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**“GROUNDS OF INFRINGEMENT: PASSING OFF ACTION AND
DECEPTIVE SIMILARITY.”**

**AUTHORED BY: MS. TIYASHA CHATTERJEE,
CO-AUTHORED BY: MS. RICHANANDY, KIIT SCHOOL OF LAW,
EMAIL IDS: TIYASHAC5@GMAIL.COM, RICHANANDI6@GMAIL.COM,
PUBLISHED AT: WWW.LAWAUDIENCE.COM.**

I. ABSTRACT:

In today's world of accelerated growth in businesses, it is quintessential for every business venture to Trademark their goods and services. Doing so, it helps establish an identity in the perception of general consumers and as a result of that helps in generation of revenue. When a product has a trademark and the brand value of the same becomes popular among the masses, it brings in a lot of success but it also becomes prone to misuse, abuse and infringement. Two such modes of infringement are “deceptive similarity” and “passing off action”. Deceptive Similarity is when one starts selling a product which is so similar to an existing trademark so as to confuse the customers under the goodwill of the already registered Trademark. This brings heavy loss to the original trademark owner in terms of both reputation as well as pecuniary aspects.

Passing off action takes place when the fraudulent owner of a good tries to sell his goods under the veil of original trademarked goods hampering the economic goodwill of the original proprietor This paper aims to discuss the various types of infringement with relevant case laws and gives a special emphasis on the notion of passing off action and deceptive similarity. It also discusses the doctrine of dilution with reference to the aforementioned.

Keywords: Trademark, infringement, passing off, deceptively similar, dilution

II. DEFINITION OF TRADEMARK:

Trademark is elucidated under Section 2 (zb)¹ is, "*trademark means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colors.*"

III. INFRINGEMENT OF TRADEMARK:

Infringement of a trademark in India infers infringement of the selective rights conceded to the owner under the Trade Marks Act, 1999. The broke benefits are those given in agreement to goods and services. Sections 29 and 30 of the Act accommodate different safeguards to cover the enrolled mark if another person encroaches it. Section 29 of the Act indicates that if an unregistered proprietor utilizes the said trademark for business, an authorized trademark is encroached.

IV. COMPONENT ELEMENTS OF TRADEMARK INFRINGEMENT:

- *Unauthorized individual that implies an individual who is not the enlisted trademark's proprietor or licensee.*
- *Identical' and' Deceptively identical'—the test to determine whether or not symbols are the same is to determine whether there is a possibility of public misunderstanding. When buyers are likely to be confused between the two labels, a violation may happen.*
- *Only an authorized trademark can be infringed. The common law standard of passing off will allude to an unregistered trademark.*
- *The infringer's goods/services must be indistinguishable or like the products spoke to by the enlisted trademark so as to set up encroachment.*

The illegal use of a registered trademark's exclusive legal rights is a violation.

The above-mentioned violation is direct infringement. Trademark infringement in India has another dimension, i.e. indirect infringement. Indirect infringement is a standard common law

¹ Trade Marks Act, 1999.2(zb).

which keeps the plain infringer's subject, yet in addition the individuals who cause the immediate infringers to embrace the encroachment. Sometimes known as collateral liability, indirect negligence has two categories: contributory infringement and vicarious liability.

In two cases, a party shall be liable for contributory infringement:

- *When the violation is known to an individual.*
- *If an individual contributes significantly or causes the infringer to commit the infringement.*

In the following circumstances, an individual will be vicariously liable:

- *When the defendant has the capacity to control the actual infringer's conduct.*
- *When a person receives an offence financial benefit.*
- *When a person is aware of and responds to the violation.*

In the case of employer-employee partnerships and the like, vicarious liability usually applies. This is alluded to implicitly in section 114 of the Act. According to this paragraph, any person responsible for the business will be liable if a corporation performs an offence under the Act. With the exception of a person who acted in good faith and without knowledge of the crime. In fact, indirect infringement occurs when a person allows another person to infringe a patent, although not specifically violating it. Responsibility for indirect infringement is extremely important with the rise in the e-commerce market, as each person involved is held accountable.

Therefore, any form of trademark infringement in India, whether direct or indirect, can incur liability. To stop trademark infringement, one must contact the trademark experts before releasing their company or product for review.

V. PASSING OFF ACTION:

Passing off is a common law tort that can be utilized to implement trademark rights that are not authorized. The passing off rule forbids the misrepresentation of one person's products and services as another's. Over the years, the definition of passing off action has undergone changes. Initially it always discussed the advantages of an individual over the other. Passing off action was extended to companies and services which was later applied to non-trading

activities. It was also applicable to other unfair competitions causing harm and hindrance to someone else's activities. The key inquiry in this maltreatment is whether the lead of the respondent is with the end goal that it seems to misdirect people in general to accept that the action of the litigant is that of the person in question or to cause disarray between the two's business exercises. Passing off torment is expansive enough to help associations engaged with form trading activities. In the landmark case of *British Diabetic Association V Diabetic Society*², the two parties were selfless social orders. Their names were misleadingly relative. The term 'Association' and 'Society' being excessively approximate as they are parallel in induction and meaning and were not completely branching in structure. A permanent injunction is given.

VI. UNFAIR COMPETITION:

"Unfair competition" is a word that pertains to untrustworthy or deceitful disputation in commercial transaction and business. It is a bifurcation of intellectual property law that deals with the act of attempting to use as an alternative to one's very own merchandise or items in the market for those of another for the reason for cheating people in general. Unfair Competition is dealt with under article 10bis of Paris Convention.

VI.I ELEMENTS OF UNFAIR COMPETITION:

Unfair Competition's element is as an enormous umbrella securing various acts; however the main part of exercises could be categorized as one of two gatherings. Now and again the term is utilized distinctly to depict circumstances in which clients have been cheated or deluded. Once in a while this kind of action is additionally alluded to as tricky practices in exchange. Truly, unfair competition includes these and different acts intended to confine or change the benefits of a business. The direct will truly bring about a tort suit in all circumstances. That is, the crime is such that in a court of law the offender can and should be found liable for civil offence. There are also some types of unfair competition that are crimes.

² British Diabetic Association V Diabetic Society, CA 31 OCT (1996)

VI.II OCCURRENCE OF UNFAIR COMPETITION:

Unfair competition manoeuvre is usually portrayed by duplicity, dishonesty, deceiving, and abuse — rivalry is to such an extent that the offended party is obstructed or halted from working together effectively. In light of their inclination to unduly obstruct rivalry, they are viewed as against open arrangement, and this affects more prominent benefit of people in general. To request to secure customers and organizations and help avert unlawful marketing, uncalled for rivalry laws are made.

VII. ELEMENTS OF PASSING OFF:

The three essential components of passing off are Reputation, Misrepresentation and Damage to goodwill. The three components for passing off that are otherwise called the Classical Trinity, by the House of Lords for the situation of *Reckitt and Colman Ltd V Borden Inc*³, are:

- *The Petitioner's Goodwill: In a passing off action, the main problem is the damage caused but the plaintiff has to prove that he is being injured by the defendant's action. Although the defendant might be deceiving the public but one cannot file a suit for passing off unless it proves that the Respondent's steps are harming the plaintiff*
- *Misrepresentation: The most straightforward manifestation of passing off is by misrepresentation. If one sells his goods saying they are of another brand's then it is misrepresenting. In case of *Khemraj v. Garg*⁴, the defendants had duplicated the arrangement, design, colour scheme, and the name "manavpanchang, mani ram panchang" and "shri vallabh Mani Ram panchang" of the plaintiff's panchang. The court decided that it is indistinguishable to the plaintiff's product and Interim injunction was granted. In the case of *Rupa & Co. Ltd v. Dawn Mills Co. Ltd*⁵, the defendant manufactured underclothes which were named dawn as indistinguishable to the litigant's manufactured underclothes don, which is producing doubt in the perception of people because the layout, and colour combination is alike to the litigant's product.*

³ Reckitt and Colman Ltd V Borden Inc, [1990]1 All E.R. 873 (House of Lords,1990)

⁴ Khemraj v. Garg, AIR 1975 Delhi 130, ILR 1975 Delhi 251(Delhi High Court, 1975)

⁵ Rupa & Co. Ltd v. Dawn Mills Co. Ltd, AIR 1998 Guj 247, (1999) 1 GLR 744 (Gujarat High Court, 1999)

- *Damage: Damages and remedy are accessible in both the cases whether the infringement suit or passing off activity in the two cases is specified.*

In this case, it was guaranteed that the inquirer should initially create goodwill or renown appended to his products or administrations in a suit for passing off. Right off the bat, the offended party ought to exhibit to the jury a misrepresentation which causes or is probably going to lead general society to accept that the merchandise and enterprises sold by the litigant are those of the inquirer. At long last, he ought to demonstrate that he has endured a misfortune in light of the assumption that the merchandise and enterprises of the blamed are those for the offended party. The passing off action emerges when there is deception, when it is harmful to the being litigant's intangible asset, when during trade it is made by a merchant, which is en-kindling the enterprise of another trader and which causes authentic hurt to the venture or grace of the merchant who is bringing on the suit.

VII.I CONTEMPORARY COMPONENTS OF PASSING OFF:

For the situation Erven Warnink vs. Townend⁶, Lord Diplock provided the fundamental current attributes of a passing off activity. They are as per the following:

- *Distortion;*
- *Made by an individual over exchange;*
- *To imminent consumer of his or immoderate buyers of outcome or administrations furnished by him;*
- *Which is established to damage the commercial enterprise or generosity of some other broker;*
- *Which makes authenticated harm of a commercial enterprise or altruism of the merchant by whom the act is brought;*

In the case of *Honda Motors Co. Ltd V Charanjit Singh & Others⁷*, the Petitioner was using trademark "HONDA" in regard to autos and power category of gear. Respondents began utilizing the trademark "HONDA" for its pressure cookers. Plaintiff obtained a suit in

⁶ Erven Warnink Vs. Townend, [1979] AC 731, [1980] R.P.C. 31 (House of Lords, 1979)

⁷ Honda Motors Co. Ltd V Charanjit Singh & Others, 101 (2002) DLT 359, 2003 (26) PTC 1 Del (Delhi High Court, 2002)

opposition to the defendant for passing off the plaintiff's company. It was decided that the usage of the mark "Honda" by the respondents could not be said to be a legit selection. Its utilization by the litigant is likely to cause uncertainty in the minds of public in general. The usage of the aggrieved party was permitted.

VII.II NECESSITY OF PASSING OFF:

The Trademark is giving pledge to registered goods and services; anyway the passing off movement is giving safety to unregistered product and ventures. The most essential point is that the fix is same in the two cases anyway the Trademark is accessible to simply the selected items and undertakings and passing off is open to unregistered products and services.

In *Durga Dutt versus Navaratna Pharmaceutical*⁸, the Supreme Court intended to differentiate the separation among infringement and passing off. The act of infringement is a statutory cure introduced on the enrolled owner of an enlisted Trademark has a particular right to the use of the trademark associated with those goods. And the passing off is accessible to the unregistered goods and services.

The next significant contention is that the respondent's utilization of the complainant's trademark is not essential in a passing-off continuing, however this will not happen on account of an infringement claim.

The third significant qualification between these two is that if the fundamental highlights of the trademark of the offended party have been received by the litigant, the way that the lay out, pressing and other composition or checks on the goods or on the bundles wherein he puts forth his goods available to be purchased stamped contrasts or demonstrate obviously an exchange starting point not the same as that of the enlisted proprietor of the mark would be unimportant; however if there should be an occurrence of passing off the respondent may escape risk on the off chance that he can show that the additional issue is adequately to recognize his goods from those of the offended party.

⁸ Durga Dutt v Navaratna Pharmaceutical, 1965 AIR 980, 1965 SCR (1) 737 (Supreme Court, 1965)

VII.III THE PLAINTIFF'S ESTABLISHMENT IN A PASSING OFF ACTION:

It is necessary to succeed in a passing off state derived from the utility of a mark or to the layout that the plaintiff must prove that the contested mark or layout has become known by the client of the products of the complainant so that the utility in correlation to any product of the kind handled by the complainant of that mark or the layout will be interpreted by the market in the potential customer's eye as representing the goods of the complainant.

VIII. IDENTICAL OR SIMILAR TRADEMARK

A trademark cannot be registered on the off chance that it is identical or similar to a previous registered trademark. According to Section 11(1) of the Trade Marks Act 1999 –"a trademark shall not be registered if, because of its identity or similarity with earlier trademark(s) and because of identity or similarity of goods or services covered by such trademarks, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trademark."

VIII.I IDENTICAL TRADEMARK

A mark is identical with the trademark where it replicates every one of the components establishing the trademark with no adjustment or augmentations or where it contains contrasts so unimportant that they may go unnoticed by the normal buyer all in all. The guidelines for grouping a mark as an equal trademark are accordingly generally basic and direct.

VIII.II SIMILARITY OF TRADEMARK:

Similar trademarks are interpreted as "deceptively similar" which has been laid down "as so nearly resembling that other marks which are likely to deceive or cause confusion". It must be likely to exist for the possibility of misunderstanding; it is not important that real

uncertainty has occurred or should occur in the general reasoning, i.e. the ordinary customer. Therefore, if it is possible that there will be ambiguity in the average consumer's mind over copying another established trademark or patent for which the claim was previously registered, then the logo may be considered identical.

In contrast, the three most relevant factors in the trademark office's review of trademark applications would generally be:

- *the equivalence and distinctions between the corresponding trademarks;*
- *the distinctiveness of the former mark;*
- *the magnitude of resemblance in the middle of the corresponding goods or services.*

VIII.II.I DECEPTIVE SIMILARITY:

Trademarks play a vital role in the development of any business ' brand name and goodwill. It helps generate revenue along with creating goodwill for the brand. Trademark is vulnerable to violation and/or abuse because it is of such vital importance. Another other way of branding is to make brands that are "deceptively similar. "Deceptively similar" trademarks can be comprehended as a trademark made, practically comparative or a carbon copy of a previously establishing trademark so as to mislead the buyers. In the Trademark Act 1999, the expression "similar" has not been defined. This idea of deceptive similarity has been talked about under Section 2(h) as: "*A mark shall be deemed to be deceptively similar to another mark if it so nearly resembles that other mark as to be likely to deceive or cause confusion.*"

Within multiple trademark laws, the principle of deceptively similar has been extensively recognized as a basis for trademark infringement. Deceptively similar is perceived as a justification for the Trademark Registrar's refusal to issue the trademark registration to an applicant under the Indian legal system as well. Notwithstanding, the Act does not discover any point of reference that can choose the scope and extent of the expression "deceptive similarity," thus, there is a gap. So as to evacuate the gap, it is basic to take into account the judicatory on different cases with respect to the said issue. Indian Courts have led down few guideline and principles in matters relating to "deceptive similarity". For adjudicate cases of

intellectual property and deceptive similarity, the courts have accepted concepts of phonetic and visual similarity, goodwill, reputation, likelihood test, etc. as some standards for evaluating deceptive similarity.

Few important judicial decisions pertaining to deceptive similarity:

• **M/S Lakme Ltd. v. M/S Subhash Trading⁹:**

In this case, the plaintiff was selling cosmetic products under the trademark name "Lakme" and the defendant was also selling similar products under the name "LikeMe". A case of trademark infringement was thus filed by the plaintiff. The High Court held that the names were not deceptively similar and are two separate marks with a difference in their spelling and appearance.

• **SM Dyechem Ltd. v. Cadbury (India) Ltd.¹⁰:**

In this case, plaintiff started a business of chips and wafers under the trademark "PIKNIK". Later, defendant started business of chocolates under the name "PICNIC". A suit alleging trademark infringement was filed thereafter. The Court held the marks not to be deceptively similar as they are different in appearance and composition of words.

• **Cadila Health Care Ltd. v. Cadila Pharmaceutical Ltd.¹¹:**

In this case, Supreme Court laid down certain guidelines for adjudication of matters concerning deceptive similarity of trademarks. In this particular case, the parties to the case were the successors of the Cadila group. The dispute arose on the issue of selling of a medicine by the defendant under the name "Falcitab" which was similar to the name of a medicine which was being manufactured by the plaintiff under the name "Falcigo". Both the drugs were used to cure the same disease and hence, the contention was that the defendant's brand name is creating confusion between the consumers.

The injunction was demanded by the plaintiff. As a defence, the defendant claimed that the prefix "Falci" has been derived from the name of the disease, i.e., Falcipharam malaria. The court observed that because of the diversified population of the country and varying infrastructure of the medical profession due to language, urban-rural divides, etc.

⁹ M/S Lakme Ltd. v. M/S Subhash Trading, 23 August, 1996 (Delhi High Court, 1996)

¹⁰ SM Dyechem Ltd. v. Cadbury (India) Ltd., 9 May, 2000 (Supreme Court, 2000)

¹¹ Cadila Health Care Ltd. v. Cadila Pharmaceutical Ltd, 2001 PTC 541 (SC) (Supreme Court, 2001)

and with the probabilities of medical negligence, it is important that confusion of marks should be strictly prevented in pharmaceuticals and drugs. The Court, thereby, held that as they are medical products more precaution and care should be taken and the names of the brand, therefore, being phonetically similar shall amount to being deceptively similar.

IX. REMEDIES FOR INFRINGEMENT OF TRADEMARK:

Trademark infringement happens when a trademark used by an individual or organization is identical to another individual or organization's registered trademark rights in the jurisdiction.

The popular way in which a trademark check for infringement screening is performed is:

- *A near resemblance of a trademark and is associated with goods and/or services with a previously registered trademark and it's related to goods and/or services.*
- *The utility of a logo which has high chances of creating confusion with a prior registered trademark among the applicable customers.*

Section 29 and section 30 of The Trademark Act, 1999 lays down both civil and criminal remedies for trademark infringement.

If a person can prove someone of infringement then the following remedies are available:

A court order or injunction which will prohibit the defendant from using the accused mark.

There can be two types of the injunction:

- *The first form is a perpetual injunction which, when the suit is eventually decreed, is usually issued on the merits of the suit.*
- *The second type is a temporary injunction, as the name suggests, which can be issued at any point of the case for a specified time period or until any further court order. This would be of utmost trouble to any grieved party because, unless the court grants a temporary injunction, the offender may carry on with using the mark and this would be contrary to the very intent of bringing an infringement or passing-off case.*
- *An order requiring destruction or forfeiture of articles of infringement;*
- *Financial compensation, including the proceeds of the defendant, any injuries suffered by the litigant and the expenses of the suit;*
- *An order that requires the defendant to bear the plaintiff's attorney's expenses.*

X. JURISDICTION FOR INSTITUTING A SUIT FOR INFRINGEMENT:

Section 134 of the Trade Marks Act, 1999, being a statutory right, includes the power to bring an infringement suit. According to the rules, a lawsuit for infringement may be brought before a District Court within the local boundaries of whose jurisdiction, at the time the lawsuit is initiated, the individual who instituted the lawsuit in all intents and purposes and willingly resides or carries on business or profitable works.

XI. PRINCIPLE TO DETERMINE DECEPTIVE SIMILARITY:

Over the years, through case law, the courts have developed principles and factors to be applied to determine the concept of deceptive similarity between marks.

The criteria for a court of law or tribunal is concerned with the following factors at the time of determining deceptive similarity and the likelihood of confusion between marks in question that have evolved over the years through precedents are as follows:

- *“The nature of the marks, whether the marks are words, labels or composite marks.”*
- *The extent of similarity between the marks, phonetic or visual or similarity in idea;*
- *The essence of the goods or services for which they are utilized as trademark;*
- *The similarity in the design, character and quality of the rival merchant/service providers ' goods/services;*
- *The group of buyers/customers who are likely to buy the products and take advantage of the facilities, their knowledge and reasoning, and magnitude of care that they are likely to implement in buying and/or using the goods.*
- *The manner in which the goods/services cross the channels of trade in the course of business or ordering the goods; the factors mentioned above are not exhaustive but only illustrative. It is not necessary to consider all the factors in evaluating the similarity of marks. Where all the circumstances indicate a deceptive similarity of the marks, this may be sufficient.*

XII. DOCTRINE OF DILUTION IN INDIA:

In the former law, i.e. the Trade and Merchandise Marks Act, 1958, the Doctrine of Dilution was not present, as in the case of section 29(4) of the Trademarks Act, 1999, by which the dilution doctrine was first introduced into a statute. Yet, given the internationally recognized status, the dilution principle was adopted by the court much before the Act. According to section 29(4) of the Trade Marks Act, infringement of trademarks in the form of dilution can occur only when the person uses the mark in the form of:

- *Identical and similar to a registered mark already known in India and*
- *Utilization is on goods or services that are distinct from those protected by registration.*

The infringement that occurs when the utility of the violating mark is found generates the following outcome:

- *When the person takes the unfair opportunity of the deemed mark or mark with a distinctive character.*
- *When the mark is damaging the distinctive mark or reputed mark.*

As the court used the dilution principle before the statute.

Daimler Benz Aktiegessellschaft & Anr vs. Hybo Hindustan¹², is one of the known cases where the court used the dilution prior to the act. In this case, the problem relates to the BENZ tag, together with a three-pointed individual in the ring used by the defendant or his undergarment business. In this case, the High Court granted the plaintiff's injunction and ruled that any person's duplication of the mark/logo such as Mercedes-Benz will result in the trademark law in India being perverted. The court said, not open to anyone to apply for anything or products.

This is the first case in India where the court prohibited the defendant from using the litigant's well-known trademark only on the basis to steer clear of doubt or deception into a picture. In particular, only a person who uses an identical or similar mark correlating to goods or services same as those for which the original mark is registered may infringe a trademark.

¹² Daimler Benz Aktiegessellschaft & Anr V. Hybo Hindustan, AIR 1994 Delhi 239, 1994 RLR 79 (Delhi High Court, 1994)

Therefore, a manufacturer of 'Surya' shoe polish would not be deemed to infringe the 'Surya' air conditioner label. On the other hand, an air-cooler manufacturer from 'Surya' may be infringing air conditioner mark 'Surya.' The reason is that the infringement test is mostly seen as the "likelihood of confusion test"—"Is it likely that the use of the mark will lead to confusion among the product's consumers? "When the two marks are used in similar companies, doubt is more likely to be caused. Therefore, under common law Passing-off acts are mostly based on misrepresentation and misunderstanding and dilution is *"only a form of harm in transit and contingent on uncertainty or deception determination."*