINGH****JUDGMENT****Prathiba M. Singh, J.**

1. This hearing has been held through hybrid mode.

**I.A. 4441/2023 (under Section 151 CPC)**

2. This is an application moved by the Plaintiff-Allied Blenders seeking to record its change of name from M/s Allied Blenders and Distillers Pvt. Ltd. to Allied Blenders and Distillers Ltd. The Certificate of Incorporation issued under Section 18 of the Companies Act, 2013 on 8<sup>th</sup> June, 2022 has been attached with the application. For the reasons stated in the application, and no objections from the Defendant, the change of name is allowed.

3. The amended memo of parties is taken on record.

4. Application is disposed of.



**I.A. 7301/2021 (u/O. XXXIX Rule 1&2 CPC)**

**Background**

5. The Plaintiff- Allied Blenders and Distillers Private Limited has filed the present suit under Section 134 and 135 of the Trade Marks Act, 1999 seeking an injunction against the Defendant- Hermes Distillery Pvt. Ltd.'s labels.

6. The Plaintiff's case is that it is one of leading manufacturer and sellers of alcoholic beverages under various trademarks, namely, 'OFFICER'S CHOICE', 'OFFICER'S CHOICE BLUE', 'OFFICER'S CHOICE BLACK', 'CLASS VODKA', *etc.* The subject matter of the present suit concerns the Plaintiff's product 'OFFICER'S CHOICE' and its labels, which have evolved over the years.

7. The products under the mark 'OFFICER'S CHOICE' were launched by the Plaintiff in 1988 and it is claimed to be one of the largest selling whiskies in the world. It is the Plaintiff's case that in July, 2014, 'OFFICER'S CHOICE' was declared as the largest selling whisky in the world. The mark 'OFFICER'S CHOICE', as a word mark, is registered by the Plaintiff since 1988. The said mark has been used since 1988 by the Plaintiff's predecessor and was officially transferred to the Plaintiff in 1991. Following a business demerger and transfer process approved by the High Court of Bombay in 2007, the Plaintiff became the proprietor of mark 'OFFICER'S CHOICE' and its variants in several categories.

8. The Plaintiff is the registered proprietor of the trade mark 'OFFICER'S CHOICE' in various classes. The details of the Plaintiff's marks are available in paragraph 7 of the plaint. However, for the purposes of the present suit, the relevant trade mark registration for devices/labels used for the 'OFFICER'S




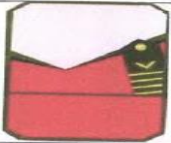




CHOICE' product are extracted below:-

 <p style="text-align: center;"><i>DEVICE OF FLAP</i></p>	<p><i>Trade Mark Application No. 2542942</i>  <i>Date: 4<sup>th</sup> June, 2013</i>  <i>Class: 32</i>  <i>Type: Device Mark</i>  <i>User: Proposed to be used</i></p>
	<p><i>Trade Mark Application No. 3238296</i>  <i>Date: 19<sup>th</sup> April, 2016</i>  <i>Class: 33</i>  <i>Type: Device Mark</i>  <i>User: Proposed to be used</i></p>
	<p><i>Trade Mark Application No. 2739309</i>  <i>Date: 19<sup>th</sup> May, 2014</i>  <i>Class: 33</i>  <i>Type: Device Mark</i>  <i>User: Proposed to be used</i></p>

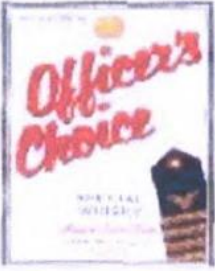





9. Some of the other registrations are mentioned below:

S. No.	Registration No.	Trademark	Class	Date
1.	489582	OFFICER'S CHOICE	33	21/04/1988
2.	610451	OFFICER'S CHOICE	32	27/10/1993
3.	819448	Officer's Choice	34	16/09/1998
4.	819449	Officer's Choice	03	16/09/1998
5.	1647607	Officer's Choice	33	29/01/2008
6.	1232776	CHOICE	32	05/09/2003
7.	3238296		33	19/04/2016

8.	2542942		32	04/06/2013
9.	1647607		33	29/01/2008
10.	538927		33	26/10/1990
11.	1036570		33	13/08/2001
12.	1501163		33	03/11/2006



13.	1501160		33	03/11/2006
14.	1788987		33	24/02/2009
15.	2739309		33	19/05/2014
16.	2739310		33	19/05/2014

10. The sales of ‘OFFICER'S CHOICE’ whiskey amount to approximately 30.10 million cases, each consisting of 9 liters, indicating a very high volume of sales. The Plaintiff claims that the Plaintiff’s ‘OFFICER'S CHOICE’ brand also has notable export sales, with hundreds of thousands to over a million cases exported annually from 2006-07 to 2019-20. Further, from 1994-2020, the Plaintiff claims to have expended between Rs. 14.90 crores to Rs. 286.15 crores for sales promotion. In 2019-2020, the Plaintiff expended Rs. 52.72 crores in promotional activities. Promotional strategies have included sponsoring the Indian Cricket Team, advertisements in magazines and



television, and the use of hoardings, posters, and other visual materials.

11. According to the plaint, the Plaintiff has been using the trade mark 'OFFICER'S CHOICE' in a distinctive design, color scheme, layout, and get-up as its label, which has become uniquely associated with its products. The white base, red font style, and lettering of the logo are considered original artistic work under Section 2(c) of the Copyright Act, 1957. In May 2009, the Plaintiff claims to have updated the 'OFFICER'S CHOICE' label to align with changing consumer attitudes and tastes, giving their whisky products a fresh appeal and premium feel. It is averred that the notable features of the new label include:

- A combination of red, white, and gold colors.
- A distinctive gold border.
- A centrally aligned coat of arms with a stylized "OC" mark at the top.
- A layout with the bottom half in red divided by a gold line running side to side, and the top half in white.
- A 'V' shaped gold border separating the red bottom half from the white top half.
- White lettering in the bottom red half.
- The mark 'OFFICER'S CHOICE' in red font at the top white half.

12. It is averred that the new label's unique arrangement of features, get-up, layout, and color combination distinguishes it as an original and distinct artistic work. The Plaintiff's new label is as follows:



13. The Plaintiff further claims to own the copyright subsisting in the artistic work underlying the label 'OFFICER'S CHOICE PRESTIGE WHISKY', duly registered bearing registration No. A-101083/2013 dated 12<sup>th</sup> June, 2013. As per the plaint, the Plaintiff also introduced a newer label incorporating the same overall combination of red, white and gold. The Plaintiff's different artistic works underlying the mark OFFICER'S CHOICE' are as follows:



14. The Defendant- company is also engaged in blending and bottling liquor brands and allied products. Its registered office is in Belgaum, Karnataka, and it also operates in New Delhi. The Plaintiff discovered the



Defendant's activities in October 2019 when 'PEACE MAKER PRESTIGE WHISKY' with the impugned label was launched in small quantities in Haryana and Assam. In November 2019, it was learnt that sales of this product had also started in North Karnataka, *albeit* sporadically. The Plaintiff's grievance is regarding labels used by the Defendant for its whisky bottles. A comparison table of the two labels is set out below :-



15. Thereafter, the Plaintiff also came across the Defendant's trade mark application for 'PEACE MAKER' device mark bearing No. TM 4261292 dated 9<sup>th</sup> August, 2019, which was advertised in the Trade Marks Journal No. 1967 dated 28<sup>th</sup> September, 2020 in class 33. The said application claimed user since 14<sup>th</sup> August, 2018. The said application was filed in the name of the Director, Mr. Amit Kore. The Plaintiff then opposed the marks under Section 21 of the Trade Marks Act, 1999 vide opposition bearing no. 1088221 dated 27<sup>th</sup> January, 2021 and has, thereafter, filed the present suit.

16. According to the Plaintiff, similarities between the two labels is as under :-





Plaintiff's label	Defendant's label
Product : Whisky	Product : Whisky
Overall Combination: Use of a Red, White and Gold colour combination	Overall Combination: Use of a Red, White and Gold colour combination
Lay out:- <ul style="list-style-type: none"> <li>• Bottom half - Red colour</li> <li>• Top Half- White colour</li> </ul>	Lay out:- <ul style="list-style-type: none"> <li>• Bottom half - Red colour</li> <li>• Top Half- White colour</li> </ul>
Border : Gold border	Border : Gold border
Lettering : In white half of the label, mark written in red colour with same font, slant and in cursive manner of writing.	Lettering : In white half of the label, mark written in red colour with same font, slant and in cursive manner of writing.
Red part of the Label, the word 'Prestige Whisky' is written.	Red part of the Label, the word 'Prestige Whisky' is written.
The word 'Whisky' is written in white colour.	The word 'Whisky' is written in white colour.

**Plaintiff's Submissions**

17. Ld. Counsel for the Plaintiff submits that the overall look and feel of the two labels is almost identical. He relies on the following features to argue that they are deceptively similar:

- **Positioning of Brand Names:** Both 'OFFICER'S CHOICE' and 'PEACE MAKER' are positioned in a similar upward slanting manner



on their respective labels.

- **Font Style and colour:** The brand names on both labels are written in red, using a similar cursive font, and feature golden-yellow accents.
- **Product Description:** The phrase '*Prestige Whisky*' is prominently displayed on both labels.
- **Placement of the marks:** The 'OFFICER'S CHOICE' and 'PEACE MAKER' marks are both located in the top half of their respective labels.
- **Color Scheme:** Both labels share a red, white, and golden-yellow color scheme.
- **Border Design:** Each label features a golden-yellow border. The top half and bottom half are divided by a gold line.
- **Central Design Element:** A right-upward slanting golden-yellow line is prominently placed in the middle of both labels.

18. According to the Plaintiff, overall similarity is completely inexplicable, especially, considering the fact that the Plaintiff's product is one of the leading whiskies in India.

19. In its written submissions dated 29<sup>th</sup> July, 2021, 6<sup>th</sup> October, 2021 and 15<sup>th</sup> September, 2023 the Plaintiff places reliance on the following judgments:

- *Allied Blenders and Distillers Pvt. Ltd. v. Shree Nath Heritage Liquor Private Limited (2014 SCC OnLine Del 3412)* (hereinafter, '*Allied Blenders I*').
- *M/s. Allied Blenders and Distillers Pvt. Ltd. v. M/s. Sentini Bio Products Pvt. Ltd (2014 SCC OnLine Del 3423)* (hereinafter, '*Allied Blenders II*').



- *Vicco Laboratories v. Hindustan Rimmer (AIR 1979 Delhi 114).*
- *Burger King Corporation v. Techchand Shewakramani (2018 SCC OnLine Del 10881, paras 50-57).*
- *Cadila Pharmaceuticals Limited v. Sami Khatib of Mumbai [2011 (47) PTC 69 (Bom.) (DB)].*
- *FDC Limited v. Docsuggest Healthcare Services Private Limited (2017 SCC OnLine Del 6381, paras 47-52).*
- *M/s Hindustan Pencil Private Limited v. M/s. India Stationary Products Co. [ILR 1989 I Delhi, para 30].*
- *J.R. Parkington and Coy. LD. v. Frederick Robinson, LD [(1946) RPC 17, para 181].*
- *Shree Nath Heritage Liquor Pvt. Ltd. v. M/s. Allied Blender & Distillers Pvt. Ltd. (2015: DHC:5236-DB).*
- *Durga Dutt Sharma v. Navaratna Pharmaceutical Laboratories (AIR 1965 SC 980).*
- *UFO Contemporary, Inc. v. Creative Kids Wear India Pvt. Ltd. [2020 (84) PTC 461 (Del), paras 29-30]*
- *Wockhardt Limited v. Eden Healthcare Pvt. Ltd. (2014 SCC OnLine Bom 16, para 25).*
- *Zenner International GMBH & CO KG v. Anand Zenner Company Pvt. Ltd. [(2018) 73 PTC 618, paras 1-12].*
- *Allied Blenders and Distillers Pvt. Ltd v. Govind Yadav, [CS(COMM) 819/2018, order dated 7<sup>th</sup> May, 2018 & RFA(OS)(COMM) 7/2019, order dated 10<sup>th</sup> April, 2019] (hereinafter, 'Allied Blenders III').*
- *Munday v. Carey [1905 (22) RPC 273, page 276].*



- *Midland Counties Dairy v. Midland Dairies (1948 RPC 429, page 435).*
- *Reckitt & Colman Products Ltd. v. Borden Inc. (1990 RPC 341, page 351).*
- *Allied Blenders and Distillers Pvt. Ltd. v. Agribiotech Industries Ltd (MANU/DE/1936/2020) (hereinafter, 'Allied Blenders IV').*

### Defendant's submissions

20. On behalf of the Defendant, it is contended that there has been no consistency in the Plaintiff's labels. The Plaintiff has been changing its labels from time to time. It is unclear since when the Plaintiff has been using the labels in question. Further, the use of the color combination, red and white is common to the trade. According to the Defendant, several other manufacturers use the similar combination of colors for their products. Some of the products cited by the Defendant are set out below:-

#### Specimen of Brands using Red, White and Golden Colors



Peter Scot



Royal Stag



AC SEKO



RED KNIGHT



Dewars



Haywards Fine Whiskey



President Medal



Jack Daniels Fire



Clan Robertson



Ballentines





21. It is further argued that since none of the claimed features are distinctive, there is no case of infringement or passing off.

22. Additionally, one of the Defendant's submissions argues that this Court lacks territorial jurisdiction. It is the case of the Defendant that it has not sold the impugned product under the mark 'PEACE MAKER' in Delhi, nor have they acquired a license required for its sale there. According to the Defendant, the plaintiff does not claim any such sales or licensing in Delhi. Neither the Defendant nor the Plaintiff has a registered or branch office in Delhi, nor are they conducting business there. Further, according to the plaintiff's documents, the Defendant's website is merely informational and not interactive. The case is also that the Defendant's registered office is located in Karnataka, while the Plaintiff's is in Mumbai, and the Plaintiff does not have a branch office in Delhi.



23. It is also claimed by the Defendant that the Defendant's 'PEACE MAKER' product is not available for sale in Delhi, nor is it stored in any warehouse in Delhi, which is also not alleged in the plaint. According to the Defendant, the sale of other products by the Defendant in Delhi does not constitute '*carrying on business*' in the region. Consequently, based on the plaint, there is no real or imminent threat to the Plaintiff's trade mark and trade dress under 'OFFICERS CHOICE' in Delhi.

24. On the merits, the Defendant's first submission on the application for interim injunction is that the present case is not a case of trade mark, but of label with a colour combination, and there can be no exclusivity for a colour combination. According to the Defendant, the onus is on the Plaintiff to show that the said label, for which protection is being sought, has by itself acquired goodwill without the mark. He submits that unless and until the label is distinctive on its own, the get up protection for label ought not be granted.

25. In the present suit, the competing marks are 'OFFICERS CHOICE' and 'PEACE MAKER'. Thus, there is no confusion between the same. However, Plaintiff's grievance appears in respect of the colour combination and certain elements used on the label including the ribbon device. Ld. Counsel Mr. Sai Deepak submits that the Plaintiff itself is not consistent in its use of the label for OFFICERS CHOICE as is evident from reading of the plaint, where the Plaintiff shows the manner in which the labels evolved.

26. Upon examining the said three different labels above, it is seen that:

- the first label features a broad combination of white and red backgrounds with a distinct device.
- The second label presents a completely white background with red printing.



- The third label, which is currently being pressed into service for alleging deception and imitation, was recently adopted.
- The Plaintiff also claims the ability to switch between various labels.
- Additionally, there are six other labels mentioned in paragraph 5 of the plaint, unrelated to the current label under consideration, as they are in blue, grey, yellow, brown, etc. colours.

27. Given this lack of consistency, according to the Defendant, the Plaintiff cannot claim that the said label is distinctive by itself, nor that it has acquired goodwill and reputation immediately associated with the label.

28. Regarding the Plaintiff's registrations, it is argued by the Id. Counsel that the back label, excluding the mark, is registered only in class 32 for non-alcoholic drinks and not in the relevant class, i.e., class 33. According to the Defendant, the emphasis in the pleadings and registrations is primarily on the mark 'OFFICERS CHOICE' and not on the label, which is the basis of the suit. Since there is no evidence demonstrating any reputation attributable to the label, the claims of either infringement or passing off are not substantiated.

29. Finally, it is submitted that the Defendant has been selling whisky under the impugned label since 2018, which is in the knowledge of the Plaintiff since 2019. Even in the plaint, the Plaintiff admits to being aware of the Defendant's 'PEACE MAKER' label since 2019, however has chosen to approach this Court in 2021, and the suit is therefore hit by delay and laches.

30. The Defendant does not have any sales in Delhi, though it does have sales in the NCR region, and does not have a license to sell liquor in Delhi. It is finally submitted that the case does not involve a single packaging versus another single packaging, where the Plaintiff's label and packaging have





themselves acquired distinctiveness or are associated by consumers with the Plaintiff's brand. Owing to the varying color combinations, trade dress, and get-up used by the Plaintiff, the reputation cannot be attached to the particular label. Hence, the onus of establishing passing off, which is a higher burden, has not been met.

31. The manner of liquor sales is further highlighted through a sample menu card and a photograph of a bar, arguing that consumers can distinctly differentiate between the Plaintiff's and the Defendant's products. The price of the Defendant's bottle is stated to be Rs. 80/- for 180 ml, while the Plaintiff's product is priced between Rs. 95/- to Rs. 140/-, varying with the sale. On this aspect, Id. counsel for the Plaintiff points out that there have been various studies which have ranked the Plaintiff's product under the mark 'OFFICER'S CHOICE' as one of the most popular whiskies. In addition, he relies on the ISB's report dated 20th December, 2016 to argue that the entire philosophy behind the label and its design has also been published by the said report.

32. On this aspect, Mr. Sai Deepak, Id. Counsel submits that the reputation of the brand, cannot be treated as the reputation of the label and, therefore, none of the reports which are relied upon would have a bearing.

33. The other submissions of the Defendant are as follows:

- Consumer buying behavior is a very relevant factor. In majority parts of India liquor is sold across the counter by brand name. Purchasers identify liquor with the brand names and hence can easily differentiate between 'OFFICER'S CHOICE' and 'PEACE MAKER'.
- The getup and representation of the Defendant's 'PEACE MAKER' and Plaintiff's 'OFFICER'S CHOICE' products are absolutely



different, apart from the difference in the brand names. The plaintiff does not even allege that the trade dress (which includes the bottle shape, colour and label as a composite whole) is similar. In any event, labels are only part of the trade dress which also includes inter alia the bottle shape and colour. Apart from the labels being substantially different, the added matter further distinguishes the Defendant's trade dress from that of the Plaintiff.

- The Defendant's label is not a reproduction of artistic work of the Plaintiffs label and as such the two artistic works are absolutely distinct and different and under no stretch of imagination the Defendant's label is an infringing artistic work of the Plaintiffs work.
- The Plaintiff's product bearing the 'new label' is not available for sale in India, but is used only for exports. Therefore, there is no likelihood of consumer confusion between the Defendant's 'PEACE MAKER' label and the Plaintiff's label, which is not sold in India.

34. The Defendant has placed on record written submissions dated 7<sup>th</sup> September, 2021. On the issue of territorial jurisdiction, the Defendant relies on the following judgments:

- *Ultra Home Construction Pvt. Ltd. v. Purushottam Kumar Chaubey (2016 (65) PTC 469 (Del), para 13).*
- *Dhodha House v. SK Maingi (AIR 2006 SC 730, paras 40 and 41).*
- *Indian Performing Rights Society Ltd. v. Sanjay Dalia (MANU/SC/0716/2015, paras 23,24,39, 47).*
- *Banyan Tree Holding (P) Ltd v. A. Murali Krishna Reddy [2010 (42) PTC 361(Del), paras 58(i) and(ii)].*



35. On the aspect of merits, such as passing off and no likelihood of confusion, the Defendant places reliance upon the following judgments:

- *Britannia Industries Ltd. v. ITC Ltd. (2021 SCC OnLine Del 1489, paras 15,19,21,23).*
- *Colgate Palmolive Co. v. Patel (2005 SCC OnLine Del 1439).*
- *Rana Steels v. Ran India Steels Pvt. Ltd. [MANU/DE/0476/2008, paras 23 and 24].*
- *American Home Products Corp. v. Mac Laboratories Pvt. Ltd. [AIR 1986 SC 137, para 36].*
- *Intex Technologies (India) Ltd v. AZ Tech (India) [2017 (70) PTC 118 (Del), para 17].*
- *Fisons Limited v. E.J. Godwin Limited (1976 RPC 653 at pages 657-658).*
- *Kellogg Company v. Pravin Kumar Bhadabhai [1996 (36) DRJ (DB), paras 19,20,32].*
- *Surya Food and Agro Limited v. Om Traders [MANU/DE/1425/2019, Para 17(XXII), Para 17(VI), (VIII) and (IX)].*
- *Godfrey Phillips India Ltd v. PTI Private Limited [2018 (73) PTC 178 (Del), para 8-12].*
- *Durga Dutt Sharma v. Navratna Pharmaceutical Laboratories (AIR 1965 SC 980, para 28).*
- *The Law of Passing Off by Christopher Wadlow (1990) (pp. 356-359):*

*“The most that need be said is that those features of get-up which are common to the plaintiff and defendant are not so overwhelmingly distinctive of the plaintiff as to outweigh the differences. In the*



reported cases on get-up the issue of distinctiveness is even more difficult to disentangle from the issue of deceptive similarity than is the case for other types of mark.

...

The test for distinctiveness is the function the get-up actually serves, rather than how well it is adapted to serve it. The colour grey is properly said to be distinctive if it serves to identify the goods of one particular manufacturer, although no colour could be said to be less distinctive in the popular sense. Despite some statements apparently to the contrary, it is not necessary for the get-up relied on to have been novel when it was adopted if it is distinctive in fact, although it is easier to prove distinctiveness for get-up which was totally new. Conversely, if the get-up does not distinguish the plaintiff's goods from those of actual or prospective rivals then however remarkable it maybe it is not distinctive in the legal sense.

...

Nor is it sufficient for the plaintiff to show that the defendant's goods are easily confused with his when they are placed side by side, still less when the doctrine of imperfect recollection is relied on. He must show that the confusion arises from those features of the get-up which are distinctive of him, at least in combination, and features which are common to the trade or otherwise not distinctive are to be disregarded. Finally, the plaintiff cannot pick and choose those elements of his get-up which find counterparts in the defendant's get-up and rely on those alone. It is tempting for the plaintiff to suggest that the only features of his get-up which matter are those which are also to be found in the defendant's get-up, or to describe the distinctiveness of his get-up in vague terms which are wide enough to embrace that of



*both parties. The get-up of the plaintiff's goods as a whole has to be compared to that of the defendant's as a whole, including features which are not to be found in the plaintiff's get-up. Weight also has to be given to differences in brand names or other marks."*

- ***Kerly's Law of Trademarks' (15<sup>th</sup> edn.) (pp. 652, 657)***

*"It is usually true in some degree that a trader's goods are recognised as his by their general appearance, or "get-up". Accordingly, resemblance of get-up is not uncommonly an ingredient in passing off, and it is possible for imitation of get-up alone to amount to passing off. Such cases are rare, since few traders rely on get-up alone to distinguish their goods, so that trade names and word trade marks are ordinarily present too, and in these days, in this country<sup>1</sup>, a difference in names is enough to warn the public that they are getting one trader's goods and not the other". Accordingly, there can hardly be passing off by get-up alone (in the usual sense of substitution of one make of a product for another) unless the resemblance between the goods is extremely close, so close that it can cf. *White, Hudson v. Asian* [1965] R.P.C. 45 (PC, Singapore) *Saper v. Specter's*: 1953 (70) R.P.C. 173] hardly occur except by deliberate imitation; and even that may not be enough. But there are forms of passing off in which a difference of name is not important: for example, where the goods themselves are distinct enough from the claimant's for a different product name to be expected. The relative importance to be attributed to names and word marks on the one hand, and to get-up on the other, is a matter upon which different people have different views; with the result that the outcome of disputes about get-up is exceptionally hard to predict."*



....

*“As in any other passing off case, a claimant relying upon get-up must prove his reputation: he must prove, that is, that the get-up concerned indicates his goods and no one else”. In particular, he must show that distinctiveness lies in the get-up and not (for instance) in his name or trade marks, if those appear on the goods. Thus, if a claimant by his cautions and advertisements shows that he relies wholly or mainly on his trade mark or business name, he makes his case on general get-up, apart from trade mark or business name, more difficult to establish. A trader who introduces a new feature into the get-up of his goods does not thereby acquire any proprietary interest in it, so as to be able to prevent its use by competitors, until it has become so identified with his goods that its use by others is calculated to deceive. No case can be made merely by showing an imitation of the parts of the get-up of goods which are common to the trade. But very little evidence of user may. Compare Saper v. Specter's with Tavener Rutledge v. Specter's: 1959 R.P.C. 83 1912 (29) R.P.C. 81 cf. New Way v. Lucking (1960) R.P.C. 147 Jones v. Anglo-American: 1912 (29) R.P.C. 361 Schweppes v. Gibbens: 1905 (22) R.P.C. 113 Imperial Tobacco v. Purnell: 1904 (21) R.P.C. 368 Klissers Farmhouse Bakeries v. Harvest Bakeries: [1989 ] R.P.C. 27. Bryant & May v. United Match: (1933) 50 R.P.C. 12. Payton v. Snelling: [1901) A.C. 308 be sufficient to establish distinctiveness where the get-up is not only novel but striking, even though it consists of a combination of commonly used parts. ...”*



### **Analysis and Conclusions**

36. The short question that arises in the present application under Order XXXIX Rule 1 & 2 CPC is whether the use of the Defendant's label violates the Plaintiff's rights and whether it constitutes infringement or passing off. The first and foremost factor that needs to be considered is the comparison between the two labels. A perusal of the above comparison would show that while the two labels are not identical, there are some clear elements of similarities between the two. Such elements includes:-

- i) The use of the ribbon like feature in the Plaintiff's and the Defendant's labels.
- ii) The placement of the white window in the red background.
- iii) The placement of insignia/coat of arms.
- iv) The placement of other descriptive matter.

37. In *Parle Products v. J.P. & Co. Mysore (1972 INSC 31)*, the Plaintiff, Parle, used a wrapper for their '*Glucos F Biscuit*' that featured a farmyard scene with a girl carrying a pail of water, surrounded by cows and hens against the backdrop of a farmhouse. The Defendant, on the other hand, sold '*Glucose Biscuits*' with a wrapper showing a girl holding hay on her head and carrying a sickle and bundle of food, with cows and hens around her in front of a building. After observing that an ordinary purchaser is not gifted with the powers of observation of Sherlock Holmes, the Supreme Court held that, in an infringement action, it was enough to demonstrate 'overall similarity' that could mislead a person accustomed to one product to accept the other if offered. The Court found that the packets were similar in size, color scheme, and design. The essential elements of both wrappers included a girl with one arm raised, carrying something in the other, and surrounded by farm animals



near a house. This similarity was deemed sufficient for a case of infringement, noting that the marks should not be compared side by side but considered based on their overall impression. The relevant portion of the decision is extracted below:

*“It is therefore clear that in order to come to the conclusion whether one mark is deceptively similar to another, the broad and essential features of the two are to be considered. They should not be placed side by side to find out if there are any differences in the design and if so, whether they are of such character as to prevent one design from being mistaken for the other. **It would be enough if the impugned mark bears such an overall similarity to the registered mark as would be likely to mislead a person usually dealing with one to accept the other if offered to him.** In this case we find that the packets are practically of the same size, the color scheme of the two wrappers is almost the same; the design on both though not identical bears such a close resemblance that one can easily be mistaken for the other. **The essential features of both are that there is a girl with one arm raised and carrying something in the other with a cow or cows near her and hens or chickens in the foreground.** In the background there is a farm house with a fence. The word "Gluko Biscuits" in one and "Glucose Biscuits" on the other occupy a prominent place at the top with a good deal of similarity between the two writings. **Anyone in, our opinion who has a look at one of the packets to-day may easily mistake the other if shown on another day as being the same article which he had seen before.** If one was not careful enough to note the peculiar features of the wrapper on the plaintiffs goods, he might easily mistake the defendants' wrapper for the plaintiffs if shown to him some time after he had seen the plaintiffs'. **After all, an ordinary purchaser is not gifted with the powers of observation of a Sherlock Holmes.** We have therefore*





*no doubt that the defendants' wrapper is deceptively similar to the plaintiffs' which was registered. We do not think it necessary to refer to the decisions referred to at the Bar as in our view each case will have to be, judged on its own features and it would be of no use to note on how many points there was similarity and in how many others there was absence of it.*

*It was argued before us that as both the trial court and the High Court had come to the same conclusion namely, that the defendants, wrapper was not deceptively similar to the plaintiffs', the finding is one of fact which should not be disturbed by this Court. Normally, no doubt this Court does not disturb a concurrent finding of fact. But where, as here, we find that the finding was arrived at not on proper consideration of the law on the subject it is our duty to set the same aside on appeal.*

*In the result, we hold that the defendant had infringed the registered trade mark of the plaintiff and the suit of the plaintiff should be decreed and an injunction granted restraining the defendant-respondent from selling or using in any manner whatsoever biscuits in wrappers similar in appearance to the registered trade mark of the plaintiffs on their packets. The appellants will be entitled to their costs throughout.”*

38. Later, *Parle (supra)* was followed in *S.M. Dyechem Ltd. v. Cadbury (India) Ltd.*<sup>1</sup>, [(2000) 5 SCC 573], wherein the dispute was between the Appellant-plaintiff, who started business in 1988 with products like potato chips and wafers and used the trademark 'PIKNIK', and the Respondent-

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<sup>1</sup> This decision has been partly overruled in *Cadila Health Care v. Cadila Pharmaceuticals Ltd.*, [(2001) 5 SCC 73], only on the principle of phonetic similarity of the marks.



Defendant, who used the mark ‘PICNIC’ for chocolates. The Supreme Court observed as under:

**“Broadly, under our law as seen above, it can be said that stress is laid down on common features rather than on differences on essential features, except for a passing reference to a limited extent in one case.**

...

*Difference in essential features are also relevant under Indian Law:*

*It appears to us that this Court did not have occasion to decide, as far as we are able to see, an issue where there were also differences in essential features nor to consider the extent to which the differences are to be given importance over similarities. Such a question has arisen in the present case and that is why we have referred to the principles of English Law relating to differences in essential features which principles, in our opinion, are equally applicable in our country.”*

39. The test for comparing the above labels, as laid down in several judgments of the Supreme Court such as in *Parle (supra)* and *S.M. Dyechem Ltd. (supra)* is not one of identity but of similarity. Further, following the decision of the Supreme Court in *Corn Products Refining Co. v. Shangrila Food Products Ltd (AIR 1960 SC 142)*, the plank of similarity is to be tested from that of a consumer with average intelligence, imperfect recollection or a hazy recollection. Considering the large-scale sale of the Plaintiff’s products under the ‘OFFICER’S CHOICE’ mark, the Defendant is obviously aware of the ‘OFFICERS CHOICE’ products and labels. It is the overall combination of various elements that makes the label confusingly and deceptively similar and not any specific single feature, for example, the Defendant uses a similar



ribbon device in its Indian brandy label. The competing labels are extracted below:



The above label, however, cannot be held to be similar to the Plaintiff's labels.

40. Again, the Defendant uses a red and white label in its 'PEACE MAKER' rum, extracted below :-





41. Even the said label is not similar to that of the Plaintiff. The above two labels are distinguishable from the impugned labels, which have a combination of various features of the Plaintiff's whisky label. If the Plaintiff's products and the Defendant's products are stacked together, it is possible for any consumer to presume that the Defendant's product also emanates from the Plaintiff's bouquet of products.

42. Confusion need not be between products but could also be one of affiliations, sponsorship or connection as well. A consumer might presume that the Defendant's product is a differently priced product, emanating from the Plaintiff. Moreover, the Court has to put itself in a realistic position to see the manner in which bottles are stacked in bar counters. These venues are typically not brightly lit and are usually dimly lit. In such a setting, if a consumer orders the Plaintiff's product and the bartender serves the Defendant's product, owing to the broad similarity of the labels, the consumer may not even be able to tell that the product served is that of the Defendant's and not of the Plaintiff's. This likelihood of confusion is further heightened by the distance at which customers typically view bottles in a bar. This is not to say that a connoisseur of such products may not be able to discern the difference after tasting them! But the test is not of the standard of a connoisseur but that of an ordinary consumer or lay-person. Even the purchase at liquor outlets would include by consumers who could be from varying strata of society and may not be able to discern fully the distinguishing features. Confusion as to affiliation or sponsorship is a clear possibility.

43. Ld. Counsel for Defendant has been at pains to contend that no case of passing off made out in the present situation, as the labels are not similar or confusing in nature due to the presence of the brand name.



44. In *Skechers USA INC v. Pure Play Sports (2016/DHC/4344)*, the Plaintiff alleged that the Defendants substantially copied the trade dress of their shoes, leading to potential confusion among customers. The competing trade dresses incorporated different marks, Plaintiff's trade mark being 'SKECHERS' and Defendant's being 'PUREPLAY'. The Court held that the Defendant substantially copied the trade dress of the Plaintiff's shoes, leading to potential confusion among customers. Despite the presence of different marks, the Court found that such distinction was insufficient to eliminate the possibility of confusion for an unwary customer. The relevant portions of the decision are extracted below:

*“18. Having myself seen the shoes of the plaintiff and compared the same with those of the defendants, I am, prima-facie, satisfied that the visual impression gathered from the trade dress of the competing products is that trade dress of the plaintiffs product is substantially copied by the defendants which is likely to result in confusion. There is every likelihood that an unwary and gullible customer may get confused as to the source of origin of the shoes of the defendants, and may assume that the same come from the source of the plaintiff as the shoes of the defendants have a remarkable resemblance with those of the plaintiffs. No doubt, the trademarks of the plaintiff, i.e. SKECHERS is inscribed on the inner sole of the plaintiffs shoes, and the defendants mark PUREPLAY is similarly inscribed on the inner sole of the defendants shoes, and there is no similarity in the said two word marks. However, that by itself, does not appear to be sufficient to dispel the possibility of confusion in the mind of an unwary customer. This is, because, the several aspects of trade dress are strikingly similar between the shoes of the plaintiffs and those of the defendants and the overall get up and trade dress is also markly similar.”*



*The word marks of the parties are printed on the inner sole, which is not what catches the attention of a consumer looking to buy a stylish shoe. As the plaintiffs themselves state - and this is evident from a visual examination of the shoes in question, the "selling point" of these shoes in their catchy colour combinations, and texture combinations, coupled with their cuts and stitching styles. It is these features that would catch the attention of the consumer and it is likely that the consumers - who would be youngsters more often than not, would overlook the labels printed inside the shoe sole which contain the word marks. So far as the logos of the parties are concerned, though they are printed on the sides of the shoe uppers, they are not all that prominent, as to immediately strike to the mind of a consumer. The logos, by themselves, may not even cause brand recall to the consumers.*

19. The two logos of the plaintiffs and the defendant, as affixed on the sides of the shoe uppers of the respective parties are not the prominent and striking features in the overall trade dress of either of the parties. The submission of learned counsel for the defendant, premised on the different word marks of the plaintiffs and the defendant is answered in Colgate (supra) in the following words:

...

20. If one were to apply the aforesaid test - as laid down in Colgate (supra) and Gorbatschow (supra) to the facts of this case, at this stage it would appear that the adoption of several unique features by the plaintiffs on its GOwalk series by the plaintiffs gives their shoes a unique trade dress which acts as a source identifier. The distinctive get up at the back of the shoe with an inverted triangular and stitching/ lining in U shape below the said cut, appear to be completely capricious and prima-facie cannot be described as functional. The very distinctive and unique outsole, and suspension rebound





go pillars on the sole have been completely copied by the defendant.

**21. The onus would lie heavily on the defendant to explain as to why the defendants have adopted the strikingly similar get up and trade dress in respect of their shoes as that of the plaintiffs. Prima-facie, at this stage it can be said that the defendants shoes are a result of a conscious and substantial imitation of the colour combination, textures, style, cut and stitching of the plaintiffs shoes. The copying of - what the plaintiffs describe as the "responsive rebound go pillars technology", by the defendants on the soles of their shoes, in my view, is a give-away of the defendants attempt to copy the plaintiffs trade dress."**

45. The Court is also inclined to hold in favour of the Plaintiff, owing to the fact that even in the past, similar labels with different marks have already been injuncted. The details are set out below:-

S. No	Suit No.	Parties	Impugned mark
1.	C.S. (OS) No. 1437 of 2011	Vishnu Laxmi Co. Op Grape Distillery	



2.	CS (COMM) 166 of 2020	Agribiotech Industries Limited “Chetak Whisky”	
3.	CS(COMM) No. 238 of 2017	Oasis Distilleries Ltd.	

46. A perusal of the above chart would show that even in the case of marks being different Courts have granted injunction and protected the ‘OFFICERS CHOICE’ label.

47. A ld. Single Judge in *Allied Blenders IV (supra)* held that a bare comparison of the Plaintiff’s ‘OFFICERS CHOICE’ label with the Defendant’s ‘CHETAK’ label reveals that they are deceptively similar. The relevant portion of the said decision is as follows:

“33. On merits, the claim of the plaintiff, prima facie, merits acceptance. A bare comparison, of the label of the "Officers Choice" label used by the plaintiff, vis-à-vis the "Chetak" label used by the defendant, reveals that they are deceptively similar. In both the labels, (i) there is a gold line, dividing the label into an upper and





lower half, (ii) the lower half has a red background, whereas the upper half as a white background, (iii) the lettering, on the lower red half of the label, is in white, and the lettering, in the upper white half of the label is in red, (iv) the placement of the trademarks "Officers Choice" (in the case of the plaintiff's label) and "Chetak", in the case of the defendant's label, are similar, and covers a major portion of the upper white half of the label and (v) both labels have an outer gold border. The overall appearance of the two labels is, at a plain glance, similar, and constitutes, therefore, similar trade dresses. The two labels are, therefore, deceptively similar, as perceived by the man of average intelligence and imperfect recollection.

34. The defendant in the written submission merely contends, in this regard, that the name of the defendant's product was different from that of the plaintiff's, there was the feature of a horse above the word "Chetak" in the label of the defendant, and the packaging of the goods was different, as the bottles were different in shape, size, and had different caps. These features do not, however, prima facie, detract from the overall similarity in the essential features of the labels used by the plaintiff and the defendant.

**35. The plaintiff has also placed, on record, orders passed by this Court, in earlier suits, filed by the plaintiff, against defendants who were manufacturing and selling Whisky, under labels which infringed the "Officers Choice" trademark of the plaintiff. A tabular depiction, of these orders, with the labels which were subject matter of consideration therein, is provided thus:**

...

36. The written submissions filed by the defendant to not dispute this position. All that is said is that the orders, on which the plaintiff relies, were either passed ex parte, or were passed in suits which were finally settled.



**37. Be that as it may, it is an undeniable fact that the plaintiff has been granted ad interim relief, by this Court, on multiple occasions, against the defendants who were selling Whisky using labels which were deceptively similar to the "Officers Choice" label of the plaintiff, and which are also similar to the label used by the present defendant on its "Chetak" Whisky.**

**38. This fact, seen in the background of the admitted reflection, on the website of the defendant, of the plaintiff's products - which the defendant has, in its written submissions, sought to explain, by contending that it was merely representing the work earlier done, by or for the plaintiff - clearly indicates that a consumer, of average intelligence and imperfect recollection, is likely to confuse the product of the defendant with that of the plaintiff.**

39. Additionally, I may note, the "triple identity" test also stands satisfied in the present case, as the mark of the defendant is deceptively similar to the trademark of the plaintiff, they are being used on identical goods, and these goods are sold through similar trade channels and are available at the same outlets.

40. For all these reasons, I am of the opinion that, pending hearing and final disposal of the present I.A., the plaintiff is entitled to ad interim relief, in terms of the prayers in the present application.

41. Accordingly, there shall be an ad interim injunction, restraining the defendant from using, manufacturing, selling, exporting, importing, offering for sale, distributing or otherwise dealing in any product, under the impugned "Chetak" label, or under any trademark or tradename which is deceptively similar to the "Officers Choice" and "Officers Choice Blue" trademarks, registered in favour of the plaintiff."

48. The Plaintiff places reliance upon *Allied Blenders II (supra)* and *Allied Blenders IV (supra)*, in which the Court recognized the unique features of the



Plaintiff's alcoholic products, particularly at the point of sale within a specific consumer segment. Regarding the Defendant's argument emphasizing the dissimilarities between rival marks ought not to be ignored, the law is well settled. The Supreme Court in *S.M. Dyechem (supra)* and *Cadila Healthcare v. Cadila Pharmaceuticals [2001 (5) SCC 73]* emphasized that the test is of overall similarity. Further, the comparison is not to be done side-by-side, but the test is of imperfect recollection. It is to be kept in mind that consumers have hazy memories and most often the intricate differences are not usually discernible. This is also clear from the extracts from *Kerly's Law of Trademarks'* and the *Law of Passing Off by Christopher Wadlow*, which have been cited on behalf of the Defendant themselves. Thus, the merely display of brand names would not obviate the confusion as to connection, business affiliation, etc. and due to overall similarity in the labels, confusion could be caused.

49. The submission that the get-up should by itself be shown to have attained distinctiveness would also stand satisfied in this case. The Plaintiff's evolution of labels would show that the broad colour scheme, get up has been similar over years & being one of the largest selling whiskies, in the market for more than three decades, such distinctiveness has been clearly attained.

50. This Court has also considered applicability of the '*initial interest confusion*' test at several instances. Considering the advancements in business and marketing strategies, infringement can be based upon confusion that creates initial customer interest, even though no actual sale is finally completed as a result of confusion.



51. In the dispute between 'OREO' and 'FAB!O', a Id. Single Judge determined that the test for initial interest confusion was met. Thus, a consumer of average intelligence and imperfect recollection, who has previously purchased and enjoyed an OREO cookie, would likely associate the FAB!O cookie with the OREO cookie upon seeing the FAB!O cookie pack. The relevant extracts of the decision are set out below:

*“What counts is the immediate effect that the impugned packing would have on the unwary customer of average intelligence and imperfect recollection. If, at first glance, a consumer is likely to be confused, and evinces interest in the product, the test of initial interest confusion stands satisfied, and the mark loses distinctiveness. The varieties of “confusion” have been thus identified, by a Division Bench of this Court in *Shree Nath Heritage Liquor Pvt. Ltd. v. Allied Blender & Distilleries Pvt. Ltd.* (2015) 63 PTC 551, relying on Mc Carthy on Trademarks and Unfair Competition:*

*Confusion can be of the following categories:*

*• Point of sale confusion-this refers to confusion that takes place at the time of purchase.*

*• Post sale confusion - this includes confusion of those other than the purchaser.*

*• Initial interest confusion - this refers to confusion that may be caused initially, i.e. prior to purchase, but at the time of purchase of the alleged infringer/tortfeasor's product or using its service, the consumer is not confused.*

*• Reverse confusion - this occurs when consumers purchase the goods or use services of the senior user thinking them to originate from the junior user.”*

*A consumer of average intelligence and imperfect recollection who has earlier purchased and had the OREO cookie would, when he sees the FAB!O cookie pack, be clearly likely to associate the FAB!O cookie with the OREO cookie that he had earlier enjoyed*



*(assuming he did). That, by itself, satisfies the test of “initial interest confusion”.*

52. In the present suit, the Court has found the following similarities in both the labels:

- (i) The lower half of the label has a red background, and the upper half has a white background,
- (ii) There is a gold line, between the upper and lower half,
- (iii) The lettering, on the lower red half of the label, is in white, and the lettering, in the upper white half of the label is in red,
- (iv) The placement of the trade marks ‘OFFICERS CHOICE’ (in the case of the Plaintiff's label) and ‘PEACE MAKER’, in the case of the Defendant's label, are similar, and covers a major portion of the upper white half of the label and
- (v) both labels have an outer gold border.
- (vi) The use of certain insignia is also similar in nature. The intricate differences cannot be noticed in the emblem/insignia.





Thus, the overall appearance of the two labels is similar at first glance, constituting similar trade dress. Therefore, the two labels were deceptively similar as perceived by a person of average intelligence and imperfect recollection.

53. It is also the settled position that in the case of labels/trade dress, the Court has to consider the totality of the trade dress and not specific elements. The Defendant has sought to highlight the differences in the following manner:-



Annexure A

Comparison of the Defendant's label and Plaintiff's unregistered label

Defendant's label	Plaintiff's label
	
<p>Uses a Bright Red shade (Pantone 032C) on its packaging and a dark gold thin border</p>	<p>Uses a Dark Red Shade (Pantone 186C) and a bright golden thick border all across the packaging.</p>
<p>The White portion of the Label where the mark 'Peace Maker' is written is in the shape of a Tag/Bookmark and has a dotted inline. This usage of the Tag on a liquor bottle is unique and distinctive to the Defendant's product.</p>	<p>The White Portion of the Label where the mark 'Officer's Choice' is cut in a triangular shape from the bottom with a Gold and Black Border.</p>
<p>No such feature.</p>	<p>The label contains the 'Epaulets Tag'</p>
<p>The label has the Defendant's house mark   consisting of two persons and the words 'Hermes Distillery' written prominently</p>	<p>The label has the Plaintiff's house mark   consisting of two horses and the abbreviation 'OC'</p>

54. A perusal of the above chart shows that the so-called differences actually establish a broad similarity. The mention of a Pantone shade of red to distinguish the two product labels, the ribbon-like cut in the white portion of the label, as well as the intricate differences in the insignia used, in fact,



have the opposite effect of highlighting the similarities rather than the differences.

55. The Court is convinced, *prima facie* that there is a clear attempt to indulge in “*smart copying*” which in the opinion of the Court would still be copying. The chart of differences, in fact, shows that extraordinary effort has been put by the Defendant in identifying the differences. The broad similarities are so obvious at the first look, the differences are nudged into oblivion.

56. In ***Baker v. Master Printers Union of New Jersey***, [47 USPQ 69 (D.N.J.1940)], it has been appropriately observed as follows:

*“The most successful form of copying is to employ enough points of similarity to confuse the public with enough points of difference to confuse the courts. Few would be stupid enough to make exact copies of another’s mark or symbol.”*

57. Ld. Counsel for the Defendant has also raised issues of jurisdiction. It is not disputed on behalf of the Defendant, that the trade mark application of the Defendant has been filed by one of its directors, a resident of Delhi. Additionally, the Defendant is also carrying on business in Delhi and has a godown in Delhi. Thus, considering the judgments in ***Indian Performing Rights Society Ltd. (supra)***, ***Banyan Tree Holding (P) Ltd. (supra)*** and ***Burger King Corporation (supra)*** at this stage, the Court is not inclined to uphold the objection of territorial jurisdiction. If required, an issue on jurisdiction can be framed at a later stage.

58. The Defendant’s submission that the red and white color combination is common to trade has also been considered by the Court. This Court is of the opinion that there cannot be any monopoly on the red and white color



combination. *Per se*, however, none of the third party red and white labels produced by the Defendant, as extracted above, share a similar overall get-up, layout, arrangement, or look and feel. The Defendant is free to use a red and white label. In fact, prior to the Defendant making a submission that it wanted to contest the matter, as recorded in orders dated 6th April, 2022 and 18th April, 2022, the Defendant was seriously exploring to make some changes in the label. The said two orders are extracted below:-

**Order dated 6th April, 2022**

2. *The matter has been heard for sometime. The dispute in this case relates to the colour combination of Plaintiff's label 'Officer's Choice' and Defendant's label 'Peace Maker' both used for whisky.*

3. *After some hearing. Id. counsels for the parties wish to seek instructions in the matter.*

Xxx      xxx    xxxx   xxx                  xxx

**Order dated 18<sup>th</sup> April, 2022**

2. *The dispute in this case relates to the colour combination of Plaintiffs label "Officer's Choice" and Defendant's label "Peace Maker" both used for whisky. Vide the previous order dated 6th April, 2022, after some hearing, Id. Counsels for the parties were directed to seek instructions in the matter.*

3. *Today, Mr. N.K. Bhardwaj, Id. Counsel for the Defendant, has produced a pantone shade card bearing no. 17880, as the shade to which the Defendant wishes to change its current label.*

4. *The Court has perused the same and it clearly appears that there is not much of a difference in the said shade and the impugned label which the Defendant is currently using.*

5. *Accordingly, on the next date of hearing, the Defendant shall produce at least four different artworks and not merely a pantone shade card, as has been done*





*today, so that matter can be resolved. The Defendant may also consider reversing the color combination of 'White over Red' to 'Red over White'. This shall be without prejudice to the rights and contentions of parties.*

*6. Let the said artwork be produced on the next date.*

59. The Defendant, however, resiled from the attempts to resolve and thereafter decided to contest the matter. The Court is of the opinion that the Defendant's label is, clearly, imitative of the Plaintiff's label. The Plaintiff's label forms part of its registered trade marks, though, in slightly different *avatars*. The broad features of the label have been imitated, and not merely the red and white color combination. Thus, the use of the Defendant's label would constitute a misrepresentation likely to result in passing off, which may or may not result in the sale of the product. It is well settled that even initial interest confusion is actionable.

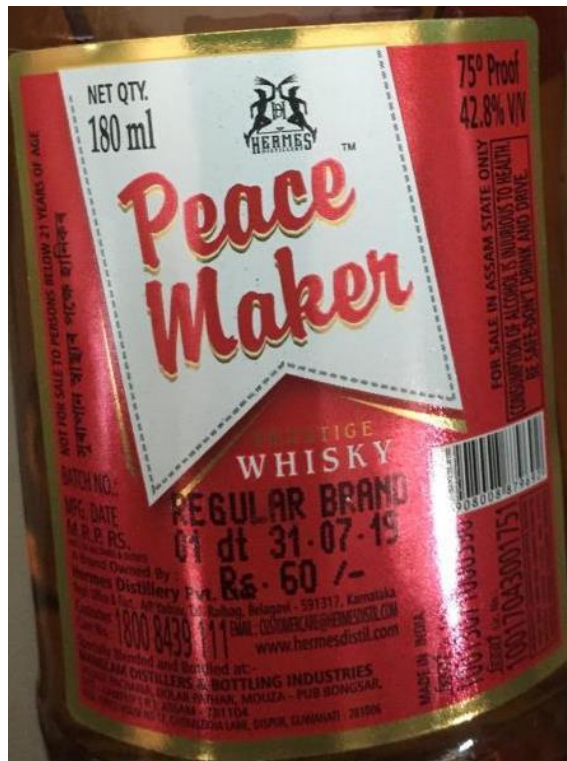
60. At the time when the suit was filed, the Defendant had recently, launched the product with the impugned label. Thus, the use by the Defendant has been, during the pendency of the suit itself and the Defendant has been well aware of the Plaintiff's grievances about its labels.

61. Under such circumstances, balance of convenience is also in favour of the Plaintiff. Irreparable harm would be caused if the interim injunction is not granted as the Plaintiff's products are well-established products in the market, whereas the Defendant's product has only been recently introduced under the impugned labels.

62. Accordingly, the impugned 'PEACE MAKER' whisky label shall stand injuncted. The Defendant is restrained from manufacturing, selling,



offering for sale whisky or any other liquor products under the impugned label, which is as follows:



The above injunction does not preclude the Defendant from using the red and white color combination in a manner so as to not cause confusion or deception or be imitative of the Plaintiff's mark/label 'OFFICERS CHOICE'.

63. The Defendant shall, in addition, file account of sales of the 'PEACE MAKER' whisky under the impugned label by means of an affidavit since launch till date, within two weeks.

64. Considering that the products are liquor products, the Defendant is given 30 days for exhausting the existing stock. The existing stock is permitted to be exhausted after an inventory is prepared in the presence of the Plaintiff's representative. For the said purpose, Id. Counsel for the parties shall coordinate. If a Local Commission is needed for the said purpose, parties



are free to approach the Court by way of an appropriate application. The injunction shall remain in force till the disposal of the suit.

65. **I.A. 7301/2021** is disposed of in the above terms. Needless to add, that the observations in the present order are *prima facie* in nature.

**CS(COMM) 274/2021**

66. List before Roster Bench on 2<sup>nd</sup> February, 2024. The present matter shall not be treated as part-heard as the order on the injunction application has been pronounced today.

**PRATHIBA M. SINGH**  
**JUDGE**

**JANUARY 15, 2024**

*mr/dn*