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

Pronounced on: 02<sup>nd</sup> August, 2022

+ CS(COMM) 87/2021

DIAGEO BRANDS B.V. & ANR.

..... Plaintiffs

Through:

Mr. Amit Sibal, Senior Advocate with Mr. Nitin Sharma, Ms. Savni D. Endlaw, Ms. Subhoshree Sil, Mr. Angad S. Makkar and Mr. Saksham Dhingra, Advocates.

versus

#### GREAT GALLEON VENTURES LIMITED ..... Defendant

Through:

Mr. Chander Lall, Senior Advocate with Mr. Kapil Wadhwa, Ms. Deepika Pokharia and Mr. Kshitiz Dua, Advocates.

# CORAM: HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

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I.A. 2608/2021 (application by Plaintiffs under Order XXXIX Rule 1 & 2 of the Code of Civil Procedure, 1908) & I.A. 4231/2021 (application by Defendant under Order XXXIX Rule 4 of the Code of Civil Procedure, 1908)

1. The Plaintiffs who claim to have spent millions to develop a "new" 180 ml liquor bottle design – marketed as the "Hipster bottle" – are aggrieved with

its lock, stock and barrel copying by the Defendant; who, on the other hand, labels both the Plaintiffs and itself as pirates, sailing in the same high seas of prior art(s).

# I. BRIEF FACTS

2. Plaintiffs are part of the Diageo group of companies, involved in the business of manufacturing, selling, distributing and marketing of *inter alia* alcoholic beverages. Plaintiff No. 1 [*Diageo Brands B.V.*] is the proprietor of the marks 'Vat 69' and 'Black & White', including their formative marks, logos, device marks, labels and trade dress. Plaintiff No. 2 [*United Spirits Ltd.*] is the Indian distributor of Plaintiff No. 1's brands *viz.* 'Vat 69' and 'Black & White', and also manufactures, sells, distributes and markets its own brand i.e., 'Black Dog', being the proprietor of its formative marks, logos, device marks, labels and the trade dress.

3. Plaintiff No. 1 is the proprietor of the Plaintiffs' Registered Design bearing No. 306577 [*hereinafter*, "*Plaintiffs' Registered Design*"] under the Designs Act, 2000 [*hereinafter*, "*Designs Act*"] in respect of the bottle design known as "Hipster" in India, and "Pocket Scotch" globally.

4. Plaintiffs also claim common law rights in the trade dress and get up of the Hipster bottle for the products 'Black Dog (Black Reserve)', 'Black Dog (Golden Reserve)', 'Vat 69', and 'Black & White' Hipster [*hereinafter*, "*the Hipster*" or the "*Plaintiffs' Bottles*"]. Plaintiffs assert that the cumulative combination of unique, distinctive, and non-functional visual

features such as shape, manner of depiction of text and label, indentations and embellishments result in a distinctive trade dress and acts as a source identifier.

5. The Hipster bottles were launched by Plaintiff No. 1 in over 180 countries in 2018, and in India in May, 2019, and met with instantaneous success.

6. Defendant is the manufacturer of alcohol through its principal brand 'GOA', which was first adopted in 1999, with variants such as 'GOA GOLD' and 'GOA SPIRIT OF SMOOTHNESS'. The brand 'GOA GOLD' is stated to enjoy more than 52% market share in its price segment.

7. Somewhere in the second week of February, 2021, Plaintiffs learnt that the Defendant was manufacturing and marketing its products in 180 ml bottles, that, the Plaintiffs claim, are a "slavish and fraudulent imitation" of their Registered Design and also a dishonest adoption of trade dress and overall get up of their bottles [*hereinafter*, "*Defendant's Bottles*"]. A comparison of the Plaintiffs' Bottles (left) and the Defendant's Bottles (right) is shown below:





8. Plaintiffs want to protect their intellectual property rights by way of permanent injunction and ancillary reliefs, restraining infringement of their Registered Design, passing off of trade dress and get-up of the Hipster Bottles.

# Previous orders:

9. By way of I.A. 2608/2021 under Order XXXIX Rule 1 & 2 of the Code of Civil Procedure, 1908 [*hereinafter*, "*CPC*"], pending adjudication of the suit, Plaintiffs seek to restrain the Defendant and its affiliates etc. from directly or indirectly dealing in the infringing product, on the ground of it being: (a) an identical, obvious or fraudulent imitation of the Plaintiffs' Registered Design, and (b) being identical/deceptively similar to the overall trade dress and get up of the Plaintiffs' Bottles, amounting to passing off and unfair competition.

10. An *ex-parte* ad-interim order was passed in this matter on 23<sup>rd</sup> February, 2021, where, a *prima facie* view was formed and the Defendant was injuncted from selling the impugned bottles. This order is still continuing.

11. Defendant has vehemently opposed this injunction in their reply to the application, and has also filed I.A. 4231/2021 under Order XXXIX Rule 4 of the CPC, seeking vacation of the above-noted *ex-parte* ad-interim injunction.<sup>1</sup>

<sup>&</sup>lt;sup>1</sup> After reserving this matter, another application bearing I.A. No. 12330/2021 was filed by the Defendant under Order XXXIX Rule 4 r/w Section 151 of the Code of Civil Procedure, 1908 seeking variation/

12. Both the applications are being disposed of by way of the instant judgement.

#### II. ARGUMENTS BY THE PLAINTIFFS (IN BRIEF)

13. Mr. Amit Sibal, Senior Counsel for the Plaintiffs, advanced the following submissions:

Novelty of Plaintiffs' Registered Design: Unlike traditional hip flasks A. which are broad and short, the Hipster is modelled on the shape and proportions of a smartphone. Its essential features reside in its: (a) tall, lean and sleek look, (b) rectangular shape inspired from the shape and proportion of a smartphone; (c) smooth rounded shoulders and symmetrical edges; (d) protruding V-shaped neck situated at the middle of both shoulders; (e) symmetrically raised and plateau-like front and rear walls; (f)two-toned rimmed and rounded cap; and (g) dimpled bottom. The said essential features form the 'shape and configuration' of its distinctive design, compositely creating a visual impression that is 'appealing to the eye'. No third-party has ever adopted a 180 ml bottle/packaging of a similar 'shape and configuration' with such novel design and strikingly distinctive visual impression that 'appeals to the eye', as that of Plaintiffs' Registered Design. Further, the definition of 'hipster' has no relation to a hip flask or the anatomical part 'hip', but is completely arbitrary when used with respect to bottles, and means "one that follows trends that are out of the ordinary".

clarification of the *ex-parte ad-interim* injunction granted *vide* order dated 23<sup>rd</sup> February, 2021, seeking that the Defendant be allowed to use a proposed design disclosed in the said application, which was being adopted in addition to the bottle/flask design impugned in the present suit. The same was dismissed as not maintainable *vide* order dated 11<sup>th</sup> October 2021.

- B. <u>*Marketing expenses*</u>: Considerable amount has been spent to promote the Hipster through advertising and social media marketing.
- C. <u>Profits and goodwill</u>: The Hipster has proved to be a runaway success, with almost 95000 cases (of 48 bottles each) worth Rs. 100 crores sold in just 1.5 years in India. As evident from its sales turnovers, media and social media coverage and awards received, the Plaintiffs have extensive goodwill and reputation in their product.<sup>2</sup> The Defendant's imitation itself is a testament to the Plaintiffs' reputation and goodwill.<sup>3</sup>
- D. <u>Common law rights in trade dress</u>: A shape can also be protected as a trade mark, if it is used as a source identifier. Plaintiffs have common law rights in the trade dress and get-up in their Bottles comprising of unique and distinctive non-functional visual features, such as the monochromatic colour scheme, two-toned rimmed and rounded cap bearing a different colour, manner of depiction of text and label, indentations and embellishments. Such a cumulative combination of visual features results in a distinctive trade dress, which creates a strong visual impression in the mind of the consumer, and thus, Plaintiffs' unique trade dress acts as a source identifier.

#### **III.** ARGUMENTS BY THE DEFENDANT (IN BRIEF)

14. Mr. Chandar M. Lall, Senior Counsel for the Defendant, on the other hand, has laid a challenge to the Plaintiffs' Registered Design itself and denies any infringement or passing-off. His submissions are as follows:

<sup>&</sup>lt;sup>2</sup> Reliance was placed on: *Cello Household Products v. M/S Modware India and Anr.*, AIR (2017) Bom. 162 at paragraph no. 37.

<sup>&</sup>lt;sup>3</sup> Reliance was placed on: *Apollo Tyres Ltd. v. Pioneer Trading Corporation*, 2017 (72) PTC 253 (Delhi).

- A. The present suit has been filed with *mala fide* intentions and is an attempt to drive out legitimate competition.
- B. Defendant is a reputed liquor manufacturer and has sold more than 35 lakh cases of 'GOA' branded products in the last 3 years, with over INR 100 crores in sales for FY 2019-2020. The 'GOA' mark of Defendant has no resemblance to the Plaintiffs' brands *viz.* 'VAT 69', 'BLACK DOG' and 'BLACK & WHITE'.
- C. Defendant prominently displays its mark 'GOA' on all its products and the same is widely recognised by customers. The presence of such apparently different brands completely eliminates any chances of confusion between them.
- D. <u>The Plaintiffs are not the creators or proprietors of the design</u>: Plaintiffs admitted in Interrogatory No. 1 that the 'creator' of the Hipster design is an agency named Love Creative. There is no pleading relating to Love Creative, as only website pages of Love Creative have been shown in the plaint, which cannot fulfil the requirement of Section 2(j) of the Designs Act. Since there is no pleading that the said author has executed the work for Plaintiffs for good consideration, or has assigned the same to the Plaintiffs, and no documentation has been shown to this effect either, the mandate of Section 2(j) of the Designs Act has not been met. Thus, prima facie the registration is liable to be cancelled.
- E. <u>Invalid Designs under the Designs Act</u>: Unlike trademarks and copyrights, patents and designs laws are strictly based upon validity of registration. If registrations are *prima facie* invalid, then any monopoly therein ends, and the design falls to the public domain, which includes

the right to freely copy.<sup>4</sup> Under designs law, Registration is not *prima facie* evidence of validity. In cases where there is a serious challenge to a design, or where a design is new and has not been tested, injunctions should not be granted.<sup>5</sup> The test, under designs law, is not from a consumer's point of view, but of an instructed person having knowledge of the state-of-the-art and common-to-trade aspects of the design.

- F. Plaintiffs' Registered Design No. 306577 is liable to be cancelled under Sections 19(1)(b), 19(1)(c), 19(1)(d) read with 2(d), 2(g), 2(j), 4(c), and 22(3) of the Designs Act, on the following grounds:
  - (i) <u>The design stands disclosed through prior art</u>: The shape and configuration of Plaintiffs' Bottles, is "inspired" from hip flasks, and is extremely common to the liquor trade, being already in use by other brands, as is evident from the visual representation below:



In fact, both the Plaintiffs' and Defendant's bottles are mere tradevariants of the hip flask, and hence not registrable. Moreover, an admission to this effect is filed by Plaintiffs in the form of a newspaper interview filed as annexure-10, where they admit to such inspiration.

<sup>&</sup>lt;sup>4</sup> Reliance was placed on: *Micolube India Ltd. v. Rakesh Kumar trading as Saurabh Industries & Ors*, 2013 SCC OnLine Del 1984 at paragraph no. 65.

<sup>&</sup>lt;sup>5</sup> Reliance was placed on: *Niki Tasha India Pvt. Ltd. v. Faridabad Gas Gadgets Pvt. Ltd.*, 1984 SCC OnLine Del 73.

(ii) <u>The Hipster's design is not new and original.</u> The registration is liable to be cancelled as the design is not new, novel or original. The introduction of ordinary trade variants into an old design cannot make it new or original.<sup>6</sup> Some of the pre-existing designs are:



The term "new and useful" is a recognised term used in relation to a primarily utilitarian function, and hence, would be the subject matter of a patent; whereas, under designs law, 'novelty' means "new and original". The moment the creator says a design is not 'novel', in effect, what is being stated is that it is not new and original. Further, the Plaintiffs had claimed that the design was "new and useful" in their response to the interrogatories; and now cannot be permitted to refute their stance by way of a note on arguments. Under Section 4(c) of the Designs Act, a design should be "significantly distinguishable from known designs or combination of known designs". Small infinitesimal changes are not sufficient to constitute a 'new' or 'novel' or 'original' design.

(iii) <u>The Hipster's design is functional</u>: The use of the terms 'pocket scotch' or 'Hipster' in the plaint, in relation to Plaintiffs' Registered Design, is indication that the design in issue is utilitarian in nature. Its shape and configuration is designed to fit a

<sup>&</sup>lt;sup>6</sup> Reliance was placed on: *Phillips v. Harbro Rubber Company*, (1920) 37 RPC 233.

hip-pocket, taking inspiration from a hip flask. The argument that the design was inspired by the smartphone is fallacious, since the designs of a smartphone and hip flask are similar to each other to the extent that both fulfil one basic utilitarian aspect of fitting in a pocket.

- (iv) The Plaintiff has contended that the design is "inspired from the smartphone" and is "unlike the shape of traditional flasks"; whereas, on its website, it is mentioned that the Hipster is a "hip-flask-size pack". A party cannot be permitted to take a stand before the Court contrary to what has otherwise been represented to the public for commercial benefits.<sup>7</sup> In fact, this is not the first instance that the Plaintiffs have been accused of fraudulently claiming rights in ordinary bottle shapes.<sup>8</sup>
- (v) Mosaicing is impermissible under Section 4(c) of the Designs Act.<sup>9</sup> A different combination of familiar contrivances cannot be injuncted.<sup>10</sup>
- G. <u>There is no similarity in the overall trade dress of the two products,</u> <u>which could cause confusion or deception</u>. There are several differences between the shape, get-up and pricing of the Plaintiffs' and Defendant's Bottles, and hence, no injunction is warranted. They are a few millimetres different in size. Afterall, bottles of the same quantity

<sup>&</sup>lt;sup>7</sup> Reliance was placed on: *Relaxo Footwears Ltd. v. XS Brands Consultancy Pvt.*, 2019 SCC OnLine Del 7515.

<sup>&</sup>lt;sup>8</sup> Reliance was placed on: *Diageo v. W. J. Deutsch*, 283 F. Supp. 3d 182 (S.D.N.Y. 2018).

<sup>&</sup>lt;sup>9</sup> Reliance was placed on: *Videocon v. Whirlpool*, 2012 SCC OnLine Bom 1171; *Glaverbel S.A. v. Dave Rose*, 2010 SCC OnLine Del 308; and *B Braun v. Rishi Baid*, 2009 (110) DRJ 127.

<sup>&</sup>lt;sup>10</sup> Reliance was placed on: Gramophone Company Ltd. v. Magazine Holder Company, 1911 RPC 221.

are bound to have only slight variations from each other, and will have the same height if they have the same bottom circumference.<sup>11</sup>

- H. <u>No injunction is liable to be granted</u> as the Defendant has raised a credible challenge to Plaintiffs' Registered Design. Moreover, it is a well-settled principle that injunction does not follow as a matter of routine in cases when serious disputed questions arise, such as prior publication of the design, lack of originality, trade variation, etc.<sup>12</sup>
- I. <u>There can be no restrain qua passing off in a registered design</u>.<sup>13</sup> Plaintiffs' Bottles are constituted of common-to-trade elements, and therefore, no distinctiveness can be claimed in the overall get-up. No case for passing off can be made by merely showing imitation of parts of the get-up of goods which are common-to-the-trade.<sup>14</sup> Hence, the shape of a bottle which is a registered design is to be disregarded for the purpose of passing off.
- J. Without prejudice to the contention that Defendant has not copied Plaintiffs' products; nonetheless, even a conscious attempt to copy, in itself, does not constitute either infringement or passing off.

# IV. REJOINDER ARGUMENTS BY PLAINTIFFS

15. Defendant is attempting to create an artificial distinction between 'new' and 'novel', that otherwise does not exist. With respect to Defendant's submission on the use of the term 'useful', it is notable that merely because

<sup>&</sup>lt;sup>11</sup> Reliance was placed on: Dabur India Ltd. v Rajesh Kumar and Ors., 2008 SCC OnLine Del 393.

<sup>&</sup>lt;sup>12</sup> Reliance was placed on: *Dabur v Rajesh Kumar* (Id.) and *Carlsberg Breweries A/S v Som Distilleries & Breweries Ltd.*, (2018) SCC OnLine Del 12912.

<sup>&</sup>lt;sup>13</sup> Reliance was placed on: *Crocs Inc. USA v. Aqualite India Limited*, 2019 SCC OnLine Del 7409, at paragraph no. 38; and *Carlburg v. Som Distilleries* (Id.).

<sup>&</sup>lt;sup>14</sup> Reliance was placed on: Britannia Industries Ltd. v. ITC Ltd., (2017) 240 DLT 156 (DB).

a new design is also useful, it does not imply that the design is dictated solely by function, and is thereby, not registrable under the Designs Act.

16. Moreover, in response to an interrogatory of the Plaintiffs, the Defendant's official had claimed that several of the design/ trade dress elements were already being used by the Defendant for more than a decade.

17. As the trade channels of the Plaintiffs and Defendant's bottles are identical; the bottles are sold in the same stores - and may even be placed right next to each other; consequently, the likelihood of confusion is high.<sup>15</sup>

18. Admittedly, Defendant launched its infringing bottle at a much lesser price. This was done to attract the Plaintiffs' customers to its product. Considering its similar design and identical trade dress, the Defendant's product has diluted the registered design, distinctiveness get-up, and unique trade dress of the Plaintiffs' product.

19. For these reasons, the injunction granted *vide* order dated 23<sup>rd</sup> February, 2021 ought to be made absolute.

#### V. ISSUES & ANALYSIS

20. Imitation may be the best form of flattery, but the Plaintiffs herein are unamused by the emulation of their Hipster bottle by Defendant, and pray that

<sup>&</sup>lt;sup>15</sup> Reliance was placed on: *Shree Nath Heritage Liquor Pvt. Ltd.* v. *M/s Allied Blender & Distillers Pvt. Ltd.*, 2015 SCC OnLine Del 10164 at paragraphs no. 5, 24, 100-105; *Baker Hughes Limited & Anr.* v. *Hiroo Khushalani & Ors.*, 1998 SCC OnLine Del 481 at paragraph no. 54; *FDC Limited* v. *Docusuggest Healthcare Services Pvt Ltd. & Anr.*, 2017 SCC OnLine Del 6381 at paragraph no. 30.

the *ad-interim* injunction granted *vide* order dated 23<sup>rd</sup> February 2021 against the Defendant be made absolute till the disposal of this case. On the other hand, Defendant has taken the plea that the registration should be cancelled for the reasons, *inter alia*, that: (i) the Plaintiffs' Registered Design is neither 'new', nor 'original', (ii) both parties drink<sup>16</sup> from the same pool of prior art (being hip flasks and alcohol packaging bottles), both of which have existed for a substantial amount of time, and (iii) the design is functional.

21. In order to succeed, at the interim stage, Plaintiffs must *prima facie* demonstrate that: (i) they are the proprietor(s) of a valid and subsisting design registration; and (ii) Defendant's bottle is an identical/ similar/ obvious imitation of Plaintiffs' Registered Design. On the other hand, to deny the injunction, notwithstanding the fact that a registered design remains open to challenge, the Defendant must, on a *prima facie* basis, discharge the burden of proof that there is a strong ground to challenge/ cancel the Plaintiffs' Registered Design made under Section 19 of the Designs Act.

22. Several grounds urged by the Defendant to deny injunction are overlapping; however, for the sake of clarity and ease of reading, the same are being dealt with *in seriatim* under separate headings, which are as

- 1. Who is the proprietor of the Registered Design?
- 2. What is the legal effect of registration of a design for deciding the relief of grant of injunction?
- 3. Has a prima facie case been established to show fraudulent and

follows:

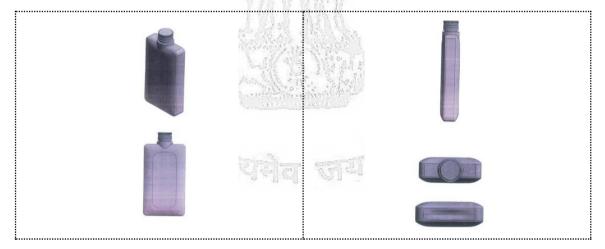
<sup>&</sup>lt;sup>16</sup> Considering the context, the pun is entirely unintended.

obvious imitation of the Plaintiffs' Registered Design, so as to warrant an injunction?

- 4. Has the Defendant demonstrated any ground of challenge enumerated under Section 19 of the Act, and if so, what is its effect?
- 5. Is there similarity in the trade-dress / get-up, constituting passing-off, and if so, can an injunction can be granted on that ground?

# 1. Who is the proprietor of the Registered Design?

23. The Design No. 306577 is registered in Class 09-01,<sup>17</sup> w.e.f. 12<sup>th</sup> June, 2018 *vide* certificate dated 22<sup>nd</sup> March, 2019 in the name of proprietor 'Diageo Brands B.V.' [i.e., Plaintiff No. 1] by the Controller General of Patents, Designs and Trade Marks. A pictorial representation of the design disclosed therein, is also extracted below:



24. Mr. Lall argued that the design was created not by Plaintiff No. 1, but by an agency named Love Creative. He also argued that insufficient documentation has been placed on record to prove any agreement with respect

<sup>&</sup>lt;sup>17</sup> Class 09-01 includes bottles, flasks, pots, carboys, demijohns, and containers with dynamic dispensing means.

to assignment of rights or payment of consideration, and thus, Plaintiff No. 1 cannot be called the legal proprietor of the design. He further submitted that, if, on this ground or any other, such registration is found to be *prima facie* invalid, Plaintiffs' design would then fall into the public domain in order to encourage design innovation, which includes the right to copy freely.

25. In the eyes of the Court, the plaint, read with the documents enclosed therewith, clearly discloses outsourcing of the design creation to Love Creative. It has been pleaded that Plaintiffs' Registered Design was created upon payment of approximately 1.5 million GBP. A screenshot of the agency's website has been shown [annexed as Annexure P-22], wherein it is stated as follows:

"When Diageo enlisted us to explore smaller formats for Scotch, we saw that smartphone culture could be the future of an embattled category" xx ... xx ... xx "Moving from initial design concepts to final production, we managed every stage of the journey until the Pocket arrived in the consumer's hand. This ground-breaking format was created for use across the entire Diageo portfolio, spanning 20 brands in total. And that's just for Scotch."

This clearly shows that Plaintiff No. 1 had indeed outsourced the creation of the design to the afore-said agency.

26. No document has been shown where Love Creative has laid a claim of ownership/proprietary rights in the design. Further, it is evident from Section 2(1)(j) of the Designs Act,<sup>18</sup> that even when work is executed for one person

<sup>&</sup>lt;sup>18</sup> Section 2 - Definitions -

<sup>(</sup>j) "proprietor of a new or original design",-

<sup>(</sup>i) where the author of the design, for good consideration, executes the work for some other person, means the person for whom the design is so executed;

by another, the first-person would remain the proprietor of the design, and at no point will the person who executed the work retain any rights/ title for the work.

27. Consequently, there is no doubt that Plaintiff No. 1 is the proprietor of registered design No. 306577 in terms of Section 2(1)(j) of the Designs Act. Hence, this escape route is not available to the Defendant and injunction cannot be refused on this ground.

# 2. What is the legal effect of registration of a design for Deciding the relief of grant of injunction?

28. Plaintiff No. 1's design registration is valid for an initial period of 10 years (till 2029), which is extendable for a further period of five years therefrom (till 2034). Despite subsisting validity of registration, Mr. Lall argued that since the registration is of a recent date; its validity is strongly disputed by the Defendant, and a cancellation application before the concerned authority is still pending,<sup>19</sup> the Plaintiffs should not be granted any injunction.<sup>20</sup> He further argued that the registration of a design is, at best, a rebuttable presumption of its novelty; it merely endorses proprietor's claim

<sup>(</sup>ii) where any person acquires the design or the right to apply the design to any article, either exclusively of any other person or otherwise, means, in the respect and to the extent in and to which the design or right has been so acquired, the person by whom the design or right is so acquired; and

<sup>(</sup>iii) in any other case, means the author of the design; and where the property in or the right to apply, the design has devolved from the original proprietor upon any other person, includes that other person.

<sup>&</sup>lt;sup>19</sup> Upon a query of the Court on this aspect during a listing of the matter on 15<sup>th</sup> July 2022, Mr. Kapil Wadhwa, counsel for the Defendant stated that an application for cancellation has been filed, but the authority is yet to serve the Plaintiff, as per rules, which is corroborated by the counsel for the Plaintiffs.

<sup>&</sup>lt;sup>20</sup> Reliance placed on: *Niki Tasha India Pvt Ltd. v. Faridabad Gas Gadgets Pvt. Ltd.*, 1984 SCC OnLine Del 73.

of 'new and original' by the registering body (i.e., the Controller General of Patents, Designs and Trade Marks), and nothing more.

29. On the issue of effect of registration, as prima facie evidence of validity, a juxtaposition is drawn between the Designs Act and the Trade Marks Act, 1999. Section 31 of the Trade Marks Act specifically notes that "Registration shall be *prima facie* evidence of validity". Curiously, there is no such corresponding section in the Designs Act, which is a later statute. This, by necessary corollary, means that the drafters intended that no such implication is to be drawn for registration of designs. The reason for this difference in treatment of a registered design vis-a-vis a registered trade mark, lies in the registration process. While both applications invite objections before the Examiner/ Controller, only trade mark applications are advertised for 'opposition' in terms of Section 21 of the Trade Marks Act. Oppositions, if any, are then adjudicated by the Registrar of Trade Marks on the basis of statement(s) and counter-statement(s), after duly hearing the applicant and opponent. These steps are undertaken prior to the grant of registration. In contrast, public opposition stage is wholly missing in the design registration process. Under Section 5(1) of the Designs Act, for registering a design, the Controller is essentially to consider whether (or not) the design applied for has previously been published in another country, and whether it is contrary to public order or morality. Thereafter, such design is made open to public inspection by way of publication only post-registration, in terms of Section 7 of the Designs Act. Hence, the only remedy available to an aggrieved person qua registration of a design, is to apply for cancellation after the grant. This is the reason Section 22(3) allows a

defendant in a suit for infringement of design, to take all defences available under Section 19 in respect of cancellation of design. Unsurprisingly, there is no corresponding section in the Trade Marks Act to Section 22(3) of the Designs Act.

30. The lowdown of the above discussion is that registration is not *prima facie* evidence of validity of a design, and to that extent, there is merit in Mr. Lall's submissions. That said, there cannot be any hard and fast rule that merely because a design registration is of a recent date, Plaintiffs would not be entitled to an injunction. Given the lack of statutory distinction between the initial and later years of registration, the effect of registration must prevail uniformly over the course of the entire life of the registration.

31. Section 11 read with Section 2(c) of the Designs Act grants the proprietor ten years from the date of registration to exercise its exclusive right to apply its design to any article in the class in which it is registered.<sup>21</sup> The same is extendable to a further period of five years. Further, Section 22 deals with piracy of a design and affords protection to the registered proprietors.

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32. Thus, if a design appears to be *prima facie* validly registered, having all the necessary attributes for registration, and Plaintiffs are able to demonstrate a strong *prima facie* case of infringement/ passing off/ imitation, injunction should follow. Under such circumstances, the recency in registration of a design would not be a matter of consequence. Nonetheless,

<sup>&</sup>lt;sup>21</sup> The same is defined as 'copyright' under Section 2(c) of the Designs Act.

keeping in mind the above-discussed statutory scheme of registration process of a design, even at the interim stage, the Court will have to necessarily venture into the grounds for cancellation of the registered design, if urged by the Defendant. This exercise, of course, would to be done on a *prima facie* basis only. Hence, the Defendant must with reasonable certainty demonstrate grounds, which would render the design susceptible to cancellation. Whether the Defendant has been successful in such endeavour, would be analysed in the succeeding paragraphs.

# 3. <u>Has a prima facie case been established to show fraudulent</u> <u>and obvious imitation of the Plaintiffs' Registered design, so</u> <u>as to warrant an injunction?</u>

33. Mr. Sibal claimed that there is an overall striking similarity in the structure of the Plaintiffs' and Defendant's Bottles. He emphasised that the Defendant has deliberately and fraudulently copied the following key features of the Plaintiffs' Registered Design:

- a. overall shape and configuration *i.e.*, tall, lean and sleek (as compared to traditional flasks which are broad and short);
- b. smooth curved edges;
- c. distance between the top sealing surface and the shoulder;
- d. distinctive 'v' element on the neck of the products;
- e. dimensions of the bottom length and width of both products;
- f. Monochromatic colour scheme i.e., the entire product is black or red or gold;
- g. Two-toned rimmed and rounded cap of the bottle with the golden top.

34. On the other hand, Mr. Lall has highlighted several differences between the shape and get-up of the two bottles as well as the pricing of the products to insist that no injunction is warranted.

35. At this juncture, it would be beneficial to see a pictorial comparison of the design and trade dress of the products, as has been filed by the parties:









36. It is a trite principle of law that for determining infringement of designs, the yardstick is 'visual effect', 'appeal to the eye' of the customer' and 'ocular impression' of design, as a whole. The test is not to look out for subtle dissimilarities, but rather, to see if there is substantial and overall similarity in the two designs.<sup>22</sup> The test has been aptly elucidated by this Court in Symphony Ltd. v. Life Plus Appliances,<sup>23</sup> as follows:

"Under the law of designs, it is the settled principle that the overall look of the product is to be seen and the same is to be judged with the naked eye. An intricate examination of the design is not to be done."

37. A Co-ordinate Bench of this Court held in Carlsberg Breweries-2017,<sup>24</sup> that apart from the overall resemblance in design, the Court is required to see, as to whether the essential part or the basis of a plaintiff's claim for novelty forms part of the impugned mark, in the following words:

"153. Thus, to see whether the imitation is obvious, the same should strike at once on a visual comparison of the article containing the registered design and the article containing the design which is said to be infringing the registered design. The impugned design should be very close to the original design - the resemblance of the original design being immediately apparent to the eye while looking at the two designs. Fraudulent imitation is one which is deliberately based upon the registered design. The imitation may be less apparent than an obvious imitation. There may be subtle distinction between the registered design and the alleged fraudulent imitation, and yet the fraudulent imitation although different in some respects from the original, renders it as a perceptible imitation when the two designs are closely scanned."

xх xх "163. In Polar Industries Ltd. (supra) since the design registration claim by the plaintiff pertained to the entire article as a whole, namely, a table fan/portable fan, the Court held that overall view of the registered designs of the plaintiff comprising of configuration, shape and ornamentation will have to be considered for the purpose of comparison. The component parts of the registered design of the

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<sup>&</sup>lt;sup>22</sup> Reliance was placed on: Alert India v. Naveen Plastics, 1997 (17) PTC 15 at paragraph no. 35; Dart Industries Inc. v. Cello Plastotech, 2017 SCC OnLine Mad 1851 at paragraph no. 42, 43; Gorbatschow Wodka KG v. John Distilleries Ltd., 2011 SCC OnLine Bom 557 at paragraph no. 18, 23; ITC Limited v Controller of Patents and Designs & Ors., 2017 (71) PTC 178 at paragraph no. 61-81; Reckitt Benckiser India Ltd. v. Wyeth Ltd., 2013 (54) PTC 90 (Del) (FB) at paragraphs no. 19, 21, 22, 23, 24. <sup>23</sup> Symphony Ltd. v. Life Plus Appliances, MANU/DE/0897/2019.

<sup>&</sup>lt;sup>24</sup> 2017 SCC OnLine Del 8125.

#### *plaintiff could not be viewed in isolation to determine as to what are its striking features.*" [Emphasis Supplied]

38. The Court now proceeds to apply the afore-noted test to determine if there is *prima facie* deceptive similarity in the impugned bottles when compared to the Hipster. While applying this test, the Court is also conscious that not every resemblance between the two designs would amount to infringement. The comparison by the eye has been done by physically holding in hand the Defendant's impugned bottle alongside the Plaintiffs'. Unequivocally, at first blush, the Defendant's impugned bottles bear a remarkable similarity to the Hipster. All the unique, essential and novel features of the Hipster: long, lean and sleek design, curved shoulders, 'v' element on the neck, etc. are found on the impugned bottle as well. In terms of shape, the bottles have identical necks, shoulders, joints and edges. Both are identically rectangular in shape, and have a dimpled bottom, which, indeed is nearly-identical and has sufficient similarity to make it difficult for the consumer to distinguish one from the other. In fact, even upon undertaking a microscopically detailed examination, or applying the instructed eye test, only three points of difference emerge: firstly, the Defendant's bottle has a crest-shaped logo of the Defendant's company embossed on the upper portion at the front, whereas the Hipster is plain. Secondly, the Defendant's bottle is a few millimetres shorter and very slightly more bulbous than the Hipster. Thirdly, and lastly, the neck of the impugned product is about one millimetre shorter. However, when examined from a distance of three to five yards, which is a reasonable distance between a potential consumer and the shelf of a liquor store where the bottles may be

displayed together, the differences vaporise.<sup>25</sup> Besides, the impugned design need not be an exact replica to constitute infringement. Minor changes in size are insignificant as the overall and substantial similarity is glaring and undeniably apparent to the naked eye. The Court is, thus, satisfied that Defendant's product is deceptively similar to the Plaintiffs' Registered Design.

39. Further, the Court is also persuaded by the response given by the Defendant's officer in response to the Plaintiffs' interrogatories, whereby it has been admitted that: (i) Defendant has neither designed the impugned bottles, nor done any research and development before adopting the shape and trade-dress of the impugned product; (ii) Defendant was well aware of the existence of the Hipster in the market; and (iii) Plaintiffs' products were inspected by the Defendant before manufacturing the impugned bottles. This is corroborated by the fact that Hipster bottles were found at the Defendant's premises by the court-appointed Local Commissioner. All of the above points drive home the Plaintiffs' allegation that the Defendant deliberately and fraudulently imitated the Hipster.

40. Also, before using the impugned bottles, Defendant was selling its product in a different packaging, which was distinct from the Plaintiffs' Registered Design and trade dress. In fact, it is the admitted case of Defendant

<sup>&</sup>lt;sup>25</sup> In *Gorbatschow Wodka KG v. John Distilleries Limited*, (*supra*) at paragraphs no. 5 and 11, the Bombay High Court noted that unlike at a bar, alcohol is bought in the market not by brand name, but by eyeing the bottle. Further, in *Wallpaper Manufacturers Ltd. v. Derby Paper Staining Co.*, (1925) 42 RPC 443, the English Court compared the impugned and original wallpaper designs by hanging up respective strips and examining from a distance of 4-5 yards to see if the two were "impossible to distinguish" from one another.

that it launched the impugned design only in 2021, which undoubtedly, makes the Plaintiffs the prior user of the design (since 2018 in the global market and since May, 2019 in India).

41. From the above, it is conclusive that the Plaintiffs have established a *prima facie* case in their favour and have successfully substantiated their case that the Defendant's impugned product is an obvious and slavish imitation of Plaintiffs' Registered Design.

42. The balance of convenience also lies in favour of the Plaintiffs. The Defendant was admittedly selling its products only in a limited geographical space *viz*. in Madhya Pradesh. It is an admitted position that Defendant's Bottles were being marketed for only a few weeks, before the ad-interim injunction was granted to the Plaintiffs on 23rd February, 2021, and the impugned design has not been sold since. Mr. Lall, upon being queried by the Court, stated that since the injunction, the Defendant has been selling its product in another bottle which is dissimilar in design to the Hipster, and an application to this effect had also been filed before the Court seeking to modify the design of its bottle. It is also noted that there is no pleading by the Defendant that its entire business would shut down as a consequence of the injunction. Hence, as such, it cannot be said that the Defendant's business has been severely impacted by the injunction.

43. Court is also convinced that irreparable harm is likely to be caused to Plaintiffs, as the Defendant seems to be attempting to ride on the coattails of the Plaintiffs' goodwill, brand value, success, marketing, and efforts to build

a market standing. Plaintiffs claim to have spent approximately 1.5 million GBP on conceptualization, design and commercial development of the Hipster, and have spent an additional 1.9 million GBP to set up a supply distribution chain globally; whereas the Defendant had to incur no such expenses. Sales figures submitted with the plaint, too, show that from May, 2019 to September, 2020, as per the Chartered Accountant's certificate presented by the Plaintiffs, net sales were recorded as INR 100.73 crore against 95623 cases of Plaintiffs' goods; whereas the Defendant has admittedly sold inventory only worth INR 24 lakhs. Therefore, the Plaintiffs will suffer irreparable harm as Defendant's Bottles are diluting the distinctiveness of the Plaintiffs' Registered Design and defeating the very purpose of protection. There would be a cascading effect in the market if such use is continued to be allowed.

44. In light of the foregoing, it emerges that Plaintiffs have indeed established all the three ingredients that warrant an injunction against the Defendant.

45. Now, what remains to be seen is whether the rebuttable presumption established in favour of the Plaintiffs, can be shown to be false, by the Defendant.

# 4. <u>HAS THE DEFENDANT DEMONSTRATED ANY GROUND OF CHALLENGE</u> ENUMERATED UNDER SECTION 19 OF THE ACT, AND IF SO, WHAT IS ITS

#### EFFECT?

46. Section 2(d) of the Designs Act defines the expression 'design' in a narrow scope, as follows:

"(d) "design" means only the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device, and does not include any trade mark as defined in clause (v) of sub-section (1) of section 2 of the Trade and Merchandise Marks Act, 1958 (43 of 1958) or property mark as defined in section 479 of the Indian Penal Code (45 of 1860) or any artistic work as defined in clause (c) of section 2 of the Copyright Act, 1957 (14 of 1957)."

47. Section 22(3) of the Act allows the Defendant to take all grounds for invalidity of a design available to it under Section 19, as a ground for defence in any suit or proceeding for injunction, damages, etc. arising out of piracy of a registered design. The Defendant herein has contended that the design is liable to be cancelled, under Section 19, on the following grounds:

"19. Cancellation of registration.— (1) Any person interested may present a petition for the cancellation of the registration of a design at any time after the registration of the design, to the Controller on any of the following grounds, namely:

48. Additionally, qua Section 19(d), the Defendant has pressed into service Section 2(d) of the Act - to assert that the Plaintiffs' design is functional, and thus not registrable; as well as Section 4(c) - to pray that Plaintiffs' Registered Design is a combination of known designs (also known as mosaicing) and not a 'design' falling under Section 2(d) above, and thus not registrable under

the Act. Sub-sections (a) and (c) of Section 4 - which is couched in negative terms - states that a design shall not be registered which is not new and original, or not significantly distinguishable from known design or combination of known designs.

49. For the sake of simplification, these grounds are being discussed under the following heads:

- A. Whether the Plaintiffs' Registered Design is liable to be cancelled on the ground of not being a new or original design due to existence of prior art.
- B. Whether the Plaintiffs' Registered Design is liable to be cancelled on the ground of mosaicing.
- C. Whether the Plaintiffs' Registered Design is liable to be cancelled on the ground that it is functional in nature.
- A. <u>Whether the Plaintiffs' Registered Design is liable to be</u> <u>CANCELLED ON THE GROUND OF NOT BEING A NEW OR ORIGINAL</u> <u>DESIGN DUE TO EXISTENCE OF PRIOR ART.</u>

50. This contention deals with the challenge raised by way of sub-section (b) and (c) of Section 19 of the Act. As the submission made by the Defendant in this regard is substantially akin to their plea of non-originality, the two are thus being discussed together.

# On existence of prior arts

51. Mr. Lall entered the defence that a palm-sized travel container of

alcohol, usually kept in pockets and known as the 'hip flask', has been in existence since 500 AD and is sold by various third-party manufacturers. To drive home this point, he attached a chart showing comparisons with existing designs, which, he claimed, amounted to prior publication in India and abroad. He further claimed that Plaintiffs' registration is liable to be cancelled on account of numerous prior publications which disclose the same features, making the design very much in public domain, which disentitled the Plaintiffs to claim monopoly.

52. To the above contention of prior arts, Mr. Sibal responded that: (i) all the prior art shown is dissimilar to the Plaintiffs' Registered Design and the Plaintiffs' Registered Design has no prior publication; (ii) the Defendant has shown 2D pictures of 3D objects, which in reality are vastly dissimilar from the Plaintiffs' Registered Design; (iii) the Defendant has merely filed images of flasks which have been used as accessory to alcohol, but no hipflasks that have been used for packaging liquor; (iv) Defendant has not highlighted the existence of any other manufacturer/distributor in the market which pre-fills and sells their product in a bottle of the same look and feel as that of the Plaintiffs. He has also filed a laboriously detailed response to the Defendant's chart of prior art.

53. The standards for comparison and substantive examination have not been met for any single prior art shown to the court. Whether the cited drawings/prior art were applied to articles or not, is not known, as no material has been placed on record to prove the same. Although the Court is not looking for the physical article for comparison, as prior art need not necessarily be commercially or physically available, nonetheless, the drawings relied upon by Defendant must at least provide a perspective view for clarity. It is also to be remembered that 2D illustrations do not depict the application of the design with the same visual effect as a 3D model. For judging by the eye, the prior art or publication relied upon must exhibit clarity of application to a specific article which is capable of being judged. Understanding of a 3D design can be perceived only if the prior publication is lucid and is shown from several angles to gauge depth/perception. Reliance on a two-dimensional view can, in fact, be quite misleading, as can be seen from the following depictions:



54. For this reason, some of the prior publications shown by the Defendant cannot be relied upon. Nonetheless, to form a *prima facie* view, each prior art, published prior to 12<sup>th</sup> December, 2017, (i.e., the date of Plaintiffs' design

registration) has been examined. To illustrate, a few of the comparisons made by the Defendant are extracted below:



55. Each one of above has visible dissimilarities when compared to Plaintiffs' Registered Design. The Defendant, in fact, painstakingly took the Court through 14 prior arts, to which the Plaintiffs further filed a detailed

reply, negating each comparison on various grounds. The Court has examined each of these individually. It would not be apt to write a separate analysis for each; but it is fitting to say that the Court has observed that indeed, the pictures, as shown, differed from the Plaintiffs' Registered Design in terms of rounded/drooping shoulders; bulbous/curved walls, shorter/longer neck; length; and existence of a false bottom instead of a dimpled bottom. It must also be mentioned that, since the prior arts so filed were 3D articles, but depicted in 2D images, the pictorial illustrations were unclear so as to visualise the 'appeal to eye' factor.

56. The court thus finds that, upon a conspectus of the prior art shown by the Defendants, the uniqueness of the Plaintiffs' Registered Design which resides in its striking features, i.e. (a) tall, lean and sleek look; (b) rectangular shape inspired from the shape and proportion of a smartphone; (c) smooth rounded shoulders and symmetrical edges; (d) protruding V-shaped neck situated at the middle of both the shoulders; (e) symmetrically raised and plateau like front and rear walls; two-toned rimmed and rounded cap; and (f) dimpled bottom, are missing in all the cited the prior arts.

# New and original

57. Notwithstanding the nascent stage of the suit, the question of novelty and originality in the shape and style of the Plaintiffs' bottles needs introspection. The Supreme Court noted in *Bharat Glass Tube Ltd. v. Gopal* 

*Glass Works Ltd.,*<sup>26</sup> that the burden is on the Defendant to show that the design is not new or original.

58. 'Original' is defined in Section 2(g) as:

"Originating from the author of such design and includes the cases which though old in themselves yet are new in their application."

59. However, the terms – 'new', 'novel' or 'novelty' are not defined. In *Reckitt Benckiser (India) Ltd. v. Wyeth Limited*,<sup>27</sup> a Division Bench of this Court noted that:

"8. The gist and heart of Sections 4, 5(1) and Section 19 is basically that only such designs are capable of being given copyright protection which are new or original. If a design is not new or original, then, the same cannot be registered. The expression "new" is not defined under the Act but the expression "original" is defined under the Act i.e., in Section 2 (g). While the expression "new" is easily understood in that which comes into existence in public knowledge for the first time the expression "original" had to be designed because "original" design may not be strictly new in that the shape of the design is available in public domain but yet there is newness or originality in applying the existing design to a particular article which no one thought of before which amounts to newness in creation and hence it is given protection as an intellectual property right. Elaborating further, what is new is quite obvious in that it comes into existence for the first time, however, a design may not be new in the sense it may already be available in the public domain, however, in its application for a particular purpose it may be totally original in the application which was not otherwise conceived of and therefore can amount to a new creation for commercial application thus entitling the same to copyright protection." [Emphasis Supplied]

#### 60. In *Bharat Glass* (*supra*), the Supreme Court further noted that:

"29. (...) <u>The expression, "new or original" appearing in Section 4 means that the</u> <u>design which has been registered has not been published anywhere or it has been</u> <u>made known to the public. The expression, "new or original" means that it had</u> <u>been invented for the first time or it has not been reproduced.</u>"

[Emphasis Supplied]

<sup>&</sup>lt;sup>26</sup> Bharat Glass Tube Ltd. v. Gopal Glass Works Ltd., (2008) 10 SCC 657.

<sup>&</sup>lt;sup>27</sup> 2010 SCC OnLine Del 3582.

61. In *ITC Limited v. Controller of Patents and Designs & Ors.*,<sup>28</sup> the Calcutta High Court placed reliance upon some English judgments to note that:

"58. Drawing a distinction between "new" and "original", Buckley L.J. stated in Dover Ltd. (supra),<sup>29</sup> that "new" referred to cases where the shape or pattern was completely new in itself and on the other hand "original" referred to cases where though old in itself, it was new in its application to the article in question. The word "original" contemplates that the person has originated something, that by the exercise of intellectual activity he has started an idea which had not occurred to anyone before, that a particular pattern or shape or ornament may be rendered applicable to the particular article to which he suggest that it shall be applied."

62. As an aside, it must also be noted that it was argued by the Defendant that "novelty" is not a concept of designs law and has been misappropriated by the Plaintiffs from the patents regime. Petitioner, on the other hand, insists that under the Designs Act, novelty equals new plus original.

63. In this regard, it must be noted that while the Designs Act, 2000 indeed uses the words "new" and "original" and not the word "novelty", there is indeed a statutory reference to "novelty" found the designs regime, in Rule 12 of the Design Rules, which reads as follows:

"12. Statement of novelty. - The applicant may, and shall, if required by the Controller in any case so to do, endorse on the application and each of the representation a brief statement of the novelty he claims for his design."

64. In compliance with this rule, Plaintiff No. 1 had also made the following statement in its design application-

"Novelty resides in the shape and configuration of the "BOTTLE" as illustrated."

<sup>&</sup>lt;sup>28</sup> 2017 (71) PTC 178 (Cal).

<sup>&</sup>lt;sup>29</sup> Dover Ltd. v. Nurnberger Celluloidaren Fabrik Gebruder Wolff, [1910] 27 R.P.C. 498.

65. To the Court, there does not seem to be any difference between "novelty" as mentioned in the Rules, and "new and original" as mentioned in the Act, apart from a grammatical one. The argument of the Defendant does not sway the Court, as the rules of construction applicable to patent law cannot be applied *stricto sensu* to the Designs Act. "Novelty" in the patent regime corresponds to new inventions and existence of an "inventive step" which cannot be appropriated to the designs regime. The Court is thus inclined to agree with the Plaintiff that in the context of the Designs Act, the word "novelty" would simply mean "new and original".

66. Coming back to the concept of 'new and original', which now stands clarified, the Court turns its eye to criteria for determining the same. The test for determining novelty under designs law is no longer *res integra*, and has been observed by this Court in *Steelbird Hi-Tech India Ltd. v. S.P.S. Gambhir & Ors.*,<sup>30</sup> as follows:

"It is rightly held in the cases decided that in the matter of novelty the eye is to be the ultimate test and the determination has to be on the normal ocular impression. In order to know its newness or originality it is necessary that a design identical with or even materially similar to the relevant design should not have been published or registered previously. A slight trivial or infinitesimal variation, from a pre-existing design will not qualify it for registration. Taking into account the nature of the article involved, the change introduced should be substantial. It is not necessary to justify registration that the whole of the design should be new, the newness may be confined to only a part of it but that part must be a significant one and it should be potent enough to impart to the whole design a distinct identity, unless registration is sought for the said part alone."

[Emphasis Supplied]

67. The Calcutta High Court's discussion on the same in *ITC* (*supra*), too, is of assistance in this regard, which is extracted as follows:

<sup>&</sup>lt;sup>30</sup> 2014 (58) PTC 428 (Del).

"The test of novelty is the eye of the judge who must place the two designs side by side and see whether the one for which novelty is claimed is in fact new. It is a matter of first impression. In The Wimco Ltd. v. Meena Match Industries, AIR 1983 Del 537, the Court held that "in the matter of novelty the eye has to be the ultimate arbiter and the determination has to rest on the general ocular impression. The court has to consider and look at the two designs in question with an instructed eye and say whether there is or there is not such a substantial difference between them that which has been published previously and the registered design to say that at the date of registration that was not published in India previously."."

[Emphasis Supplied]

68. Courts have regularly held that new and original has to be seen as a whole.<sup>31</sup>Little variation in pre-existing well recognized shape of an article of common use in the market, such as adding a curve here or there, would not make it a new or original design.<sup>32</sup>

69. It merits noting that, in fact, what is protected under designs law is not the article itself, but the idea/conceptualization which has been applied upon it, that is to say, the physical manifestation of such idea. This was elucidated by the Supreme Court in *Bharat Glass (supra)*, in the following words:

"36. (...) Therefore, the concept of design is that a particular figure conceived by its designer in his mind and it is reproduced in some identifiable manner and it is sought to be applied to an article. Therefore, whenever registration is required then those configuration has to be chosen for registration to be reproduced in any article. The idea is that the design has to be registered which is sought to be reproduced on any article. Therefore, both the things are required to go together, i.e. the design and the design which is to be applied to an article.

"44. Our attention was invited to Gammeter v. Controller of Patents & Designs and others A.I.R. 1919 Cal. 887. Their Lordships discussed the concept of new and original. In that context, it was observed as follows:

> "A design in order to be new or original within the meaning of the Act, need not be new or original in the sense of never having been seen before as applied to any article whatever, there might be a novelty in applying an old thing to a new use, provided it is not merely analogous. Where the design of a metal band called the "Novelty band," intended to attach a

<sup>&</sup>lt;sup>31</sup> Bombay High Court in *Harish Chhabra v. Bajaj Electricals Ltd.*, (2005) 5 Bom CR 153 at paragraphs no. 5-6; and Calcutta High Court in *ITC Limited v Controller of Patents and Designs & Ors.*, (*supra*) at paragraph no. 8.

<sup>&</sup>lt;sup>32</sup> B. Chawla and Sons v. Bright Auto Industries, AIR 1981 Del 95.

watch to the wrist, was similar in shape and configuration to a bracelet previously manufactured for ornamental purpose."

Their Lordships further held as follows:

"Though the shape of the "Novelty" band by itself could not be said to be new and original, the application of it to a watch to be worn on the wrist was for a purpose so different from and for a use so similar to the purpose and use of the bracelet that the design in question might be said to be original."

*Therefore, this case also depended on the appreciation of the material placed before the Court.*"

70. Needless to say, a bottle/hip flask is not a new or novel invention by itself; they have been used for the purpose of carrying liquid since time immemorial and their design certainly lies in the public domain. The innovation and novelty of the design, as conceptualised in the mind of its author, lies not in the bottle/flask design, but in the "shape and configuration" as applied to a bottle. Plaintiffs' claim is that no one has applied a shape inspired by smartphones to liquor bottles prior to the Plaintiffs. Mr. Sibal had elaborated on this creative idea of converting the 180 ml bottle into the portable Hipster flask, in a deliberately smaller format, to say that the aim was to attract young aspirational drinkers who may have lower disposable incomes and are not be able to afford the expense of larger 750 ml bottles. Indeed, the design has the ubiquity; it is travel-sized slim, glossy, angular, and has fit-in-the-pocket characteristics of the smartphone. To that effect, it is also not the Defendant's case that there exists a prior-publication which is based upon the lean and thin design of a smartphone. The Plaintiffs' product is the first in the market to take the visually-appealing features of a smartphone and apply it to pre-packaged alcohol. None of the third-party products shown by the Defendant are pre-filled flasks which have the striking ocular attraction of the Hipster bottles. The Defendant has shown no other manufacturer/ distributor of alcohol that prefills and sells their product in a bottle that look and feel like that of the Plaintiffs'. It also weighs on the mind of the Court, as further evidence of originality, that Plaintiffs' Registered Design had been conceptualised and designed after undertaking extensive research and development. The mental activity that has gone into conceiving the design is exhibited in this novel concept in the bottling industry which has been in existence for quite some time. The aesthetic appeal (or in other words, the pleasing, attractive appearance) which is the sum total of the configuration of the unique features discussed above (rounded shoulders, V neck, symmetrical design, raised front and back etc.) is the novelty that needs protection. It is not just a trade variant of previous design, as sought to be trivialised by the Defendant. A bottle is undoubtedly a common article which has common features, such as neck, shoulders, etc. It is an article that offers limited artistic freedom to innovate. Yet, it has been significantly transformed in the Hipster, with distinguishable features, giving it an aesthetic appeal that had not been conceived hereinbefore. This clearly meets the threshold of 'new and original' as it creates an altogether different impression on an informed user, entitling the Plaintiff to exclusivity. Undoubtedly, a transformed bottle will still remain a bottle, but that is not the test to be applied. Accepting this argument would only mean that for common articles, there can be no 'new or original' product. That would hinder innovation, creativity and inspiration which can never be the intent or theme of laws relating to intellectual properties.

71. From the foregoing, the Court is *prima facie* convinced of the novelty and originality of the Plaintiffs' Registered Design.

## B. <u>Whether the Plaintiffs' Registered Design is liable to be</u> <u>CANCELLED ON THE GROUND OF MOSAICING.</u>

72. Mr. Lall took great pains to take the Court through a plethora of prior art, in furtherance of his submission that the Plaintiffs' Registered Design is a mix and match of existing and known designs, and hence not registrable under the Act. Mr. Sibal strongly objected to the same, stating that there cannot be any innovation if mosaicing is not allowed.

73. In *Cello v. Modware* (*supra*), which also relates to infringement of the design of bottles, the Bombay High Court has called 'mosaicing' a "*cobbling together* (of) *several pre-existing known designs*". It made the following observation with respect to mosaicing:

28. I must reject too Mr. Tolia's argument of mosaicing. I believe it to be misapplied to this case. It is not a requirement of the law in infringement or passing off in relation to a design that every single aspect must be entirely newly concocted and unknown to the history of mankind. If that were so, we should never see any new or original design at all. It is a general rule that "mosaicing" of prior art, i.e., combining selected features in different prior art publications, is not permissible when assessing whether an invention is new. Conversely, mosaicing is also no defence to a charge of infringement of a registered design. Mosaicing contemplates taking known integers or combinations and simply re-arranging them. In a situation like ours, it might for example apply if Cello laid claim to a very similar bottle with a similar shape, configuration and ornamentation but merely repositioned the ornamentation by setting it horizontally rather than vertically and doing not much else besides. That is not the case here. [Emphasis Supplied]

74. The Defendant's argument of mosaicing being inadmissible, has also been shunned by the Bombay High Court in *Selvel Industries and Ors. v. Om Plast (India)*,<sup>33</sup> where it was held that:

<sup>&</sup>lt;sup>33</sup> 2016 SCC OnLine Bom 6945.

"36. Mr. Khandekar then troubles me to go through several pages of illustrations annexed to the Affidavit in Reply. These are all images of various types of cylindrical containers. All of them have some sort of lid or the other. Some of them have airtight lids. Some are fixed with clasps, others have rubber rings, some have both. I am unable to see the purpose of this exercise. If the argument is that we can, or should, de-construct any article into its constituent elements and then, on showing that there are other similar constituent parts, even if not applied in this fashion, and therefore no question of novelty remains, then that argument is without substance. I have not understood Dr. Saraf to claim design copyright in the cylindrical or round-bottom shape of the container.

37. (...) It may often happen, and I think both counsel in fairness agree on this as a matter of law, that two previously known components or integers may be combined or applied in such a way so as to result in a completely novel design. Therefore, to suggest that there is no novelty in the shape, that the wave itself is not novel and, therefore, the addition of the wave to the container cannot possibly be novel and is necessarily only a trade variant is not an acceptable argument. What the Defendant must show is that there is such a design, or one very similar to it, that preceded the Plaintiffs' design; that would rob the Plaintiffs' design of the necessary newness and originality.

xx xx 42. (...) It is entirely possible to take two old or known integers and combine them in a new way, one that is purely aesthetic and appeals to the eye, by a process contemplated by the statutory definition, and to yet receive a result that qualifies as a design, both entirely new and entirely original. We see many such examples. From lead pencils to match boxes, there is no limit to human imagination or innovation." [Emphasis Supplied]

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...

75. What follows from the foregoing is that: (i) The Court should not dissect individual features of a design and try to find them individually in each prior art; instead, a conspectus of features as a whole should be seen. (ii) It is well within the realm of possibilities that existing features of known designs can be combined in a hitherto unseen manner which can result in a new and original design. (iii) Mosaicing of pre-existing designs is not a defence to seek cancellation of registration. (iv) Defendant will have to show one single prior art to claim prior publication.

76. Applying the above test, the Court is unconvinced of the Defendant's argument that the Plaintiffs have merely 'cobbled together' known integers. The element of originality in the aesthetics and style of the Hipster certainly bears out in the Court's prima facie vision, as discussed above. Defendant has also failed to point out which particular known designs have been allegedly combined to get the Plaintiffs Registered Design. The images filed by the Defendant does not provide the perspective/3D view of the claimed/alleged known designs. The Court cannot take the neck of one bottle and the shoulder of another and attempt to stitch together such known features to see whether the Plaintiffs' Registered Design is disclosed. The burden was on the Defendant to show any one prior art which would be an exact match to qualify for a prior publication. That said, the Plaintiffs are free to pick and choose elements and take inspiration from multiple pre-existing designs, as long as they are able to apply the same to create a new or original design. Certainly not all designs can be made *avant garde*, completely bereft of any inspiration from existing designs. True novelty lies in the originality of application of existing ideas in a hitherto unknown fashion. Any rule stricter than this would amount to stifling human creativity and enterprise, and would be counterproductive to the intent of novelty and innovation in design.

77. The judgments of *Glaverbel S.A. v. Dave Rose (supra)*, and *B Braun v. Rishi Baid (supra)*, cited by the Defendant in this regard are wholly inapplicable on account of being patent law cases, where mosaicing needs to be seen with a much stringent eye.

78. Thus, there is no merit in this ground for cancellation.

## C. <u>Whether the Plaintiffs' Registered Design is liable to be</u> <u>CANCELLED ON THE GROUND THAT IT IS FUNCTIONAL IN NATURE.</u>

79. A Design which is purely functional cannot be protected, as the same lies in the domain of patent laws. Functionality, *ipso facto*, does not render a design liable to be cancelled. For the ground of functionality to succeed, the Defendant must establish that the Plaintiffs' Registered Design is the only way possible to manufacture/create a given article, considering the functional requirements of the product. To put it in another manner, the design protection so afforded to the proprietor must become a hindrance to the manufacture/creation of such an article by any other person, thereby stifling innovation - which goes against the tenets of designs law - only then must such defence succeed. Merely because form has relevance to function does not disentitle a proprietor from registering its design.

80. It was thus urged by Mr. Lall that if indeed the shape of the Plaintiffs' Bottle is designed to fit into the pocket akin to a smartphone - then it is a functional innovation, and should have been registered as a patent, but certainly cannot be registered as a 'design' as defined under Section 2(d) of the Act. After all, he said, a bottle is a bottle, and any innovation which assists its function is bound to be a patentable invention instead of a design registration one.

81. *Per contra*, Mr. Sibal has argued that the Plaintiffs' Registered Design is not functional in nature and has several non-functional features, which are

distinguishable from traditional flasks. He submitted that 180 ml flasks can be designed in any way possible, not only in the same shape and configuration as claimed by the Plaintiffs under its Registered Design, and what makes the Plaintiffs' Registered Design distinctive is it unique shape and configuration which has strikingly attractive 'appeal to the eye' factor.

82. The Court is unable to agree with the Defendant. Notably, in *Cello v*. *Modware* (*supra*), which also relates to infringement of the design of bottles, the Bombay High Court had rejected the approach of "a bottle is a bottle", in the following words:

"15. Mr. Tolia's defences are these. He says, first, that there is prior publication. He says this on the basis that Modware also manufactures bottles. His case is that a bottle is a bottle, by whatever name called. It is a container of liquid. Generally, it is taller than wider. Modware makes very many bottles. So do others. He shows me images of Modware's various bottles and those of other manufacturers. All these are just bottles, he says. Therefore, according to him, there is neither novelty nor originality in Cello's claim as to 'shape' or 'configuration'. Others have also made tall cylinders with screw top or flip top lids. Cello can claim no originality in these. xx ... xx
19. The a-bottle-is-a-bottle argument must be rejected. It is not possible to accept this submission that no vertical cylindrical fluid container can have either originality

this submission that no vertical cylindrical fluid container can have either originality or novelty because it is, after all, vertical and cylindrical. That is an unacceptable oversimplification of the requirements of the Designs Act and of the law on the subject."

83. This approach is more of a patents law-based approach, and cannot be favoured over promoting "*design activity in order to promote design element in an article of production*", as provided in the Statement of Objections and Reasons of the Designs Act, 2000.

84. The test in law for cancellation is whether the design is dictated solely by function, which is not the case with the Plaintiffs' Registered Design. It is quite possible that an article has both design aspects and functionality aspects. In such a case, functionality has to be actively not considered while considering a design's novelty. Hence, in *ITC* (*supra*), the Calcutta High Court noted that:

"Lord Reid, J. in Amp. Inc. v. Utilux Pty. Ltd. (1972 RPC 103) quoted with approval in Castrol India (supra) has been relied upon the manufacture of electric terminals. The following observation of Lord Reid J. is: —

"... and the words 'judged solely by the eye' must be intended to exclude cases where a customer might choose an article of that shape not because he thought that the shape made it more useful to him."" [Emphasis Supplied]

85. This Court in *Apollo Tyres Ltd. v. Pioneer Trading Corporation and Ors.*,<sup>34</sup> made a detailed analysis of the defence of functionality, in the following words:

"92. (...) For a defense of functionality to succeed, it is not enough to say that the form has some relevance to the function. If a particular function can be achieved through a number of different forms, then a defense of functionality must fail. For the defence of functionality to succeed, it is essential for the Defendant to establish that the design applied for is the only mode/option which was possible considering the functional requirements of the products. Even otherwise, as submitted by the Plaintiff assuming that the shape also performs a certain function, that by itself is not determinative of the fact that the design is functional if that is not the only shape in which the function could be performed.

93. No doubt, the tread pattern adopted by the plaintiff in respect of its tyre also serves the purpose which the treads on any tyre serve. However, if the same function can be achieved through numerous different forms of tread patterns, then the defence of functionality must fail. It was essential for the defendant to, at least, prima facie, establish that the tread pattern of the plaintiff was the only mode/ option, or one of the only few options, which was possible to achieve the functional requirements of the tyre. The position which emerges on a perusal of the documents placed on record by the plaintiff is that there are innumerable different and unique tread patterns in existence, adopted by different manufacturers of tyres, which achieve the same objective.

*xx* ... *xx* ... *xx* 

111. Thus the submission of Mr. Lall that the tread pattern adopted by the plaintiff is functional and, therefore, not capable of protection, cannot be accepted. This submission is rejected."

<sup>&</sup>lt;sup>34</sup> 2017 (72) PTC 253 (Delhi).

86. It is indeed correct that any other shape of a bottle will be just as likely to carry liquid, as the shape of a hipster. However, the Defendant has failed to establish that the alleged functionality can only be performed by shape and configuration of the Plaintiffs' Registered Design. Rather, Defendant itself was manufacturing/selling another 180 ml bottle for its product, which performs the same function - of storing alcohol - as that of the Plaintiffs' Registered Design. The fact that the Plaintiffs have innovated upon the pre-existing shape of a hip-flask and applied it to a 180 ml bottle, inspired by smartphones, is the novel and unique design, and cannot *prima facie* be said to be dictated by function. Novelty is therefore not inhabiting in the functionality of the design.

87. In summation, none of the grounds for cancellation are *prima facie* made out by the Defendant.

## 5. <u>Is there similarity in the trade-dress/ get-up, constituting</u> <u>PASSING-OFF, AND IF SO, CAN AN INJUNCTION CAN BE GRANTED ON</u> <u>THAT GROUND?</u>

88. Drawing on the Hipster's distinctive get-up comprising of visual features such as monochromatic colour scheme, two-toned rimmed and rounded cap, manner of depiction of text and label, indentations and embellishments, Mr. Sibal sought protection of the Plaintiffs' common law rights in the Hipster's trade dress. He asserted that the cumulative combination of the Hipster's visual features results in a distinctive trade dress which creates a strong visual impression in the mind of the consumer, and thus, the Plaintiffs' trade dress acts as a source identifier. He emphasised that

any other entity using a container with the same monochromatic vibrant colour scheme was bound to deceive the consumers and cause confusion. He placed reliance on *LA Opala R.G. Ltd. v. Celloplast and Ors.*,<sup>35</sup> wherein it was held that for creation of an individual visual impression, distinctive elements of a product are not to be seen in isolation, but must be considered as a whole. *M/s Castrol Limited & Anr. v. Tide Water Oil & Anr.*,<sup>36</sup> was also alluded to, wherein the Court stated that the impugned product need not be an exact replica; similarity is to be judged by the eye alone; and where the article in respect of which the design is applied is itself the object of purchase, the text has to be the "eye of the purchaser" and not the "eye of an instructed person".

89. *Au contraire*, Mr. Lall made the submissions that: (i) design element cannot form the basis of a passing off action, as per the full bench of this Court in *Carlsberg Breweries v. Som Distilleries & Breweries Ltd.*;<sup>37</sup> (ii) the difference in brand names, prices, and get-up is enough to distinguish the Hipster from the Defendant's bottles; (iii) the Hipster's trade tress is constituted of common-to-trade elements such as a two-toned cap and a monochrome label, which, especially in black-&-gold, is utterly common in the business of alcohol manufacture.

90. At the very outset, it must be observed that Mr. Lall's reliance on the decision of the full bench of this Court in *Carlsberg Breweries v. Som* 

<sup>&</sup>lt;sup>35</sup> 2018 SCC OnLine Cal 16455.

<sup>&</sup>lt;sup>36</sup> 1994 SCC OnLine Cal 303.

<sup>&</sup>lt;sup>37</sup> (2018) SCC OnLine Del 12912.

*Distilleries & Breweries Ltd.* is entirely misconceived. In fact, the holding of the afore-noted judgement is altogether contrary to his submission. The bench therein found a composite suit (for infringement of registered design and for passing off of the said design) to be maintainable, relying on principles of joinder of two causes of action as enshrined in the Code of Civil Procedure, 1908.

91. That said, let's now examine the passing off claim of the Plaintiff. As noted above, it is based essentially on 'trade dress'. A trade dress is a combination of various elements that together create a strong visual impression. In *Colgate Palmolive Company v. Anchor Health and Beauty Care Pvt. Ltd.*,<sup>38</sup> a Co-ordinate Bench of this Court explained the concept in the following words: "*trade dress involves the total image of a product and may include features such as size, shape, colour combinations, texture, or graphics*", and further observed that the trade dress is a single source of origin for consumers to recognize a company's goods.

92. The distinctiveness of a trade dress is not to be perceived by its individual elements in isolation, but has to be seen as a whole, to determine whether its essential features are distinctive enough to become a source identifier. In this regard, the view taken by Calcutta High Court in *LA Opala RG. Ltd.* (*supra*) is also noteworthy. Therein, the Court had noted that individual elements of a trade dress cannot be segregated. The test, therefore,

<sup>&</sup>lt;sup>38</sup> 2003 (27) PTC 478 (Del).

is whether all the elements as a whole are creating a distinctive visual impression. The necessary corollary being that, in order to defend the allegation of imitation of a trade dress, the Defendant cannot cherry pick parts of the trade dress to carve out an artificial distinction.

93. Before analysing the similarities in the two trade dresses presented to the Court, reiteration of the ingredients that are essential to sustain the tort of passing off, would be apposite. Passing off action is founded on: (i) the use of a mark in the trade for sale of the Plaintiffs' goods; (ii) the generation of reputation and goodwill as a consequences of trade; and (iii) the association of the mark with the Plaintiffs' goods, and (iv) the misrepresentation sought to be created by the Defendant by its use of such mark, so as to deceptively portray that its goods originate from the Plaintiffs. On this issue, one immediately recalls the classical trinity test laid down in the *Jiff Lemon* case,<sup>39</sup> which has been recently revisited by a coordinate bench of this Court in *RB Health (US) LLC & Anr. v. Dabur India Ltd.*,<sup>40</sup> as follows:

"17. Passing off is a tortious action for deceit. For such an action to succeed, it must have, in the very least, the following three indicias, commonly known as the "classical trinity". The said markers are articulated in what is commonly known as the Jiff Lemon case [Reckitt & Colman Products Ltd. vs. Borden Inc., [1990] 1 All E.R. 873] and can, broadly, be paraphrased in the manner set forth hereafter.

- *i. First, the plaintiff must be able to establish that it has the necessary goodwill and reputation in the goods sold or services offered to the consumers at large which in turn should be interlinked with the get-up in which they are proffered.*
- *ii.* <u>Second, the plaintiff must be able to demonstrate that the defendant's</u> <u>misrepresentation qua the goods or services offered by him have led</u> <u>consumers to believe that they originate from the plaintiff.</u>
- *iii. Third, that the action of the defendant has resulted in damage or is likely to result in damage on account of the misrepresentation of the defendant with regard to the origin of the goods and services.*

<sup>&</sup>lt;sup>39</sup> Reckitt & Colman Products Ltd. v. Borden Inc., [1990] 1 All E.R. 873.

<sup>&</sup>lt;sup>40</sup> 2021 (276) DLT 64.

17.1.	XX	 xx	 xx
17.2.	xx	xx	xx

17.3. Therefore, in a case, where a plaintiff institutes a passing off action, it is incumbent upon him to demonstrate that he has inter alia goodwill in the jurisdiction over which the concerned Court has sway.

17.4. The very same parameters have been adopted by this Court as well. In this behalf, see the following observations in Rich Products Corporation & Anr. vs. Indo Nippon Food Ltd., 2010 SCC OnLine Del 734 [which were sustained by the Division Bench of this Court, vide judgement dated 20.09.2010, passed in RFA (OS) No. 37/2010].

"39. Consequently, this brings me to the submission of the plaintiffs that the defendant's use of the infringed mark constitutes passing off. In this connection, let me reiterate the well known parameters of what constitutes passing off. Passing off as is ubiquitously held in most jurisdictions subject to usual turn of phrase or change of phraseology, a tort of false representation, whether intentional or unintentional whereby, one person attempts to sell his goods or services as those manufactured or rendered by another which is "calculated" to damage the goodwill of that other person. <u>Thus, the necessary ingredients which a plaintiff in an action of</u> <u>passing off is required to prove, is the:</u>

- (i) employment of deception. Mere confusion will not suffice;
- *(ii) intent is not a necessary as long as the unwary consumer is deceived; and*
- (iii) <u>the act of the tort should injure the goodwill not just his</u> <u>reputation.(...)""</u> [Emphasis Supplied]

94. In light of the foregoing discussion, the Court now proceeds to make a comparison of the trade-dress of the products in question. Immediately, it is noticed that the Hipster is marketed in three colour variants: white, golden and black. The Defendant's bottles are in the colour variants red and black. Whilst all the bottles are in a dual-chromatic scheme, there is indeed some grain of truth in the Defendant's submission that the black-and-gold combination is common to trade, and has been used by a plethora of alcohol manufacturers. Mr. Lall had produced various such trade dresses, which are extracted below:



Similarly, a two-toned rimmed and rounded cap, too, has been widely used in the said industry and is not unique to the Plaintiffs. Hence, upon a comparison of the trade dress as a whole, the Court cannot *prima facie* agree that the essential features are distinctive enough to become a source identifier. Apart from the black & gold colour scheme, there is hardly any similarity in the labels, trade dress, and get-up. Thus, the Court is not entirely convinced that the same is being imitated by the Defendant to deceive unwary customers. The Court is further *prima facie* unconvinced that the purported imitation of the Hipster's trade dress by the Defendant has resulted in some tangible confusion with regard to the origin or source of the goods, considering that the 'GOA' brand is boldly displayed on the bottle, the labels are largely dissimilar, and the price points of the goods are vastly different.

95. For the foregoing reasons, no passing off action is made out.

96. Before moving on, clarification on one aspect is necessary, lest it might lead to confusion. While examining the issue of passing off, the Court has not borne in mind the design similarities, for which the Defendant is found to be at fault as discussed above. This claim of the Plaintiff is analysed squarely on the aspect of passing off of the trade dress, overall get-up, and presentation of the product through packaging. Even on the above noted aspect, there are undeniably some similarities which are quite visible, but they are largely occurring because of identical designs (for which the plaintiff is entitled to injunction on account of design infringement) and the mono-chromactic colour of the bottles. However, at this interim stage, such similarities are not sufficient to grant injunction on a passing off action, particularly when the trinity test, recounted above is not met.

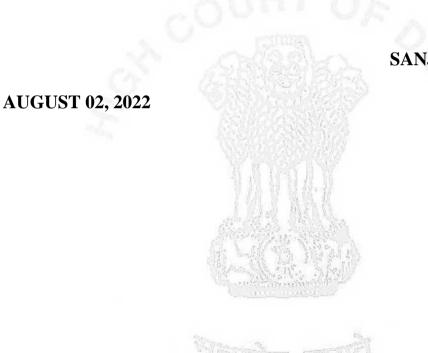
## VI. CONCLUDING REMARKS

97. Needless to say, the observations made herein above are on a *prima facie* basis, for the purpose of deciding the interim applications.

98. No case for vacation of the *ex-parte*, ad-interim injunction passed on 23<sup>rd</sup> February 2021 is made out. However, since injunction is being granted on account of design infringement only, the prayer 'a' contained in IA No. 2608/2021, granted *vide* order dated 23<sup>rd</sup> February 2021 is made absolute.

99. Accordingly, I.A. 4231/2021 is allowed in the following terms: The Defendant, its directors/principal officers, sister concerns, affiliates, group companies, agents, legal representatives, heirs and any other person acting for or on its behalf are restrained from manufacturing, selling, offering for sale, importing, exporting, advertising, directly or indirectly dealing in the infringing products including 'GOA Gold' Whisky (180 ml), 'GOA Gold' Rum (180 ml) or any other product which has an identical/obvious or fraudulent imitation of the Plaintiffs' Registered Design No. 306577 or doing any other act which may amount to infringement of the Plaintiffs' Registered Design No. 306577, till the final disposal of the instant suit.

100. The prayer 'b' of I.A. 2608/2021 is declined. Defendant's applicationI.A. 4231/2021 is dismissed.



SANJEEV NARULA, J