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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

INTERIM APPLICATION (L) NO.31556 OF 2023
IN
COM IP SUIT (L) NO.26056 OF 2023

Dharampal Satyapal Foods Ltd.

...Applicant /
Defendant No.2

In the matter between
Parle Products Pvt. Ltd. & Anr.

...Plaintiffs

Versus

DS Innovative Products LLP and Ors.

...Defendants

Dr. Virendra Tulzapurkar, Senior Advocate, Hiren Kamod,
Lakshyaved R Odhekar, Omkar N. Mhasde and Anees Patel for the
Plaintiff.

Darius Khambata, Senior Advocate, Rohaan Cama, Shrinivash Bobde,
Deepak Dhingra, Anirudh Bhat, Rajuram Kuleriya, Vidhi Shah, Ritika
Gupta, Varad Dubey, Shubham Sharma, Samhita Choudhary, E. Khan
and Alex Dsouza i/b. Rajuram Kuleriya for the Applicant / Defendant
No.2.

Charushila Vaidya, 2nd Asstt. to Court Receiver is present.

CORAM : R.I. CHAGLA J.

Reserved on : 23rd September, 2024.

Pronounced on : 25th October, 2024.

ORAL ORDER:

1. By this Interim Application, the Applicant / Defendant

No.2 is seeking recall / vacation / suitably modify the impugned exparte ad-interim Order dated 4th October, 2023 passed by this Court.

2. By the impugned exparte ad-interim Order, this Court had granted injunction Order in terms of prayer Clause (c) for passing off and prayer Clause (d) for appointment of Court Receiver for execution of the commission. Accordingly, the Defendants were temporarily restrained from manufacturing, marketing, selling, trading, offering for sale, promoting or advertising the impugned goods under impugned mark “MAZE”. It is pertinent to note that the Plaintiff had pressed for ex-parte ad-interim relief only in respect of passing off and not for trademark infringement.

3. Mr. Darius Khambata, the learned Senior Counsel appearing for the Applicant in the present Interim Application has submitted that in case of grant of ex-parte injunctions, it is well settled that a party who is seeking injunction must disclose all facts material to the determination of his right and it is no excuse for such person to say that it was not aware of the importance of any fact which he omitted to bring forward. He has placed reliance upon the

decision of the Supreme Court in *Ramjas Foundation Vs. Union of India*¹, paragraph 22.

4. Mr. Darius Khambata has submitted that such duty of disclosure extends to (a) all matters which the Applicant would have been aware of had reasonable inquiries been made, and (b) issues likely to arise and potential difficulties in the claim. He has in this context reliance upon *Kewal Ashokbhai Vasoya v. Suarabhakti Goods Pvt Ltd*² at paragraph 17(iv) and (v).

5. Mr. Khambata has submitted that suppression of material fact renders the application and affidavit filed in support thereof by the Plaintiff as false and misleading. He has in this context placed reliance upon the decision of this Court in *Laser Shaving (India) Pvt. Ltd V/s. RKRM International Products Pvt. Ltd*³, and in particular paragraph 22 thereof.

6. Mr. Khambata has submitted that if any material fact is suppressed or not fairly and objectively brought forward by the party

1 (2010) 14 SCC 38.

2 2022 SCC OnLine Bom 3335

3 IA (L) No. 7226 of 2024 in Comm. IP Suit (L) No. 44 of 2024 dated 2nd May, 2024.

seeking the injunction, the Court may, without hearing such a party on the merits of the matter, set aside any injunction granted. He has placed reliance upon *Ramjas Foundation (Supra)* at paragraphs 21, 23 & 27 and this Court's judgment in *Maganlal Kapadia v. Themis Chemicals Ltd.*⁴, at paragraph 12 and 14.

7. Mr. Khambata has submitted that specifically under Order XXXIX Rule 4 of CPC, the Court must apply the following test(s) while deciding whether to vacate the *ex-parte* order:

(i) Had the material held back from the Court been placed with the plaintiff and application for interim relief, “whether this Court would have had an opportunity to consider issuing notice to the Defendants for a response”? **Laser Shaving [para 29];**

and/or

(ii) Whether the undisclosed material could be an anticipated or likely argument or defence that the

⁴ Appeal No. 333 of 1991 dated 22nd April, 1991.

opposition may choose to adopt? **Kewal Vasoya** [para 16 citing para 5(b) of **Sun Pharmaceuticals**]; this Hon'ble Court's judgement dated 3rd July 2023 in **Lallubhai Amichand Ltd v. Absolink Enterprises Pvt. Ltd. (Interim Application (L) No. 8399 of 2023 in Suit (L) No. 8369 of 2023)** [para 30].

8. Mr. Khambata has submitted that if any one of the aforementioned tests is met, the Court will discharge the injunction order, notwithstanding that the Plaintiff would have succeeded even if the relevant matter was brought to the Court's attention. He has in this context placed reliance upon ***Keval Vasoya (Supra)*** at paragraph 17 (xi) and ***Laser Shaving (Supra)*** at paragraph 27.

9. Mr. Khambata has submitted that the provisions of Order XXXIX Rule 4 strengthen the inherent powers of the Court under Section 151 of Code of Civil Procedure, 1908 and do not limit its powers. In this context he has placed reliance upon ***Barbara Taylor Bradford & Anr. Vs. Sahara Media Entertainment Ltd. & Ors.***⁵, paragraphs 220 and 221.

5 2003 SCC OnLine Cal. 323.

10. Mr. Khambata has submitted that the proceedings before the Trademark Registry are a material fact which must be disclosed. The party's stand before the Trademark Registry is necessary material pertaining to the history of the trademark and which requires to be brought to the notice of the Court by the Applicant while seeking an ex parte injunction. He has placed reliance upon *Laser Shaving (Supra)*, paragraph 38 distinguishing *Sabmiller India Ltd. Vs. Jagpin Breweries Ltd.*⁶. Further, a contrary stand taken by the Plaintiff's before Trademark Registry from that in its Complaint is also a material fact which to be brought to the notice of the Court. In this context he has placed reliance upon *Laser Shaving (Supra)*, paragraph 28.

11. Mr. Khambata has submitted that where the Plaintiff has referred to certain facts in the Complaint (which is required to contain only material facts), the Plaintiff is deemed to have accepted that such proceedings (specifically including pending proceedings before the Trademark Registry) are relevant. He has in this context placed reliance upon *Laser Shaving (Supra)*, paragraph 23.

12. Mr. Khambata has submitted that the Plaintiffs have

⁶ 2014 (5) Bom C.R. 721.

deliberately suppressed material facts and misled this Court to obtain the impugned Order. He has placed reliance upon the First Rectification application filed by the Plaintiff No.1 on 6th September, 2023 before the Trademark Registry seeking cancellation of Defendant No.2's trademark registration of 'MAZE' mark (pronounced as 'MAYZ'). He has specifically referred to ground 2(j) of the 1st Rectification Application, where the Plaintiff averred:-

*“The Applicant states that the said trademark **“MAZELO”** is in respect of the flavoured candies which are manufactured as taste enhancers and for spreading joy and having fun while consuming. The terms “having fun” in Hindi language translates to “मजे लो”. It is stated that the said term, if has to be written in English, would spell as “maje lo”. The Applicant then coined their trademark by spelling the said term in English language. Instead of using the alphabet “J” to spell the Devnagari alphabet “ज”, the Applicant used the alphabet “Z” as a fun element and combined both the words and coined their trademark **“MAZELO”** which, due to the usage of the alphabet “Z” would be pronounced as “mah-zhe-lo”, if one has to spell the said coined term in devnagari it would be “मझेलो”. Thus, by using the intention behind manufacturing of the flavored candies & its purpose of ‘having fun’, the Applicant came up with a coined and unique word **“MAZELO”** and got a registration for the same as its word mark...”* (emphasis supplied)

13. Mr. Khambata has submitted that First Rectification application was withdrawn on 7th September, 2023 and reasons for withdrawal was that the Applicants are not interested in pursuing the

said Rectification Application.

14. Mr. Khambata has submitted that on the very same date of withdrawal i.e. of the First Rectification Application i.e. 7th September, 2023, the Plaintiff filed the Second Rectification Application for cancellation of Defendant No.2's registered trademark "MAZE". He has submitted that in the Second Rectification Application, the Plaintiff modified ground 2(j) alone to state that "MAZELO" was "completely arbitrary" and "has no significance or connection, whether direct or indirect" to the goods for which it is being used and /or registered.

15. Mr. Khambata has submitted that though the First Rectification Application was withdrawn and thereafter the Second Rectification Application filed, the Plaintiff misleadingly suggest that only one Rectification Application has been filed. He has referred to the online status page of trademark e-register "MAZE" trademark relied upon by the Plaintiffs which reflects the filing of only one Rectification Application viz. The First Rectification Application. The Plaintiffs chose not to file the online status page of the said trademark e-register which reflected the filing of both the First and

Second Rectification Applications. Further, only the Second Rectification Application filed on 7th September, 2023 was annexed by the Plaintiffs at Exhibit P to the Plaint.

16. Mr. Khambata has submitted that the Plaint is consistent with what is stated in the Second Rectification Application. However, paragraph 10 of the Plaint is inconsistent and contrary to what is stated in paragraph 2(j) of the First Rectification Application. He has drawn comparison between the two. He has submitted that to seek *ex parte* injunction, the Plaintiffs have pressed their submission on the distinctiveness of their mark MAZELO and their purported arbitrary coinage and lack of connection to the product, as recorded in paragraph 8 of the impugned Order.

17. Mr. Khambata has submitted that had the Plaintiffs disclosed the First Rectification Application, the Defendants could have *inter alia* raised the defences on the basis thereof to oppose the injunction. The first defence that could have been raised is that as per order VI Rule 2 of the Code of Civil Procedure, 1908, only material facts are required to be disclosed in the Plaint. Paragraph 22 of the Plaint refers to the Rectification Application filed by the Plaintiff

before the Trademark Registry and annexes a copy of the Second Rectification Application. Thus, the Plaintiffs admit that filing/s before the Trademark Registry is a material fact. As such, the Plaintiffs ought to have disclosed even the First Rectification Application, filing of which is a material fact. He has placed reliance upon the judgment of *Laser Shaving (Supra)*, paragraph 23 in this context. The second defence is that the stand taken by the Plaintiffs in previous proceedings is a relevant factor in all subsequent proceedings while deciding the Plaintiffs' entitlement for temporary injunction. He has submitted that doctrine of prosecution history estoppel would fully apply as the Plaintiff has admitted to the common, generic, descriptive nature of their mark "MAZELO" before the Trademarks Registry and therefore, the Plaintiffs are not entitled to any interlocutory relief. He has placed reliance upon the decisions of this Court in *Shantapa V/s. Anna*⁷ and *People Interactive Pvt. Ltd. Vs. Vivek Pahwa*⁸ paragraph 12 and 13.

18. Mr. Khambata has submitted that third defence available to the Plaintiff is that : "मजे लो" appears in the dictionary and is directly transliterated to English as "Maze lo". "MAZELO" is spelled in

7 2023 SCC OnLine Bom 2566

8 2016 SCC OnLine Bom 7351.

Hindi as “मज़ेलो” (and not “मझेलो”). In any event, even if the Plaintiffs’ case in the 1st Rectification Application is accepted, such a minor variation (replacing ‘J’ with ‘Z’) does not make a generic / descriptive mark into a coined term. A phonetic equivalent of a generic or common descriptive word formed by misspelling it (e.g. ‘table’ misspelt as ‘tabel’) does not become an invented word, “*if to the eye or ear the same idea would be conveyed as by the word in its ordinary form*”. He has in support thereof place reliance upon (i) *Delhivery v Treasure Vase Ventures Pvt. Ltd. - 2020 SCC Online Del 2766 [Para 68]*; (ii) *Indchemie Health Specialities Pvt. Ltd. Vs. Intas Pharmaceuticals Ltd. - 2015(6) Mh. L. J. 324 [Paras 4-7]*; (iii) *People Interactive v Vivek Pahwa - 2016 SCC Online Bom 7351 [Paras 12, 13, 18]*; (iv) *Marico Ltd v Agro Tech Foods Ltd. - 2010 SCC Online Del 2806 [Paras 8-10, 29-30]*, and (v) *In re ‘UNEEDA’ - 1901 Chancery Division Pg. 550 [pg. 554-555]*

19. Mr. Khambata has submitted that fourth defence which would have been available for the Plaintiff is that the Mazelo mark is used by the Plaintiffs in the descriptive sense and therefore, cannot be protected. Dictionary meaning of the Hindi word “मज़े” “when used in the context of food items (such as candies) is “*flavour, relish,*

savour, deliciousness, taste” and of the phrase “मजे लो” is “to relish”.

Plaintiffs admit in the First Rectification Application that “*the said trademark “MAZELO” is in respect of the flavoured candies which are manufactured as taste enhancers and for spreading joy and having fun while consuming”*

20. Mr. Khambata has submitted that first defence would have available to the Plaintiff is that Mazelo is not a coined or invented word. Mazelo is a common Hindi expression. There is no variation introduced by the Plaintiffs who also use the term as a generic expression. For example, the Plaintiffs have run social media campaigns with tag line ‘*Holi ke Mazelo*’.

21. Mr. Khambata has accordingly submitted that for the reasons set out above, suppression of First Rectification Application is a material suppression, which has mislead the Court into passing the impugned Order, ex-parte.

22. Mr. Khambata has submitted that the Plaintiffs have suppressed their knowledge of the Trademark “MAZE” since 2019 and falsely claimed to become aware of the said Trademark in or

around September, 2023.

23. Mr. Khambata has submitted that the Defendant No.2 has been in open, continuous, uninterrupted use of “MAZE” mark. The “MAZE” (word) mark was registered as Defendant No.1’s trademark on 12th March, 2019 and assigned to Defendant No.2 in the same year. During examination by the trademark registry, Plaintiffs “MAZELO” was not even cited as a prior mark. The Defendant No.2 filed for an additional trademark application “AMAZE inspite of MAZE” on 26th December, 2022. This mark was also accepted and advertised. Since then, the Defendant No.2 has been in open, continuous and uninterrupted use of the “MAZE” trademark and has created a distinct brand identity, cultivating a loyal customer base throughout the territory of India for its MAZE toffee. He has placed reliance upon tax invoices since October 2019 with the first tax invoice for the MAZE toffee having been issued on 12th October, 2019. Further, reliance is placed on the fact of MAZE toffee being widely advertised on popular digital / social media (such as Facebook, Instagram, Twitter, Youtube) amongst its trade channels, and through in person promotional events in universities etc. Further, the fact of investment of over Rs.30 lacs in advertising during FY

2019-20 and FY 2022-23 alone by this Defendant, apart from significant time and effort, in establishing their presence in the market. Also that MAZE toffee has generated a turnover of INR 21,82,78,840/- from FY 2019-20 to FY 2022-23. In support of this is the CA statement for turnover and advertisement expenses for FY 2019-20 till FY 2022-23 which is Annexed at annexure I/D-2's Additional Document.

24. Mr. Khambata has submitted that the Plaintiff's plea that the competitors are aware of each other's marks would squarely apply to the Plaintiff's too and they cannot disclaim knowledge of Defendant's mark Maze since 2019. He has placed reliance upon both the First and Second Rectification Applications where it is the Plaintiff's case that "Being in the same market / trade, the Respondent considered to be well aware that the Applicant's trade mark "MAZELO" has acquired tremendous goodwill and reputation in the market". If that be so, the Plaintiffs cannot be heard to contend that a different benchmark be applied to them when it comes to their knowledge of Defendant No.2's mark MAZE and that they were not aware of the Defendant No.2's mark prior to September, 2023.

25. Mr. Khambata has submitted that even otherwise, the Plaintiffs and the Defendants are close competitors in the confectionery industry and both sell sugar candies / toffees. Large companies like the Plaintiffs are reasonably expected to conduct market surveys and research prior to launching of any products, and to monitor the competing products' performance after the launch. DS Group and the Plaintiffs are established and direct competitors in the confectionery market. The MAZE toffee was listed as one of the products on the DS Group's website. Thus, even a nominal search on DS Group's website would have shown its candies under MAZE trademark. The Plaintiffs' claim to be unaware of MAZE trademark prior to September 2023 defied belief and is false.

26. Mr. Khambata has submitted that various trademarks existed in the same Class 30, using the terms 'MAZE' such as "MAZEDAR, MAJEDA and MAJELO".

27. Mr. Khambata has submitted that the Plaintiffs prepared for a long time to file the captioned Suit and the false plea of knowledge in September, 2023 was taken only to obtain an ex-parte Order. He has submitted that the captioned Suit was filed by the

Plaintiff only on 16th September, 2023. However, the purported specimen invoices of the Plaintiffs annexed to the Complaint ranging from 2nd May, 2019 to 2nd May, 2023 were all printed on 13th May, 2023 within a period of half an hour. He has submitted that this is a not an innocent coincidence.

28. Mr. Khambata has submitted that the suppression of 'knowledge' is material because it shows that: (a) the Defendant is not a fly-by-night operator but rather, an established company with a product which has been used years before the Complaint was filed, and (b) it demonstrates that there was in fact absolutely no urgency to pass the impugned Order. He has submitted that if the Plaintiff had disclosed the correct date of their knowledge of the Defendant No.2's mark, this Court may not have permitted the application to be made ex-parte. If the Defendants had been given notice, they would have brought to the notice of this Court the materials mentioned above and it would have an opportunity to consider the Defendants' defence. He has placed reliance upon the decision of this Court in *Kamruddin Mehsaniya V/s. Sarah International^P*.

9 2021 SCC OnLine Bom 13933.

29. Mr. Khambata has submitted that the Plaintiffs have suppressed the Defendant No.2's public advertisements which show phonetic dissimilarity between 'MAZE' and 'MAZELO'. He has submitted that the Plaintiffs have specifically pleaded that they had conducted online search on social media (Facebook / Instagram) and seen the advertisement / promotional material of Defendant No.2 regarding its MAZE mark. However, the Plaintiffs failed to bring to notice of this Court that Defendant No.2's mark 'MAZE' is an English word (pronounced as 'MAYZ') which connotes a puzzle through which one has to get through to get to the centre of the toffee (and has nothing to do with Hindi word "मजे") and which is evidence from Defendant No.2's promotional material which shows maze as a puzzle. The Plaintiffs selectively annexed some of the promotional / advertising material from the social media leaving out a large number of social media advertising posts. This is a material suppression. Had the attention of this Court been drawn to the social media campaign of the Defendant No.2 in relation to its trademark MAZE, this Court may not have permitted the application to be made ex-parte. Had the notice been given to the Defendants, they could have brought to this Court's notice that there was no similarity, phonetic or otherwise, between the two marks and the Plaintiffs'

claim for passing off was not justified.

30. Mr. Khambata has submitted that the First Rectification Application is relevant even if the Plaintiffs only pressed for passing off at the ex-parte stage. It is the contention of the Plaintiff that since they did not press for reliefs qua trademark infringement, the First Rectification Application filed by the Plaintiffs was not a subject for consideration before this Court at the time of passing of the impugned order. He has submitted that the Plaint is a composite Plaint, which is to be read as a whole. It seeks reliefs qua both claims of trademark infringement and passing off. As such, the Plaintiff's duty of candour and disclosure applies to the entire Plaint, irrespective of which relief was pressed and on what grounds at the ex-parte ad-interim stage.

31. Mr. Khambata has submitted that the Plaintiffs had whilst applying for the ex-parte injunction order, pressed into service their submissions (albeit incorrectly) that the MAZELO mark "is a coined word of the Plaintiffs and is completely arbitrary in respect of the goods for which it is being used..."

32. Mr. Khambata has submitted that even in a claim for passing off, the distinctiveness of the mark is a relevant consideration and Courts have generally declined to grant injunction where a mark is found to be descriptive and / or generic: *(a) para 8-19 / Marico Ltd v Agro Tech Foods Ltd., 2010 SCC Online Del 2806; (b) para 76 - 77 / Delhivery v Treasure Vase Ventures Pvt. Ltd. 2020 SCC Online Del 2766; (c) Paras 5 – 6 / Teju Singh v. Shanta Devi, 1973 SCC Online AP 162; and (d) Paras 6-7 / Sant Kumar Mehra v Ram Lakhan, 1999 SCC Online Del 219..*

33. Mr. Khambata has submitted that the Plaintiffs have relied upon the judgment of *Sabmiller India (P) Ltd. V/s. Jagpin Breweries Ltd.*¹⁰ to contend that only relevant documents were required to be annexed to the Complaint and the First Rectification Application contained no admissions and as such, was not relevant. Further, the Plaintiffs have also cited judgments in *Raj Kumar Chawla Vs. Lucas Indian Services*¹¹ and *Chantex Vs. Applause Bhansali Films Pvt. Ltd.*¹² to show that there was no admission in the First Rectification application.

¹⁰ 2014 SCC Online Bom 4842.

¹¹ 2006 SCC OnLine Del.490.

¹² 2009 SCC OnLine Bom 405.

34. Mr. Khambata has submitted that the *Sabmiller India Ltd. (Supra)* case is distinguishable on facts as there the Court had found that in the facts of that case, the prosecution history was not material. It did not lay down any general proposition. In the present case, the Plaintiffs have admitted to the generic and descriptive nature of their mark “MAZELO” before the Trade Marks Registry.

35. Mr. Khambata has submitted that it is the Plaintiffs contention that it was not necessary to bring the First Rectification Application before this Court as the Plaintiffs had immediately withdrawn the First Rectification Application “*as there were certain corrections in the draft*” and the First Rectification Application had been inadvertently filed without such correction. He has submitted that at the outset the First Rectification Application was withdrawn by the Plaintiffs not on the basis that there were certain corrections and that it was inadvertently filed but on the ground that “*the Applicants are not interested in pursuing the said rectification Application...*”. He has submitted that this application for withdrawal has also been suppressed.

36. Mr. Khambata has further submitted that though a

pleading may have been withdrawn, the statements made in such pleadings continue to exist for all purposes, including as admissions, unless rebutted. Consequently, it is not open for the Plaintiffs to contend that the First Rectification Application loses its relevance just because it was withdrawn. He has in support of this contention placed reliance upon *Mohammed Seraj Vs. Adibar Rehaman*¹³, paragraph 15 and *Barbara Taylor Bradford Vs. Sahara Media Entertainment*¹⁴, paragraph 207.

37. Mr. Khambata has submitted that the bare perusal of the First Rectification Application would show that the same was not a draft but a final application which was duly verified by the Plaintiffs agent / advocates and the Plaintiffs are estopped from claiming to the contrary.

38. Mr. Khambata has submitted that it is the Plaintiffs contention that it was not necessary to bring the First Rectification Application before this Court as the rectification proceedings are still pending and no orders have been passed therein on merits is a misconceived contention. He has submitted that it is entirely

¹³ 1968 SCC OnLine Cal. 43.

¹⁴ 2003 SCC OnLine Cal 323.

irrelevant that the Second Rectification Application was pending adjudication or that no orders have been passed therein. The Plaintiffs ought to have candidly disclosed the First Rectification Application to this Court as the admissions contained therein regarding the genesis of the MAZELO mark in paragraph 2(j) showed that it was not an arbitrary or invented word, contrary to what was stated by the Plaintiff in the Plaint. He has submitted that it is no good for the Plaintiffs to contend that the Plaintiffs' mark is registered and hence, there is an assumption of it being distinctive / non-generic / non-descriptive. It is well settled that a generic / descriptive word cannot be registered by a party. If a generic / descriptive mark is wrongly registered, the Court cannot ignore the generic / descriptive nature of the mark and confer a monopoly on the same in favour of one party. He has placed reliance upon the *Delhivery (Supra)*, paragraph 68.

39. Mr. Khambata has submitted that the Plaintiffs have contended that the Defendant No.2 has not averred as to what is false or misleading in the Plaint and that suppression of admissions in the First Rectification Application. They have submitted that in absence of pleadings, no arguments could be addressed in that

regard. The Plaintiffs in support of this contention cited the judgments of the Supreme Court in *Ram Sarup Gupta V/s. Bishun Narain Inter College*¹⁵, *Bachhaj Nahar Vs. Nilima Mandal*¹⁶ and *Kalyan Singh Chouhan Vs. C.P. Joshi*¹⁷.

40. Mr. Khambata in response to these contentions has submitted that the Defendant No.2 in its Interim Application as well as Affidavit in Rejoinder clearly and sufficiently specifically pleaded the false / misleading statements in the Plaint as well as the suppression of the Plaintiffs' admission. He has submitted that in any case the Plaintiffs clearly understood the Defendant No.2's case they have to meet, as evident from their Affidavit in Reply, wherein they state that the Interim Application is premised on Defendant No.2's false contentions / allegations that the said Order was obtained by the Plaintiffs by suppression of material or vital facts and documents and by making false statements before this Court.

41. Mr. Khambata has submitted that the judgments cited by the Plaintiffs infact assist Defendant No.2. In *Ram Sarup Gupta*

¹⁵ 1987 2 SCC 555.

¹⁶ 2008 17 SCC 491.

¹⁷ 2011 11 SCC 786.

(Supra), the Plaintiffs only partially read the first half of paragraph 6. The Plaintiffs however, omitted reading the remaining paragraph where the Court has held that, “*the pleadings should receive a liberal construction, the Court must find out whether in substance the parties knew the case and the issues upon which they went to trial...*”. This ratio has been followed in the cases of *Bachhaj Nahar (Supra)* and *Kalyan Singh (Supra)*.

42. Mr. Khambata has submitted that the Plaintiffs’ contention that the Defendants have to show actual knowledge of the Plaintiffs by leading positive evidence and presumption of Plaintiffs’ knowledge is not sufficient and for which reliance has been placed on the judgment of case *Marico Ltd. Vs. KLF Nirmal Industries Pvt. Ltd.*¹⁸ is a misconceived contention. He has submitted that in *Marico (Supra)*, this Court had in the facts of the case found that the application for vacating the ex-parte Order lacked material particulars and the Defendant therein could not demonstrate that the Plaintiff therein had prior knowledge and had concluded that there was no material suppression. Thus, this decision is distinguishable on facts.

¹⁸ Interim Application (L) No.26759 of 2023 in Com IPR Suit (L) No.22293 of 2023.

43. Mr. Khambata has submitted that in the present case the Plaintiffs have not denied Defendant No.2's specific averment that with their coffee – flavoured candies (launched in 2017 and 2022) being direct competitors of Defendant No.2's Maze toffee, the Plaintiffs would have conducted pre-launch market surveys and post launch, continuously monitor the competing products including MAZE toffee. The Plaintiffs have neither denied Defendant No.2's specific averment that the Complaint was kept ready to be filed from May, 2023 nor offered any explanation for printing within a half - hour period in May 2023, the invoices annexed to the Complaint which range from 2019 to 2023 and applying the benchmark adopted by the Plaintiffs themselves, competitors are "considered to be aware" of each other's marks.

44. Mr. Khambata has submitted that the Plaintiffs during the course of arguments in sur-rejoinder have raised new points namely, the Plaintiffs have argued in demurrer, that the ex-parte ad-interim Order dated 4th October, 2023 ought not to be vacated in view of the 'larger public interest' involved in the matter and for which judgments have been relied upon. He has submitted that these judgments are distinguishable on facts. He has further submitted that

there are certain judgments which have been relied upon in the Written Statement for the very first time and which should not be considered by this Court. In any event, these judgments are irrelevant and distinguishable on facts and do not further the case of the Plaintiffs.

45. Mr. Khambata has accordingly submitted that the present Interim Application filed by the Defendants be allowed and the impugned Order be immediately discharged without renewal and exemplary and compensatory costs be imposed on the Plaintiffs.

46. Dr. Tulzapurkar, the learned Senior Counsel appearing for the Plaintiffs, has submitted that the present Interim Application filed under Order XXXIX Rule 4 of the Code of Civil Procedure, 1908 does not disclose any cause of action. He has submitted that an application under Order XXXIX Rule 4 of the CPC can be made by the Defendants for discharge or setting aside of ad-interim Order passed without giving notice to the Defendants only and only if it can be shown that the Plaintiff has knowingly made a false or misleading statement in the Plaint, in relation to a material particular. He has submitted that in the present Interim Application taken out by the

Defendant No.2, there is no averment of any false or misleading statement being made by the Plaintiffs. He has submitted that though the Applicant is required to particularize the statements which according to the Applicant, are false or misleading, not a single statement is mentioned in the entire Interim Application which according to the Defendant No.2 is false or misleading.

47. Dr. Tulzapurkar has submitted that in the present Interim Application, the Defendant No.2 has raised contentions to show that the interim reliefs cannot be granted to the Plaintiffs. There are various grounds set out which can be considered at the time of the hearing of the Interim Application of the Plaintiffs under Order XXXIX Rules 1 and 2 of the CPC for interim reliefs. Those grounds are totally irrelevant for deciding the Interim Application under Order XXXIX Rule 4 of the CPC.

48. Dr. Tulzapurkar has submitted that Defendant No.2 during the course of oral arguments have contended that the Plaintiffs have failed to disclose the First Rectification Application and there was an admission in the First Rectification Application that the Plaintiffs' own mark was descriptive. In view of the alleged

admission it was contended that the Plaintiffs were estopped from contending that their mark MAZELO was a coined word or that the same was not descriptive. The second argument is on the surmise that the Plaintiffs had knowledge of the Defendants mark 'MAZE' based on the Plaintiffs own invoices downloaded by the Plaintiffs three months before filing of the Suit.

49. Dr. Tulzapurkar has submitted that these contentions are not pleaded in the Interim Application. These contentions have been raised for the first time during the oral arguments. He has submitted that in the absence of specific plea the Interim Application itself is liable to be rejected in the *limine*. He has submitted that in the entire Interim Application, there is no single averment or allegation that in the First Rectification Application, the Plaintiffs had admitted that their mark MAZELO was descriptive. There is no allegation that the Plaintiffs are bound by the alleged admission.

50. Dr. Tulzapurkar has submitted that there is no mention in the Interim Application that the Plaintiffs wrongfully withdrew the alleged admission by withdrawing the First Rectification Application and in the Second Rectification Application omitted to mention the

facts as to how the Plaintiffs coined their mark. He has submitted that the Defendant No.2 is not entitled to argue what is not pleaded and the Court cannot decide on any matter beyond the pleadings. He has submitted that in absence of any pleadings, the Plaintiffs would not have opportunity to show that there was no admission; that there was no statement in the First Rectification that the Plaintiffs mark MAZELO was descriptive; and that the statement in the First Rectification Application regarding the manner in which the Plaintiffs mark was coined are totally irrelevant as the Plaintiffs mark was already registered. He has submitted that it is a settled position in law that a party is not entitled to argue what is not pleaded nor the Court can give a finding on the basis of such arguments.

51. Dr. Tulzapurkar has in support of this submission placed reliance upon the decisions of the Supreme Court in *Gajanan Krishnaji Bapat Vs. Dattaji Ragobaji Meghe*¹⁹, *Krojan & Co. V/s. Nagappa Chettiar*²⁰, *Ram Sarup Gupta Vs. Bishan Narain Inter College*²¹ at 562-563, paragraph 6; *Bachhaj Nahar Vs. Nilima Manda*²² at 496 and 500, paragraphs 12, 13 & 23 and *Kalyan Singh*

¹⁹ (1995) 5 SCC 347.

²⁰ AIR 1953 SC 235.

²¹ (1987) 2 SCC 555.

²² (2008) 17 SCC 491.

*Chouhan Vs. C.T. Joshi*²³ at 794, 795 and 796, paragraphs 24 and 25.

52. Dr. Tulzapurkar has submitted that as regards the second plea of knowledge, when the Plaintiffs downloaded their own invoices, is also not to be found in the Interim Application. He has submitted that there is no plea taken or material shown to the effect that the Plaintiffs had any positive knowledge of the Defendants' use of the impugned trade mark MAZE. He has submitted that the reliance placed by the Defendants on the judgment of this Court in *Laser Shaving Blades (Supra)* is not applicable as the facts are totally different. In that case there was suppression by the Plaintiffs of the correspondence before the Registrar of Trade Marks and particularly, a letter addressed by the Plaintiffs to the Registrar in which it was stated that the Plaintiffs' mark and the Defendant's mark are different. In the present case there is no such suppression. The First Rectification Application does not contain any statement that the mark is descriptive.

53. Dr. Tulzapurkar has submitted in the alternative, there is no statement in the First Rectification Application that the Plaintiffs'

²³ (2011) 11 SCC 786.

mark MAZELO is descriptive. Nor there is any admission to that effect. In fact, the consistent case of the Plaintiffs in both the Rectification Applications was that the Plaintiffs mark MAZELO is unique and coined. He has submitted that the statement made in First Rectification Application about how the Plaintiffs coined their mark do not, by any stretch of imagination, amount to any admission as alleged. The explanation or the thought process behind coining the mark MAZELO and adopting it in respect of the Plaintiffs' goods i.e. confectioneries / candies in the First Rectification Application can never make the Plaintiffs' mark descriptive. Therefore, there is no question of suppressing any alleged admission.

54. Dr. Tulzapurkar has submitted that a bare perusal of the Second Rectification Application would show that there is no question of the Plaintiffs having made any admissions in the present case. The admission, if any, must be clear and categorical and not based on mere surmises or inferences. In this context he has placed reliance upon *Shantez Vs. Applause Bhansali Films*²⁴, paragraph 4 and *Raj Kumar Chawla Vs. Lucas Indian Services*²⁵, paragraph 5.

²⁴ 2009 SCC OnLine Bom.405.

²⁵ 2006 SCC OnLine De.409.

55. Dr. Tulzapurkar has submitted that suppression must be 'relevant' and of a 'material' fact to fall within Order XXXIX Rule 4 of the CPC. He has submitted that in the present case, there is no suppression much less suppression of any material or relevant fact. He has submitted that the fact that the Plaintiffs withdrew the First Rectification Application is not relevant at all. The Plaintiffs have disclosed the only material fact that they have challenged the Defendant's trade mark registration for the impugned mark MAZE. Even in the rectification proceedings, how the Plaintiffs coined their mark MAZELO is not a germane issue because the mark was already registered with effect from 28th June, 2004 and that the registration of the Plaintiffs' mark was not the subject matter of any challenge or in issue in the present Suit. He has submitted that the facts and documents which are alleged to have been suppressed are in any event, not material or relevant to the issues involved in the Suit. He has placed reliance upon the following decisions:

(i) RKRM International Products Pvt. Ltd. Vs. Supermax IPR Holdings AG and Anr., (Order dated 19th June, 2023 passed by this Court in Interim Application (L) No.16016 of 2023 in Interim Application (L) No.12388 of 2023 in COMIPL No.12372 of 2023) paragraphs 12 to 18.

***(ii) SJS Business Enterprises Vs. State of Bihar,
(2004) 7 SCC 166 paragraph 10.***

***(iii) Sabmiller India Ltd. Vs. Jagpin Breweries Ltd.
2014 SCC OnLine Bom.4842, paragraph 47.***

56. Dr. Tulzapurkar has submitted that it is settled law that in a Suit for infringement, a Plaintiff is only required to show that this mark is registered. The Plaintiff is not required to give any reason for coining the mark. In any event the Plaintiffs mark “MAZELO” can never be held to be descriptive of candies. When the trademark is registered and the entries made in the Register of Trademarks, the Plaintiff has already discharged the burden that the trademark is distinctive and satisfied the criteria of a ‘trade mark’ within the definition of a trademark and the requirement of Sections 9 and 11 of the Trade Mark Act, 1999. He has placed reliance upon *Lupin Ltd. Vs. Eris Life Sciences Pvt. Ltd.*²⁶ paragraph 19 and *Sabmiller India Ltd. (Supra)* paragraph 47 in this context.

57. Dr. Tulzapurkar has submitted that the manner of coining a mark will not render the mark descriptive. In determining the issue as to whether mark is descriptive, the Court has to consider the

²⁶ 2016 (6) PTC 144 (Bom.)

nature of the goods or services in relation to which the mark is to be used. There has to be a direct reference in the mark to the character or quality of the goods or services for it to be descriptive. He has in this context placed reliance upon the decisions of this Court which have dealt with issue of descriptive marks. It is settled law that suggestive marks are “inherently distinctive” and are not at par with descriptive marks. These are as under:-

(i) J.M. Mehta Vs. Registrar of Trade Marks, MANU/MH/0144/1962 paragraphs 10, 11 and 12.

(ii) The Eastman Photographic Materials Co. Ltd. Vs. The Comptroller General of Patents, Designs and Trademarks, 1898 Appeal Cases 571, pages, 577, 578, 583, 584 and 585: and

(iii) Bata India Ltd. Vs. Chawla Boot House, MANU/DE/1368/2019 paragraphs 26 – 31.

58. Dr. Tulzapurkar has submitted that the argument of the Defendant that (i) the Plaintiffs’ registered mark MAZELO is descriptive of its candies or (ii) that the Plaintiffs cannot claim monopoly in respect of the same or (iii) that the Plaintiffs registration is liable to be cancelled etc. are all factors which go into the merits of the case and have no bearing whatsoever while deciding the present

Interim Application filed by the Defendant under Order XXXIX Rule 4 of the CPC.

59. Dr. Tulzapurkar has submitted that the contention of the Defendant No.2 that the Plaintiffs ought to have given notice because the Plaintiffs were aware about the Defendants' launch of the impugned products bearing the impugned mark MAZE since October, 2019 and that this amounts to suppression and therefore the Order is required to be vacated is misconceived. He has submitted that there is no specific plea or statement that the statement in paragraph 19 of the Plaint that the Plaintiffs learnt about the Defendants use in September, 2023 is false. Further, it is not even the pleaded case of the Defendants that the Plaintiffs were actually aware of the Defendants alleged use since 2019. What is pleaded by the Defendant in paragraph 39 of the Interim Application is that the Plaintiffs ought to have known about the Defendants launch of the products under the mark MAZE since October, 2019. Hence, the whole basis of seeking vacation of the Order on the basis of the alleged suppression is based on mere conjectures and surmises without any positive evidence. He has placed reliance upon the decision of this Court in

*Marico Ltd. V/s. KLF Nirmal Industries Pvt. Ltd*²⁷, paragraph 12, 21, 24, 28, 29, 40, 64, 66, 69, 73 and 74. This Court has held that an application under Order XXXIX Rule 4 cannot be made on the basis of conjectures and it is necessary to plead and establish facts to show knowledge.

60. Dr. Tulzapurkar has submitted that as regards the argument about the date on which the Plaintiffs downloaded their invoice in May, 2023, the same is not pleaded in the Interim Application and in any event the allegation that at that time, the Plaintiffs had downloaded the same for filing the Suit is a mere conjectures or surmise. He has submitted that such plea is required to be stated to be rejected. He has submitted that had this allegation been made in the Interim Application, the Plaintiffs could have dealt with the same by giving reasons for downloading those invoices.

61. Dr. Tulzapurkar has submitted that neither there has been any suppression on the part of the Plaintiffs nor has there been any wilful or knowingly made false or misleading statement on the part of the Plaintiffs, let alone any perjurious statement in the Plaint

²⁷ 2023 SCC OnLine Bom 2734.

or any other pleadings in the present Suit. Thus, the reliance placed by the Defendants on ***Kewal Ashokbhai Vasoya (Supra)*** and ***Lallubhai Amichand Ltd. (Supra)*** is misplaced. The Plaintiffs have infact satisfied all requirements set out in the judgment in ***Kewal Ashokbhai Vasoya (Supra)*** in respect of the grant of ex-parte relief and have made full and reasonably accurate disclosures of material facts and have invited the Court's attention to factual, legal and procedural issues as required.

62. Dr. Tulzapurkar has submitted that it is essential in the case of infringement actions or passing off actions to consider public interest while deciding an application made under Order XXXIX Rule 4 of the CPC, especially when the products in question are edible and where the dishonesty in adoption by the Defendants is apparent and evident. He has in this context placed reliance upon the ***Shaw Wallace & Co. Vs. Mohan Rocky Spring Water, MIPR 2007, page 185, (paragraphs 10, 11 and 14), Hindustan Unilever Ltd. V/s. Farooq Usman Batliwala, in Interim Application (L) No.37027 of 2022 in COMIP(L) No.26527 of 2022 dated 22nd December, 2022, paragraph 13 and 14 and Apollo Tyres Ltd. Vs. Pioneer Trading Corporation & Anr., 2017 SCC OnLine Del. 9825 paragraph 2, 23, 24 and 118.***

63. Dr. Tulzapurkar has also placed reliance upon the decision of this Court in *Marico Ltd. (Supra)*, where this Court has held that presuming that it has been established that a party has knowingly made a false or misleading statement in relation to a material particular for vacation of the ex-parte Order under Order 39 Rule 4, even then under the first proviso to Order XXXIX Rule 4, this Court may not vacate the injunction if it considers that it is not necessary to do so in the interest of justice.

64. Dr. Tulzapurkar has submitted that the Defendants have relied upon the decisions to contend that the Plaintiffs mark MAZE is descriptive when used in relation to candies. He has submitted that this argument is on merits of the case and is not relevant for the present Interim Application under Order XXXIX Rule 4 of the CPC. He has submitted that the decisions relied upon by the Plaintiffs are distinguishable on facts. In any event, the Plaintiffs mark MAZELO can never be termed descriptive of the goods in respect of which it is being used i.e. candies.

65. Dr. Tulzapurkar has accordingly submitted that all submissions in the present Interim Application are outside the scope

of Order XXXIX Rule 4 of the CPC and accordingly, the Interim Application is not maintainable and without any substance. He has therefore, submitted that the Interim Application of Defendant No.2 is liable to be, and should be, dismissed with costs.

66. Having considered the rival submissions, it is necessary to consider that the present Interim Application is filed under Order XXXIX Rule 4 of the CPC and under this provision which may be available to the Defendant to set aside an ex-parte ad-interim Order, the Application can only be allowed if it can be shown that the Plaintiff has knowingly made a false or misleading statement in the Plaint, in relation to any material particular. The present Interim Application in my view has failed to particularize which of the statements in the Plaint are false or misleading.

67. The Defendant No.2 in the present Interim Application has alleged that the Plaintiffs have suppressed the fact of the First Rectification Application and in particular its contents in paragraph 2(j) thereof. It is the contention on behalf of Defendant No.2 that the explanation given by the Plaintiffs in paragraph 2(j) of the First Rectification Application for coinage of its mark MAZELO could have

been used by the Defendants as a defence to contend that the MAZELO is not an invented word but infact is a generic expression and used in descriptive sense. I do not find any merit in this argument on behalf of the Defendant No.2, particularly considering that in paragraph 2(j) of the First Rectification which was withdrawn there is no mention of the mark “MAZELO” of the Plaintiff being descriptive and infact it is stated that the Plaintiffs have coined “MAZELO”. This is consistent with what has been stated in paragraph 10 of the Plaint as well as the finding in paragraph 8 of the impugned Order. Further, in the present Interim Application, there is no averment or allegation that in the First Rectification Application, the Plaintiffs have admitted their mark MAZE being descriptive. Further, there is no allegation that the Plaintiffs are bound by such alleged admission. Thus, there is no suppression of any relevant or material fact by the Plaintiffs. The only material fact in my view is that the registration of the Defendants’ mark MAZE is under challenge in rectification proceedings and which the Plaintiffs have disclosed.

68. In any event the Plaintiffs mark “MAZELO” has been registered with effect from 28th June, 2004 and given the fact of registration the explanation given by the Plaintiffs of how they coined

their mark in the rectification proceedings is not a germane issue. The decisions relied upon by the Plaintiffs namely ***RKRM International Products Pvt. Ltd. (Supra)***, ***SJS Business Enterprises (Supra)*** and ***Sabmiller (Supra)*** in support of their contention that facts and documents alleged to be suppressed by the Plaintiffs not being material or relevant to the issue involved in the Suit is a factor which the Court will consider in an Application under Order XXXIX Rule 4 of the CPC are apposite.

69. Further, it is the contention on behalf of the Defendant No.2 that the proceedings before the Trademark Registry are material facts which must be disclosed and reliance has been placed on the principle “prosecution history estoppel”. Reliance has been placed on the decision of this Court in ***Laser Shaving (India) Pvt. Ltd (Supra)*** in support of this contention. However, in view of my said finding that by not disclosing the First Rectification Application there is no suppression of a relevant and / or material fact which is the pre-requisite under Order XXXIX Rule 4 of the CPC, the doctrine of prosecution history estoppel as laid down in the aforesaid decision does not apply in the facts of the present case. In the case of ***Laser Shaving (India) Pvt. Ltd (Supra)***, the Plaintiffs in response to

the examination report stated that the Plaintiffs' mark and Defendants' mark are different and it was on the basis of this statement that the Plaintiffs mark proceeded for registration. This fact and the documents filed before the Trademark Registry were suppressed by the Plaintiff in the Plaint in that case. However, in the present case, the Plaintiffs mark is already registered and the First Rectification Application was filed and withdrawn much after the grant of the Plaintiffs registration. There is therefore, no question of doctrine of prosecution history estoppel being applicable against the Plaintiffs in the present case. This is apart from the fact that the First Rectification Application does not contain any statement that the Plaintiffs mark is descriptive and on the contrary states that Plaintiffs mark is a coined mark which is consistent with what has been stated by the Plaintiffs in the Plaint. Further, the other decision which had been cited by Defendant No.2 viz. *Shantapa V/s. Anna (Supra)* on prosecution history estoppel also is not applicable in the present case.

70. The next contention on behalf of the Defendant No.2 is that the Plaintiff suppressed their knowledge of the trademark "MAZE" since 2019 and falsely claimed to be aware of the trade mark "MAZE" in September 2023, is in my view a misconceived

contention. This contention on behalf of the Defendant No.2 is by imputing knowledge to the Plaintiffs of alleged use by the Defendants of the impugned mark for which reliance has been placed on tax invoices since October, 2019; advertisements of of MAZE toffee on popular digital / social media and through in person events in universities. Further, on the fact that the Defendants incurred advertisement expenses worth over Rs.30 lacs as well as the sales figures of Defendants in respect of the impugned product and Defendants Chartered Accountant Certificate.

71. In my view, the Defendants have failed to establish that the Plaintiffs in fact were aware of any of the aforementioned material on which reliance has been placed. Thus, such knowledge cannot be imputed to the Plaintiffs. The arguments raised by the Defendant No.2 as to prior knowledge of the Plaintiffs and suppression of such knowledge is purely based on conjectures and surmises. There is no positive evidence shown by the Defendant No.2 in the Interim Application to impute knowledge on the Plaintiffs prior to their stated knowledge of September, 2023. It has been held by this Court in **Marico (Ltd.)** at paragraphs 40, 41, and 74 that positive evidence is required to be shown by the Defendants to impute

knowledge on the Plaintiffs and this cannot be purely based on conjectures and surmises.

72. Accordingly, I do not find there to be any suppression of the Plaintiffs knowledge of the Defendants mark “MAZE” prior to that stated in the Plaint i.e. in or about September, 2023 when the Plaintiffs had knowledge of the Defendants mark “MAZE”. Further, I do not find merit in the Defendant No.2’s contention that the Plaintiffs plea that the competitors are aware of each other’s marks would squarely apply to the Plaintiff’s too and they cannot disclaim knowledge of Defendant’s mark Maze since 2019. Reliance has been placed by Defendant No.2 on the First and Second Rectification wherein the Plaintiffs have made the aforementioned plea. This contention of Defendant No.2 has lost sight of the fact that the Plaintiffs registration of MAZELO dates back to 2004 and has been subsisting on the Register of Trade Marks since 2004. The Plaintiffs open, extensive and continuous use thereof in respect of their said goods dates back to 2011. On the other hand, Defendant No.2’s alleged adoption of the impugned mark ‘MAZE’ is of October, 2019. Thus, the argument on behalf of Defendant No.2 that the Plaintiffs cannot be heard to contend that a different benchmark be applied to

them when it comes to their alleged knowledge of Defendant No.2's mark, is in my view misconceived considering that in the facts of the present case, the Plaintiffs have established prior registration and use of their own mark. The Plaintiffs cannot reasonably be held to the same standards or knowledge regarding Defendant No.2's impugned mark, particularly when Defendant No.2 adopted the impugned mark much after the Plaintiffs' long standing registration and use of their mark MAZELO. Thus, the expectation that the Plaintiffs should have been aware of Defendant No.2's mark prior to September, 2023 is misplaced and unfounded.

73. With regard to the Defendant No.2's contention that the Plaintiffs downloaded their invoices in May, 2023 for the purpose of filing the Suit and therefore, would have had knowledge of the Defendant No.2's mark prior to September, 2023 is also of no merit. It is necessary to bear in mind that these are Plaintiffs own invoices which are for the Plaintiffs' own goods and which may have been downloaded by the Plaintiffs for any reason other than the purpose of the present Suit such as for compliance with regulatory requirements or other such requirements and there would be no inference that can be drawn that the downloading of the Plaintiffs invoices is only for

the purpose of filing of the Suit. I also find that this contention is again based on surmises and it has not been established that the Plaintiffs had any positive knowledge of the Defendants use of the impugned trademark MAZE.

74. The Defendant No.2 has contended that the advertisements / social media material of the Defendants show that that they were promoting the impugned product by depicting a “MAZE”, as in “a puzzle” or a “game” in their promotional material. This was sufficient to show that the rival marks are phonetically dissimilar and had the Plaintiffs annexed these advertisements / social media material to the Plaint, this would have been apparent to the Court. This contention on behalf of the Defendant No.2 has lost sight of the fact that the Defendant No.2’s idea or reasoning behind its adoption of the impugned mark MAZE does not travel to the market and is therefore, completely irrelevant. Further, in intellectual property matters, the Court is protecting the interest of the public / consumers. The persons / consumers of average intelligence with imperfect recollection will only look at / remember the Plaintiffs prior mark “MAZELO” / products bearing the Plaintiffs prior mark MAZELO, which has been in the market since 2011 and when they

came across the Defendants' product bearing the impugned mark MAZE in the market, they are bound to / likely to be confused or deceived into purchasing the Defendants' product thinking that it is the product of the Plaintiffs or that there is an association or nexus between the Plaintiffs and the Defendants. A comparison of the rival marks / products makes it evident that there is likelihood of confusion. It is also settled law that actual confusion need not be proved and the likelihood of such confusion is sufficient.

75. A pertinent factor to consider is that the Defendants in their own social media post have mentioned that the impugned product bearing the impugned mark MAZE was stated to be "coming soon" in August, 2022. The inference being that the Defendants were not using the impugned mark until August, 2022. Thus, the contention of the Defendants that the Plaintiffs had knowledge of the use of the Defendants mark since 2019 is belied by the Defendants own social media post.

76. A well settled principle of law laid down by the Supreme Court is that "once a case of passing off is made out the practice is generally to grant a prompt ex-parte injunction followed by

appointment of local commissioner, if necessary. This has been held in *Laxmikant Patel Vs. Chetanbhai Shah & Anr.*²⁸, paragraph 13 and 14.

77. Given the grounds urged by Defendant No.2, the ex-parte ad-interim Order cannot be vacated particularly where a prima facie case of passing off is made out.

78. The decisions which have been relied upon on behalf of the Plaintiffs with regard to the consideration of public interest in cases of passing off infringement actions are apposite.

79. The decisions relied upon by the Defendant No.2, namely *Sant Kumar Mehra Vs. Ram Lakhan*²⁹ and *Teju Singh Vs. Shanta Devi*³⁰, have held that where the Defendants use of the mark which is prima facie held to be descriptive of the goods, the registered proprietor cannot interfere with such bonafide use. These decisions have been decided on the facts of those cases, and would be inapplicable in the present case, as it is not the Defendant No.2's

28 2004 SCC OnLine Bom 1074.

29 1999 SCC OnLine Del 219.

30 1973 SCC OnLine AP 162.

case, that their own use of the impugned mark MAZE in respect of candies is descriptive. In any event this cannot be contended by Defendant No.2 as Defendant No.2 has itself applied for registration of the impugned mark MAZE and obtained registration, which registration is under challenge at present.

80. I accordingly find that the present Interim Application under Order XXXIX Rule 4 of the Code of Civil Procedure, 1908 is wholly without merit as the requisites for falling under that provision have not been met as there has been no false or misleading statement in the Plaint of a material particular and / or suppression of any relevant and / or material fact and hence the Interim Application is dismissed. There shall be no order as to costs.

[R.I. CHAGLA J.]