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

\+ RFA(OS)(COMM) 18/2025, CM APPL. 38556/2025, CM APPL. 38557/2025, CM APPL. 38558/2025 & CM APPL. 38559/2025

RAJASTHAN AUSHDHALAYA PRIVATE LIMITED .....Appellant

Through: Mr. Ashwani Kumar Upadhyay and Mr. Chandra Shekhar, Advs.

versus

HIMALAYA GLOBAL HOLDINGS LTD & ANR. .....Respondents

Through: Mr. J. Sai Deepak, Sr. Adv. with Ms. Suhrita Majumdar, Mr. Vishal Nagpal and Mr. Luv Virmani, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR
HON'BLE MR. JUSTICE AJAY DIGPAUL

JUDGMENT (ORAL)

% 04.07.2025

C. HARI SHANKAR, J.

CM APPL. 38559/2025 (Exemption)

1. Exemption allowed, subject to all just exceptions.

2. The application stands disposed of.

RFA(OS)(COMM) 18/2025, CM APPL. 38556/2025, CM APPL. 38557/2025 & CM APPL. 38558/2025

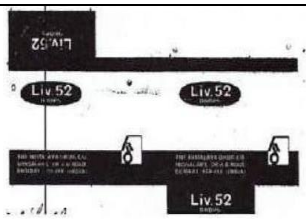
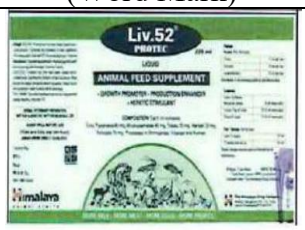
3. CS (Comm) 433/2024[1] stands decreed by the learned Single Judge of this Court on 25 February 2025, in favour of the plaintiff Himalaya Global Holdings Ltd and Himalaya Wellness Company and against the defendants Rajasthan Aushdhalaya Pvt Ltd and Rajasthan Herbal International Pvt Ltd. Aggrieved thereby, the defendants have preferred the present appeal before us, under Section 13-A of the Commercial Courts Act, 2015.

The Plaint

4. The Respondent-plaintiff is a leading global health brand, founded in 1930. One of their flagship brands, with which the present dispute is concerned, is 'Liv.52', a mark under which the respondents has been manufacturing and marketing tablets which act as a liver tonic. Apart from various 'Himalaya' device marks, the respondents are also the registered proprietor of the mark 'Liv.52', in Class 5 for "Medicinal Preparations for the treatment of disorders of the Liver", with effect from 10 July 1957. The Respondents are also the registered proprietor of various 'Liv.52' formative marks, such as 'Liv.52 PROTEC', 'Liv.52 HB' and 'Liv.52 HAEMOTEC'. The Respondents are also the registered proprietor of various device marks, of which 'Liv.52' forms a prominent part. A list of these registrations, as provided in para 19 of the impugned judgment, maybe thus

[1] **Himalaya Global Holdings Ltd & Anr. v Rajasthan Aushdhalaya Pvt Ltd**

reproduced:

Sl. No.	Application No. & Class	Application Date	Trade Mark	Status
1.	180564 in Class 05	10/07/1957	LIV. 52 (Word Mark)	Registered
2.	290061 in Class 05	10/08/1973		Registered
3.	401959 in Class 05	25/02/1983		Registered
4.	839263 in Class 05	01/02/1999	LIV.52 PROTEC (Word Mark)	Registered
5.	1115539 in Class 05	01/07/2002		Registered
6.	1813135 in Class 05	30/04/2009	LIV.52 HB (Word Mark)	Registered
7.	5738547 in Class 05	26/12/2022	Liv.52 HAEMOTEC	Registered

5. The Respondents asserted, in their plaint, that the mark Liv.52 was used for a natural remedy for improving liver function, had been adopted by the predecessors-in-interest of the respondents in 1955, and was in continuous and extensive use ever since. Under the umbrella mark ‘Liv.52’, the respondents were selling the formulation in various forms and preparations, such as Liv.52 Syrup, Liv.52 Tablets, Liv.52 DS Tablets, Liv.52 HB Capsules, Liv.52 Protec Liquid, Liv.52 Furglow Liquid, and the like.

6. The Respondents claim to have come to learn, in January 2024, of several listings of the mark 'Liv-333', as well as the Logo , under which the appellant was selling preparations for liver treatment in capsule and tablet forms, amongst others. A commercial invoice dated 23 April 2015, manifesting use, by the appellant, of the Liv-333 mark, also came to the notice of the respondents. The Respondents, therefore, issued a cease and desist notice to the appellant on 17 January 2024, calling upon the appellant to discontinue use of the mark 'Liv-333'. As the appellant did not discontinue such use, the respondents instituted CS (Comm) 433/2024 before this Court, praying for a decree of permanent injunction, restraining the appellant from using the mark 'Liv-333', or any other mark which was identical or deceptively similar to the 'Liv.52' Mark, registered in favour of the respondents.

Proceedings before the learned Single Judge

7. While issuing summons on 24 May 2024 in CS (Comm) 433/2024, the learned Single Judge granted *ex parte ad interim* injunction, restraining the appellant from using the mark 'Liv-333', or any other mark which was identical or deceptively similar to the respondents registered 'Liv.52' trademark.

8. Despite summons having been issued, the appellant failed to file a written statement within the time granted. By order dated 23 January

2025, the right to file written statement was closed. That order was never challenged by the appellant and, therefore, attained finality. The impugned judgment notes that, though the appellant had sought to contend that they had filed a written statement on 2 August 2024, no such written statement was forthcoming on the record.

9. We may note, here, that this position is not disputed by Mr. Ashiwini Kumar Upadhyay, learned Counsel for the appellant. Mr. Upadhyay submits, however, that the appellant should not be prejudiced owing to the fault of their Counsel to remove objections and ensure that the written statement was placed on record. This, in fact, is one of the principal planks of Mr. Upadhyay's submissions.

10. The right of the appellant to file written statement having been closed, and that order never having been challenged by the appellant, the respondents filed IA 46699/2024 in the suit under Order VIII Rule 10[2] of the CPC[3] , praying that the suit be decreed in terms of the prayers contained therein.

The Impugned Judgment

11. Holding that, in the absence of any written statement, and in view of the fact that the right of the appellant to file written statement stood closed, there was no impediment in proceeding with the suit

[2] **10. Procedure when party fails to present written statement called for by Court**. – Where any party from whom a written statement is required under Rule 1 or Rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up.

[3] Code of Civil Procedure, 1908

under Order VIII Rule 10 of the CPC, the learned Single Judge has, by the impugned judgment dated 25 February 2025,

(i) decreed the suit against the appellant and in favour of the respondents in terms of the prayers contained in paras 69 (a) and (b) of the plaint,

(ii) granted, to the respondents and against the appellant, costs of ₹ 10,91,567/–, and

(iii) awarded damages, to the respondents and against the appellant, of ₹ 20 lakhs, of which ₹ 10 lakhs each was payable by Defendants 1 and 2.

12. The impugned judgment notes, at the outset, that the appellant breached the *ad interim* injunction granted on 24 May 2024, by continuing to sell products under the 'Liv-333' Mark, even after the injunction had been granted. It was only after a contempt petition was filed by the respondents, alleging contempt, by the appellant, of the order dated 24 May 2024, that the appellant discontinued use of the 'Liv-333' mark. Consequent to directions issued by the learned Single Judge in the Contempt Petition, the respondents placed, on record, the number of pieces of the infringing products sold after 24 May 2024, as well as the earnings therefrom. This disclosed that the appellant had earned ₹ 8,64,440/-, by sale of Liv-333 capsules and syrup after 24 May 2024.

13. Proceeding, thereafter, to the merits of the matter, the learned Single Judge holds that there was no question of infringement, by the appellant, of the registered Himalaya mark, by the appellant's

mark, as the two marks were visually, phonetically and structurally different. The submission of the respondents that the marks were similar owing to the use, by the appellant, of the "two leaves" motif, as well as a common green and orange colour combination, was found to lack merit.

14. For the following reasons, however, the learned Single Judge has upheld the allegation of infringement, by use of the 'Liv-333' mark by the appellant, of the registered 'Liv.52' mark of the respondents:

(i) 'Liv' formed the essential feature of the 'Liv.52' Mark. The addition of the number '333' after 'Liv' did not serve to distinguish the appellant's mark from the mark of the respondents. The use of the essential element 'Liv' resulted in a high degree of similarity and likelihood of consumer confusion. The primary and most recognisable component of the marks was identical. For this purpose, the learned Single Judge placed reliance on the decision of a Division Bench of this Court in ***Himalaya Drug Company v S.B.L. Ltd***[4].

(ii) As held by the Supreme Court in ***Cadila Healthcare Ltd v Cadila Pharmaceuticals Ltd***[5], in the case of medicinal products, possibility of confusion could have serious detrimental effect on public health and, therefore, the issue of

[4] **2012 SCC OnLine Del 5701** referred to, hereinafter, as "**Himalaya v SBL**"
[5] **(2001) 5 SCC 73**

deception had to be addressed with greater caution.

(iii) The Appellant's mark 'Liv-333', which involved the word 'Liv' in isolation followed by a number, was nearly identical/deceptively similar to the respondents registered trademark 'Liv.52', of which they enjoyed priority of use.

The relevant paras from the impugned judgment, where these observations and conclusions are to be found, may be reproduced thus:

> 16. However, upon comparison of the plaintiffs' 'Liv.52' mark with the defendants' 'Liv-333' mark, it is evident that the mark LIV forms the essential feature of the plaintiffs' 'Liv.52' mark and the defendants have clearly infringed upon the said mark by adding a numeral '333', that does not sufficiently distinguish their mark from that of the plaintiffs. The use of the term 'LIV' as the essential element in both marks creates a high degree of similarity, leading to a likelihood of confusion among consumers. The mere addition of the numeral '333' does not alter the overall impression of the mark, as the primary and most recognizable component remains identical.
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> 17. Reference may be made to the decision of a Division Bench of this Court in ***Himalaya Drug Co. v. SBL Ltd.***, wherein, the respondent therein was restrained from using the mark LIV as part of its trade mark LIV-T in respect of medicinal preparations. It was held that the use of the expression 'LIV', even in isolation, is an infringement of the prominent feature of the plaintiffs' registered trade mark. The relevant portion of the aforesaid judgment, is reproduced as under:
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> > "*94. The plaintiff in the present case was able to prove that the Liv.52 is still distinctive. The customers purchase the product of the plaintiff by asking Liv.52 which is being used for the last more than 57 years. It has also come in evidence that the mark LIV is the essential feature of the registered trade mark Liv.52.* On the other hand, the defendant was unable to prove that it is a generic word and becomes common to the trade. It is also pertinent to mention here that on one hand, the defendant's entire case is that mark 'LIV' is a generic word and is unprotectable in

law, but on the other hand, the defendant itself applied for registration of 'LIV-T' in the Trade Marks Registry for getting the exclusive right before filing of the written statement, however in written statement word LIV is a generic mark and has become *publici juris*. Therefore, the findings arrived at by the learned Single Judge in relation to Issue 12 are not correct and the same are set aside.

95. *As we have arrived at the finding that the LIV written in isolation is an essential feature of the trade mark Liv.52 and also noticed the rules of comparison which is that the marks are to be compared as whole. Therefore, the presence of the mark LIV which is an essential feature of the mark Liv.52 shall be considered for the purposes of comparison with that of LIV-T.*

96. Following the dictum of ***Cadila Health Care Ltd. v Cadila Pharmaceuticals Ltd***. and tests laid down by the Supreme Court from time to time and also the material available on record, it can be said that *for the purposes of comparison of the mark Liv.52 and LIV-T, the word LIV represented in a particular form cannot be excluded for the purposes of measuring the deceptive resemblance.* This is more so when we have arrived at the finding that there is no sufficient material showing the user of the word LIV written in isolation which establishes the generic nature of the component and there is no also non establishment of material facts leading up to generic nature of the word.

97. Once we arrive at the finding that the Liv.52 mark is conclusive in registration without any challenge as per Section 32, then the conclusion would be that the use of the expression LIV in isolation is an infringement of the prominent feature of the plaintiff's registered trade mark. As the defendant is using the mark LIV in isolation, therefore, the defendant is not entitled to use the same. However, we permit the defendant, if so advised, that the defendant may use the mark containing the expression LIV not written in isolation and is accompanied by suffixes, examples of which are given in the written statement i.e. LIVOGEN, Livpar, Livosin, LIVAPLEX, LIVOFIT, LIVA, LIVOL, LIVDRO, LIVAZOL, LIVERITE, LIVERJET, LIVERNUT, LIVERPOL, LIVUP. At this stage, we wish to recall the submission of the Mr. Hemant Singh, learned counsel that the plaintiff that the plaintiff has no objection if the defendant may use the word LIV along with suffixes which may not be

> visually, phonetically or structurally similar to the trade of the plaintiff."
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> (emphasis supplied)
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> 18. Furthermore, considering that the goods in question are medicinal products, even a minimal degree of confusion can have serious consequences for public health, as mistaken identity of the products may lead to adverse medical effects or improper treatment. Therefore, the risk of deception must be assessed with greater caution, and the defendants' unauthorised use of the impugned mark cannot be permitted, as it creates a likelihood of confusion among consumers, medical practitioners, and pharmacists. (See: ***Cadila Health Care Ltd. v Cadila Pharmaceuticals Ltd***.).
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> *****
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> 20. Accordingly, upon careful consideration of the aforesaid discussion, it is noted that the plaintiff's claim of infringement is well-founded, as the defendants' use of 'Liv-333' is likely to deceive or cause confusion among the members of trade and public. The unauthorised use of the 'LIV' element in a manner that does not materially differentiate the defendants' mark from the plaintiffs' well-established 'Liv.52' mark amounts to a violation of the plaintiffs' statutory rights. This position is further fortified by the aforesaid decision in ***Himalaya Drug Co.***. Thus, it is manifest that the defendants' mark 'Liv-333', with the word 'Liv' appearing in isolation followed by a numeral, is nearly identical/deceptively similar to plaintiffs' registered and prior used trade mark 'Liv.52'.

15. Having thus concluded that a clear case of infringement was made out, the impugned judgment proceeds to hold, relying on the judgment of this Court in ***Impresario Entertainment & Hospitality Pvt Ltd v Mocha Blu Coffee Shop***[6], that Order VIII Rule 10 of the CPC could legitimately be invoked in such a case. It is further noted, in para 24 of the impugned judgment, that as the assertions in the plaint remained unchallenged by way of any written statement, despite adequate opportunity having been granted to the appellant in that

[6] **2018 SCC OnLine Del 12219**

regard, they had to be deemed to be admitted.

16. The impugned judgment thereafter proceeds to the aspect of costs and damages. Relying on the judgment of this Court in ***Microsoft Corporation v Rajendra Pawar***[7], the impugned judgment holds that punitive and exemplary damages could be granted to discourage disobedient parties and hold them accountable for damages and loss caused to other parties by infringement. In view of the appellant's continued and wilful infringement of the respondents' 'Liv.52' Mark, in the teeth of an existing *ad interim* injunction, the impugned judgment deems it appropriate to award compensatory costs and damages. Relying on the aforenoted material, and an affidavit of costs filed by the respondents, stating that costs of ₹ 10,91,567/- had been incurred in pursuing the legal proceedings, the impugned judgment decrees the suit against the appellant and in favour of the respondents. Apart from decreeing the suit in terms of prayers 69 (a) and (b) therein, the impugned judgment awards damages of ₹ 20 lakhs, with each of the defendant/appellant being required to pay ₹ 10 lakhs, along with costs of ₹ 10,91,567/-. Payment of damages and costs have been directed to be made within four months. Prayers 69 (a) and (b) in the suit, we may note, read thus:

> "69. Therefore, there Plaintiff's pray for the following reliefs:
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> a. A decree of permanent injunction restraining the defendants, its directors, employees, officers, servants, agents, manufacturers, sellers, distributors, dealers, stockists and all others acting for and on their behalf from making, selling, distributing, advertising, exporting,

[7] **2007 SCC OnLine Del 1973**

offering for sale, and in any other manner, directly or indirectly, dealing in any goods or goods packaging formats including pouches, sachets, boxes, cartons and containers, bearing the infringing mark 1, i.e. Liv-333 and/or any other mark which is identical and/or deceptively similar to the plaintiffs' registered trademark Liv.52 so as to result in infringement of Plaintiffs' registered trademarks;

b. A decree of permanent injunction restraining the defendants, its directors, employees, officers, servants, agents, manufacturers, sellers, distributors, dealers, stockists and all others acting for and on their behalf from making, selling, distributing, advertising, exporting, offering for sale, and in any other manner, directly or indirectly, dealing in any goods or goods packaging formats including pouches, sachets, boxes, cartons and containers, bearing the infringing mark 1, and/or any other mark which is identical and/or deceptively similar to the plaintiffs' registered trademark Liv.52 so as to result in passing off of Defendants goods as those of the plaintiffs;"

17. The present appeal, under Section 13A of the Commercial Courts Act read with Section 96 of the CPC, assails the aforenoted judgment of the learned Single Judge.

18. We have heard Mr. Upadhyay for the appellant and Mr. Sai Deepak for the respondents.

Rival Contentions

Submissions of Mr. Upadhyay

19. Mr. Upadhyay commenced his submissions by placing reliance on paras 3 and 26 of the judgment of a Division Bench of this Court in

S.B.L. Ltd v The Himalaya Drug Co.[8], which read thus:

> 3. The grievance of the plaintiff is against the use by the defendant of the trade mark LIV-T for its similar product the defendants are also manufacturers and merchants of Homoeopathic pharmaceutical preparations.
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> *****
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> 26. Reverting back to the facts of the case, from the documentary evidence filed we are satisfied that there are about 100 drugs in the market using the abbreviation 'Liv' made out of the word Liver—an organ of the human body, as a constituent of names of medicinal/pharmaceutical preparations with some prefix or suffix—mostly suffixes—meant for treatment or ailments or diseases associated with liver. Liv has thus become a generic term and *publici juris*. It is descriptive in nature and common in usage. Nobody can claim an exclusive right to the use of 'Liv' as a contituent of any trade mark. The class of customers dealing with medicines would distinguish the names of the medicines by ignoring 'Liv' and by assigning weight to the prefix or suffix so as to associate the name with the manufacturer. The possibility of deception or confusion is reduced practically to nil in view of the fact that the medicine will be sold on medical prescription and by licensed dealers well versed in the field and having knowledge of medicines. The two rival marks Liv. 52 and LIV-T contain a common feature Liv which is not only descriptive but also *publici juris*; a customer will tend to ignore the common feature and will pay more attention to uncommon features i.e. 52 and T. The two do not have such phonetic similarity as to make it objectionable."

In this context, Mr. Upadhyay submits that the prefix 'Liv', in 'Liv.52' was merely an abbreviation for 'liver', as the preparation was intended to treat liver ailments. He has drawn our attention to data available on the website of the Registrar of Trade Marks, which indicate that there are several marks which are registered, of which 'Liv' forms a part. 'Liv', therefore, submits Mr. Upadhyay, is *publici juris*, and no one can claim exclusivity, or a monopoly, over the use of 'Liv' as a part of a mark under which preparations for the liver are

[8] **(1997) 67 DLT 803 (DB)**, referred to, hereinafter, as "**SBL v Himalaya**"

dispensed. Mr. Upadhyay submits that it is common, in the pharmaceutical industry, to name the product by including, in the name, the ailment or the part of the body which it is intended to treat and cure. Such marks cannot be injuncted.

20. Moreover, submits Mr. Upadhyay, that there is no visual similarity between the 'Liv.52' and 'Liv-333' marks of the respondents and the appellant respectively. The colour combination of the marks, and their visual appearance, are distinct and different. The respondents' products are dispensed in capsule form, whereas the appellants' products are tablets. There is a wide difference in price between them. The packaging of the products is also different, and there is no likelihood of confusion.

21. The conferment of exclusivity to the respondents, over the 'Liv' prefix, submits Mr. Upadhyay, is contrary to Section 17[9] of the Trade Marks Act, 1999[10] and the principle that exclusivity cannot be claimed over individual parts of a composite mark, which are not separately individually registered under the Trade Marks Act.

22. Besides, submits Mr. Upadhyay, the Trade Marks Act is not a

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[9] **17. Effect of registration of parts of a mark**. –
(1) When a trade mark consists of several matters, its registration shall confer on the proprietor exclusive right to the use of the trade mark taken as a whole.
(2) Notwithstanding anything contained in sub-section (1), when a trade mark—
(a) contains any part—
(i) which is not the subject of a separate application by the proprietor for registration as a trade mark; or
(ii) which is not separately registered by the proprietor as a trade mark; or
(b) 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.

[10] "the Trade Marks Act", hereinafter

statute which is intended to confer monopolies. It has to be implemented in accordance with Article 19(1)(g)[11] of the Constitution of India, which guarantees, to every citizen, the right to carry on any trade, occupation or business. Mr. Upadhyay submits that, if the impugned judgment is to be accepted, no trademark for any liver medication, which comprises 'Liv' with a number, such as 'Liv 25' or 'Liv 100', would be permissible. Such an incongruous outcome, he submits, should not be allowed to result.

23. Mr. Upadhyay further submits that, as the products of the appellant and respondents, sold under the rival marks, are prescription drugs, to be dispensed on the advice of a registered medical practitioner, there is no likelihood of confusion. Both doctors and chemists, he submits, would easily be able to distinguish one formulation from another, and there is no chance of deception.

24. For all these reasons, Mr. Upadhyay submits that the impugned judgment is seriously in error in holding that the 'Liv-333' mark of the appellant infringes the registered 'Liv.52' trade mark of the respondents.

25. Mr. Upadhyay also submits that the learned Single Judge was in error in proceeding on the basis of Order VIII Rule 10 of the CPC. The mere fact that no written statement was on record, he submits,

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[11] **19. Protection of certain rights regarding freedom of speech, etc**. –
(1) All citizens shall have the right—
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(g) to practise any profession, or to carry on any occupation, trade or business.

does not *ipso facto* entitle the court to proceed under Order VIII Rule 10, even before evidence is led, and decree the suit. He relies, for this purpose, on the judgment of the Supreme Court in ***Asma Lateef v Shabbir Ahmad***[12].

Submissions of Mr. Sai Deepak

26. Mr. Sai Deepak, learned Senior Counsel, who appears on advance notice, submits that there is no error in the impugned judgment, and that there is no reasonable explanation for the appellant adopting 'Liv-333' as the mark under which they were manufacturing and selling therapeutic liver preparations, even though the respondents 'Liv.52' was almost a household mark, and had been in the market since 1930. No case for interference with the impugned judgment, he submits, exists.

27. Besides, he submits, the case is fully covered by the judgment of the Division Bench of this Court in ***Himalaya v SBL***. The Division Bench decision in ***SBL v Himalaya***, cited by Mr. Upadhyay, he points out, was rendered in an appeal against an interlocutory order of the learned Single Judge under Order XXXIX Rules 1 and 2 of the CPC and, therefore, expressed only a *prima facie* view. The suit, in which the said interim order had been passed, was finally decreed in favour of SBL Ltd, and the judgment in ***Himalaya v SBL***, on which the impugned judgment relies, was in the appeal against the final judgment and decree in the suit. It is this judgment, therefore, he

[12] **(2024) 4 SCC 696**

submits, which is of binding precedential value, and not the judgment in ***SBL v Himalaya***, cited by Mr. Upadhyay.

28. Apropos costs and damages, Mr. Sai Deepak submits that the damages were awarded on the basis of the sales returns of the appellant, using the impugned 'Liv-333' Mark, after the use of the mark had been injuncted by this Court on 24 May 2024. There can, therefore, be no objection to the computation of damages by the learned Single Judge. Insofar as costs are concerned, Mr. Sai Deepak submits that, given the blatant manner in which the appellant, with impunity, breached the *ad interim* order dated 24 May 2024, and earned substantial revenues thereby, no interference with the direction for costs was justified either.

29. Mr. Sai Deepak, therefore, prays that the appeal be dismissed altogether, and the impugned judgment be upheld in its entirety.

Analysis

30. Having heard learned Counsel and applied ourselves to the material on record, we are not inclined to issue notice in this appeal so far as the injunction against the appellant using the mark 'Liv-333' has been granted. However, insofar as the damages and costs levied on the appellant by the impugned order are concerned, given the fact that it is a money decree, we issue notice on the appeal, returnable on 29 October 2025, and stay the operation of the impugned order only to the extent of the costs and damages awarded in the impugned order,

subject to the appellant depositing the principal amount of damages with the Registry of this Court within a period of eight weeks from today.

31. Insofar as the merits are concerned, we proceed to set out, seriatim, our reasons for refusing to issue notice in the appeal, in the following paragraphs.

A. No absolute prescription against use of 'Liv' as part of the name of any pharmaceutical preparation has been granted by impugned judgment and decree

32. We must note, at the outset, that the impugned judgment and decree do not altogether injunct the use of 'Liv', as a prefix, suffix, or part of the brand name of a pharmaceutical preparation, even if it is for treatment of liver ailments. Mr. Upadhyay's apprehension that the impugned judgment could result in the 'Liv' monosyllable becoming unusable by the rest of the world as any part of the name under which pharmaceutical preparations for liver treatment are manufactured and sold is, therefore, not justified, given the ultimate judgment and decree under challenge. The impugned judgment and decree injunct only the use of the mark 'Liv-333', or any other deceptively similar mark.

33. Inasmuch as the impugned judgment and decree do not permanently injunct use of 'Liv' as a part of any mark, we do not propose to deal with the apprehension, to that effect, expressed by Mr. Upadhyay. We, however, are of the opinion, for reasons which would become presently apparent, that any mark which combines 'Liv' with

a number, with 'Liv' as the prefix and the number as the suffix, and contains nothing else, such as 'Liv 25' or 'Liv 100', to cite the examples cited by Mr. Upadhyay himself, would expressly infringe the registered 'Liv.52' mark of the respondents and would, therefore, be liable to be injuncted, if a cause in that regard is brought before the Court.

B. Dispute is covered by the judgment of the coordinate Division Bench in ***Himalaya v SBL***

34. The passages from ***Himalaya v SBL***, which already stand reproduced *supra*, clearly hold that the use of the prefix 'Liv', for an ayurvedic therapeutic liver preparation, would infringe the mark 'Liv.52'. The Division Bench has, therefore, clearly held that use of 'Liv' as a prefix for an ayurvedic therapeutic liver preparation is not permissible and would amount to infringement.

35. To our knowledge, this decision has not been disturbed in appeal or in any other proceeding. It, therefore, binds us as well as the learned Single Judge, and the learned Single Judge has correctly relied upon the said decision.

C. Judgment in ***SBL v Himalaya***, cited by Mr. Upadhyay has no binding precedential value in view of the judgement in ***Himalaya v. SBL***

36. Apropos the judgment of the Division Bench of this Court in ***SBL v Himalaya***, on which Mr. Upadhyay places reliance, it is clear that the said decision cannot be relied upon in preference to the

judgment in ***Himalaya v SBL***. As Mr. Sai Deepak has pointed out, the decision in ***SBL v Himalaya*** was in an appeal against an interim order passed by the learned Single Judge under Order XXXIX Rules 1 and 2 of the CPC. The views expressed in that decision are, therefore, obviously, only *prima facie.* The suit, in which the interim order which forms subject matter of appeal in ***SBL v Himalaya*** was passed, proceeded to a final decree, and the decision in ***Himalaya v SBL*** is passed in the appeal against the final judgment and decree. Quite obviously, therefore, the views of the Division Bench in ***Himalaya v SBL*** are final views of the Division Bench as opposed to the *prima facie* view expressed in ***SBL v Himalaya***. They, therefore, have necessarily to be accorded precedence over the views expressed in ***SBL v Himalaya***. We, therefore, do not deem it necessary to advert to the specific paragraphs of ***SBL v Himalaya*** to which Mr. Upadhyay made reference.

D. Section 17 of the Trade Marks Act not breached by impugned judgment

37. Mr. Upadhyay also sought to place reliance on Section 17 of the Trade Marks Act, 1999. Section 17 incorporates the principle of anti-dissection, under which it is not permissible to claim exclusivity over any one part of a composite mark unless a separate registration has been obtained in respect of that part. Mr. Upadhyay's contention is that, therefore, no exclusivity could be claimed for 'Liv', as any such claim would violate Section 17.

38. This contention can obviously not be accepted in view of the

judgment of the Division Bench in ***Himalaya v SBL.***

39. The scope and ambit of Section 17 have been addressed, in detail, by a Division Bench of this Court in ***South India Beverages Pvt. Ltd. v General Mills Marketing Inc.***[13]**.** The Division Bench of this Court has held, in the said decision, as under:

> "15. Analysis of composite marks in the cases of trademark infringement pose peculiar problems and has led the Courts to develop the rules of '*anti-dissection*' and identification of '*dominant mark*'.
>
> **The Rule of Anti-Dissection**
>
> 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* [***Fruit of the loom, Inc. v Girouard***[14]; ***Autozone, Inc. v Tandy Corporation***[15]].
>
> *****
>
> **The Identification of 'Dominant Mark'**
>
> 19. Though it bears no reiteration that while a mark is to be considered in entirety, yet it is permissible to accord more or less importance or '*dominance*' to a particular portion or element of a mark in cases of composite marks. Thus, a particular element of a composite mark which enjoys greater prominence vis-à-vis other constituent elements, may be termed as a '*dominant mark*'.
>
> 20. At this juncture it would be apposite to refer to a recent decision of this Court reported as ***Stiefel Laborataries v Ajanta***

[13] **(2015) 61 PTC 231**
[14] **994 F.2d 1359, 1362 (9th Cir. 1993)**
[15] **174 F. Supp. 2d 718, 725 (M.D. Tenn. 2001)**

Pharma Ltd.[16] The Court whilst expounding upon the principle of 'anti-dissection' cited with approval the views of the eminent author on the subject comprised in his authoritative treatise- McCarthy on Trademarks and Unfair Competition. It was observed:

> "41. The anti-dissection rule which is under these circumstances required to be applied in India is really based upon nature of customer. It has been rightly set out in McCarthy on Trademarks and Unfair Competition about the said rule particularly in Para 23.15 which is reproduced hereunder:
>
> 23.15 Comparing Marks : Differences v Similarities
>
> [1] The Anti-Dissection Rule
>
> [a] Compare composites as a Whole : Conflicting composite marks are to be compared by looking at them as a whole, rather than breaking the marks up into their component parts for comparison. This is the "anti dissection" rule. The rationale for the rule is that the commercial impression of a composite trademark on an ordinary prospective buyer is created by the mark as a whole, not by its component parts. However, it is not a violation of the anti-dissection rule to view the component parts of conflicting composite marks as a preliminary step on the way to an ultimate determination of probable customer reaction to the conflicting composites as a whole. Thus, conflicting marks must be compared in their entireties. A mark should not be dissected or split up into its component parts and each part then compared with corresponding parts of the conflicting mark to determine the likelihood of confusion. It is the impression that the mark as a whole creates on the average reasonably prudent buyer and not the parts thereof, that is important. As the Supreme Court observed:"The commercial impression of a trademark is derived from it as a whole, not from its elements separated

[16] **211 (2014) DLT 296**

and considered in detail. For this reason it should be considered in its entirety." The anti-dissection rule is based upon a common sense observation of customer behavior : the typical shopper does not retain all of the individual details of a composite mark in his or her mind, but retains only an overall, general impression created by the composite as a whole. It is the overall impression created by the mark from the ordinary shopper's cursory observation in the marketplace that will or will not lead to a likelihood of confusion, not the impression created from a meticulous comparison as expressed in carefully weighed analysis in legal briefs. In litigation over the alleged similarity of marks, the owner will emphasize the similarities and the alleged infringer will emphasize the differences. The point is that the two marks should not be examined with a microscope to find the differences, for this is not the way the average purchaser views the marks. To the average buyer, the points of similarity are more important that minor points of difference. A court should not engage in "technical gymnastics" in an attempt to find some minor differences between conflicting marks.

However, where there are both similarities and differences in the marks, there must be weighed against one another to see which predominate.

The rationale of the anti-dissection rule is based upon this assumption:"An average purchaser does not retain all the details of a mark, but rather the mental impression of the mark creates in its totality. It has been held to be a violation of the anti-dissection rule to focus upon the "prominent" feature of a mark and decide likely confusion solely upon that feature, ignoring all other elements of the mark. Similarly, it is improper to find that one portion of a composite mark has no trademark

> significance, leading to a direct comparison between only that which remains."
>
> 21. The view of the author makes it scintillatingly clear, beyond pale of doubt, that the principle of '*anti dissection*' does not impose an absolute embargo upon the consideration of the constituent elements of a composite mark. The said elements may be viewed as a *preliminary step* on the way to an ultimate determination of probable customer reaction to the conflicting composites as a whole. Thus, the principle of '*anti-dissection*' and identification of '*dominant mark*' are not antithetical to one another and if viewed in a holistic perspective, the said principles rather compliment each other.
>
> *****
>
> 23. It is also settled that while a trademark is supposed to be looked at in entirety, yet the *consideration of a trademark as a whole does not condone infringement where less than the entire trademark is appropriated*. It is therefore not improper to identify elements or features of the marks that are more or less important for purpose of analysis in cases of composite marks.
>
> *****
>
> 26. Dominant features are significant because they attract attention and consumers are more likely to remember and rely on them for purposes of identification of the product. Usually, the dominant portion of a mark is that which has the greater strength or carries more weight. Descriptive or generic components, having little or no source identifying significance, are generally less significant in the analysis. However, words that are arbitrary and distinct possess greater strength and are thus accorded greater protection.[***Autozone, Inc. v Tandy Corporation***]"

40. Thus, the anti-dissection rule contained in Section 17 is subject to the dominant part test. The decision of the Division Bench in ***Himalaya v SBL*** has categorically held that the dominant part of the mark 'Liv.52' is 'Liv'. Once the dominant part of the 'Liv.52' is 'Liv', the use of 'Liv' as a prefix as correctly been held by the Division Bench not to be permissible and, therefore, given the judgment in ***South India Beverages***, Section 17 cannot come to the

aid of the appellant.

E. Re. plea that the mark Liv.52 is generic

41. When seen as a whole mark, it is obvious to us that 'Liv.52' cannot be regarded as generic in any sense of the word. The combination of 'Liv' with a number is, quite obviously, unique to 'Liv.52', and was coined by the respondents. The plaint, as filed before the learned Single Judge, sought to explain the origin of the mark 'Liv.52' as a combination of 'Liv' as an abbreviation for 'liver' and '52' as representing the year in which the mark was coined. Irrespective of the merits of the explanation, it is clear that 'Liv.52', as a whole mark, is not generic, but is clearly a coined and invented mark. Owing to its nature, and the reputation that it has garnered over a period of time, it is clear that a consumer of average intelligence and imperfect recollection – or even of average intelligence and perfect recollection, for that matter – and who is aware of the mark 'Liv.52' and the preparation which is manufactured and dispensed under the said mark would, on coming across the mark 'Liv-333', immediately presume an association between the marks and, perhaps, that 'Liv-333' is another formulation by the manufacturers of 'Liv.52'. The presumption of an association between the marks is, in our opinion, inevitable, and is directly attributable to the adoption, by the appellant, of a mark which is as proximate to 'Liv.52', as 'Liv-333'.

F. Infringement clear upon a comparison of the rival marks as whole marks – Not to be placed side-by-side – Initial interest confusion test

42. Even otherwise, if one were to compare the two marks as whole marks, a clear case of infringement within the meaning of Section 29(2)(b)[17] of the Trade Marks Act is, in our view, made out. Infringement does not merely take place where there is a case of likelihood of confusion. If, owing to the similarity between the marks and the identity or similarity of the goods or services in respect of which the rival marks are used, there is even a likelihood of presumption of association between the marks, that itself would suffice to constitute infringement under Section 29(2)(b).

43. It is also well-settled that the issue of infringement has to be addressed by applying the initial interest confusion test. A Division Bench of this Court recently stated thus, of the initial interest confusion test, in ***Under Armour Inc v Anish Agrawal***[18]:

> "The Initial Interest Confusion Test recognizes that confusion in the minds of the customers arises only at the stage prior to consummating the purchase. However, at the time of completing the transaction, there is no doubt in the customer's mind regarding the origin of the goods. The confusion, albeit limited to the initial stage, is sufficient to satisfy the condition of deceptive similarity as contemplated in Section 29 of the TM Act."

The Division Bench, in this decision, approved the following enunciation of the "initial interest confusion test", by one of us (C.

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[17] (2) A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which because of—

*****

(b) its similarity to the registered trade mark and the identity or similarity of the goods or services covered by such registered trade mark; or

*****

is likely to cause confusion on the part of the public, or which is likely to have an association with the registered trade mark.

[18] **2025 SCC OnLine Del 3784**

Hari Shankar J) in ***Under Armour Inc. v Aditya Birla Fashion & Retail Ltd***[19]:

> "(v) Besides, the matter has to be examined from the point of view of initial interest confusion. It has to be examined from the point of view of a customer of average intelligence and imperfect recollection who, after having come across the goods bearing the plaintiff's mark, comes across the mark of the defendant at a somewhat later point of time. The question that is to be asked is whether, in such a situation, the customer of average intelligence and imperfect recollection is likely to be placed in a state of wonderment as to whether the mark is the same as that one he had earlier seen, or whether the mark which is before him bears an association to the mark that he had seen earlier. If such a feeling arises *when the customer initially views the defendants' mark* - having seen the plaintiff's some time earlier - that feeling, by itself, suffices to make out a case of infringement. The *initial impression* is what, fundamentally, matters."

The marks are, further, not to be placed side by side. In ***Parle Products (P) Ltd v J.P. & Co.***[20], the Supreme Court held:

> "9. It is, therefore, clear that in order to come to the conclusion whether one mark is deceptively similar to another, the broad and essential features of the two are to be considered. *They should not be placed side by side to find out if there are any differences in the design and if so, whether they are of such character as to prevent one design from being mistaken for the other. It would be enough if the impugned mark bears such an overall similarity to the registered mark as would be likely to mislead a person usually dealing with one to accept the other if offered to him*."
>
> (Emphasis supplied)

The definitive test is the impression that the mark of the defendant would *immediately* convey (hence the moniker "initial interest confusion"), *on a consumer of average intelligence and imperfect recollection*[21] *coming across it after having seen the plaintiff's mark*

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[19] **(2023) 300 DLT 573**
[20] **(1972) 1 SCC 618**
[21] Refer **Amritdhara Pharmacy v Satya Deo Gupta, AIR 1963 SC 449, Cadila Healthcare, Satyam**

some time earlier. If, at this *initial interest* stage, such a consumer is *placed in a state of wonderment*[22] *as to whether the mark of the plaintiff, which he had seen earlier*, *was the same, or whether there may be an association between them,* infringement, *ipso facto*, takes place.

44. Further, Section 29(9)[23] of the Trade Marks Act provides that, where the distinctive element of the plaintiff trademark consists of, or constitutes, words, the spoken use of those words would also constitute use of the mark for the purposes of infringement under Section 29. By this token, and applying the "initial interest confusion" principle, if the spoken use of the mark 'Liv-333' is likely to lead a consumer of average intelligence and imperfect recollection, on immediately hearing the spoken word, to presume an association between the mark and 'Liv.52', that would suffice to constitute infringement. To our mind, it is obvious that, if someone were to state that he has been prescribed 'Liv-333', for a liver ailment, at the initial interest stage, the immediate impression that this would convey to a person who receives the information, and is aware of the pre-existing 'Liv.52' product of the respondents, is that the prescribed 'Liv-333' must have some association with 'Liv.52'.

45. This likelihood of a presumption of association is also sufficient to constitute infringement within the meaning of Section 29(2)(b).

Infoway Ltd v Siffynet Solutions Pvt Ltd, (2004) 6 SCC 145

[22] Refer **Shree Nath Heritage Liquor Pvt Ltd v Allied Blender & Distillers Pvt Ltd, 221 (2015) DLT 359**

[23] (9) Where the 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 reference in this section to the use of a mark shall be construed accordingly.

46. Besides, Courts cannot turn their eyes away from reality. Though Mr. Upadhyay sought to contend that 'Liv.52' is a prescription drug, no material to that effect is placed on record. To our understanding and knowledge, one does not need a prescription to visit a chemist and obtain a box of 'Liv.52'. It is an Ayurvedic preparation, which is generally dispensed over the counter. The perception of the consumer of average intelligence and imperfect recollection is also, therefore, a relevant. To a consumer of imperfect recollection, who may have earlier come across the respondents' 'Liv.52', there is every likelihood of confusion, when such a consumer later encounters the appellant's 'Liv-333'.

47. In fact, we are also sanguine that the adoption, by the appellant, of the two-leaf symbol, forming an integral part of the respondents' Himalaya logo, in their Rajasthan Herbal International Pvt. Ltd. logo, is nothing but an overt attempt to exacerbate the possibility of confusion in the mind of the consumer. Though there may be a mild difference in the shading, the possibility of confusion is also enhanced by the use, by the appellant, of a green-and-white colour scheme. Every consumer who has earlier purchased, or come across 'Liv.52' need not be consciously aware of the fact that the respondents are the manufacturers of the product. If he were to recollect the manufacturers' logo, not by name, but by its generalised features of the colour scheme and the two-leaf motif, the possibility of confusion gets enhanced. Such a confused consumer may well mistake 'Liv-333' for 'Liv.52'.

48. Section 29(2)(b) would, therefore, apply, not only on the touchstone of likelihood of association, but also by applying the principle of likelihood of confusion.

49. In this context, the impugned judgment also correctly relies on the decision of the Supreme Court in ***Cadila Pharmaceuticals***, in which the Supreme Court has clearly held that, while dealing with cases of alleged infringement in pharmaceutical products, Courts have to be additionally cautious, and that the standard of similarity, required to make out a case of infringement, would be proportionately lesser, so as to ensure that there is no possibility, even remote, of one drug being prescribed, dispensed or even purchased, mistaking it to be another. Public health considerations weigh in the bargain, and the approach has, therefore, to be one of near zero tolerance.

G. Re. Differences in physical appearance, manner in which the formulation is dispensed, price, etc.

50. The reliance, by Mr. Upadhyay, on the fact that 'Liv.52' is sold in tablets, whereas 'Liv-333' is sold in capsules, they are widely differing in prices, there is no resemblance in the physical packaging in which the preparations are sold, and the like, are of no relevance while examining the claim of the respondents regarding infringement. These are considerations which may be of some relevance if the Court were to examine the case from the point of view of passing off. A claim of infringement has to be examined merely by a mark-to-mark comparison, inasmuch as the tort of infringement is an injury to the

mark and not, unlike passing off, an attempt to make the public believe the goods or services of the defendant to be those of the plaintiff. Even if the two marks are phonetically similar, a case of infringement is made out. Phonetic similarity may be assessed even by the manner in which the marks are spoken in common parlance. "Added features", such as the visual dissimilarity between the marks, difference in packaging, difference in price, and the like, therefore, are of no relevance to a claim of infringement.

51. The position in law, in this regard, was expounded as far back as in 1964, by the Supreme Court in ***Kaviraj Pandit Durga Dutt Sharma v Navaratna Pharmaceutical Laboratories***[24], in the following passages:

> "28. The other ground of objection that the findings are inconsistent really proceeds on an error in appreciating the basic differences between the causes of action and right to relief in suits for passing off and for infringement of a registered trade mark and in equating the essentials of a passing off action with those in respect of an action complaining of an infringement of a registered trade mark. We have already pointed out that the suit by the respondent complained both of an invasion of a statutory right under Section 21 in respect of a registered trade mark and also of a passing off by the use of the same mark. *The finding in favour of the appellant to which the learned counsel drew our attention was based upon dissimilarity of the packing in which the goods of the two parties were vended, the difference in the physical appearance of the two packets by reason of the variation in the colour and other features and their general get-up together with the circumstance that the name and address of the manufactory of the appellant was prominently displayed on his packets and these features were all set out for negativing the respondent's claim that the appellant had passed off his goods as those of the respondent. <u>These matters which are of the essence of the cause of action for relief on the ground of passing off play but a limited role in an action for infringement of a registered trade mark by the registered proprietor who has a statutory right to that mark and who has a</u>*

[24] **AIR 1965 SC 980**

statutory remedy for the event of the use by another of that mark or a colourable imitation thereof. While an action for passing off is a Common Law remedy being in substance an action for deceit, that is, a passing off by a person of his own goods as those of another, that is not the gist of an action for infringement. *The action for infringement is a statutory remedy conferred on the registered proprietor of a registered trade mark for the vindication of the exclusive right to the use of the trade mark in relation to those goods*" (Vide Section 21[25] of the Act[26]). The use by the defendant of the trade mark of the plaintiff is not essential in an action for passing off, but is the sine qua non in the case of an action for infringement. No doubt, where the evidence in respect of passing off consists merely of the colourable use of a registered trade mark, the essential features of both the actions might coincide in the sense that what would be a colourable imitation of a trade mark in a passing off action would also be such in an action for infringement of the same trade mark. But there the correspondence between the two ceases. In an action for infringement, the plaintiff must, no doubt, make out that the use of the defendant's mark is likely to deceive, but *where the similarity between the plaintiff's and the defendant's mark is so close either visually, phonetically or otherwise and the court reaches the conclusion that there is an imitation, no further evidence is required to establish that the plaintiff's rights are violated.* Expressed in another way, *if the essential features of the trade mark of the plaintiff have been adopted by the defendant, the fact that the get-up, packing and other writing or marks on the goods or on the packets in which he offers his goods for sale show marked differences, or indicate clearly a trade origin different from that of the registered proprietor of the mark would be immaterial; whereas in the case of passing off, the defendant may escape liability if he can show that the added matter is sufficient to distinguish his goods from those of the plaintiff.*

29. When once the use by the defendant of the mark which is claimed to infringe the plaintiff's mark is shown to be "in the

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[25] **21. Right conferred by registration** –
(1) Subject to the provisions of Sections 22, 25 and 26, the registration of a person in the register as proprietor of a trade mark in respect of any goods shall, if valid, give to that person the exclusive right to the use of the trade mark in relation to those goods and, without prejudice to the generality of the foregoing provision, that right shall be deemed to be infringed by any person who, not being the proprietor of the trade mark or a registered user thereof using by way of the permitted use, uses a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion, in the course of trade, in relation to any goods in respect of which it is registered, and in such manner as to render the use of the mark likely to be taken either—
(a) as being used as a trade mark; or
(b) to import a reference to some person having the right either as a proprietor or as registered user to use the trade mark or to goods with which such a person as aforesaid is connected in the course of trade.

[26] The Trade Marks Act, 1940

course of trade", *the question whether there has been an infringement is to be decided by comparison of the two marks. Where the two marks are identical no further questions arise; for then the infringement is made out. When the two marks are not identical, the plaintiff would have to establish that the mark used by the defendant so nearly resembles the plaintiff's registered trade mark as is likely to deceive or cause confusion and in relation to goods in respect of which it is registered* (Vide Section 21). A point has sometimes been raised as to whether the words "or cause confusion" introduce any element which is not already covered by the words "likely to deceive" and it has sometimes been answered by saying that it is merely an extension of the earlier test and does not add very materially to the concept indicated by the earlier words "likely to deceive". But this apart, as the question arises in an action for infringement the onus would be on the plaintiff to establish that the trade mark used by the defendant in the course of trade in the goods in respect of which his mark is registered, is deceptively similar. *This has necessarily to be ascertained by a comparison of the two marks* — the degree of resemblance which is necessary to exist to cause deception not being capable of definition by laying down objective standards. The persons who would be deceived are, of course, the purchasers of the goods and it is the likelihood of their being deceived that is the subject of consideration. *The resemblance may be phonetic, visual or in the basic idea represented by the plaintiff's mark. The purpose of the comparison is for determining whether the essential features of the plaintiff's trade mark are to be found in that used by the defendant.* The identification of the essential features of the mark is in essence a question of fact and depends on the judgment of the Court based on the evidence led before it as regards the usage of the trade. It should, however, be borne in mind that *the object of the enquiry in ultimate analysis is whether the mark used by the defendant as a whole is deceptively similar to that of the registered mark of the plaintiff*."

(Emphasis supplied)

52. Infringement is, therefore, decided on the basis of a mark-to-mark comparison. "Added matter", in the form of visual dissimilarities between the marks as they are actually used on the goods on which they are affixed, the packaging of the products for which the marks are used and difference in price between the products of the plaintiff and defendant are not relevant considerations, while

examining a claim of infringement. They, however, are of relevance if the Court is considering a claim of passing off.

53. The afore-extracted passages from ***Kaviraj Pandit Durga Dutt Sharma***, therefore, conclusively establish the submissions of Mr. Upadhyay, predicated on the visual dissimilarities between the 'Liv.52' and 'Liv-333' marks, the difference in the price of the products, the manner in which the products are packed and the fact that one may be dispensed in capsule form and the other in tablet form, to be misguided.

54. Besides, this aspect, even on merits, is covered against the appellant by the judgment of the Supreme Court in ***K.R. Chinna Krishna Chettiar v Shri Ambal & Co.***[27] in which the Supreme Court was concerned with two marks which were radically visually different from each other. Even in such a situation, the Supreme Court held that as the dominant part of each of the marks was the word 'Ambal' in one case and 'Andal' in the other, and the words were phonetically similar, a case of infringement as well as passing of was made out. The complete visual dissimilarity between the marks – which the Supreme Court emphasizes in the judgment – was held to make no difference.

55. For this reason too, the factors which Mr. Upadhyay relies on cannot come to the aid of his client.

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[27] **(1969) 2 SCC 131**

H. Re. proliferation of 'LIV' marks in the Register of Trade Marks – irrelevant

56. Mr. Upadhyay also sought to submit that there was a proliferation of marks, registered with the Registrar of Trade Marks, of which 'Liv' is a part. He has drawn our attention to a computer-generated Trade Mark Search Report from the website of the Registrar of Trade Marks, which refers to marks such as 'LIVOGEN', 'LIVADEX', 'LIVOTONE', 'NEO-LIVACON', and the like. These marks, according to Mr. Upadhyay, indicate that there are several registered trademarks, of which 'Liv' is a part, and which are used for pharmaceutical preparations. 'Liv', as a part of marks used for pharmaceutical preparations is, therefore, according to him, common to the trade and, therefore, cannot be monopolised by anyone, including the respondents.

57. The proscription against any claim of exclusivity, in respect of parts of a registered trademark, which is common to the trade, is contained in Section 17(2)(b)[28] of the Trade Marks Act, which provides, *inter alia*, that, when a trademark contains any matter which is common to the trade, the registration of the trademark shall not confer any exclusive right, on its proprietor, on the matter forming the said part of the trademark. In other words, briefly put, the proprietor of the trademark cannot claim exclusivity over a part of the mark which is common to the trade.

58. Inasmuch as, in the present case, the impugned judgment of the

[28] See Footnote 9

learned Single Judge has *not* granted exclusivity, to the respondents, over 'Liv' per se, as a part of a trademark under which pharmaceutical preparations are manufactured and sold, no occasion really arises to consider this submission of Mr. Upadhyay. Even if, for the sake of argument, 'Liv' were to be regarded as common to the trade in the pharmaceutical industry, Section 17(2)(b) of the Trade Marks Act would only proscribe any claim to exclusivity over 'Liv' as a part of the mark under which pharmaceutical preparations are manufactured or sold. The impugned judgment does not uphold any such claim to exclusivity over 'Liv' as a part of any mark, whether for use in pharmaceuticals or otherwise.

59. Even otherwise, legally, Mr. Upadhyay's submission is untenable. A plea, almost identical to that raised by Mr. Upadhyay before us, was raised before another Division Bench of this Court in ***Pankaj Goel v Dabur India Ltd***[29]. The rival marks before the Court, in that case, were HAJMOLA and RASMOLA. The defendant sought to urge that the common suffix 'MOLA' was *publici juris* and common to the trade and, inasmuch as the only similarity between the rival marks was this common MOLA suffix, no case of deceptive similarity could be said to exist. Addressing this submission, the Division Bench held thus:

> "21. *As far as the appellant's argument that the word MOLA is common to the trade and that variants of MOLA are available in the market, we find that the appellant has not been able to prima facie prove that the said 'infringers' had significant business turnover or they posed a threat to Plaintiff's distinctiveness.* In fact, we are of the view that the respondent/Plaintiff is not expected to sue all small type infringers who may not be affecting

[29] **(2008) 38 PTC 49 (DB)**

Respondent/Plaintiff business. The Supreme Court in ***National Bell v Metal Goods***[30], has held that a proprietor of a trademark need not take action against infringement which do not cause prejudice to its distinctiveness. In ***Express Bottlers Services Pvt. Ltd. v Pepsi Inc***.[31], it has been held as under:—

> "….To establish the plea of common use, the use by other persons should be shown to be substantial. In the present case, there is no evidence regarding the extent of the trade carried on by the alleged infringers or their respective position in the trade. If the proprietor of the mark is expected to pursue each and every insignificant infringer to save his mark, the business will come to a standstill. Because there may be occasion when the malicious persons, just to harass the proprietor may use his mark by way of pinpricks…. The mere use of the name is irrelevant because a registered proprietor is not expected to go on filing suits or proceedings against infringers who are of no consequence… Mere delay in taking action against the infringers is not sufficient to hold that the registered proprietor has lost the mark intentionally unless it is positively proved that delay was due to intentional abandonment of the right over the registered mark. This Court is inclined to accept the submissions of the respondent No. 1 on this point… The respondent No. 1 did not lose its mark by not proceeding against insignificant infringers…"

22. In fact, in ***Dr. Reddy Laboratories v Reddy Paharmaceuticals***[32], a Single Judge of this Court has held as under:—

> "…the owners of trade marks or copy rights are not expected to run after every infringer and thereby remain involved in litigation at the cost of their business time. If the impugned infringement is too trivial or insignificant and is not capable of harming their business interests, they may overlook and ignore petty violations till they assume alarming proportions. If a road side Dhaba puts up a board of "Taj Hotel", the owners of Taj Group are not expected to swing into action and raise objections forthwith. They can wait till the time the user of their name starts harming their business interest and starts misleading and confusing their customers." "

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[30] **(1970) 3 SCC 665**
[31] **(1989) 7 PTC 14**
[32] **(2004) 29 PTC 435**

60. Two legal postulates emerge from these passages.

61. The first is that the mere fact that the plaintiff's asserted mark may have been infringed by others as well is no ground to deny an injunction against the defendant, where the defendant is also found to be an infringer. This is for the simple reason that it is for the plaintiff to choose his defendant, and there is no legal obligation on a Plaintiff to sue every infringer. The Plaintiff is not answerable as to why it has not proceeded against another infringer. There may be several reasons. It is, for example, quite possible that the other infringer is too small a player as to pose any threat to the plaintiff or its trademark and that, therefore, it makes no commercial sense to proceed against it. Thus, a defendant cannot escape the consequences of infringement merely by pleading that there are other infringers in the market.

62. The second legal postulate which emerges from the decision in ***Pankaj Goel*** is that a mark or a part of a mark, cannot be pleaded to be common to the trade by merely providing examples of registrations existing on the Register of the Registrar of Trade Marks, which may be identical or similar to the plaintiff mark. The expression contained in Section 17(2)(b) is "common to the trade". The defendant, in order to seek sanctuary behind this clause, would have to establish that the mark being used by him, and which is alleged by the plaintiff to be infringing in nature, has become common *to the trade in which that mark is used by the defendant*. In other words, it would have to be shown, by the defendant, that the examples of usage of the same mark, by others, is because, *in the trade* – and not merely *on the Register of*

Trade Marks – the user of that mark has become common. ***Pankaj Goel*** makes it clear that, for this, the defendant would have to establish that the other infringers had significant business turnover or posed a threat to the distinctiveness of the plaintiff's asserted trade mark. Mere reference to registrations, present on the Register of the Registrar of Trade Marks, are entirely insufficient in this regard. These registrations do not even indicate actual user of the registered marks. The defendant would have to show not only that the registered marks are being used, but that the user is significant and poses a business threat to the plaintiff's asserted registered trademark. Empirical data in this regard has to be produced by the defendant, failing which the plea that the mark, or the part of the mark which, according to the defendant, has become common to the trade, must fail.

63. Moreover, the registration, by the respondents, of the mark 'Liv.52', dates back to 10 July 1957. Given the reputation that the mark has amassed over time, there is every likelihood of other infringers having themselves adopted identical, or similar, marks, to capitalize on the respondents' goodwill and reputation. The mere fact that other infringers are also coexisting cannot, quite obviously, provide a license to the appellant, to infringe.

64. One of us (C. Hari Shankar J.) has, in ***Under Armour Inc. v Aditya Birla Fashion & Retail Ltd*** *(supra)*, examined the concept of a or part of a mark, becoming "common to the trade" in the backdrop of the decisions in Pankaj Goel and ***Glaxosmithkline Pharmaceuticals***

Ltd v Horizon Bioceuticals Pvt Ltd[33] and has concluded that "mere citing of a multitude of marks, which are available on the register of trademarks and which include, as a part or as the whole, of 'ARMOUR' cannot make out a case of the marks asserted in the present case, or even part thereof, being common to the trade".

65. The defence of Mr. Upadhyay, predicated on the submission that 'Liv' was common to the trade has, therefore, to fail.

I. Re. Invocation of Order VIII Rule 10 of the CPC

66. Mr. Upadhyay also placed reliance on the judgment of the Supreme Court in ***Asma Lateef***, which dealt with the circumstances in which a suit would be decreed under Order VIII Rule 10 of the CPC. In the present case, however, this judgment cannot come to the aid of the appellant. The learned Single Judge has decreed the suit under Order XIIIA Rule 3[34] of the CPC as amended by the Commercial Courts Act, 2015. She has placed reliance in this context on the following passages from the judgment of this Court in ***Impresario Entertainment & Hospitality Pvt. Ltd. v Mocha Blu Coffee Shop***[35]:

> "6. This Court while dealing with a similar application under Order VIII Rule 10 CPC in CS (OS) 873/2015 ***Samsung Electronics Company Limited v Mohammed Zaheeer Trading As***

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[33] **(2023) 95 PTC 1**

[34] **3. Grounds for summary judgment**. – The court may give a summary judgment against a plaintiff or defendant on a claim if it considers that—

(a) the plaintiff has no real prospect of succeeding on the claim or the defendant has no real prospect of successfully defending the claim, as the case may be; and

(b) there is no other compelling reason why the claim should not be disposed of before recording of oral evidence.

[35] **2018 SCC OnLine Del 12219**

Gujarat Mobiles[36] has culled out the relevant law as under:—

> "10. The Supreme Court in ***C. N. Ramappa Gowda v C. C. Chandregowda***[37], has interpreted the Order VIII Rule 10 CPC as under:—
>
> > "25. We find sufficient assistance from the apt observations of this Court extracted hereinabove which has held that the effect [Ed.: It would seem that it is the purpose of the procedure contemplated under Order 8 Rule 10 CPC upon non-filing of the written statement to expedite the trial and not penalise the defendant.] of non-filing of the written statement and proceeding to try the suit is clearly to expedite the disposal of the suit and is not penal in nature wherein the defendant has to be penalised for non-filing of the written statement by trying the suit in a mechanical manner by passing a decree. We wish to reiterate that in a case where written statement has not been filed, the court should be a little more cautious in proceeding under Order 8 Rule 10 CPC and before passing a judgment, it must ensure that even if the facts set out in the plaint are treated to have been admitted, a judgment and decree could not possibly be passed without requiring him to prove the facts pleaded in the plaint.
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> > 26. It is only when the court for recorded reasons is fully satisfied that there is no fact which needs to be proved at the instance of the plaintiff in view of the deemed admission by the defendant, the court can conveniently pass a judgment and decree against the defendant who has not filed the written statement. But, if the plaint itself indicates that there are disputed questions of fact involved in the case arising from the plaint itself giving rise to two versions, it would not be safe for the court to record an ex parte judgment without directing the plaintiff to prove the facts so as to settle the factual controversy. In that event, the ex parte judgment although may appear to have decided the suit expeditiously, it ultimately gives rise to several layers of appeal after appeal which ultimately compounds the delay in finally disposing of the suit

[36] **2017 SCC OnLine Del 9317**
[37] **(2012) 5 SCC 265**

giving rise to multiplicity of proceedings which hardly promotes the cause of speedy trial."

11. A Coordinate Bench of this Court in ***Nirog Pharma Pvt. Ltd. v Umesh Gupta***[38], has held as under:—

> "11. Order VIII Rule 10 has been inserted by the legislature to expedite the process of justice. The courts can invoke its provisions to curb dilatory tactic, often resorted to by defendants, by not filing the written statement by pronouncing judgment against it. At the same time, the courts must be cautious and judge the contents of the plaint and documents on record as being of an unimpeachable character, not requiring any evidence to be led to prove its contents.
>
> *****
>
> 28. The present suit is also a commercial suit within the definition of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 and it was the clear intention of the legislature that such cases should be decided expeditiously and should not be allowed to linger on. Accordingly, if the defendant fails to peruse his case or does so in a lackadaisical manner by not filing his written statement, the courts should invoke the provisions of Order VIII Rule 10 to decree such cases."

12. Another Coordinate Bench of this Court in ***Satya Infrastructure Ltd. v Satya Infra & Estates Pvt. Ltd.***[39], has held as under:—

> "4. I am of the opinion that no purpose will be served in such cases by directing the plaintiffs to lead ex parte evidence in the form of affidavit by way of examination-in chief and which invariably is a repetition of the contents of the plaint. The plaint otherwise, as per the amended CPC, besides being verified, is also supported by affidavits of the plaintiffs. I fail to fathom any reason for according any additional sanctity to the affidavit by way of examination-in-chief than to the affidavit in support

[38] **235 (2016) DLT 354**
[39] **2013 III AD (Delhi) 176**

> of the plaint or to any exhibit marks being put on the documents which have been filed by the plaintiffs and are already on record…"

67. Though Mr. Upadhyay submits that the appellant should not be penalised for the fact that his client's Counsel did not clear the objections in the written statement filed by way of response to the suit, much had transpired even after that stage before the impugned order was passed. Not only were the objections in the written statement not cleared despite grant of sufficient opportunities; a judicial order was passed, closing the right to file written statement. That order was also never challenged by the appellant. It is too late in the day, therefore, today for the appellant to raise the contention that his Counsel was remiss in failing to clear objections.

68. Even otherwise, it is well settled that, in a matter of trademark infringement, where the comparison is on a word mark to word mark basis, it is the judge's perception which matters, and it is not a matter to be decided by leading of evidence.

69. We have given a complete audience to Mr. Upadhyay and we have seen the impugned order in the light of the law that exists in that regard. We do not find that even on merits any error is contained in the impugned judgment of the learned Single Judge.

J. Dishonest adoption

70. We, in fact, are of the view that the adoption, by the appellant,

of a mark which was a portmanteau of 'Liv' as an abbreviation for liver and a number thereafter, cannot be treated as innocent. The obvious intent appears to have been to come close to the mark 'Liv.52' which was being used by the respondent.

71. In such a case, the principles in ***Munday v Carey***[40] and ***Slazenger & Sons v Feltham & Co***[41], which have been adopted with approval by countless decisions in this country, would also apply. The relevant retracts from the said decisions may be reproduced thus:

> ***Munday v Carey***
>
> "…Where you see dishonesty, then even though the similarity were less than it is here, you ought, I think, to pay great attention to the items of similarity, and less to the items of dissimilarity."
>
> ***Slazenger***
>
> "One must exercise one's common sense, and, if you are driven to the conclusion that what is intended to be done is to deceive if possible, I do not think it is stretching the imagination very much to credit the man with occasional success or possible success. Why should we be astute to say that he cannot succeed in doing that which he is straining every nerve to do?"

72. In ***Munday***, it has been held, in cases of dishonest imitation or copying, that the Court has to concentrate on the points of similarity between the rival marks, rather than points of dissimilarity. Where there is a clear and dishonest intention to adopt a mark which is imitative of an existing mark of another, with intent to deceive, the decision in ***Slazenger*** holds that the Court must presume that the

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[40] **(1905) 22 RPC 273**
[41] **(1889) 6 RPC 531**

attempt at deception, practiced by the defendant, succeeds.

K. Re. Article 19(1)(g) of the Constitution

73. Mr. Upadhyay's reliance on Article 19(1)(g) of the Constitution of India, which is more a residuary argument than anything else, is obviously misconceived. Article 19(1)(g) certainly does not entitle anyone to, while carrying on its business or profession, do so by infringing the registered trademark of another. No more deserves to be said on this issue.

L. The sequitur

74. In view of the aforesaid, we do not feel that a case for issuance of notice on the appeal insofar as the impugned judgment injuncts the appellant from use of the mark 'Liv-333' is concerned. We, therefore, affirm and uphold the impugned judgment to that extent.

75. The present appeal, therefore, insofar as it challenges the impugned judgment and decree of the learned Single Judge to the extent it grants prayers (a) and (b) in CS (Comm) 433/2024, fails and is dismissed. The impugned judgment stands affirmed to that extent.

76. Notice, however, shall stand issued on the aspect of costs and damages in the terms already noted hereinabove.

77. Re-notify to hear on the aspects of costs and damages on

29 October 2025.

C. HARI SHANKAR, J.

AJAY DIGPAUL, J.

JULY 4, 2025/*AS/Aky*

Click here to check corrigendum, if any