

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

% *Reserved on* : 04th April, 2024
Pronounced on : 15th May, 2024

+ **CS(COMM) 523/2023 & I.A. 5392/2024**

MOUNTAIN VALLEY SPRINGS INDIA PRIVATE LIMITED

....Plaintiff

Through: Mr. Amit Sibal, Sr. Advocate
alongwith Mr. Essenese Obhan,
Ms. Swathi Sukumar, Ms. Ayesha
Guhathakurta, Ms. Yogita Rathore
and Ms. Anjuri Saxena, Advocates

versus

BABY FOREST AYURVEDA PRIVATE LIMITED (FORMERLY
KNOWN AS M/S LANDSMILL HEALTHCARE PRIVATE LIMITED)
& ORS.....Defendants

Through: Mr. Jayant Mehta, Sr. Advocate
alongwith Mr. Sudeep Chatterjee,
Mr. Rohan Swarup, Ms. Tanya
Arora, Mr. Jaydeep Roy and Mr.
Udit Dedhiya, Advocates for D-1.

CORAM

HON'BLE MR. JUSTICE ANISH DAYAL

JUDGMENT

ANISH DAYAL, J.

**I.A. 14373/2023 & I.A. 21648/2023 (under Order XXXIX Rules 1 and 2
CPC)**

1. This judgment disposes of the applications filed under Order XXXIX Rules 1 and 2 of Code of Civil Procedure, 1908 (hereinafter referred to as “CPC”) seeking *ad interim* injunction as part of the suit filed by plaintiff for permanent injunction restraining defendants and all

those acting for or on their behalf from directly or indirectly infringing plaintiff's trademarks 'FOREST ESSENTIALS', 'BABY ESSENTIALS', 'FOREST ESSENTIALS-BABY ESSENTIALS', 'LUXURIOUS AYURVEDA' and 'SOUNDARYA' and/or any other trademark deceptively similar. Permanent injunction is also sought for restraining defendants from dealing in goods and business under defendants' marks 'BABY FOREST', 'BABY FOREST-SOHAM OF AYURVEDA', 'BABY ESSENTIALS' and 'SAUNDARYA POTLI'.

2. When the matter was first listed on 04th August, 2023, senior counsel for defendants had submitted that defendants are not intending to use the marks 'SAUNDARYA' and 'BABY ESSENTIALS' and have undertaken so, in their reply dated 12th July, 2023 to the cease-and-desist notice. The dispute, therefore, stood restricted as to whether the marks 'BABY FOREST' and 'BABY FOREST-SOHAM OF AYURVEDA' (hereinafter referred to as "**Impugned Marks**") are to be treated as deceptively similar to the mark 'FOREST ESSENTIALS'.

3. It is also noted that various rectifications filed by plaintiff against defendants of the said marks are pending adjudication by this Court and are numbered as CO(COMM.IPD-TM) 186/2023, CO(COMM.IPD-TM) 187/2023, CO(COMM.IPD-TM) 188/2023, CO(COMM.IPD-TM) 189/2023, CO(COMM.IPD-TM) 190/2023 and CO(COMM.IPD-TM) 191/2023.

4. Comparative representation of the marks of both parties, is tabulated as under:

Plaintiff's Marks	Defendants' Marks
<p>FOREST ESSENTIALS FOREST ESSENTIALS BABY FOREST ESSENTIALS BABY ESSENTIALS</p>	<p>BABY FOREST</p>
<p>FOREST ESSENTIALS LUXURIOUS AYURVEDA</p> 	<p>BABY FOREST SOHAM OF AYURVEDA</p> 



5. Arguments were heard on behalf of both parties, which are synopsisized as under.


Submissions on behalf of plaintiff

6. Mr. Amit Sibal, Senior Counsel, appeared on behalf of plaintiff and made the following submissions:

6.1 Senior Counsel for plaintiff claimed that plaintiff has been using the mark 'FOREST ESSENTIALS' continuously since 2000 with over 150 stores in India and internationally, enjoying annual sales of over Rs.425 crores and having spent over Rs.32 crores in annual advertising and business promotion activities. Plaintiff claims to supply its products, to over 500 hotel chains, exporting products to 120 countries and is available online on websites such as 'Amazon' and 'Flipkart'. The documents in support of this, were pointed out by Senior Counsel for plaintiff.

6.2 Plaintiff had trademark registrations for both word and logo marks for 'FOREST ESSENTIALS' in multiple classes, including Class 3. The details of the registrations of plaintiff's marks are tabulated as under:

S. No.	Trademark	Registration		Class	Status
		Application No.	Application Date		
1.	FOREST ESSENTIALS(LOGO)	1125917	13/08/2002	03	Registered
2.	FOREST ESSENTIALS	1640599	11/01/2008	03	Pending
3.	FOREST ESSENTIALS	1640600	11/01/2008	05	Registered
4.	FOREST ESSENTIALS	1640601	11/01/2008	09	Pending
5.	FOREST ESSENTIALS	1640602	11/01/2008	10	Registered
6.	FOREST ESSENTIALS	1640603	11/01/2008	16	Registered
7.	FOREST ESSENTIALS	1640604	11/01/2008	20	Registered
8.	FOREST ESSENTIALS	1640605	11/01/2008	21	Registered
9.	FOREST ESSENTIALS	1640606	11/01/2008	25	Registered
10.	FOREST ESSENTIALS	1640607	11/01/2008	29	Registered
11.	FOREST ESSENTIALS	1640608	11/01/2008	30	Registered
12.	FOREST ESSENTIALS	1640609	11/01/2008	31	Registered
13.	FOREST ESSENTIALS	1640610	11/01/2008	32	Registered
14.	FOREST ESSENTIALS	1640611	11/01/2008	33	Registered
15.	FOREST ESSENTIALS	1640612	11/01/2008	35	Registered
16.	FOREST ESSENTIALS	1640613	11/01/2008	41	Registered
17.	FOREST ESSENTIALS	1640614	11/01/2008	42	Registered
18.		1748470	27/10/2008	03	Registered
19.		1748471	27/10/2008	05	Pending

S. No.	Trademark	Registration / Application No.	Application Date	Class	Status
20.		1748472	27/10/2008	16	Pending
21.		1748473	27/10/2008	35	Registered
22.		1748474	27/10/2008	42	Registered
23.	FOREST ESSENTIALS	3932253	31/08/2018	03	Registered
24.		4975130	17/05/2021	03	Registered
25.	FOREST ESSENTIALS LUXURIOUS AYURVEDA	4975131	17/05/2021	03	Pending
26.		4975132	17/05/2021	03	Pending

6.3 The registration for the device mark ‘FOREST ESSENTIALS’ was granted on 11th March, 2005 in class 3 under No. 1125917 w.e.f. 13th August, 2002; for the word mark ‘FOREST ESSENTIALS’ in class 3 granted on 29th March, 2019 under No. 3932253 w.e.f. 31st August, 2018 and for the device mark of the ‘Tree’ in class 3 under No. 4975130 w.e.f. 17th May, 2021.

6.4 Plaintiff claims to have continuously sold its ‘Mother and Baby care’ products since 2006 under its marks ‘FOREST ESSENTIALS-BABY ESSENTIALS’ and ‘FOREST ESSENTIALS BABY’. Plaintiff claims significant annual sales of approximately Rs. 15 crores in the baby

products, having been purchased by hotels, celebrities, Ministry of External Affairs, and further relies on, various articles published in newspapers and magazines. In this regard, attention was drawn by counsel for plaintiff to invoices, CA certificates, newspaper articles, emails, Google search results etc.

6.5 The images provided by plaintiff of their products and label are as under:



LEGALERA
THE PEOPLE

Plaintiff's Products and Label	

LEGALERA
FOR THE PEOPLE



6.6 Comparative images of plaintiff's products and that of defendants, are reproduced as under:



Plaintiff's Product



Defendants' Product



ERA
PEOPLE

Plaintiff's Product and Advertisement



LEGALERA
PEOPLE



Defendants' Product and Advertisement



6.7 Senior counsel for plaintiff pointed out to illustrations to show that confusion had arisen in relation to defendants' products for customers of plaintiff, by citing the following instances:

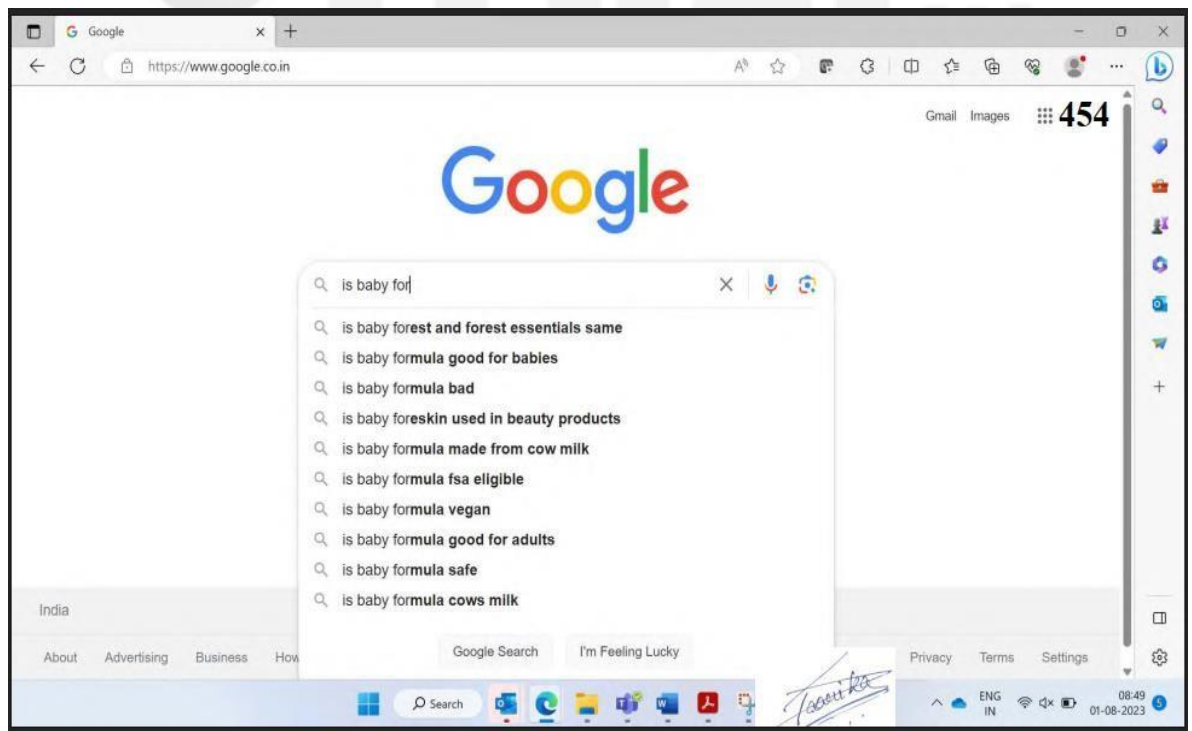
6.7.1 An email dated 26th July, 2023, was received from 'sherry.padda@hyatt.com' to plaintiff, asking if defendants' collection 'BABY FOREST', was a new collection of plaintiffs, since it has been advertised as under:



LEGALERA
THE PEOPLE

6.7.2 A comment made on Instagram feed of defendant no.1 asking, “*Are you a unit of forest essentials?*”, to which there was no reply by defendant no.1, whereas, they had engaged with subsequent user comments *inter alia* which had congratulated defendant no.1 on its products.

6.7.3 Attention was drawn to auto-complete suggestions, which was a feature within Google search, generating predictions to help people save time in completing the search. These Google predictions were based *inter alia* on past searches. In this regard, a Google search was shown, where a text was entered relating to ‘BABY FOREST’ and the first auto-complete prediction was “*is baby forest and forest essentials same*”. Screenshot of the same is extracted as under:



6.7.4 An email dated 08th August, 2023 from Oberoi Hotel to plaintiff was shown asking to check, “If your baby forest range is also being offered in small size for hotel use as well?”.

6.7.5 Affidavits were filed by employees of plaintiff stating that by entering in the search the string “*is baby f*” in Google, predictions were suggested by Google search engine of “*is baby forest and forest essentials same*”.

6.8 On this basis, Senior Counsel for plaintiff submitted that this was enough *prima facie* evidence for the confusion which was being caused in the minds of the consumers with defendants’ products being associated with plaintiff. It was submitted that defendants were estopped from taking a contradictory stand.

6.9 Plaintiff’s trademark application No. 6058801 for ‘FOREST ESSENTIALS BABY’ with user date of 23rd May 2006, had been advertised by the Trademark Registry on 9th October, 2023. Defendants opposed the application on 9th February 2024 under Sections 9 and 11 of the Trademarks Act, 1999 (hereinafter referred to as “**the Act**”) on the ground that plaintiff’s mark was deceptive and plaintiff’s adoption was dishonest and detrimental to defendants’ mark. On this basis, it was pleaded that defendants had, therefore, admitted that there was confusion between plaintiff’s and defendants’ mark and therefore, were estopped from taking a stand, that it was not.

6.10 It was claimed that defendants’ mark was registered on a ‘*proposed to be used*’ basis in 2020 and plaintiff was clearly the prior user of the mark ‘FOREST ESSENTIALS BABY’. Defendants’ registrations in

classes 3, 5, 21, 25, 28 and 35 have been challenged by plaintiff in the rectification petitions, mentioned above.

6.11 Defendants changed their name from '*Landsmills Healthcare Private Limited*' to '*Baby Forest Ayurveda Private Limited*' in 2023. The earliest invoice on record, with defendants' new company, is of July 2023. Invoice of July 2023 does not mention a 'BABY FOREST' product being sold. In fact, invoices till June 2023, make no mention of the mark 'BABY FOREST'.

6.12 Defendants' adoption of the mark was dishonest, since they made every effort to come as close as possible, to plaintiff's mark and to ride on the reputation and goodwill of plaintiff. Not only did defendants adopt deceptively similar mark 'BABY FOREST' but also adopted 'LUXURY AYURVEDA' 'BABY ESSENTIALS' and 'SAUNDARYA' and a similar 'Tree' logo.

6.13 Attention was drawn to the order dated 04th August 2023 of this Court, when defendants undertook to stop using the mark 'SAUNDARYA' and the mark 'BABY ESSENTIALS'. The change of name from '*Landsmills Healthcare Pvt. Ltd.*' to '*Baby Forest Ayurveda Pvt. Ltd.*' in 2023, was also taken as an indication to ride on the reputation of plaintiff.

6.14 The trade channels for sale of products by the parties, were also similar. Defendants had launched a store in Saket, Delhi, in the very same mall, as plaintiff's store.

6.15 The products being identical, they have a common class of consumers. The products of both plaintiff and defendants, namely oils, creams etc., were targeted at mothers and children i.e. similar class of consumers and therefore, there was bound to be confusion. Both companies are in the business of premium Ayurvedic Products, selling through identical trade channels, including e-commerce websites. Defendants were therefore, relying on the *initial interest confusion* of the consumers to sell its products and made every attempt to use the plaintiff as a springboard.

6.16 In conclusion, counsel for plaintiff submits that the reputation in ‘FOREST ESSENTIALS’ products was there since 2000. First invoice of defendants of use in new company is only of July, 2023 and at best could be claimed from 2022 onwards. Plaintiff launched their baby products in 2006 with an invoice of 2006, which had already been shown. Advertisement of 18th August, 2023 in *Times of India* was shown for best baby powder and for new born sensitive skin, which had listed out ‘*FOREST ESSENTIALS Baby Powder*’. Therefore, it was reiterated, that they were identical goods. Initial interest confusion was to be considered, the ‘*Tree*’ logo was similar, ‘FOREST’ was a dominant feature of the mark and there was also a safety issue, since the products were for babies.

6.17 Case laws relied upon by counsel for plaintiff are *Raman Kwatra & Anr. v. KEI Industries Ltd.*, 2023 (93) PTC 485, on the issue of approbation and reprobation; *S. Syed Mohiddeen v. P. Sulochana Bai*, (2016) 2 SCC 683, on the rights of prior user superior than that of the registration; *N.R. Dongre & Ors. v. Whirlpool Corporation & Anr.*, (1996) 5 SCC 714, in that it did not matter whether the deception is from

a registered or unregistered marks, but goods cannot be passed of as someone else's; *Mac Personal Care Pvt. Ltd. & Anr. v. Laverana GmbH and Co. Kg & Anr.*, 2016 SCC OnLine Del 530, on dishonest user at the very inception and that subsequent concurrent user did not purify the same; *Century Traders v. Roshan Lal Duggar Co.*, (1979) 15 DLT 269, on injunction could be made out on likelihood of confusion; *Shree Nath Heritage Liquor Pvt. Ltd v. Allied Blender & Distillers Pvt. Ltd.*, (2015) 221 DLT 359, on consumers being in a state of wonderment, then question of confusion and association arises; *Parle Products Pvt. Ltd. v. J.P. and Co., Mysore*, (1972) 1 SCC 618, on broad and essential features to be considered rather than placing them side to side if there are differences in design & *M/s. South India Beverages v. General Mills Marketing*, 2014 SCC OnLine Del 1953, on principles applying to anti-dissection and dominant marks.

Submissions on behalf of defendants

7. Mr. Jayant Mehta, Senior Counsel for defendants, made the following submissions in response:

7.1 It was pointed out that plaintiff's mark was 'FOREST ESSENTIALS' and not 'FOREST ESSENTIALS BABY' or 'FOREST ESSENTIALS-BABY ESSENTIALS'. The word '*Baby*' present on the packaging of plaintiff's baby care products does not make plaintiff's trademark as 'FOREST ESSENTIALS BABY'. The word '*Baby*' was used to describe the intended purpose of the goods and not used as a trademark.

7.2 On the packaging of its products or marketing material, plaintiff does not use the term ‘FOREST ESSENTIALS BABY’ or ‘FOREST ESSENTIALS-BABY ESSENTIALS’. To substantiate this, screenshots from various e-commerce websites like ‘Amazon’, ‘Flipkart’, ‘Nykaa’, ‘Myntra’ and others were brought to attention. Screenshots of plaintiff’s own website, show various product names adopted by plaintiff, and not a single one of them uses ‘FOREST ESSENTIALS BABY’ or ‘FOREST ESSENTIALS-BABY ESSENTIALS’.

7.3 Plaintiff instead uses the term “*Mother and Child*” on its website for the category of baby care products and as per defendants, it was only during the pendency of the suit that plaintiff had changed its category name to “*Mom and Baby*”.

7.4 To distinguish baby care products from regular products, the word ‘Baby’ had been inserted in the product name. As an illustration, the word ‘Baby’ is found in other products like ‘Johnson’s Baby Shampoo’ or ‘Himalaya Baby Powder’ and the word ‘Baby’ does not become part of the trademark, but is used in a descriptive sense.

7.5 In addition to its main trademark ‘FOREST ESSENTIALS’, plaintiff also used the word ‘DASAPUSHPADI’ on all its baby care products and in fact the range is referred to as ‘DASAPUSHPADI’, as evident from the articles in *Times of India* and on the blog ‘www.easymommylife.com’.

7.6 On 4th August 2023, this Court did not grant an order of injunction to plaintiff. Only thereafter, on 09th August 2023 did plaintiff file multiple applications for registration of ‘FOREST ESSENTIALS BABY’ and

‘FOREST ESSENTIALS-BABY ESSENTIALS’, thereby clearly demonstrating that these were not considered as trademarks earlier and had never been applied for registration.

7.7 In legal notice dated 16th June 2023, plaintiff's case was different since ‘FOREST ESSENTIALS BABY’ and ‘FOREST ESSENTIALS-BABY ESSENTIALS’ are not even mentioned once in the notice.

7.8 Defendants’ reply on 12th July 2023 pointed out the dissimilarity between ‘BABY FOREST’ and ‘FOREST ESSENTIALS’. Realizing that they have no case, plaintiff suddenly changed its tack and suddenly started claiming ‘FOREST ESSENTIALS BABY’ and ‘FOREST ESSENTIALS-BABY ESSENTIALS’ as trademarks.

7.9 The trademark ‘BABY FOREST’ stood registered in the name of defendants since 29th June 2020, was never opposed by plaintiff.

7.10 The details of the registration of defendants’ marks are tabulated as under:

S. No.	Trade mark	Application No.	Application Date	Class	Status
01	BABY FOREST	4548864	29/06/2020	28	Registered/Rectification proceedings pending. [C.O. (COMM.IPD-TM)-190/2023]
02	BABY FOREST	4548865	29/06/2020	35	Registered/Rectification proceedings pending. [C.O. (COMM.IPD-TM)-191/2023]
03	BABY FOREST	4548866	29/06/2020	21	Registered/Rectification proceedings pending. [C.O. (COMM.IPD-TM)-188/2023]

S. No.	Trade mark	Application No.	Application Date	Class	Status
04	BABY FOREST	4549537	30/06/2020	25	Registered/Rectification proceedings pending. [C.O. (COMM.IPD-TM)-189/2023]
05	BABY FOREST	4549589	30/06/2020	3	Registered/Rectification proceedings pending. [C.O. (COMM.IPD-TM)-187/2023]
06	BABY FOREST	4549590	30/06/2020	5	Registered/Rectification proceedings pending. [C.O. (COMM.IPD-TM)-186/2023]

7.11 Defendants exclusively sell products for babies, infants and toddlers, ranging from 0-8 years of age. The products sold and marketed by defendants under the mark 'BABY FOREST' include *baby body massage oil, baby hair massage oil, baby shampoo, baby body wash, baby body lotion, baby face cream, talc-free baby powder, natural baby soap, baby wipes, cold pressed coconut oil, beech wood baby comb, baby kajal, cold pressed almond oil, diaper rash cream, baby sunscreen lotion, baby mosquito repellent spray, liquid detergent for baby clothes, baby vapour rub, baby rose water mist, toy beach bucket, stacking toy for babies, geometric shaped stacking toy, baby feeding bottle, baby feeding bowl and head-shaping pillow*. It is submitted that other than *lotion, soap, baby powder, body wash, massage oil and head massage oil*, plaintiff has no corresponding product as compared to defendants' far wider and more extensive range of baby care products.

7.12 Plaintiff, on the other hand, has an extensive range, essentially targeted towards adults. Out of over 250 products sold by plaintiff, only 3-6 products are for baby care. Plaintiff claims to have sold products worth over Rs.1400 crores in the last 5 years, out of which only 15 crores are attributed to the sales of baby care segment, which constitutes about 1%. Defendant no.1's sales for the financial year 2022-23, are about Rs.2.26 crores and in the same range for the subsequent year, the promotional expenses spent by defendant no.1 are in the range of about Rs.1.9 crores.

7.13 Defendant no.1 operates various domain names including, 'www.babyforeststore.com', 'www.babyforest.in,' 'www.babyforest.ae', 'www.babyforest.uk', 'www.babyforest.us', 'www.babyforest.co.in' and 'www.babyforest.asia'.

7.14 It was stressed on behalf of defendants, that all the elements of reputation and goodwill cited by plaintiff, were for the main 'FOREST ESSENTIALS' range and not for the 'baby care' range of 'FOREST ESSENTIALS'. Not a single post on social media had been placed on record by plaintiff, relating to this 'baby care' product.

7.15 Plaintiff could not claim monopoly over the word 'FOREST' in relation to cosmetics, Ayurvedic products or baby care products.

7.16 Plaintiff had only ever used 'FOREST' and 'ESSENTIALS' together and therefore, has trademark registrations for the word 'FOREST ESSENTIALS' and not 'FOREST' and 'ESSENTIALS' separately.

7.17 In response to objections of the trademark registration, plaintiff stated that its mark must be seen as a whole and they only use the said

mark comprising the two words together. For this, attention was drawn to the reply dated 26th October, 2009 by plaintiff to the Examination Report of the trademark application No. 1640600 in class 5 for registration in the trademark 'FOREST ESSENTIALS'. It was further submitted that the word 'FOREST' is a dictionary word and no entity can be granted exclusive right to use the same for its products and that plaintiff was seeking to monopolize market of baby care products by driving out competition.

7.18 Reliance placed on Google search results, was misplaced since results can be easily manipulated by search engine optimization, paid advertisements and by multiple queries being submitted to the engine by plaintiffs, executives and representatives.

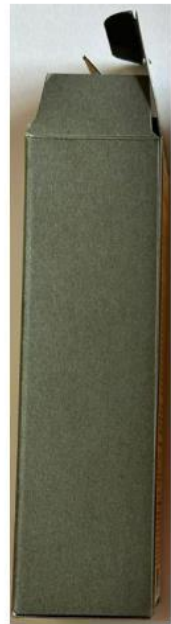
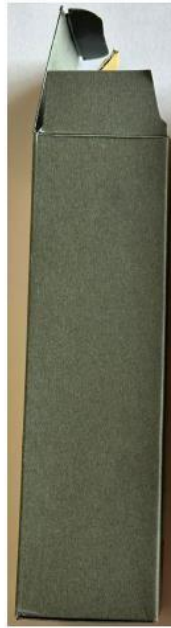
7.19 The trade dress adopted by defendants was still completely different from that of plaintiff. There was an overall dissimilarity between the colors, fonts, stylization, artwork and even to price and product types, there was no similarity between the products.

7.20 Comparative images of the products of plaintiff and defendants and packaging adopted, are as under:

Body Wash		
View	Plaintiff	Defendant
Packaging front view		
Packaging back view		

ERA
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Packaging
side view



Bottle front view		
Bottle back view		

Baby Powder		
View	Plaintiff	Defendant
Packaging front view	Plaintiff's Baby Powder does not come in an outer packaging.	
Packaging back view	Plaintiff's Baby Powder does not come in an outer packaging.	

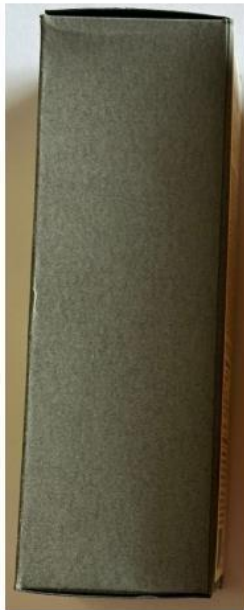
<p>Packaging side view</p>	<p>Plaintiff's Baby Powder does not come in an outer packaging.</p>	
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ERA
E PEOPLE

<p>Bottle front view</p>		
<p>Bottle back view</p>		

Body Massage Oil		
View	Plaintiff	Defendant
Packaging front view		
Packaging back view		

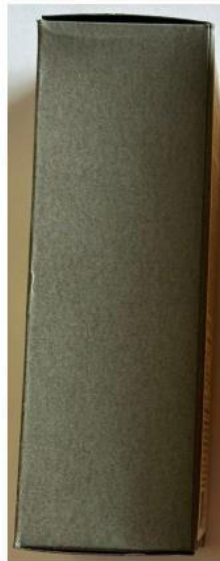
Packaging
side view



<p>Bottle front view</p>		
<p>Bottle back view</p>		

Body Lotion		
View	Plaintiff	Defendant
Packaging front view		
Packaging back view		

Packaging
side view





<p>Bottle front view</p>		
<p>Bottle back view</p>		

<p>Packaging side view</p>		
<p>Bottle front view</p>		

ERA
PEOPLE



7.21 Even as regards the device of the ‘Tree’, it was submitted that the device/artwork used by defendant no.1 was completely distinct from the ‘Tree’ logo used by plaintiff. It is also asserted that plaintiff has changed its ‘Tree’ device over a period of time. In fact, the logo of defendant no.1 is a sapling which is on top of a cradle, to signify that the exclusive focus of products of defendant no.1 is meant for babies and infants. Comparative images of the logo/device used by parties are as under:

Plaintiff	Defendant
	

7.22 It was pointed out that there were 100 registrations in class 3 of the marks containing the word ‘FOREST’, showing that the word is commonly used in cosmetic and skin care products.

7.23 In particular, the status of the trademark registration relating to ‘FOREST NECTAR’ in class 3 was pointed out. The same was applied *vide* application No. 752930 on 21st February, 1997 with user detail from 22nd February, 2000 and granted on 08th December, 2005, which was much before plaintiff’s application for ‘FOREST ESSENTIALS’. This was applied by ‘*Modi Care Limited*’, which was a reputed company and therefore, defendants’ submission was that plaintiff does not have the monopoly over the mark ‘FOREST’. Similarly, with regard to the trademark ‘RAIN FOREST’ in class 3 *vide* application No. 966389, which was applied on 25th October, 2000 and granted on 14th August, 2017, was for ‘*agarbathies*’.

7.24 Defendants’ website domain name ‘*babyforest.in*’ was registered on 01st July, 2020; *Facebook* page was created on 29th June, 2022 and *Instagram* page was created on October, 2020. Registration for the mark ‘BABY FOREST’ was applied on 29th June, 2020 and the earliest email communications with the designer for the proposal of design of the brand, was as early as April, 2021. Defendants purchased moulds for its product bottles in January 2022.

7.25 Senior Counsel for defendant drew attention to evidence of extensive coverage of the launch of the brand, including articles from 21st April 2023, 12th June 2023, 29th August 2022 and 14th October 2022.

Documents like invoices, screenshots were also adverted to. Corporate name of defendants was '*Landsmill Healthcare Private Limited*' and was changed to '*Baby Forest Ayurveda Private Limited*' on 20th April 2023 and the products of defendants were always sold under the mark 'BABY FOREST' since August 2022. The invoices filed from October 2022 onwards, reflect the logo mark.

7.26 As regards the e-mails received by plaintiff from *Grand Hyatt* and *Oberoi Hotel*, it was pointed out that these were regular customers of plaintiff and therefore, the e-mails being generated at the behest of plaintiff cannot be ruled out, particularly since they were addressed on 26th July 2023 and 08th August 2023, subsequent to the reply by defendants on 12th July 2023 to plaintiff's legal notice of 16th June 2023.

7.27 In any event, plaintiff has only relied on one comment from an *Instagram* post of defendant's social media feed as noted above, which does not reflect '*widespread confusion amongst consumers*' and is an isolated document. Defendants' stand in the notice of opposition filed to plaintiff's application for registration of 'FOREST ESSENTIALS BABY' is not indicative of defendant's contradictory stand. Instead, the opposition was based on the *mala fide* and bad faith application made by plaintiff.

7.28 The question of estoppel applying against defendants does not arise. Moreover, defendant only elected to stop using 'BABY ESSENTIALS' as a product category and stop using 'SAUNDARYA' to describe its travel kit product, as a good faith gesture in order to resolve the issue, and for parties to continue the business. In any event, this was communicated in defendants' reply to plaintiff's cease and desist notice

and does not indicate any concession which was made in front of the Court.

7.29 Attention was drawn to certain articles filed by plaintiff from the customers websites showing that the baby products of plaintiff were represented as 'FOREST ESSENTIALS' and not 'FOREST ESSENTIALS BABY'.

7.30 Defendants adverted to the following extracts:

3. Forest Essentials:

Forest Essentials is renowned for its luxurious Ayurvedic skincare products, and their babycare range is no exception. Using traditional formulations and natural ingredients, Forest Essentials offers a collection of baby massage oils, gentle washes, and hydrating creams. The brand's emphasis on purity and quality makes it a preferred choice for parents seeking an indulgent Ayurvedic experience for their little ones.



Forest Essential

4. **Forest Essentials: Baby Hair And Body Wash Dasapushpadi**



I tried the **Forest Essentials baby body wash dasapushpadi** when my son was about 6 months old. I didn't know such a product existed until I saw it in stores at Forest Essentials in a mall. They don't advertise their baby range as much as their other skin care products. Nevertheless, I tried it out and was quite happy with the baby wash.

Ingredients [mmylife](#)

A handwritten signature in black ink, appearing to read 'Manish Kumar'.



7.31 Senior counsel for defendants relied upon *inter alia* the decisions of ***Kaviraj Pandit Durga Dutt Sharma v. Navaratna Pharmaceuticals Laboratories***, 1964 SCC OnLine SC 14, on the point of added matter being sufficient to distinguish goods from that of plaintiff; on ***Gufic Ltd. & Anr. v. Clinique Laboratories, LLC & Anr.***, 2010 SCC OnLine Del 2322 on the point of how a consumer of average intelligence with an imperfect recollection would not be deceived between the goods of plaintiff and defendants; on ***Phonepe Pvt. Ltd. v. EZY Services & Anr.***, 2021 SCC OnLine Del 2635 & ***Vardhman Buildtech Pvt. Ltd. v. Vardhman Properties Ltd.***, 2016 SCC OnLine Del 4738 regarding how exclusivity can be claimed only in respect of the entire mark of plaintiff, and not in respect of part thereof.

Analysis

8. After having heard the counsel for parties and perusing the documents on record, this Court is of the opinion that the interim injunction as sought by plaintiff cannot be granted in favour of plaintiff and the instant application, therefore, is to be dismissed for *inter alia* the following reasons:

8.1 Though, plaintiff is claiming proprietorship of the mark ‘FOREST ESSENTIAL BABY’ and ‘FOREST ESSENTIALS-BABY ESSENTIALS’, they have never sought registration of the same, even though they claim to be using these products since 2006. The first application for registration of these marks was made after the suit was filed and after this Court did not grant an *ex parte ad interim* injunction on 04th August 2023. Only on 9th August 2023, plaintiff filed multiple applications for registration of the said marks. This along with other factors which are articulated as under, would show that plaintiffs were not trading under the said marks and the word ‘Baby’ and ‘Baby Essentials’ was merely used as a descriptive term along with their main house mark ‘FOREST ESSENTIALS’.

8.2 Plaintiff had admitted that they had never applied for the registration of the device mark of ‘BABY ESSENTIALS’ along with the ‘ribbon’ device below in the logo which they use on the packaging of the baby care products. It is also a matter of fact that the registration applied by defendants in ‘BABY FOREST’ was never opposed by plaintiff. Even the listing of baby care products on various e-commerce websites, adverted to by defendants (*para 7.2 above*), do not show that the product

is identified under the trademark 'FOREST ESSENTIALS BABY' or 'FOREST ESSENTIALS-BABY ESSENTIALS'.

8.3 It is evident from the documents filed by plaintiffs themselves that the baby care range is marketed under the main house mark 'FOREST ESSENTIALS' and not a separate sub-brand of 'FOREST ESSENTIALS BABY' and 'FOREST ESSENTIALS-BABY ESSENTIALS'. The baby care products are clearly one sub-category of products under the '*Mother and Child/ Mother and Baby care / Mom and Baby range*'.

8.4 For plaintiff to appropriate and seek proprietorship of the marks 'FOREST ESSENTIALS BABY' and 'FOREST ESSENTIALS-BABY ESSENTIALS', in this factual context would not be tenable, at least at the *prima facie* stage. It is also noted that from a perusal of the various pictures of the products of plaintiff, that the prominent use along with the mark 'FOREST ESSENTIALS' is 'DASAPUSHPADI' which refers to the Ayurvedic preparation used in their baby care products. This seems to be part of the theme of plaintiff using stock phrases from Ayurveda for various products. Examples of use of such phrases, some of which are registered by plaintiff, are 'SAUNDARYA', 'TEJASVI', 'SANJEEVANI', 'NAYANTARA', 'INARA' and 'SOM RASA'.

8.5 Defendants had already launched their products since August 2022, having applied for the trademark in June 2020 and registered the domain name '*babyforest.in*' in July 2020. There was no opposition by the plaintiff to the defendant's registration. Plaintiff sent a legal notice only on 16th June 2023, in which they do not mention the mark 'FOREST

ESSENTIALS BABY’ or ‘FOREST ESSENTIALS-BABY ESSENTIALS’.

8.6 Plaintiff's documents showing reputation and goodwill in their products, are essentially towards their principal products under the ‘FOREST ESSENTIALS’ range targeted towards adults, though some documents have been adverted to from baby care and parenting websites, relating to baby care products. All registrations (*extracted in para 6.2 above*) are for their house mark ‘FOREST ESSENTIALS’. Defendants also operate many other websites/domains viz. ‘*www.babyforeststore.com*’, ‘*www.babyforest.in*,’ ‘*www.babyforest.ae*’, ‘*www.babyforest.uk*’, ‘*www.babyforest.us*’, ‘*www.babyforest.co.in*’ and ‘*www.babyforest.asia*’.

8.7 The vast reputation of plaintiff essentially hinges and is focused on the ‘FOREST ESSENTIALS’ trademark. Not only do plaintiffs seem to have a vast reputation in the ‘FOREST ESSENTIALS’ trademark as submitted, basis documents on record, but there is no document which would incontrovertibly show that the ‘FOREST ESSENTIALS BABY’ or the ‘FOREST ESSENTIALS-BABY ESSENTIALS’ trademark has been used in a composite manner, in isolation and separately from the ‘FOREST ESSENTIALS’ trademark.

8.8 While plaintiffs only have half a dozen products of baby care under their ‘FOREST ESSENTIALS’ umbrella (*noted as defendant’s submission in para 7.12 above*), defendants are focused on only baby care products and claim to have numerous products under their portfolio, and

exclusively sell baby products (*as adverted to by defendants in para 7.11 above*).

8.9 The word ‘FOREST’ in itself is generic and plaintiff cannot claim dominance over the said part of their trademark having not sought registration under Section 17 (2) of the Act. Reliance is placed on the decision in *Vardhman Buildtech Pvt. Ltd. v. Vardhman Properties Ltd.*, 2016 SCC OnLine Del 4738, where it has been held that registration does not confer exclusive right in part of the mark. Also, besides there being many trademark registrations containing the word ‘FOREST’, that the defendant has pointed out (*as reproduced in para 7.23 above*), the mark ‘FOREST NECTAR’ in class 3 was registered since 1997, much prior to that of the plaintiffs’ mark since 2002. For plaintiff to claim monopoly over the mark ‘FOREST’, which is itself a commonly used word, therefore may not be tenable. Relevant extracts from *Vardhman Buildtech* (*supra*) are as under for ease of reference:

“8. On a plain reading of Section 15(1), it is evident that where a proprietor of a trade mark claims to be entitled to the exclusive use of any part thereof separately, he is permitted to apply to register the whole and the part as separate trade marks. In the present case, the respondent is the proprietor of the label/mark which includes the words ‘VARDHMAN PLAZAS’. The respondent is claiming exclusivity in respect of the word ‘VARDHMAN’. It is clear that he had the option to make an application for registering the word ‘VARDHMAN’ as a separate trade mark. Assuming that he could have had the word mark registered, it is an admitted fact that the respondent made no such application. Section 17 of the said Act makes it clear when a trade mark consists of

several matters, as it does in the present case, its registration shall confer on the proprietor exclusive right to the use of the trade mark taken as a whole. There is no dispute that the label/mark, taken as a whole, is the exclusive property of the respondent. The learned counsel for the appellants has no quarrel with this at all. The issue arises when the respondent claims exclusive right to a part of the label/mark and particularly to the word 'VARDHMAN'. Section 17(2) is a non-obstante provision [vis-à-vis sub-section(1)], which stipulates that when a trade mark contains any part which is not the subject matter of a separate application by the proprietor for registration as a trade mark or which is not separately registered by the proprietor as a trade mark or contains any matter which is common to the trade or is otherwise of a non-distinctive character, the registration thereof shall not confer any exclusive right in the matter forming only a part of the whole of the trade mark so registered. In the present case, neither has the respondent separately registered 'VARDHMAN' as a trade mark nor has any such application been made. Furthermore, the word 'VARDHMAN' is itself of a non-distinctive character and is not only common to this trade but to several other businesses. Consequently, the registration of the label/mark which contains the words 'VARDHMAN PLAZAS' does not confer any exclusive right on the respondent insofar as a part of that mark, namely, 'VARDHMAN' is concerned.

9. *We now come to Section 28 of the said Act which deals with the rights conferred by registration. It is clear that by virtue of Section 28, the registration of a trade mark, if valid, gives to the registered proprietor of the trade mark the exclusive right to the use of the mark in relation to the goods or services in respect of which the trade mark is registered and, importantly, to obtain relief in*

respect of infringement of the trade mark in the manner provided by the Act. What is important to notice is that Section 28(1) begins with the words 'subject to the other provisions of this Act'. In other words, Section 28 would have to be read as subject to Section 17 of the said Act. Consequently, in our opinion the registration of the label/mark in favour of the respondent, which includes the words 'VARDHMAN PLAZAS', does not confer an exclusive right on the respondent insofar as part of the mark, which has reference to the word 'VARDHMAN', is concerned.

10. The learned counsel for the respondent, as pointed out above, sought to take the benefit of Section 29(9) of the said Act. That provision stipulates that where 'distinctive elements' of a registered trade mark consist of or include words, the trade mark may be infringed by the spoken use of those words as well as by their visual representation and the reference in Section 29 to the use of a mark is to be construed accordingly. First of all, the stress in the said provision is on the words 'distinctive elements'. Neither is 'VARDHMAN' nor the word 'PLAZAS' a distinctive element of the trade mark. The word 'VARDHMAN' has not been registered as a trade mark nor could it be because it is commonly used and, as pointed out above, is the name of Lord Mahavir. Secondly, the word 'PLAZAS' is also commonly used and cannot be appropriated by the respondent. Therefore, the distinctive elements are neither the word 'VARDHMAN' nor the word 'PLAZAS'. But, the two words taken together - 'VARDHMAN PLAZAS' - is a distinctive element of the label/mark. Thus, if the appellants were to use words 'VARDHMAN' and 'PLAZAS' in conjunction, then the respondent may have had a right to restrain them from using the same. We are,

therefore, of the view that Section 29(9) of the said Act also does not come in aid of the respondent.”

(emphasis added)

8.10 In fact, plaintiff’s reply to the examination report, as pointed out by defendants, underscores their basic stand that uniqueness is in using the word ‘FOREST’ and ‘ESSENTIALS’ together. Having achieved reputation in a unique combination of these two words which are uniquely coined, the ‘*anti-dissection rule*’ would therefore, have to apply against plaintiff. Reliance for this is placed on *South India Beverages (supra) & Vasundhra Jewellers Pvt. Ltd. v. Kirath Vinod Bhai Jadwani & Anr.*, 2022 SCC OnLine Del 3370.

8.10.1 Relevant portion of *South India Beverages (supra)* is extracted as under:

“16. This rule mandates that the Courts whilst dealing with cases of trademark infringement involving composite marks, must consider the composite marks in their entirety as an indivisible whole rather than truncating or dissecting them into its component parts and make comparison with the corresponding parts of arrival mark to determine the likelihood of confusion. The raison d’tre underscoring the said principle is that the commercial impression of a composite trademark on an ordinary prospective buyer is created by the mark as a whole and not by its component parts [994 F.2d 1359, 1362 (9th Cir. 1993) Fruit of the loom, Inc. v. Girouard; 174 F. Supp. 2d 718, 725 (M.D. Tenn. 2001) Autozone, Inc. v. Tandy Corporation].”

(emphasis added)

8.10.2 Relevant portion of *Vasundhra Jewellers* (*supra*) is extracted as under:

“33. Having stated the above, it is also necessary to bear in mind that examining the dominant part of the trademark for comparing it with the conflicting mark is solely for the purpose of determining whether competing marks are deceptively similar when viewed as a whole. It is, thus, not permissible to hold that two competing marks are deceptively similar by examining a portion of one mark and comparing it with the portion of another mark, if the composite marks viewed as a whole are dissimilar. It is relevant to refer to the text from McCarthy on Trademarks and Unfair Competition, which explains the said principle as under....”

34. In the facts of the present case, the learned Single Judge had found that the appellant held registration of the device marks/composite marks that contain the word ‘Vasundhra’ but it did not have any registration of the word mark ‘VASUNDHRA’. It is material to note that the appellant had applied for registration of the word mark but the same has not been granted to it as yet. The Court had, thus, found that the appellant did not have an exclusive right to use the word ‘Vasundhra’ except as part of its device trademarks.

35. This Court finds no infirmity with the said view. This Court concurs with the view that a proprietor of a trademark cannot expand the area or protection granted to the mark. Indisputably, the appellant does not enjoy the monopoly for use of the word ‘Vasundhra’.”

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38. Second, the word ‘Vasundhra’ is a generic word and it is brought on record that there are

several registered trademarks, which include the word 'Vasundhra'. Further, 'Vasundhra' in Hindi means the earth or the bearer of all. Thus, intrinsically, the word 'Vasundhra' would be a weak trademark. Although it is possible for a proprietor to claim exclusive right in respect of the word 'Vasundhra', however, for that, it would be necessary to establish on account of extensive use, the said common word has been identified exclusively with the business of the proprietor and no other. Prima facie, it is difficult to accept that the appellant meets the said threshold. The learned Single Judge had noted that the appellant has a single store. Although the appellant's turnover is about Rs. 79 crores, it pertains to high value items and therefore, does not necessarily establish the reputation associated with the VASUNDHRA Trademarks."

(emphasis added)

8.11 The question of deceptive similarity also does not arise for the reason that the products of plaintiffs and defendants are packaged quite differently, as is evident from the pictorial extracts of numerous products (*in Para 7.20 above*). Not only is the font used for the trademarks different but also the stylization as well as the trade dress and the whole get up and layout of the packaging for both products is dissimilar.

8.12 The 'Tree' logo used by plaintiff and defendants is different and may not cause immediate confusion or even *initial interest confusion* as contended by plaintiff. Defendants' product is a sapling emanating from a very distinctive cradle, clearly showing that defendant's products and brand is purely based on baby care products, whereas, that of plaintiff is

more akin to ‘*a tree of life sketch*’ and is associated with a whole range of products.

8.13 As correctly pointed out by counsel for the defendants, an allegation of *widespread confusion* is not borne out from what is being presented by plaintiff. A couple of social media references are not enough to show that there is ‘*widespread confusion*’ or likelihood thereof. There is no substantial evidence to show continued confusion amongst customers over a length of time. In this regard, reference may be made to principles enunciated in *Shree Nath Heritage Liquor Pvt. Ltd. v. Allied Blender & Distillers Pvt. Ltd.*, 2015 SCC OnLine Del 10164, at para 4(iii).

8.14 Google search is not sufficient to show confusion since algorithms on Google work on variety of factors and as contended by defendants, can easily be generated by consecutive multiple searches by various persons. Emails by hotels *Hyatt* and *Oberoi* addressed to plaintiff are interestingly, only dated after the reply of defendants to the cease-and-desist notice of plaintiff, despite the launch of the products of defendants since 2022.

8.15 The concession given by defendants to not use ‘BABY ESSENTIALS’ and ‘SAUNDARYA’ cannot, by itself, be amplified to a larger concession by defendants that their mark is deceptively similar to that of plaintiff. A concession may be given for various reasons *inter alia* strategic, commercial convenience and to not cause business disruption and possibly in order to resolve issues. This concession in itself, at least *prima facie*, does not prove dishonest adoption.

8.16 Change of corporate name from ‘*Landsmill Healthcare Private Limited*’ to ‘*Baby Forest Ayurveda Private Limited*’ on 20th April 2023 may not be incontrovertible evidence of dishonest adoption and association since products of defendant were always sold under the mark ‘BABY FOREST’ since 2022. On the basis of a registered mark (*granted registration on 2nd February 2021 with effect from 29th June 2020*), the defendants cannot be faulted or suspected for changing their corporate name.

8.17 As is evident from the grounds taken by defendants in the notice of opposition dated 9th February 2024, it was pointed out that the registration was sought after the suit had been filed before this Court and therefore was a hurried belated attempt and in this regard, paras 21-28 of the notice of opposition may be adverted to, where the defendants have specified the facts and circumstances, in which such registration was sought by the plaintiff.

8.18 The fact that plaintiff has sold Rs. 15 crores worth of products as opposed to defendants Rs. 2.26 crores, does not in itself give them a right to appropriate any mark related to ‘FOREST’, or to displace a registered mark ‘BABY FOREST’, without having a registration themselves in ‘FOREST ESSENTIAL BABY’ and ‘FOREST ESSENTIALS-BABY ESSENTIALS’. The balance of convenience is clearly in favour of the defendants.

8.19 Monopolies or an attempt to create monopoly have to be carefully filtered, sifted and eschewed by the Court. Reliance may be placed in this regard on the decision of this Court in *Registrar of Trade Marks v. Ashok*

Chandra Rakhit Ltd., (1955) SCC OnLine SC 12, the relevant portion of which is extracted as under:

*“8. The third thing to note is that the avowed purpose of the section is not to confer any direct benefit on the rival traders or the general public but to define the rights of the proprietor under the registration. The registration of a trade mark confers substantial advantages on its proprietor as will appear from the sections grouped together in Chapter IV under the heading “Effect of Registration”. It is, however, a notorious fact that there is a tendency on the part of some proprietors to get the operation of their trade marks expanded beyond their legitimate bounds. An illustration of an attempt of this kind is to be found in *In re Smokeless Powder Co.'s Trade Mark* [LR (1892) 1 Ch 590 : 9 RPC 109] . Temptation has even led some proprietors to make an exaggerated claim to the exclusive use of parts or matters contained in their trade marks in spite of the fact that they had expressly disclaimed the exclusive use of those parts or matters. Reference may be made to *Greers Ltd. v. Pearman and Corder Ltd.* [(1922) 39 RPC 406] commonly called the “Banquet” case. The real purpose of requiring a disclaimer is to define the rights of the proprietor under the registration so as to minimise, even if it cannot wholly eliminate, the possibility of extravagant and unauthorised claims being made on the score of registration of the trade marks.*

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14. It is true that where a distinctive label is registered as a whole, such registration cannot possibly give any exclusive statutory

right to the proprietor of the trade mark to the use of any particular word or name contained therein apart from the mark as a whole. As said by Lord Esher in *Pinto v. Badman* [8 RPC 181 at p 191] :

“The truth is that the label does not consist of each particular part of it, but consists of the combination of them all”.

Observations to the same effect will be found also in *In re Apollinaris Company's Trade Marks* [LR (1891) 2 Ch 186], *In re Smokeless Powder Co.*, *In re Clement and Cie* [LR (1900) 1 Ch 114] and *In re Albert Baker & Company* and finally in the *Tudor* case referred to above which was decided by Sargant, J. This circumstance, however, does not necessarily mean that in such a case disclaimer will always be unnecessary. It is significant that one of the facts which give rise to the jurisdiction of the tribunal to impose disclaimer is that the trade mark contains parts which are not separately registered. It is, therefore, clear that the section itself contemplates that there may be a disclaimer in respect of parts contained in a trade mark registered as a whole although the registration of the mark as a whole does not confer any statutory right with respect to that part.”

(emphasis added)

8.20 The test of ‘customer of average intelligence and imperfect recollection’ (originally articulated in *Corn Products Refining Co. v. Shangrila Food Products Ltd.*, 1959 SCC OnLine SC 11, by the Hon’ble Supreme Court) also has to take into account the category of goods which are being considered, the price range at which they are and the ability to

access relevant information over the internet and social media in order to get clarity (*if at all required*) of which brand to pick. Merely, because there could be a slight possibility of some customers having minor, transient confusion sifting the brands, it cannot give a right to plaintiff to get an injunction against defendants' mark *in toto*.

8.21 It is also important to note that in respect of baby care products, the purchasers are parents, who will be very careful about picking the right product for their baby and therefore, are much more alert of the product/brand that they choose to buy.

8.22 In today's world, where a substantial amount of retail purchase is through online medium, it is not uncommon for a customer to cross check the origin of the products and the particular brand that they are seeking to purchase, even if they are faced with a “*state of wonderment*” as articulated in *Under Armour Inc. v. Aditya Birla Fashion and Retail Ltd.*, 2023 SCC OnLine Del 2269.

8.23 The ‘*initial interest confusion test*’, therefore, may not strictly apply. This is so because a customer of average intelligence and imperfect recollection also has substantial data and resources available at their fingertips through access to the internet through their smart phones or other devices and a plethora of search engines. An initial feeling/wonderment usually will trigger a search by an average consumer before purchase. Possibly the test of ‘*customer of average intelligence and imperfect recollection*’ will have to be evolved to add the factor of a customer with access to greater resources and greater knowledge of the market. It is important to note that a full evolution and disruption of the

traditional market has happened since, with the introduction of online e-commerce retail.

8.24 Confusion, therefore, if at all at the initial stage may not subsist for very long and may be ephemeral, transient, since even an average customer will be prompted to check. The journey of the consumer is a new consumer journey starting from *awareness* to *information* to *purchase*. There is a changing landscape of consumer behavior which is duly recognized by various authoritative advertising publications / commentaries on brands and consumer behavior.

8.25 This additional consideration/parameter is important, particularly, in high price point products where the demography of the consumer is different, in that the customer may be more sophisticated, careful, discerning, resourced, having access to peer purchases.

8.26 In the opinion of this Court, these factors now also have to be considered as well rather than applying just the traditional 1960s test in an isolated manner and without accounting for the new channels and consumer journey towards purchase. The new digital revolution in retail is obvious, and does not need to be articulated, since it envelops and involves most consumers, at least in the urban and semi-urban areas. With approximately 450 million smartphone users in India, the ability to access information is very high and prevalent, and while understanding the mindset of the consumer, this must be brought into the consideration.

8.27 In the spirit of evolving trademark confusion tests to include modern consumer behaviour and sophistication, a useful analysis is found in an Article titled '*Trademark confusion revealed: An Empirical*

Analysis’ in the Journal ‘*American University Law Review*’ by Daryl Lim, ‘*Professor of Law & Director, Center for Intellectual Property, Information and Privacy Law, University of Illinois Chicago School of Law.*’ Certain selected extracts, reproduced under, are instructive, educative and inform our opinion:

“Courts analyze the degree of care reasonably expected of potential customers from the perspective of “the ordinary purchaser, buying under the normally prevalent conditions of the market and giving the attention such purchasers usually give in buying that class of goods.” - **Gen. Mills, Inc. v. Kellogg Co.**, 824 F.2d 622, 627 (8th Cir. 1987). More expensive products or services mean consumers take more time and effort when making decisions, and therefore, the likelihood of confusion decreases- **Kibler v. Hall**, 843 F.3d 1068, 1080 (6th Cir. 2016) (observing that when consumers exercise caution in purchasing items, they are less likely to confuse their origins, such as “when consumers have expertise in the items and when the items are particularly expensive”).

However, two products or services within the same general field do not automatically trigger a likelihood of confusion - **Matrix Motor Co. v. Toyota Jidosha Kabushiki Kaisha**, 290 F. Supp. 2d 1083, 1092 (C.D. Cal. 2003). Similarly, a high percentage of overlap in “an extremely small subset of products does not demonstrate a high degree of relatedness - **AutoZone, Inc. v Tandy Corp.**, 373 F.3d at 786, 71 U.S.P.Q.2d 1385 (6th Cir. 2004) (“If the defendant stocked only five types of batteries all of which were also sold by the plaintiff, the overlap would be 100%, even though in reality the defendant and the plaintiff would share only five products of the approximately 55,000 offered by the plaintiff.”).

*Courts look both to the “relative sophistication of the relevant consumer” - **Fortune Dynamic, Inc. v. Victoria’s Secret Stores Brand Mgmt., Inc.**, 618 F.3d 1025, 1038 (9th Cir. 2010) and the cost of the item- **Brookfield Commc’ns, Inc. v. W. Coast Ent. Corp.**, 174 F.3d 1036, 1060 (9th Cir. 1999) in determining the degree of care likely to be exercised by the purchaser. The “reasonably prudent consumer” is expected “to be more discerning—and less easily confused—when [they are] purchasing expensive items.”*

(emphasis added)

8.28 Another useful analysis is found in Article titled ‘**Trademarks, Consumer Psychology and The Sophisticated Consumer**’ in ‘*Emory Law Journal*’ by Thomas R. Lee, Glenn L. Christensen & Eric D. DeRosia, certain extracts of which are illuminating and extracted as under. Referring to factors in **Polaroid Corp. v. Polarad Electronics Corp.**, 287 F.2d 492 (2d Cir. 1961) it is stated by the author that:

*“.....the eighth factor, referred to alternatively as the “consumer’s degree of care”- **Sally Beauty Co. v. Beautyco, Inc.**, 304 F.3d 964,975 (10th Cir. 2002) or “consumer sophistication”- **Bristol-Myers Squibb Co. v McNeil-P.P.C., Inc.**, 973 F.2d 1033, 1047 (2d Cir. 1992) encompasses several considerations that are thought by the courts to affect the attention consumers may pay to their purchases. Under this factor, the courts generally hold that if a consumer can be expected to exercise a high degree of care, she will be less likely to be confused by any connection between a senior and junior trademark. A sophisticated consumer is expected to act not on “impulse,” but on the basis of “a careful consideration of the reliability and dependability of the manufacturer*

*and seller of the product.” - **Astra Pharm. Prods., Inc. v. Beckman Instruments, Inc.**, 718 F.2d 1201, 1206 (1st Cir. 1983). In other words, a sophisticated consumer is one who is apt to spend more time, attention, or care in making a purchasing decision-and who is thus deemed less likely to be confused as to the source or sponsorship of the trademarked products she buys. Unsophisticated consumers, by contrast, are “the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearance and general impressions.” - **Florence Mfg. Co. v. J.C. Dowd & Co.**, 178 F. 73,75 (2d Cir. 1910). The prototypical unsophisticated consumer is the man walking the supermarket aisle who “undergoes an experience not unlike that of hypnosis,” - **Pikle-Rite Co. v. Chi. Pickle Co.**, 171 F. Supp. 671,676 (N.D. III 1959) in which purchases are made impulsively and thoughtlessly.*

A key threshold question in the case law is how to distinguish the careful and sophisticated consumer from the unthinking and credulous one. Although the courts have not attempted to articulate any comprehensive theoretical framework for assessing consumer propensities toward care, a few consistent themes have emerged in the case law. The principal strands of analysis in the case law, which are elaborated and evaluated in some detail below, include the assertion that consumer care or sophistication correlates positively with price, length and complexity of the purchase transaction; infrequency of purchase; education, age, gender, and income; and the notion that professional buyers, avid hobbyists, and (sometimes) women are more sophisticated.

As explained in further detail below, the case law elaborating these considerations is based on an ad hoc, impressionistic conception of sophistication;

the courts have never articulated anything approaching a rigorous, theoretical understanding of consumer care. Yet the perceived degree of sophistication can often be the factor that dictates the degree of protection afforded by law to a trademark holder. Some courts have gone so far as to suggest that a high degree of consumer sophistication in a target market may trump all other factors, virtually eliminating the likelihood of consumer confusion in the case of a professional or highly sophisticated buyer. - Sara Lee Corp. v. Kayser-Roth Corp., 81 F.3d 455, 467 (4th Cir. 1996) (holding that the “relative sophistication of the market may trump the presence or absence of any other factor”).

According to the theories developed in the consumer behavior literature, a consumer attempting to avoid source confusion by making a source-identification judgment must perform a series of steps. First, the consumer must gather product information that she considers of potential relevance to the source-identification judgment. Such information might include the trademark itself, trade dress, and the price at which the product is being offered. Second, the consumer must comprehend the information—that is, consider the information to determine its meaning. Whereas some types of information (such as brief and simple written descriptions) are easily comprehended by most consumers, others (such as numeric and technical data) are more difficult for most consumers to comprehend. Third, the consumer must identify the implications of the environmental information and integrate the implications to form the source identification judgment.”

(emphasis added)

8.29 Besides there are various aspects of a brand, *inter alia*, the word mark, the device mark, the trade dress, get up, layouts, artistic work, the

presence of the brand on the internet and social media, the positioning of the brand, the price point, the target consumer. Confusion, disruption and association are therefore to be seen not in an isolated context of one of these aspects, especially when the Court has to undertake a full journey of assessment (*a global appreciation*) to determine these at the behest of the plaintiff. Reliance may be placed in this regard on the decision of this Court in *Abros Sports International Private Limited v. Ashish Bansal and Ors.*, 2024:DHC:3551, the relevant portion of which is extracted as under:

“35. “...Differences in physical appearance of goods or the manner in which they are packaged, the get up, or the presentation of the marks, all become relevant for assessment. Further, the plaintiff has not presented any evidence to show that there is actual confusion in any section of consumers, i.e. the nature and extent of any actual confusion. This has been considered as a relevant consideration by a Division Bench of this Court in *Shree Nath Heritage Liquor Pvt. Ltd. v. Allied Blender & Distillers Pvt. Ltd.*, 2015 SCC OnLine Del 10164, in Para 4(iii), as also in Para 9 (where the Court lists out the Du Pont factors, Polaroid factors, Sleekcraft factors, which had been articulated by the Courts in the United States of America and have been cited with approval by Indian Courts). Para 4 of *Shree Nath Heritage* (*supra*) is extracted below, for ease of reference:

“4. It would be profitable to quickly summarize the general principles applicable in trademark cases, and we could do no better than distillate them from *McCarthy on Trademarks and Unfair Competition, Ed. IV*:
i. Likelihood of confusion (i.e. confusion is probable and not simply possible) is the

standard for both trademark infringement and passing off.

ii. Priority of use needs to be considered.

iii. To establish trademark infringement and/or passing off in most cases (we discuss one statutory exception where confusion is presumed by court below) it needs to be shown that an appreciable number of buyers and not the majority of buyers are likely to be confused. Even 1% of India's population will be an appreciable number of buyers.

iv. Likelihood of confusion may be proved in many ways, such as:

- Through survey evidence;*
- By showing actual confusion;*
- Through arguments based on a clear inference arising from a comparison of the marks in question and the context in which the marks are used;*
- Under Section 29 of the Trademarks Act, 1999, confusion is presumed if the marks are identical and are used for identical goods/services.”*

*36. Further, the following relevant observation has been made in Para 11 of the **Shree Nath Heritage** (supra):*

“11. The Supreme Court has cautioned that weightage to be given to each of the above factors should depend upon the facts of each case and same weightage cannot be given to each factor in every case. The above Cadila factors for passing off have not been specifically applied to trademark infringement cases.”

*37. Essentially, the Division Bench, in relying on the principles enunciated by the Hon’ble Supreme Court in **Cadila Healthcare Ltd. v. Cadila***

Pharmaceuticals Ltd., (2001) 5 SCC 73, and the factors laid down by the American Courts, was underscoring that a holistic global consideration and assessment needs to be made rather than giving excessive weightage only to isolated factors for assessment of infringement and/or passing off. This theme of integrated, holistic assessment, rather than a compartmentalized approach is echoed by a Single Judge of this Court in **AMPM Fashions (P) Ltd. v. Akash Anil Mehta**, 2021 SCC OnLine Del 4945, in particular in para 61, 62, where the Court while applying the “global appreciation” test held as under:

“61. When applying the test, one has to make a “global appreciation”. The “global appreciation” test requires one to examine, inter alia, the following facets, albeit, holistically as they are inter-dependent:

(i) The degree of visual, aural and/or conceptual similarity between the marks.

(ii) The overall impression created by the marks.

(iii) The impact that the impugned marks have on the relevant public i.e., the matter should be considered through the eyes of an average consumer, who would buy or receive the goods or services.

(iv) The distinctive character that the infringed mark has acquired i.e. either because of the mark per se or on account of reputation that it has enjoyed in the public space.

(v) That the average consumer has an imperfect recollection.

(vi) *The degree of similarity between the goods or services, which are purveyed under the rival marks.*

62. It needs to be emphasized that, while evaluating the aforesaid facets, one has to bear in mind the global/composite appreciation test, which enjoins that each of them is inter-connected and explicable, as a whole. In other words, an integrated rather than a compartmentalized approach is required to be adopted. The proclivity of giving weight to one facet as against the other facet(s) is to be abjured. It is only an overall evaluation of all facets which helps in ascertaining, whether or not there is a likelihood of confusion. Likelihood of confusion would arise, if there is a risk of the relevant consumers/public believing that the goods or services offered by the defendants originate from the plaintiff or in some way, are economically or commercially linked to the plaintiff.”

38. This Court resonates with the “global appreciation” test, in other words, a “holistic assessment” than a skewed weightage to an isolated factor or test. Adversarial submissions by parties are prone to focus on one or the other factor to rest substantiate their case. But this should not preclude the Court from inviting an encouraging, a wider, composite assessment. This will also be in consonance and, in fact, is the theme embedded in the much quoted, cited, and approved exposition by Parker J. in **Pianotist Co. Application**, (1906) 23 RPC 774, and extracted hereunder:

“You must take the two words. You must Judge them, both by their look and by their

sound. You must consider the goods to which they are to be applied. You must consider the nature and kind of customer who would be likely to buy those goods. In fact you must consider all the surrounding circumstances and you must further consider what is likely to happen if each of those trade marks is used in a normal way as a trade mark for the goods of the respective owners of the marks.”

(emphasis added)

8.30 As an epilogue to the above discussion, it is useful in this context, to remind ourselves of the ‘*Pianotist test*’, by Parker J which was relied on in *Kaviraj Pandit* (*supra*) by the Hon’ble Supreme Court. This forms the fundamental bedrock, the veritable anchor, till date, of assessing infringement/ deception/confusion/association. It is underscored that the test itself adumbrated by Parker J includes assessing customer behavior and surrounding circumstances. The ‘*Pianotist test*’ includes “*you must consider the nature and kind of customer who would be likely to buy those goods” and “in fact you must consider all these surrounding circumstances...”*”.

8.31 These three aspects of monopolies (*discussed in para 8.19 above*), *sophisticated consumer test* (*discussed in para 8.20-8.28 above*) and the *global appreciation test* (*discussed in para 8.29-8.30 above*), would serve, in the opinion of this Court as a useful triad for evolving our assessment of trademark confusion, in the context of today’s world.

Conclusion

9. In view of the facts and circumstances stated above, in the opinion of this Court, the plaintiff is not entitled to the injunction it seeks against the defendants for use of the marks 'BABY FOREST', 'BABY FOREST-SOHAM OF AYURVEDA', and the instant applications being I.A. 14373/2023 and I.A. 21648/2023 under Order XXXIX Rules 1 and 2 of CPC are dismissed to that extent. However, the undertaking by defendants, to not use the marks 'SAUNDARYA' and 'BABY ESSENTIALS' (*as noted in order dated 04th August, 2023 and in para 2 above*) will continue to subsist.

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1. List before Joint Registrar on 10th July, 2024.
2. Judgment be uploaded on the website of this Court.

**(ANISH DAYAL)
JUDGE**

MAY 15, 2024/RK/na