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

% *Date of Decision: 23rd November, 2026*

CNR No. DLHC010093412026

\+ CS(COMM) 246/2026

LAWRENCE SCHOOL SANAWAR SOCIETY .....Plaintiff

Through: Mr. Sudarshan Kumar Bansal, Mr. Amit Chanchal Jha, Mr. Shivang Bansal and Ms. Nishtha Kapoor, Advocates.

versus

TIGERFIRE LLC USA & ORS. .....Defendants

Through: Mr. Akhil Sibal and Ms. Swathi Sukumar, Senior Advocates with Mr. Aman Taneja, Mr. Rishabh Sharma, Ms. Ridhie Bajaj, Ms. Jahnavi Sindhu, Ms. Vanshika Thapiyal, Mr. Sidharth Singh, Mr. Ritik Raghuwanshi, Ms. Rishika Aggarwal and Ms. Anshu Tulsyan, Advocates for D-1 to D-4.
Mr. Amit Sibal, Senior Advocate with Mr. Arjun Raghavendra M, Mr. Apoorva Agarwal, Ms. Ramayni Sood, Ms. Shambhavi Singh, Mr. Aditya Sarin, Mr. Stephin George, Mr. Saksham Dhingra and Mr. Ankit Handa, Advocate for D-5.

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J.

I.A. 6537/2026 *(u/O XXXIX Rules 1 & 2 CPC by Plaintiff)*
I.A. 10828/2026 *(u/O XXXIX Rule 4 CPC by D-1 to D-4)*

1. This judgment will dispose an application filed by the Plaintiff under Order XXXIX Rules 1 and 2 CPC and the other by Defendants No.1 to 4 under Order XXXIX Rule 4 CPC for vacation of *ex parte* ad interim injunction dated 20.03.2026 passed in I.A. 6537/2026.

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2. As pleaded in the plaint, Plaintiff is a society registered under Societies Registration Act, 1860 and owns, administers and manages Lawrence School, Sanawar ('School') as its governing body. Reference to the term Plaintiff hereinafter shall include the School and the Society. School was founded in 1847 by Sir Henry Lawrence and named as Lawrence Asylum, Sanawar. In 1920, the School was renamed as Lawrence Royal Military School and later in 1949 it got its present name. Sometime in about 1914, School adopted and started using the phrase NEVER GIVE IN as its trade mark/motto as also its artistic and distinctive insignia  and has been using them since then.

3. It is stated in the plaint that the School is a premier and prestigious educational institution and is well known not only in India but across the world and the trademark NEVER GIVE IN enjoys tremendous visibility, recognition and appeal. School has a rich and enduring history, culture and heritage which has flourished over the years and its students, both present and past, have excelled in all walks of life. School can boast of distinguished alumini as also invitees as Chief Guests, such as Dr. Rajendra Prasad and Shri. S. Radhakrishnan, Former Presidents of India as also Former Prime Ministers, Chiefs of the Army Staff etc. and the Board of the School includes Secretaries to the Government of India, officers from Department of Education and many others occupying top positions in different fields. School is affiliated and/or associated with several foreign schools/ universities/educational institutions all over the world and conducts many students exchange programmes and conferences.

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4. Plaintiff pleads that it has been using the mark NEVER GIVE IN individually and conjointly on School's literature, publications, uniforms, stationary, vehicles and all other paraphernalia associated with educational institutions and services and the mark forms an inseparable part of the School song and express core values, philosophy, mission, guiding principles, rules of conduct and discipline, all geared towards shared goals like excellence, institutional ethos, community living and togetherness. In order to obtain statutory rights in the NEVER GIVE IN mark and its formative marks, Plaintiff obtained registrations in Classes 16 and 41, which are valid and subsisting. Details of registrations are as follows:-

S. No	Registration No.	Date	Trademark	Class	Status	Disclaimer
1.	2743315	26.05.2014		41	Registered upto 26.05.2034	NO
2.	3138907	24.12.2015	NEVER GIVE IN	16	Registered upto 24.12.2035	NO
3.	3138908	24.12.2015	NEVER GIVE IN	41	Registered upto 24.12.2035	NO
4.	3138913	24.12.2015		16	Registered upto 24.12.2035	NO
5.	3138914	24.12.2015		41	Registered upto 24.12.2035	NO
6.	4961939	01.05.2021		16	Registered upto 01.05.2031	-

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7.	4961940	01.05.2021		41	Registered upto 01.05.2031	-

5. It is stated that by virtue of Section 28 of the Trade Marks Act, 1999 (1999 Act), Plaintiff is entitled to exclusive use of its registered trademarks and restrain third parties from infringing them. The trademark NEVER GIVE IN is fanciful and arbitrary in relation to the educational institution and hence, entitled to the highest degree of protection. Members of public associate the mark exclusively with the Plaintiff and its ethos and none else, since Plaintiff has used the mark regularly and continuously over decades. Several leading newspapers as also electronic media have carried news covering different events organised by the Plaintiff from time to time and illustratively, in one of the events, the alumni of the School, who held a high position in the Government of India, incorporated the mark as a part of his speech and stated that "*The motto of Sanawar, NEVER GIVE IN has been my guiding light throughout my life….. The education in Sanawar trained and inspired me to chase my passion and achieve my goal.*"

6. It is stated that Defendant No.1 is a Corporation under Laws of USA while Defendant No.2 is a limited liability partnership under Laws of India, wherein Defendants No.3 and 4 are partners and Defendant No.5 is an actor and celebrity as also an alumni of the School. Defendants No. 1 to 4 are engaged in business of manufacture and trade of alcoholic beverages including vodka. In order to encash on the immense reputation attached to

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the trademark NEVER GIVE IN and its formatives as also with the Plaintiff, Defendants *mala fidely* adopted the word mark NEVER GIVE IN as a trademark and slogan/tagline/punch line for the product vodka, an alcoholic beverage. On learning from members of civil society, such as former students, teachers and parents, of the promotional activities of the Defendants, Plaintiff carried out its own investigation and search and found material evidencing promotion of vodka by the Defendants in different trade journals as also on website www.tigerfirevodka.com and other social media platforms, using the mark NEVER GIVE IN as a trademark along with the mark TIGERFIRE.

7. It is stated in the plaint that to the best of Plaintiff's belief Defendants have not physically launched the impugned goods under the impugned trademarks 

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and 

which subsume Plaintiff's mark NEVER GIVE IN in entirety, however, there was aggressive promotion through circulation of literature, writings, narratives and campaigns, which gave rise to a legitimate apprehension that the impugned product was being launched shortly. Defendant No.5 prominently featured in the promotion campaigns as founder and brand ambassador. Plaintiff also discovered from search of the e-records of the Registrar of Trade Marks that Defendant No.2 had applied for registration of the marks TIGERFIRE and NEVER GIVE IN in logo/label format on 'proposed to be used' basis.

8. Basis this information and to protect its statutory and common law

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rights in the registered mark NEVER GIVE IN, Plaintiff filed the present suit and vide order dated 20.03.2026, Court granted *ex parte* ad interim injunction, restraining Defendants No.1 to 4 and all others acting on their behalf from advertising, promoting, soliciting, marketing, selling or offering for sale through any mode whatsoever alcoholic beverages and other distilled spirits using Plaintiff's registered trademark NEVER GIVE IN as a part of impugned mark/labels/slogans/taglines/punchlines or from using any other mark deceptively similar to NEVER GIVE IN, amounting to infringement and/or passing off. Further direction was issued to take down all promotional content from whichever platform it was published on, to the extent there was use of the mark NEVER GIVE IN. Subsequent thereto, Defendants No.1 to 4 filed I.A. 10828/2026 for vacation of the interim injunction order raising multiple grounds in their support and after completion of pleadings, both the aforementioned applications were heard together.

CONTENTIONS ON BEHALF OF THE DEFENDANTS

9. The *ex parte* ad interim injunction order dated 20.03.2026 deserves to be vacated as Plaintiff suppressed material facts and misled the Court on the date of launch and period of physical availability of the impugned product in the market. Plaintiff unequivocally averred in the plaint that Defendants were yet to launch their product, contrary to its knowledge that the product was physically available in the market since 10.12.2025 and its launch was widely covered in the media as also on several social media platforms such as facebook and instagram. Documents filed with the plaint at pages 632, 644-646 and 648-649 evidence aggressive promotional campaigns in November-December, 2025 as also the launch in December, 2025. In fact,

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the launch event was prominently covered by the media, posted on social media posts and attended by several prominent Bollywood personalities and had generated significant and widespread visibility and public traction. Despite all this information readily available in public domain, Plaintiff mischievously misled the Court into believing that impugned product was poised to be launched and hence, obtained *ex parte* interim injunction.

10. In a short span of time, Defendants' product became popular in the market and the sales figures rose to approximately Rs. 1.6 crores within three months. Based on the sales volume, it is estimated that Defendants' product had become second leading brand in premium vodka segment after Grey Goose and the product featured in Forbes (Lifestyle) and received prestigious Economics Times Award for the most creative visual identity and luxury packaging. Worldwide commercial roll out of the product commenced in US market with launch in August, 2025 and despite all this information, Plaintiff gave an impression that the product was yet to be launched. The mischief is fortified by the fact that Plaintiff filed the suit without serving any legal notice to the Defendants and/or effecting advance service and falsely created an artificial urgency in the exemption application stating that owing to the impending launch of the product with Plaintiff's trademark amounting to infringement/passing off, any delay will prejudice the Plaintiff. It is trite that a person who approaches the Court for grant of relief is under a solemn obligation to candidly disclose all material facts, which have a bearing on adjudication of all issues raised. In fact, every party who comes to Court must come with clean hands and since Plaintiff has failed in this duty, on this ground alone the *ex parte* order deserves to be vacated.

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11. Defendants have not copied the NEVER GIVE IN trademark of the Plaintiff and are neither using nor have any intent to use the phrase in the trademark sense. The brand TIGERFIRE-NEVER GIVE IN was conceived and designed in December, 2021, by Mr. Jason DeLand, a prominent US based brand strategist and artist, who focused on the fearless personality, attitude, resilience and indomitable spirit of Defendant No.5, a renowned Bollywood celebrity with an eminent film career spanning over four decades. Defendant No.5 has won several national awards including two Filmfare awards, two IIFA awards, three Stardust awards and two Zee Cine Awards, amongst others. His work in several movies has been applauded by one and all. Defendant No.5 has had series of ups and downs in his life, which are well known and include his battle with last-stage lung cancer. The brand philosophy of the tagline NEVER GIVE IN is inspired by and grounded in the extraordinary personal and professional journey of Defendant No.5, who in addition to being an acclaimed actor and producer, is a global vodka connoisseur. The phrase NEVER GIVE IN does not come from Plaintiff's mark but is an expression of Defendants' approach to life that no matter whatever be the highs and lows, 'never give in'. Motivational phrases such as: Johnnie Walker: Keep Walking; Royal Stag: It's Your Life, Make It Large; Mountain Dew: Darr Ke Aage Jeet Hai; Thumps Up: Taste the Thunder; and Cadbury Bourn Vita: Tayyari Jeet Ki, are often used as taglines for alcoholic/non-alcoholic beverages as a matter of established industry practice and use of NEVER GIVE IN by Defendants is not extraordinary.

12. The phrase NEVER GIVE IN is an ordinary and customary phrase in English language, very often used as a motivational expression. It is neither

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a coined term nor invented expression and cannot be uniquely associated with anyone, including the Plaintiff. The expression has a low level of inherent distinctiveness and hence, cannot be monopolised and function as a source identifier. The phrase is extensively used by various third parties across classes for different goods and services and is most prominently associated with Winston Churchill's celebrated speech at Harrow School on 29.10.1941, wherein he exhorted '*Never give in, never give in, never, never, never…*'. This speech is in public domain and one of the most widely reproduced orations in history. The phrase is also a Title of multiple books commercially available online as also in retail stores across India and internationally, such as title of the book 'Never Give In: The 12 Commando Rules for Life' by Major Scotty Mills, 'Never Give In: The Extraordinary Character of Winston Churchill (Leaders in Action Series)' by Stephen Mansfield. NEVER GIVE IN was also the Title of the show 'Sir Alex Ferguson – Never Give In' on Amazon Prime. In fact, NEVER GIVE IN is extensively used for merchandise including clothing, accessories, sports goods and as a slogan, tagline and motto by prominent political leaders, coaches and motivational speakers across the globe. Therefore, as a trademark it is a weak mark and it is settled that when a party adopts a mark which is inherently non-distinctive or generic or *publici juris,* it takes the potential risk of third parties using the mark *albeit* Defendants are not using NEVER GIVE IN in the trademark sense.

13. Recently, the Supreme Court has reiterated and reaffirmed in ***Pernod Ricard India Private Limited v. Karanveer Singh Chhabra, 2025 SCC OnLine SC 1701,*** that generic, descriptive or laudatory words/phrases,

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particularly, those used commonly in the given trade, cannot be monopolised by any one proprietor and even where such words/phrases forms part of a registered trademark, protection does not extend to these elements *per se,* unless it is affirmatively shown that they have acquired secondary meaning and have come to be exclusively and distinctively associated with the party's goods in the perception of the consuming public and to judge this, mere duration of use or even volume of sales by itself, is insufficient to displace the mark's inherent descriptive or laudatory character. Coordinate Bench of this Court in ***Institute of Directors v. Worlddevcorp Technology and Business Solutions Pvt. Ltd. and Others, 2023 SCC OnLine Del 7841,*** observed that words of ordinary English usage cannot be monopolised else the entire English language will be appropriated by a few, which cannot be permitted. Obtaining registration in respect of mark which comprises of common English words is fraught with possibility of its own adverse sequelae. While obtaining registration of such a mark, the registrant ought to have been conscious that the mark 'Institute of Directors' being combination of ordinary English words and being non-distinctive, will always be open to a possibility of another party using a similar mark. Applying these judgments to the instant case, the phrase NEVER GIVE IN being a combination of English words commonly used, cannot be monopolised by the Plaintiff *sans* evidence of having acquired secondary meaning.

14. Plaintiff's own pleadings reveal that the Plaintiff is known as 'The Lawrence School, Sanawar' and/or 'Sanawar' amongst members of public and that the words 'Lawrence' and 'Sanawar', both individually and conjointly, form essential part of majority of the trademarks/trade name of

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the Plaintiff such as . This demonstrates Plaintiff's own understanding on what constitutes dominant part of its marks as also that its reputation and goodwill lies in 'Lawrence' and 'Sanawar', by which the institution is widely known concededly, in India and abroad. Plaintiff has word mark registration in NEVER GIVE IN but has never used the same as a standalone trademark and there is no material on record to show otherwise. Use of the mark is at best as a part of the School crest or as a motto or on letter heads and part of speeches of guests and articles by alumini and no document has been placed which would even remotely indicates that the mark NEVER GIVE IN by itself acts a source identifier of the Plaintiff in the minds of public and brings to the mind recollection of the School. Plaintiff's own pleadings and documents filed with the plaint evince Plaintiff's tacit acknowledgement that the students of the School are known as Sanawarians and the School is popularly known as the 'The Lawrence School, Sanawar' or simply 'Sanawar', in the relevant field. Thus there is no independent goodwill or reputation in the mark NEVER GIVE IN and the claim of passing off is untenable in the absence of this essential ingredient.

15. The second essential ingredient of passing off, namely, misrepresentation is also not established by the Plaintiff. Defendants have never used NEVER GIVE IN in a manner which suggests any association or commercial nexus with the Plaintiff so as to encash on its reputation, either on the product or during advertising or marketing activities and moreover, there is no standalone use and the phrase is always used in conjunction with

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the distinct housemark TIGERFIRE. Impugned product is a premium vodka targeting discerning consumers looking for signature alcoholic drink at home or at a club or in a party and there is no gainsaying that those who seek admission in a premium educational institute as that of the Plaintiff, would know the difference between educational services and vodka and no consumer of either party is likely to believe that education and vodka have the same source origin, especially, when there is no such representation by the Defendants in the manner of use of NEVER GIVE IN.

16. Plaintiff has failed to make out even a *prima facie* case of infringement under Section 29 of 1999 Act. Firstly, Defendants do not use the phrase in the trademark sense and the use is purely as a motivational phrase. Secondly, even assuming that Defendants use the phrase as a trademark, Plaintiff's rights flowing from registrations in Classes 16 and 41 can be enforced only in respect of goods, for which it has registrations and cannot extend to other classes. It is a settled law under the 1999 Act that registration of a trademark in a particular class does not confer any right on the proprietor to restrain use of the mark in a different class. In order to succeed in its claim of infringement under Section 29(2) of 1999 Act, Plaintiff will have to demonstrate not only identity/similarity of the trademarks but also identity/similarity in the rival goods/services. Rival goods being dissimilar and falling in different classes, Plaintiff cannot allege infringement, unless the asserted mark is a declared well known mark or the case falls under Section 29(4), with a high threshold of reputation, which is not the case here as there is no standalone reputation in the mark NEVER GIVE IN. Even otherwise, there is no scope of confusion in the present case, which is *sine qua non* for bringing a case within the four corners of Section

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29(2), inasmuch as neither party uses NEVER GIVE IN as a standalone phrase/mark and whenever or whereever used it is in conjunction with their respective reputed house marks. Plaintiff uses the mark alongside 'The Lawrence School, Sanawar' and Defendants use the phrase NEVER GIVE IN with the house mark TIGERFIRE and this obviates any scope of likelihood of confusion. It is equally settled that to ascertain any linkage or likelihood of confusion for determing infringement, Courts must consider various factors such as mode of purchasing the goods, class of consumers, degree of similarity etc. In the instant case, no potential or even existing consumer will confuse the services rendered by the Plaintiff in the field of education with liquor sold by the Defendants; the consumers are discerning; and rival services/product are dissimilar and thus ingredients of Section 29(2) are not satisfied.

17. Conscious of the fact that Plaintiff has no case under Section 29(2), Plaintiff attempts to take shelter under Section 29(4) of 1999 Act to restrain use of the mark NEVER GIVE IN in respect of a dissimilar product, which is a wholly misconceived attempt. Section 29(4) provides that a registered trademark 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 is identical with or similar to the registered trademark and is used in relation to dissimilar goods or services and where the registered trademark has a reputation in India and use of the impugned mark without due cause takes unfair advantage of or is detrimental to the distinctive character or repute of the registered mark. Plaintiff is unable to establish even *prima facie* that the mark NEVER GIVE IN was ever used as a standalone mark and/or in the sense of a trademark and/or that reputation resides in the said

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mark of a threshold required under Section 29(4). Instead of establishing its alleged case of reputation in the phrase NEVER GIVE IN as required under Section 29(4), Plaintiff asserted during oral arguments, though not pleaded, that a trademark need not be a source identifier and can simply be an emotion or feeling and that Plaintiff is not required to show sales volume to demonstrate reputation. Emotions and feelings are concepts alien to a mark such as NEVER GIVE IN and can be invoked for marks which have acquired such a reputation that they are distinctly associated with the proprietor alone in the minds of public and function as a source identifier. To bring its case under Section 29(4), Plaintiff will have to demonstrate reputation of a high threshold in the mark NEVER GIVE IN and cannot import the reputation earned as an institution. That reputation must be shown to exist in the mark alleged to be infringed *albeit* in the context of the relevant goods, is no longer *res integra*. ***[Ref.: Ashok Leyland Limited, 1, Sardar Patel Road, Guindy, Chennai-600 032, represented by its General Manager-Legal and Constituted Attorney, Mr. S. Venkataraman v. Blue Hill Logistics Pvt. Ltd., 171, 2nd Floor, Nilgiri's Building, Brigade Road, Bengaluru-560 001. 2. Dilip Chhabria Design Private Limited, Keytuo Industrial Compound, Kondivita Road, MIDC, Andheri (East), Mumbai-400 059, 2010 SCC OnLine Mad 6126; ITC Limited v. Philip Morris Products SA and Ors., 2010 SCC OnLine Del 27;*** and ***Pepsico, Inc. and Another v. Jagpin Breweries Limited and Another, 2023 SCC OnLine Del 2542.*** Only strong and famous marks are worthy of protection under Section 29(4) and any other plea to the contrary will lead to a situation where a mark, no matter how weak it is, will turn into an anti-competitive weapon across classes taking advantage of Section 29(4) and proprietor will invoke

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the anti-dilution remedy to restrain use of all similar marks in every market and trade, which will upset the traditional balance of fair use versus free competition.

18. Plaintiff has not placed any material on record which demonstrates that the use of tagline NEVER GIVE IN by the Defendants has led to an unfair advantage to the Defendants or has caused detriment to the distinctive character of its mark. Plaintiff must produce some material to show that there is change in the economic behaviour of consumers by use of the phrase by the Defendants, which it has failed to do. No survey reports/accounts/ customer reviews/comments/data of reduction in the number students taking admission have been filed to show any economic impact and in fact, there is no pleading to this effect in the plaint. No evidence of dilution or tarnishment has been filed and the foundation of claim of dilution is the moral discourse that use of NEVER GIVE IN for alcohol will dilute the mark NEVER GIVE IN, but that cannot by itself be a criteria to judge dilution of a reputed trademark, in law.

CONTENTIONS ON BEHALF OF THE PLAINTIFF

19. It is denied that Plaintiff has suppressed facts or misled the Court for seeking *ex parte* injunction. Before filing the suit, Plaintiff had not come across the impugned product in the market and this fact was truthfully and correctly stated in the plaint and is reiterated. The suit was filed basis the aggressive promotional activities, including literature, writings, campaigns, narratives etc. on various platforms, which showed that Defendants were intending to launch the product shortly and therefore, the threat of infringement was real, tangible and credible. The literature on the websites and social media platforms itself indicated that the product was not in the

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market and Defendants were intending to roll out the product physically later. Plaintiff correctly averred that Defendants were intending to launch and the stand of Defendant that product was launched on 10.12.2025 is incorrect and only to misguide the Court into believing that Plaintiff has suppressed material facts. Defendants' document at page 116 in their List of Documents, which is an extract from website of 'social media dissect' dated 18.12.2025, reflects that the impugned product will roll out across Maharashtra, Goa, Hyderabad and Delhi NCR following its Indian debut and therefore, by their own saying, there is a difference between launch in media and publicity campaigns on one hand and physical launch/roll out in the market, on the other. Defendants' document at pages 282 and 283 reveal that the impugned product was officially launched and sold in Goa only around 09.02.2026. Thus, there is no suppression or misrepresentation in the plaint and the preliminary objection deserves to be rejected.

20. On becoming aware of Defendants' publicity material, Plaintiff reached out to Defendant No.5 through its staff to cease the impugned use and was assured that the concern will be addressed, but no corrective action was taken. It is wrong for the Defendants to contend that Plaintiff sought exemption from service of advance copy of the suit by creating false and artificial urgency. The aggressive promotions by Defendants left little doubt that they would be launching the impugned product and if this was permitted, it would have irreparably damaged Plaintiff's reputation and tarnished its image as also infringed the registered mark NEVER GIVE IN. Therefore, there was a genuine urgency for seeking injunction against use of the registered mark. Defendants are in fact themselves guilty of misrepresentation of facts. The stand that there was a worldwide commercial

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roll out of Defendants' impugned product in USA in August, 2025 is incorrect. All applications, filings and registrations in USA, UK or European Union are without leave, license or approval of the Plaintiff and Plaintiff reserves its right to contest the same. In any case, applications or registrations overseas do not give any right to the Defendants to use the impugned mark in India, without authority and permission.

21. Adoption of the mark NEVER GIVE IN by Defendants is dishonest and *mala fide.* Defendant No.5 has not disclosed that he is an alumni of the School and is thus well aware of the reputation attached to the mark NEVER GIVE IN, as that would have highlighted the dishonest and bad faith adoption. Defendant No.5 cannot deny that NEVER GIVE IN is associated with the ethos, goals and mission of the Plaintiff and that the reputation of the School and Society, is inseparable from the trademarks. Defendant No.5's stand that use of NEVER GIVE IN is inspired by his life journey or conceptualises the high-end spirit of the impugned product and embodies themes of strength, resilience and defiance, is false and preposterous. The fact is that Defendant No.5 is using the expression in a negative and derogatory manner for a product such as vodka for commercial gains and this directly tarnishes the image and immense reputation of the Plaintiff, built over years and dilutes the mark.

22. Defendants are not correct in urging that phrase NEVER GIVE IN has a low level of distinctiveness being a combination of words from English language and/or is an inherently non-distinctive mark. It is settled that words of a language can be combined together to coin a term or invent a new expression and distinctiveness or descriptiveness is relative to goods or services for which the mark is used and as an illustration a simple word such

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as Apple is arbitrary for computers and entitled to highest degree of protection. Defendants wrongly take a position that Plaintiff does not claim proprietary rights in the phrase NEVER GIVE IN or that it has never used the expression as a trademark standalone. Firstly, the word mark NEVER GIVE IN is separately registered, which vests in the Plaintiff a statutory right to use it exclusively as also to restrain third parties from using the same without license or authority. There is no law which mandates that a registered trademark cannot be used in conjunction with other registered/ non-registered mark. NEVER GIVE IN forms an essential and material part of Plaintiff's School crest as also motto and is a source identifier for Plaintiff's services in the market.

23. Defendants are using NEVER GIVE IN in the trademark sense and not in the descriptive sense, as alleged and therefore, the stand that the phrase is inspired by the ups and downs in the journey of Defendant No.5 has no meaning and is irrelevant. The mere fact that the phrase is used with the house mark TIGERFIRE is also not sufficient to overcome the unfair use of the mark as NEVER GIVE IN is the dominant and essential part of Defendants' mark, which they themselves understand and which is why there is resistance in giving up the use of the mark. The sole purpose of using NEVER GIVE IN is to establish an association with the Plaintiff and encash on its formidable goodwill and reputation, else there was no reason to adopt the mark for vodka and Defendants could sell the product under their mark TIGERFIRE alone.

24. It is not correct for Defendants to urge that the mark NEVER GIVE IN does not meet the threshold of reputation required under Section 29(4) of 1999 Act and/or that the reputation and goodwill reside in the name of the

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School i.e. 'The Lawrence School' and/or 'Sanawar' and not in the trademark NEVER GIVE IN. Plaintiff's consumer base includes students from different strata of the society and the students, parents and guardians prefer Plaintiff's institution, guided by its ethos and values including the spirit embodied in the trademark NEVER GIVE IN. Plaintiff has placed sufficient and cogent material on record showing extensive use of the mark on the its crest, letter heads, boards as also during events and as part of speeches of many dignitaries and there is no doubt that the mark has acquired reputation in India of a threshold required under Section 29(4) and thus any use of NEVER GIVE IN without due cause and especially for an alcoholic product will be detrimental to the distinctive character and reputation of the mark. Also, while determining the extent or threshold of reputation garnered, institution's reputation cannot be divorced altogether to defend the claim of infringement.

25. Primary function of the mark is unquestionably that of indication of origin and a mark also acts as means of conveying other messages *inter alia* quality or particular characteristic of goods/services which it covers or images and feelings it conveys, such as luxury, lifestyle, exclusivity and adventure, as in the case of ***Argos Ltd v. Argos Systems Inc, MANU/UKCH/0032/2017,*** where the controversy revolved around unauthorised use of a sign ARGOS in the domain name www.argos.com in the context of an advertisement. In Para 2-016 of Kerly's Law of Trade Marks and Trade Names 15th Edition under the heading *'THE COMMUNICATION, INVESTMENT AND ADVERTISING FUNCTIONS'*, it is stated as follows:-

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"2-016 The existence of functions of the trade marks which go beyond the essential function of denoting origin and the function of indicating quality was mentioned by the General Court in SIGLA v OHIM-Elleni Holdings:

> *"...[T]he primary function of a mark is unquestionably that of an 'indication of origin' (see the seventh recital in the preamble to Regulation No 40/94). The fact remains that a mark also acts as a means of conveying other messages concerning, inter alia, the qualities or particular characteristics of the goods or services which it covers or the images and feelings which it conveys, such as, for example, luxury, lifestyle, exclusivity, adventure, youth. To that effect the mark has an inherent economic value which is independent of and separate from that of the goods and services for which it is registered. The messages in question which are conveyed inter alia by a mark with a reputation or which are associated with it confer on that mark a significant value which deserves protection, particularly because, in most cases, the reputation of a mark is the result of considerable effort and invest-ment on the part of its proprietor."*"

26. Trademarks also play an important function of expressing emotions and functions. In Bently Intellectual Property Law 6th Edition, it is clearly provided that an important change has taken place in the role played by trademarks around the beginning of 20th century. During this period trademarks changed from being indicators of origin to become valuable assets in their own right. ***[Ref.: Eastman Photographic Materials Co. v. John Griffith Cycle Corp., (1898) 15 RPC 105].*** Some marks by virtue of their distinctiveness or appeal are able to convey some sort of emotional allure to potential consumers. More recently, trademarks have taken up new roles and have come to take on a mythical status and in their mythical forms, trademarks help to provide consumers with an identity and marks such as FERRARI or PRIUS fall in this category. When a consumer purchases a product bearing a mark, it purchases an 'experience envelope' that helps to construct its identity. The conception of trademark as 'myth' can be seen in the increased attention given to brands. While definition of brands varies in

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both marketing and legal analysis, it normally extends beyond a word or device mark to encompass the personality, style or aura associated with a particular product. For those who believe in the ontological status of brands, COCA-COLA is more than a product, a reputation for quality and a mark and is instead an image and a way of life, which is instituted through presentation, marketing, advertising and packaging.

27. Legislature has carefully enacted Section 29(4) of 1999 Act, wherein it is not necessary to establish confusion or even likelihood of confusion to prove infringement and it is sufficient to show a degree of similarity between the rival marks and establish that Plaintiff's trademark has a reputation and use of the similar mark by the Defendant is without due cause and takes unfair advantage of or is detrimental to the distinctive character or repute of the registered trademark and thus Defendants' argument that there is no scope of confusion owing to dissimilarity of goods, is wholly misplaced. In this context, reliance was placed on the following passages from the judgment in ***O2 Holdings Limited and O2 (UK) Limited v. Hutchison 3G Limited, MANU/UKCH/0117/2006,*** where similar provision being Section 10(3) of Trade Marks Act, 1994 was under consideration:-

> *"**57**. The main issues that I have to decide are the following:*
>
> *i) Are the nominated bubbles trade marks validly registered as trade marks?*
>
> *ii) If so, is there a prima facie case of infringement under article 5 (l)(b) of the Trade Marks Directive/section 10 (2) of the Trade Marks Act 1994;*
>
> *iii) If the registrations are valid, is there a prima facie case of infringement under article 5 (2)/section 10 (3) of the 1994 Act;*
>
> *iv) If there is a prima facie case of infringement on either ground,*

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does H3G have a defence under the Comparative Advertising Directive;

v) Alternatively, does H3G have a defence under section 10 (6)?

xxx xxx xxx

***131**. O2 allege that:*

i) The sign is similar to the mark;

ii) The trade mark has a reputation In the United Kingdom;

iii) The use of the sign, without due cause, takes unfair advantage of, or is detrimental to, the distinctive character or reputation of the mark.

Reputation

***132**. In General Motors Corp v Yplon S/4[19991 ECR 1-5421 the ECJ held that In order to have a reputation a trade mark had to satisfy a "knowledge threshold". They described this as follows:*

26 The degree of knowledge required must be considered to be reached when the earlier mark Is known by a significant part of the public concerned by the products or services covered by that trade mark.

27 In examining whether this condition Is fulfilled, the national court must take into consideration all the relevant facts of the case. In particular the market share held by the trade mark, the intensity, geographical extent and duration of Its use and the size of the Investment made by the undertaking in promoting it.

Misuse of the sign

***133**. At this point I must notice a difference in language between the Trade Marks Directive and the Trade Marks Act. Article 5 (2) describes Infringement: "where use of that sign without due cause takes unfair advantage of, or Is detrimental to, the distinctive character or the repute of the trade mark". Section 10 (3) describes It as: "the use of the sign, being without due cause, takes unfair advantage of, or Is detrimental to, the distinctive character or the repute of the trade mark." The former use of language suggests that the use of the sign must both be without due cause and must also take unfair advantage of the mark. The latter form of language suggests that If the use of the sign Is without due cause. It follows that It takes unfair advantage of the mark.*

***134**. In General Motors Jacobs A-G said in paragraph 42 of his opinion:*

Above all. It Is necessary to give full weight to the provisions of Article 5(2) as a whole. Thus the national court must be satisfied In

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every case that the use of the contested sign Is without due cause; and that it takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the mark. These requirements, properly applied, will ensure that marks with a reputation, whether or not the reputation Is substantial, will not be given unduly extensive protection.

***135**. This, to my mind, treats the language as requiring satisfaction of two conditions; viz. that the use of the sign Is without due cause and that It takes unfair advantage of the mark. The ECJ itseif did not deal with this question. In Premier Brands UK Ltd v/ Typhoon Europe Ltd [20001 FSR 767 Neuberger J approached this question on the basis that two conditions needed to be satisfied. I will do the same. Although this requires a strained interpretation of section 10 (3), that interpretation is necessary to give effect to article 5 (2) of the Trade Marks Directive. It is another example of unnecessary draftsman's changes in transposing the Trade Marks Directive into domestic law.*

***136**. It is common ground that it is not necessary to establish confusion or the likelihood of confusion in order to establish infringement under this head. It is sufficient for the degree of similarity between the mark with a reputation and the sign to have the effect that the relevant section of the public establishes a link between the sign and the mark: Adidas-Salomon AG v Fitnessworld Trading Ltd[2004] Ch 120. ECJ para. 31. As I have said, in Sabel the ECJ distinguished between three types of association. The first they called "direct confusion"; the second "indirect confusion". Given that infringement under article 5 (2) does not require any likelihood of confusion, these types of association are not required. That, therefore, leaves the third kind of association referred to in Sabel, viz. that the perception of the sign calls to mind the memory of the mark, although the two are not confused (likelihood of association in the strict sense). It seems to me to follow that it was this kind of association to which the ECJ referred in Adidas as being a sufficient link for the purposes of article 5 (2). It was, however, common ground that the link must be such as to affect the economic behaviour of consumers.*

Without due cause

***137**. The words "without due cause" govern both the use of the sign and the taking of unfair advantage: Premier Brands at 790. Quite what amounts to due cause is not easy to identify. But in Premier Brands Neuberger J said that the issue was not whether the defendant could be said to be acting "in good faith" or "for good and honest commercial reasons". He cited with apparent approval a statement by the Benelux Court to the following effect:*

What this requires, as a rule, is that the user (of the mark) is under

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> *such a compulsion to use this very mark that he cannot honestly be asked to refrain from doing so regardless of the damage the owner of the mark would suffer from such use, or that the user is entitled to the use of the mark in his own right and does not have to yield this right to that of the owner of the mark ....*

Takes unfair advantage

***138**. The first point to make is that this category of infringement is concerned with actual effects; not with risks or likelihoods: Daimierchrysler AG v Alavi [2001] RPC 42. Second, it is not enough that use of the sign takes advantage of the mark. The advantage must be unfair. The most comprehensive description of what constitutes unfair advantage is that of the First Board of Appeal of OHIM in Case R 308/2003-1 in Mango Sport System Sri Socio Unico Mangone Antonio Vincenzo v D/A:nak[2005] ETMR 5 at "[I9]:*

> *As to unfair advantage, which is in issue here since that was the condition for the rejection of the mark applied for, that is taken when another undertaking exploits the distinctive character or repute of the earlier mark to the benefit of its own marketing efforts. In that situation that undertaking effectively uses the renowned mark as a vehicle for generating consumer interest in its own products. The advantage for the third party arises in the substantial saving on investment in promotion and publicity for its own goods, since it is able to "free ride" on that already undertaken by the earlier reputed mark. It is unfair since the reward for the costs of promoting, maintaining and enhancing a particular trade mark should belong to the owner of the earlier trade mark in question.*

***139**. The notion of taking unfair advantage in this sense is that the third party is unfairly using the registered mark to enhance his own business. Thus in the Mango case itself the Board considered that the registration of the trade mark "Mango" for crash helmets might take unfair advantage of the registered mark "Mango" in relation to ladies clothing aimed at fashionable young women. The mischief clearly was that the manufacturer of crash helmets would increase his sales by feeding on the reputation acquired by the manufacturer of clothing. In other words, the one mark supports (or would support) the other. This does not fit easily into comparative advertising, where it is the contrast between some feature of the advertiser's business and that of his competitor which constitutes the enhancement. I must, I think, be careful not to take general statements out of context.*

xxx** **xxx** **xxx

***141**. In addition to dilution by tarnishing, it is also recognised that a trade mark may suffer detriment through blurring of its distinctiveness: see*

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Premier Brands. In Daimlerchrysler Pumfrey J also said:

> *Detriment can take the form either of making the mark less attractive (tarnishing, to use Neuberger J's word) or less distinctive (blurring).”*

28. The difference in goodwill and reputation is well explained in the judgments in ***Intex Technologies (India) Ltd. & Anr. v. M/s. AZ Tech (India) & Another, 2017 SCC OnLine Del 7392;*** and ***Metropolitan Nat. Bank of New York v. St. Louis Dispatch Co. et al., MANU/USSC/0232/1893*** and legally the two expressions are not synonymous. Goodwill is a form of legal property representing the connection between business and customer while reputation is a matter of fact. Illustratively, an internationally known mark may have a reputation in this country but yet have no goodwill because there are no sales of the product under the said mark. Goodwill is the attractive force which brings in customer and is a form of legal property and some sort of business is necessary to bring goodwill, while for reputation existence of business is not a *sine qua non.* For a tort of passing off, establishment of goodwill is an essential ingredient and in the instant case, there is enough and cogent material on record to show existence of goodwill as also reputation while both may not be necessary to restrain the Defendants for an act of passing off their product using Plaintiff’s mark NEVER GIVE IN. Plaintiff has garnered immense reputation in the mark NEVER GIVE IN as a standalone mark by way of use as a motto and on various documents as also elaborately during speeches and functions. Reputation is a sort of right to enjoy the good opinion of others. It has been defined in the dictionary as ‘to have a good name; the credit, honour, or character, which is derived from a favourable public opinion or esteem and character by report’.

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[Ref.: Umesh Kumar v. State of Andhra Pradesh and Another, (2013) 10 SCC 591].

29. In ***Dallas Cowboys Cheerleaders, INC. v. Pussycat Cinema Ltd. and Michael Zaffarano, MANU/FESC/0038/1979,*** the Court of Appeals was dealing with an action brought by the Plaintiff alleging infringement under Section 43(a) of Lanham Act, unfair competition and dilution of trademark in violation of Section 368-d of the New York General Business Law. Case of the Plaintiff was that at all the football games and public events, its cheerleaders appeared clad in a distinctive uniform, where the outfit showcased white vinyl boots, white shorts, white belt decorated with blue stars, a blue bolero blouse and a white vest decorated with three blue stars on each side of the front and a white fringe around the bottom and it is in this uniform that Plaintiff asserted a trademark and alleged infringement and dilution by the Defendant in advertising and exhibiting 'Debbie Does Dallas'. In this context, it was held that trademark laws are designed not only to prevent consumer confusion but also to protect the synonymous right of a trademark owner to control his product's reputation and the District Court did not err in holding that Plaintiff had established likelihood of confusion within the meaning of the Lanham Act sufficient to entitle it to preliminary injunction on its claim of unfair competition and dilution.

30. Even phrases or words in English language otherwise ordinarily used can be combined and the unique combination can grant to the proprietor a monopoly and therefore, the Defendants are not right in claiming that Plaintiff's mark NEVER GIVE IN is a weak mark and is not entitled to protection despite the fact that it is a registered mark and registration of the trademark is *prima facie* evidence of its validity in terms of Section 31 of

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1999 Act. In ***Living Media India Limited v. Jitender V Jain & Anr., 2002 SCC OnLine Del 605,*** the controversy before the Court was whether the name and style 'AAJ TAK' and its logo, having distinctive feature in relation to the news channel, was a generic term and as such no person could claim monopoly over it in relation to news programme or otherwise. Confirming the *ex parte* injunction granted in favour of the Plaintiff, the Court held that a mark is always used for indicating either a connection in the course of trade between the goods and it is the prior user which provides the right of protection. The words 'AAJ' and 'TAK' may be individually descriptive and dictionary words and may not be monopolised by any person, but their combination does provide a protection as a trademark if it has been in long, prior and continuous use in relation to particular goods manufactured and sold by a particular person so as to identify the mark with that person. This is irrespective of the fact whether such combination is descriptive in nature and/or has a dictionary meaning and any kind of prefix or suffix will not make a difference permitting a third-party to use the mark and hence, adoption of similar or deceptively similar mark would amount to passing off.

ANALYSIS AND FINDINGS

31. From the expose of facts narrated above, it is an undisputed position that Plaintiff is the registered proprietor of trademark NEVER GIVE IN along with other marks as referred to in a tabular representation above. By virtue of registrations, Plaintiff asserts exclusive right to use the mark NEVER GIVE IN in terms of Section 28(1) of 1999 Act as also to restrain third parties from using the said marks. Tracing the history of the educational institution 'The Lawrence School, Sanawar' to 1847 as also

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bringing forth the rich lineage of distinguished alumni and the rich and enduring history, culture and heritage of the institution, Plaintiff also asserts common law rights in the mark owing to the immense reputation garnered in NEVER GIVE IN, which is registered not only as a word mark but also in a stylized and artistic manner with the distinctive insignia. The claim of infringement and passing off is essentially predicated on the use of the mark NEVER GIVE IN as an essential part of trademarks, school motto and school song as also its use individually and conjointly on school literature, publications, uniforms, stationary, vehicles etc. Pithily put, the case is that the mark NEVER GIVE IN forms an inseparable part of the school song and express core values, philosophy, mission, guiding principles and rules of conduct and discipline of the educational institution, all geared towards shared goals of excellence, institutional ethos, community living and togetherness. Much emphasis was placed by counsel for the Plaintiff on use of the mark regularly and continuously, evidenced through the fact that various leading newspapers and electronic media have from time to time carried news on different events organized by the Plaintiff. In particular, references have been made to many speeches by the alumni of the school holding high positions in different fields as also dignitaries including former Presidents of India, wherein NEVER GIVE IN is specifically alluded to.

32. Defendants, on the other hand, contest the case of the Plaintiff and seek vacation of *ex parte* interim injunction bringing forth that there is material concealment and misrepresentation in the plaint with regard to the actual launch of the impugned product under the impugned phrase NEVER GIVE IN and its availability in the market in physical form much before the suit was filed. On merits, case of the Defendants in a nutshell is that there

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was and is no intent to infringe the mark NEVER GIVE IN or pass off their goods by showing any association with the Plaintiff. Since the services of the Plaintiff and impugned product of the Defendants are dissimilar, Plaintiff will have to bring its case within the four corners of Section 29(4) of 1999 Act to establish infringement, however, Plaintiff has failed to cross the threshold of reputation required under Section 29(4). Strength of the mark NEVER GIVE IN *albeit* registered by the Plaintiff, is also questioned on the ground that it is an ordinary English phrase and being generic, it cannot be monopolised. Amongst other grounds, it is also urged that Defendants are not using the phrase NEVER GIVE IN in the trademark sense but are using the same *bona fidely* as a motivational slogan, inspired by Defendant No.5's approach to life as also the ups and downs of his life journey, including his struggle with last stage lung cancer. Moreover, the phrase NEVER GIVE IN is not used standalone by Defendants but is always in conjunction with its house mark TIGERFIRE, which was conceived and designed in December, 2021, by a prominent US based brand strategist. Defendants have also questioned whether an institutional reputation in 'The Lawrence School' or 'Sanawar' can be conflated with reputation of the trademark. Defendants also contend that Plaintiff has not placed on record any evidence which even *prima facie* substantiates the plea of the Plaintiff that by using NEVER GIVE IN, Defendants are taking unfair advantage of the reputation and/or the use of its mark is detrimental to the distinctive character of Plaintiff's mark, assuming that it has acquired distinctiveness and secondary meaning, which test also Plaintiff has failed to prove, according to the Defendants.

33. Since the present suit is filed claiming infringement as also passing off, before proceeding further it will be profitable to closely look at the law

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on both aspects. Infringement and passing off are distinct torts while there may be overlapping tests and considerations. An action for infringement is brought forth by a registered proprietor of a trademark to protect its intellectual property and statutory right and determination of infringement involves mark to mark comparison, which means that establishment of the mere fact that Defendant is using a mark identical/deceptively similar to that of the registered mark of the Plaintiff, leading to confusion amongst members of public is enough to prove infringement, however, this may not necessarily lead to an inevitable conclusion of passing off, inasmuch as it is open to the Defendant to show other factors which may negate the possibility of consumer confusion by way of added matter etc. Infringement is thus a statutory tort while passing off is a common law tort.

34. Section 29 of 1999 Act deals with infringement of registered trademarks and sub-Section (2) postulates that registered trademark would be 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 its identity with the registered trademark and similarity of goods or services covered by it or its similarity to the registered trademark and identity or similarity of goods or services or its identity with the registered trademark and identity of goods or services covered by the registered trademark, is likely to cause confusion on the part of the public or likely to have an association with the registered trademark. Sub-Section (4) provides that registered trademark is infringed by a person, who not being a registered proprietor or a person using by way of permitted use, uses in course of trade, a mark which is identical with or similar to registered trademark and is used in relation to goods/services which are not similar to those for which the

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trademark is registered and the registered trademark has a reputation in India and use of the mark without due cause takes unfair advantage of or is detrimental to the distinctive character or repute of the registered trademark. Clearly, legislature has used the word 'or' after clauses (a) and (b) in sub-Section (2) of Section 29, whereas the word 'and' is used after clauses (a) and (b) in sub-Section (4), which means that unless all three conditions stipulated in sub-Section (4) are satisfied, it will not be open to the registered proprietor to sue for infringement even though the rival trademarks are identical or deceptively similar and used in relation to dissimilar goods.

35. Another important factor that is noticeable in Section 29 is that the entire structure of sub-Section (4) is different from sub-Sections (1), (2) and (3) and the ethos is 'dilution'. The test of 'likelihood of confusion' is not incorporated in infringement envisaged under Section 29(4) of 1999 Act and as held in ***ITC Limited (supra),*** the object of dilution form of infringement under this sub-Section is a wider trademark protection, without the concomitant of likelihood of confusion requirement since it is in respect of dissimilar or unrelated products and services. Therefore, in order to succeed under Section 29(4), Plaintiff will need to establish that its registered mark has a reputation in India and its use without due cause by another party amounts to taking unfair advantage of or is detrimental to the distinctive character or repute of the registered trademark, even where similarity of rival marks is established. Relevant passage from the judgment in ***ITC Limited (supra)*** is as follows:-

> *"**34.** The Act, as existing is not explicit about dilution-it does not refer to that term. Yet, the entire structure of Section 29(4) is different from the*

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earlier part, and in effect expresses Parliamentary intent about the standards required for a plaintiff to establish dilution of its trademark, in relation to dissimilar goods or products. This is because:

(1) The "likelihood of Confusion" test which is the essential basis of Trademark law, is not incorporated in relation to infringement of the kind Section 29(4) envisions. Section 29(1) — which talks of trademark infringement, generally, prescribes that the impugned mark should be "identical with, or deceptively similar to" the registered trademark. Section 29(2), (which deals with trademark infringement) enacts that the impugned mark should be similar or identical with the registered mark, as to cause confusion in relation to similar goods. The emphasis on similar goods is the recurring theme in each of the sub clauses (a), (b) and (c)) and the identity/similarity requirement along with the similarity of goods are twin, conditions (established by the use of the conjunctive "and"). However, Section 29(4) posits identity or similarity of the mark alone but, in relation to dissimilar goods.

(2) The object of the "dilution" form of infringement (under Section 29(4)) in effect, is a wider trademark protection without the concomitant likelihood of confusion requirement, as it is in respect of dissimilar or unrelated products and services.

(3) The confusion requirements under Section 28 are different from those under Section 29(4). Section 29(4) does not refer to the need for proving confusion anywhere in the relevant portions. Obviously the emphasis here is different.

(4) The plaintiff has to establish, under Section 29(4) apart from the similarity of the two marks (or their identity) that his (or its) mark—

(i) has a reputation in India;

(ii) the use of the mark without due cause

(iii) the use (amounts to) taking unfair advantage of or is detrimental to, the distinctive character or repute of the registered trade mark.

(5) Importantly, there is no presumption about trademark infringement, even if identity of the two marks is established, under Section 29(4). In contrast, Section 29(3) read with Section 29(2)(c) enact that if it is established that the impugned mark's identity with the registered trade mark and the identity of the goods on services covered by such registered trade mark is likely to cause confusion on the part of the public, or which is likely to have an association with the registered trade mark, "the court shall presume that it is likely to cause confusion on the part of the public."

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36. In the context of the meaning of 'reputation', the Court in ***ITC Limited (supra)*** relied on the judgment in ***General Motors Corp. v. Yplon SA, [1999] All ER (EC) 865*** as also in ***Canada Toys v. Mattel Inc, 518 F.3d 628, (2008) (2nd Circuit)*** and relevant passages are as follows:-

> *"**38.** Explaining what is meant by "reputation" it was held, in General Motors Corp v. Yplon SA, [1999] All ER (EC) 865 by the ECJ that in order to have a reputation a trade mark had to satisfy a 'knowledge threshold'. This was described as follows:*
>
> > *"26 The degree of knowledge required must be considered to be reached when the earlier mark is known by a significant part of the public concerned by the products or services covered by that trade mark.*
> >
> > *27 In examining whether this condition is fulfilled, the national court must take into consideration all the relevant facts of the case, in particular the market share held by the trade mark, the intensity, geographical extent and duration of its use, and the size of the investment made by the undertaking in promoting it."*
>
> ***39.** US Courts have emphasized the similarity or confusing nature of the mark, having regard to dissimilar goods, by saying that that the perception of the sign or mark should be that it calls to mind the memory of the mark, although the two are not confused (likelihood of association in the strict sense). Thus, it was held by the Seventh Circuit (US), in Barbecue Marx, Incorporated, Plaintiff v. Ogden, Incorporated, 235 F.3d 1041 (7th Cir. 2000) that:*
>
> > *"In order to secure injunctive relief, the rival mark should be confusingly similar in appearance and suggestion, to the plaintiffs mark."*
>
> ***40.** Recently, in Canada Toys v. Mattel Inc 518 F.3d 628, (2008) (2nd Circuit) it was held that:*
>
> > *"The federal dilution statute also requires a showing of likelihood of dilution either [**16] by blurring or by tarnishment. 15 U.S.C. § 1125(c)(1). Where, as here, a plaintiffs claim is based on a dilution by blurring theory, the question is whether the "association arising from the similarity between a mark or trade name and a famous mark ... impairs the distinctiveness of the famous mark." Id. § 1125(c)(2)(B). A court may consider all relevant factors in making this determination, including the six identified by the statute:*

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(i) The degree of similarity between the mark or trade name and the famous mark.

(ii) The degree of inherent or acquired distinctiveness of the famous mark.

(iii) The extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark.

(iv) The degree of recognition of the famous mark.

(v) Whether the user of the mark or trade name intended to create an association with the famous mark,

(vi) Any actual association between the mark or trade name and the famous mark."

37. In ***Bloomberg Finance LP v. Prafull Saklecha & Ors., 2013 SCC OnLine Del 4159***, the Court emphasised on the absence of the element of having to demonstrate likelihood of confusion in Section 29(4) and observed that perhaps to balance this element, legislature has mandated the necessity of showing that: (a) the registered mark has a reputation in India; (b) the mark has a distinctive character; and (c) the use of the mark by the infringer is without due cause. It was observed that the word 'detriment' in the context of 'distinctive character' of the mark brings in the concept of dilution and blurring and in the context of 'repute' the same is relatable to tarnishment and degradation. The words '*takes unfair advantage*' refers to free riding on the goodwill attached to the mark which enjoys reputation. The disjunctive 'or' between the words 'distinctive character' and 'repute' is designedly inserted to cater to a situation where a mark may not have a distinctive character and yet may have a reputation.

38. It is important to highlight that in ***Bloomberg (supra)***, Court emphasised on the other significant part of the judgment in ***ITC Limited (supra),*** i.e., the need to establish linkage or mental association of the

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offending mark with Plaintiff's mark as one of the vital essentials for securing relief in a claim for dilution. In this context, it is apposite to refer to a judgment of the Madras High Court in ***Ashok Leyland (supra),*** where the Court held that protection extended by Section 29(4) even to dissimilar goods/services is based on doctrine of dilution, which is a type of violation of a trademark in which Defendant's use, while not causing a likelihood of confusion, blurs distinctiveness or tarnishes the image of Plaintiff's mark. Relevant passages from ***Ashok Leyland (supra)*** are as follows:-

> *"**33.** The protection extended by Section 29(4) even to dissimilar goods and services, is actually based upon 'the doctrine of dilution'. Dilution is a type of violation of a trade mark, in which the Defendant's use, while not causing a likelihood of confusion, blurs distinctiveness or tarnishes the image of the Plaintiff's mark. In Daimler Benz Aktigesellschaft v. Hybo Hindustan, AIR 1994 Del. 239, it was held that the rights conferred upon owner of the registered mark cannot be diluted by other persons adopting the same mark, and trying to escape through the gateway that they have adopted the mark for dissimilar products and services. The same principles were followed in Honda Motors Co. Ltd. v. Charanjit Singh, 2003 (26) PTC 1 (Del.). In Ford Motor Company of Canada Limited v. Ford Service Centre, 2009 (39) PTC 149, the Plaintiff's registered trade mark was in relation to motor vehicles. The Defendant used the same mark for its fuel filling station. A defence taken by the Defendant in that case, similar to the one taken in this case, was rejected by the Delhi High Court. In Tata Sons Limited v. A.K. Choudhry, 2009 (40) PTC 54, the Delhi High Court prohibited the Defendants from using the trade mark 'Tata' in relation to cutlery by invoking Section 29(4).*
>
> ***34.** There cannot be any dispute in this case about the fulfillment of the conditions contained in clauses (a) and (b) of sub-section (4) of Section 29. The Plaintiff's registered trade mark is "LUXURA'. The mark adopted by the First Defendant is the word "LUXURIA" along with the device of a reclining chair. Therefore, certainly, the mark adopted by the First Defendant is similar to the registered trade mark of the Plaintiff. Hence, Clause (a) of sub-section (4) of Section 29 stands satisfied.*
>
> ***xxx xxx xxx***
>
> ***40.** Once it is clear that the focus of Section 29(4)(c) is on the reputation of the mark and not on the reputation of its maker, we may have to see how to assess and determine the reputation of a mark. The reputation of a*

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trademark has to be assessed on the basis of several factors, such as the publicity that preceded and succeeded the launch of the product carrying the mark, the volume of turnover and the impact that the mark has created in the minds of the public, enabling them to associate the mark with the product. The reputation of the mark need not always be reflected by the volume of turnover alone. While dealing with the concept of "goodwill", which is only an expression that belongs to the same genre as the expression "reputation," a learned Judge of the Delhi High Court, extracted in his decision in Thermofriz Insulations v. Vijay Udyog, 1981 PTC 128, a passage from an unreported judgment of the Supreme Court which reads as under:

> *"17. The Supreme Court in Civil Appeal No. 1201/66 in an unreported judgment Khushal Khengar Shah v. Mrs. Khorshedbanu Dadiba Boatwalla, dated February, 12, 1970 has laid down:*
>
> > *"The goodwill of a business is however an intangible asset being the whole advantage of the reputation and connections formed with the customers together with the circumstances which make the connection durable. It is that component of the total value of the undertaking which is attributable to the ability of the concern to earn profits over a course of years because of its reputation, location and other features".*

39. It is thus clear that the threshold of reputation required to be established by the registered proprietor making a claim of infringement under Section 29(4) of 1999 Act on the doctrine of dilution in respect of goods/services is high *albeit* the mark need not be a declared well-known mark. Another principle which is equally well settled is that focus of Section 29(4)(c) of 1999 Act is on the reputation of the mark of the registered proprietor in relation of the goods/services it is registered for and not on the reputation of its maker and reputation of the trademark has to be assessed on the basis of many factors such as publicity that precedes and succeeds the launch of the product carrying the mark, the volume of turnover and the impact the mark creates in the minds of the public *albeit* reputation may not always be reflected in volumes of sales alone. ***[Ref.: Ashok Leyland***

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(supra)]. This position of law is restated by the Division Bench of this Court in ***VIP Industries Limited v. Carlton Shoes Limited and Another, 2025 SCC OnLine Del 4620,*** *albeit* in the context of passing off and goodwill, holding that the goodwill that is required to be established is in the mark or name and no doubt, when used in connection with the goods or services and is also alluded to in the judgment of this Court in ***Pepsico (supra).***

40. The case of the parties will have to be tested on the anvil of the aforesaid principles set forth in the judgments in the context of Section 29(4) of 1999 Act and the first question that needs consideration is whether Plaintiff has been able to *prima facie* establish reputation in the mark NEVER GIVE IN of a threshold required under the said provision so as to invoke the doctrine of dilution and restrain the Defendants from using the phrase NEVER GIVE IN, without prejudice to the defence that the said phrase is not used by the Defendants in a trademark sense. Parties are not at variance that the goods/services of the respective parties are not similar inasmuch as Plaintiff is in the field of education while the product of the Defendants is vodka, an alcoholic beverage. Section 29(2) of 1999 Act comes into play when the goods or services of the rival parties are similar or identical, which is not the case here and which is why Plaintiff has pitched its case on the high pedestal of Section 29(4), where infringement is in respect of dissimilar goods/services and therefore, it needs to be examined whether the mark NEVER GIVE IN has acquired reputation required under the said provision and whether the claim to this effect is vouchsafed by pleadings and documents on record.

41. On examination of the pleadings and documents of the Plaintiff, I am of the *prima facie* view that Plaintiff has not shown a single standalone use

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of the mark NEVER GIVE IN and claim to fame of the Plaintiff is entirely predicated on 'The Lawrence School, Sanawar' or 'Sanawar', which are essential parts of many other device marks of the Plaintiff and where NEVER GIVE IN is a component part. Plaintiff proceeds on an erroneous assumption in law that registration in the composite mark with NEVER GIVE IN as a component or even the word mark NEVER GIVE IN automatically entitles the Plaintiff to restrain third parties from using the mark in respect of dissimilar goods/services, which is in the teeth of Section 29(2) as also Section 29(4) of 1999 Act. Plaintiff will have to independently establish its reputation in the mark NEVER GIVE IN in India as one of the conditions to fall under Section 29(4) and I may add that reputation of the educational institution *per se* will not establish the reputation of the mark NEVER GIVE IN. I may now test the documents filed by the Plaintiff to demonstrate use of or reputation in the mark NEVER GIVE IN.

42. The documents from pages 156-171 are copies of audited balance sheets and financial statements of the Plaintiff's school for the years 2003, 2009, 2010, 2011, 2012, 2019, 2022 to 2024. In none of these documents, there is any reference to the mark NEVER GIVE IN and all documents refer to 'The Lawrence School (Sanawar) Society'. Documents at pages 172-188 are copies of invitation letters/e-mails in connection with students exchange programmes of Plaintiff's school with foreign Schools/Universities and even these do not contain any reference to NEVER GIVE IN. Each of these documents only refer to 'The Lawrence School, Sanawar' India, in whatever context used.

43. Similarly, documents at pages 189 and 191-193 pertain to media coverage of celebrations on the Founder's Day of the School in the year

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2012 and include reports in prominent newspapers such as Tribune, Hindustan Times and Indian Express and NEVER GIVE IN is conspicuously missing in these documents. Similarly, all other documents filed by the Plaintiff at the highest establish the varied activities carried on in the School and/or achievement of the students such as media coverage of world record in climbing Mount Everest; publications/press releases on celebration of 173rd Founder's Day in 2020; social initiatives by the School; awards received and awards conferred; video clippings from DD National News Channel Telecast dated 26.01.2026, showing Captain Samira Zenath, an alumni of the school; extracts from School's coffee table book; and WHOIS report of Plaintiff's websites www.sanawar.edu.in and www.oldsanawarian.com. These documents, to my mind, do not establish standalone use of the mark NEVER GIVE IN and consequently, cannot aid the Plaintiff in proving reputation for the purpose of Section 29(4).

44. Coming back to the documents, where NEVER GIVE IN is mentioned, I find that none of them establish the use of the mark as a trademark and consequently, the question of these documents constituting as evidence of reputation does not arise. Copies of media coverage on Founder's Day of the school for 2012 contains a statement of an alumni in the article stating "*Founder's Day celebrations at Lawrence School conclude"... "addressing the gathering, he said a sound foundation was laid by good education and the school's motto never give in attain success*". To the same effect are articles in news reports, publications and press releases of the Founder's Day in 2020 recording the statement of an alumnus that the motto of Sanawar is 'never give in'. Communications refer to 'never give in' as a motto and references are restricted to applauding the school for

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shaping the future of the students as per the motto. One of the documents is a school song containing the motto ‘never give in’, but the use only indicates inner institutional value and not a use as a trademark. The screenshots from the websites of the Plaintiff also demonstrate that the mark is not used standalone but is in conjunction with the prominent identifier ‘The Lawrence School, Sanawar’. The only document with standalone use is a display board installed at the school premises, however, this can hardly be treated as a use in the trademark sense. Defendants are thus right that *sans* the reputation in the standalone mark NEVER GIVE IN, the threshold of Section 29(4) is not met.

45. It needs no reiteration that to be capable of being diluted, the mark must have a high degree of distinctiveness, strength and reputation and this could be inherent or acquired, such that the mark gains secondary meaning. In the instant case, all that the Plaintiff puts forth are letter heads; communications; speeches by dignitaries on Founder’s Day etc,; articles in newspapers or school magazine; and postal stamp in 1997, but each of these prominently display ‘The Lawrence School, Sanawar’ with NEVER GIVE IN endorsed in conjunction, more as a motto than in the trademark sense. Thus, Plaintiff is unable to establish reputation in the mark NEVER GIVE IN, which is a *sine qua non* for restraining a third party selling dissimilar goods, even if the rival marks are similar invoking Section 29(4) of 1999 Act. It is trite that reputation must be established in the mark separate from the reputation of the maker or as in this case the institution *per se*. Defendants do not for these proceedings question or dispute registration in the mark NEVER GIVE IN in favour of the Plaintiff or even the reputation of the Plaintiff but urge and rightly so, that reputation of the educational

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institution and reputation in the mark are two distinct issues and Plaintiff cannot automatically transpose the reputation associated with the institution, its historical background and its educational achievements and/or the achievements and stature of its alumni as the reputation of the mark NEVER GIVE IN, which will have to be established independently by showing that the mark is associated in the minds of the public exclusively with the Plaintiff.

46. The documents placed on record by the Plaintiff demonstrate that NEVER GIVE IN has been used more as an institutional motto reflecting the ethos, philosophy, aspirations of the institution and of its alumni. In order to succeed in restraining the Defendants under Section 29(4), Plaintiff must establish through cogent evidence at least *prima facie* at this stage that the mark has acquired an independent source identifying significance in the minds of relevant public, distinct from the identity and reputation of 'The Lawrence School, Sanawar' and it cannot rely merely on the antiquity of the school or the historical use of its motto to presume that the expression has acquired a reputation extending across unrelated commercial sectors, including alcoholic beverages industry. I may also add that the mere fact that Plaintiff has separate registration for NEVER GIVE IN as a word mark cannot dispense with the requirement of establishing reputation under Section 29(4) as registration of the mark and the requisites of reputation under the said provision are legally different concepts and cannot be conflated. The judgment of this Court in ***ITC Limited (supra),*** is extremely instructive on the statutory protection available under Section 29(4) on the doctrine of dilution when rival marks are used for dissimilar goods and Court has emphasised that Plaintiff must establish amongst other things,

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reputation in India in the mark and that Courts cannot mechanically apply principles governing infringement in respect of identical or similar goods to the infringement envisioned under Section 29(4) and therefore, requirement of this sub-Section must be independently met. Court also observed that the test for dilution is not exactly the same as under Section 29(2) of 1999 Act, for one, Parliament has consciously eschewed the deceptively similar standards under Section 29(4), which means that the standard is a notch higher and Plaintiff must prove: (i) identity/similarity in the rival marks; (ii) reputation of the mark of a high threshold; (iii) use of the mark by the Defendant without due cause; (iv) unfair advantage; and (v) resultant dilution of the mark and detriment. Relevant paragraphs from the judgment are as follows:-

> *"**46.** The plaintiffs argument that the W-NAMASTE logo is ITC'S house-mark, in the court's opinion, not on a sound footing. It was not disputed during the hearing that the ITC's triangular logo is used in its non-hospitality products and services. As far as the W-Namaste logo or mark is concerned, what is apparent from a visual or aural perspective, is that it is the stylized depiction of the Indian greeting "Namaste". There is perhaps, a natural association with the hospitality industry. Apart from the fact that the stylization is distinctive — and has been in apparent use for the last 34 years or so, is that the mark is part of a larger logo. Thus, the W-NAMASTE is part of the trademark or label, for which the plaintiff has secured registration. The mark includes words such as "ITC-Welcom Hotel New Delhi"; "ITC-Hotel & Windsor Towers, Bangalore"; "ITC Hotel Bangalore"; "Welcomhotel Vadodara"; "ITC Hotel Gardenia Grand Bangalore"; "ITC Camp Bharat" and so on. Similarly, the copies of copyright registrations placed on the record reveal that the W-Namaste logo is a part of the overall mark, which invariably includes the "ITC" and "Welcom." words, with reference to the hotel, resort or restaurant concerned. The depiction of the W-Namaste is predominantly in conjunction with the other words, which too, are part of the copyright claimed. Besides, the Namaste logo, although an important element, does not dominate the overall trademark or logo.*
>
> ***47.** It would be, at this stage, relevant to recollect the two rival marks, which are in question. The defendant has been using a broad "M" Roof*

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mark. That mark is depicted on the top portion of each cigarette carton; usually it is set in one or the other colour, such as red, blue, maroon, etc.

The impugned mark is set in black background with

the mark further depicted in yellow flames

(presumably to denote the festive occasion of Diwali). The

two marks — original mark used by the defendant, and the

impugned mark, are shown in the box, at the right side.

The plaintiffs logo is as follows:

The further details about the two rival marks is that the plaintiffs' logo is almost always depicted with some words, usually "Welcomgroup". The defendant's impugned mark, is not a "stand alone" logo or mark; the words Marlboro are written with it.

48. *It is an established principle, in India, that in any trademark infringement action, the question of similarity (of the rival marks) is to be addressed first. Here, the test — evolved over 40 years ago — of course in the context of similar goods and applied consistently by the court, was summarized by the following quote, (from an old English decision) by the Supreme Court, in Amritdhara Pharmacy v. Satya Deo Gupta, AIR 1963 SC 449 onwards:*

> *"You must take the two words. You must judge them, both by their look and by their sound. You must consider the goods to which they are to be applied. You must consider the nature and kind of customer who would be likely to buy those goods. In fact you must consider all the surrounding circumstances; and you must further consider what is likely to happen if each of those trade-marks is used in a normal way as a trade mark for the goods of the respective owners of the marks."*

This court is of opinion that the test here (for dilution) is not exactly the same. For one, Parliament has consciously eschewed the "deceptively" similar standard-which is defined by Section 2, in relation to infringement claims under Section 29(4). This would mean that the identity or similarity standard is a notch higher — the claimant has to prove or establish that the two marks are identical with or similar to each other. The question of deception does not arise here. There must be a near identification of the two marks or they must have the closest similarity. The second aspect is that the other elements necessary to establish dilution dissimilarity of goods, the claimant mark having a reputation in India; the use of the mark without due cause, resulting in detriment to it, or the defendant taking undue advantage, have to be established. These ingredients are all to be established, as the conjunctive "and" is used, in Section 29(4).

49. *As commented earlier, the analogy of tests evolved in infringement*

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actions where similar goods or services are in question appears to be inapposite, after the enactment of Section 29(4). The plaintiff has to fulfill a more stringent test (than the deceptive similarity standard) of proving identity or similarity, where trademark dilution is complained. Applying the reasoning of the decisions cited previously, it is held that a "global" look, rather than a focus only on the common elements of the mark, is to be taken, while considering if the impugned or junior mark infringes, by dilution, an existing registered mark. As noted in the previous part of the judgment, the plaintiffs' mark is not a "stand alone" mark; it is used with the words Welcomgroup, or the name of the resort or service. Moreover, the plaintiffs' mark is part of the overall marks and devices which are used in relation to each hotel, restaurant, resort or service it offers, to the consumer. The defendants claim that the impugned mark is used only for a special festive pack, i.e Diwali. The plaintiffs mark resembles a "W" but clearly a "Namaste" is discernable. All the defendant's previous marks resemble "M" (perhaps depicting MARLBORO). Considering the overall marks or logos, without cataloging minutely the similarities or dissimilarities, this court discerns no "identity" or "similarity" in the overall presentation of the two. This conclusion is further fortified for the reason that the plaintiffs mark, in relation to hospitality industry, is a stylized logo, which has to be juxtaposed with another mark, which, the materials on record prima facie suggest, has its own distinctive market. The case law in India, on dilution — mostly pertaining to the situation existing prior to Section 29(4) has hinged round comparison of competing word marks, which have their peculiarities. In the case of logos and other marks, the application of the "identity" or "similarity" test has to result in a conclusion that the rival marks bear a very close resemblance, seen from an overall perspective. It is, therefore, concluded, that prima facie the two trademarks are neither identical, nor similar to each other. This prima facie conclusion would also govern the plaintiffs copyright claim, because the W-NAMASTE of the dissimilarity between that logo or mark and the tilting "flame" logo of the defendants. The latter mark is quite different, and has its own artistic elements.

***50.** The second question is, whether assuming the plaintiff has proved similarity, has it also established distinctiveness and reputation of the mark and the services associated with it, which, if used, the way the defendants are using it, would whittle down such distinctiveness or exclusivity. The materials on record show that the plaintiffs' W-NAMASTE logo is connected mainly with hotels, resorts, restaurants and the hospitality sector generally. The plaintiff also uses it for the "kitchens of india" range of products marketed by it. The plaintiff's reputation in its mark contains an aura of luxury could possibly transcend the hospitality business, and may well evoke a broad association with luxury goods. However, though the "aura" of the W-NAMASTE mark may go beyond the*

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> *niche hospitality services, and could extend to other luxury goods, there is nothing suggestive that such association extends to mid to high priced cigarettes. This aspect is crucial, because the plaintiff does not deny selling competing goods, i.e cigarettes in different price ranges, some of which are priced competitively with the defendants' cigarettes. All materials suggest that the difference between the two products and service ranges — i.e hospitality business of ITC, which alone apparently uses the W-NAMASTE — and the defendant's cigarettes — are significant and fundamental. Besides the printouts, write up and other written materials, laudatory of the plaintiffs services, there is no evidence to show how the W-NAMASTE logo is likely to be affected prejudicially, or that the defendant's use of their mark would result in detriment to the plaintiffs mark. The defendant, on the other hand, has shown that its marks have always carried a distinctive M roof design; that design has now been modified, and also tilted, making the alphabet M prominent, which is depicted in flames, against a dark (black) background, with the words MARLBORO prominently accompanying it. The plaintiff has not shown that it uses the W-NAMASTE mark for its cigarette brands; anyway that is not such products' primary or main logo. Importantly, the class of users of the plaintiffs hospitality services and the consumer of high and mid-end priced cigarettes are not the kind who would associate the defendant's mark (with MARLBORO depicted prominently) as those of the rival ITC. Taking into consideration all these factors, and the materials on record, the court is prima facie satisfied there is no linkage between the defendant's mark and the plaintiffs' services, so as to cause detriment to the latter, and undue advantage to the former."*

47. As the Plaintiff is unable to cross the hurdle of showing reputation in the mark NEVER GIVE IN as a standalone mark, one of the essential ingredients of Section 29(4) is not fulfilled and *prima facie* claim of infringement fails. In light of this, *albeit* it is not necessary to delve into other ingredients of the provision, but I find that Plaintiff fails even on those parameters. There is no material to show that Defendants have taken unfair advantage of Plaintiff's mark or that use of NEVER GIVE IN by them has diluted the registered mark of the Plaintiff. In ***ITC Limited (supra),*** Court held that unfair advantage cannot be presumed and must be affirmatively proved as a matter of fact. ***Medecins Sans Frontieres International v.***

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Dharma Productions Private Limited and Others, 2026 SCC OnLine Del 2831, is a decision of this Court where Plaintiff had instituted the suit for infringement in respect of the mark 'Medecins Sans Frontieres/Doctors Without Borders' in a film. The submissions of the Defendants were broadly that for determining unfair advantage, it must be demonstrated that Defendants sought to ride on the coat-tails of the trademark owner to benefit from the reputation of the mark as articulated in ***Argos Ltd (supra)*** and accepted in ***Bloomberg (supra).*** It was also contended that it will be insufficient to simply assert that Defendants were obtaining economic advantage without demonstrating a change in economic behaviour of customers in respect of Plaintiff's goods or services or the likelihood of such a change and that Plaintiff was required to demonstrate detriment to the distinctive character or reputation of the mark and/or dilution or blurring or whittling away of distinctive character, by evidence that in the consumer's mind the trademark was getting weakened as applied in ***Comic Enterprises Ltd v. Twentieth Century Fox Film Corpn, [2017] Bus LR 429.*** Secondly, detriment may also be to the reputation of the mark in the form of tarnishment or degradation and this would effectively require the Plaintiff to show that power of attraction of the well known mark has been reduced in the eyes of the users.

48. Analysing the submissions and provisions of Section 29(4) of 1999 Act, the Court in ***Medecins Sans (supra),*** observed that to establish unfair advantage, Plaintiff must produce material to indicate change in the economic behaviour of an average consumer and must also show that distinctive attraction of the mark has diminished among consumers *albeit* even likelihood of change may suffice and *sans* any such evidence even

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prima facie Plaintiff cannot seek restraint under Section 29(4), alleging infringement. In the instant case, Plaintiff has neither pleaded nor produced any material or testimonial or report showing change in the economic behaviour of any potential or existing student, parent or alumni or even material that the public is establishing an association of Defendants' product with the mark NEVER GIVE IN causing its dilution and the case is largely predicated on the moral aspect of use of the mark in the liquor industry. Therefore, in my *prima facie* view, Plaintiff has failed to make out a case of infringement under Section 29(4) of 1999 Act.

49. There is yet another aspect of the matter which merits consideration. Defendants have pleaded, articulated and demonstrated that NEVER GIVE IN is not used by the Defendants in respect of the impugned product in the sense of a trademark and the use is in the sense of an inspirational and motivational phrase. It is explained that Defendant No.5 is the inspiration and the origin of the motivational tagline has its genesis in the extraordinary personal and professional journey of Defendant No.5, who has encountered rough phases in his life, including his battle with last stage lung cancer, which he overcame in 2020. The brand TIGERFIRE NEVER GIVE IN was conceived and designed in December, 2021, by Mr. Jason DeLand, a prominent US based brand strategist and artist, who focused on fearless personality, attitude, resilience and indomitable spirit of Defendant No.5. The phrase NEVER GIVE IN in Defendants' mark is therefore an expression of his approach to life and his life's journey. Moreover, use of motivational phrases as taglines is an established practice in the industry of alcoholic and non-alcoholic beverages and illustratively, reference was made to: Johnnie Walker: Keep Walking; Royal Stag: It's Your Life, Make It

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Large; Mountain Dew: Darr Ke Aage Jeet Hai; Thumps Up: Taste the Thunder; and Cadbury Bourn Vita: Tayyari Jeet Ki.

50. From the documents on record as also the screenshots, I am of the *prima facie* view that Defendants are right in contending that they are using the phrase NEVER GIVE IN not as a trademark but as an ordinary motivational or promotional phrase along with their house mark TIGERFIRE, which remains the principal source identifier of the impugned product. The expression is used in its ordinary linguistic sense to communicate a motivational message and there is no representation that Defendants' product emanates or originates from or is sponsored by or has any commercial association with the Plaintiff. For ready reference one of the screenshots showing use of NEVER GIVE IN is as follows:-



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51. Under 1999 Act, there is a clear distinction between a 'mark' and 'trademark' and the intent of the legislature is to keep the two distinct as they have different connotations. Section 2(1)(zb) defines a trademark as a mark capable of being represented graphically and importantly capable of distinguishing the goods and services of one person from another. Therefore, the fundamental role of a trademark is that it distinguishes the goods/ services of the proprietor from the others. Trademarks are intangible assets of the proprietors, which serve as 'source identifiers', instantly connecting the goods/services with its proprietor in the minds of the public. In ***Red Bull AG v. Pepsico India Holdings Pvt. Ltd, (2022) 3 HCC (Del) 106,*** this Court held that use of the impugned tagline 'STIMULATES MIND, ENERGISES BODY' by the Defendants was in a descriptive/laudatory manner and not as a trademark. Being an expression comprising of four English words that aims to describe the features and quality of its drink in comparison to its brand name 'STING', its use cannot be termed as infringement of Plaintiff's registered trademark/tag line 'VITALIZES BODY AND MIND' under Section 29 of the Act. What emerges from the observations in the aforesaid judgments is that if the Defendant is able to demonstrate that its use of the allegedly infringing trademark is not as a trademark but merely descriptive of its goods, it can escape the rigours of Section 29 of the Act. In fact, this defence is available to the Defendant under Section 30(2)(a) of the Act which provides that a registered trademark is not infringed where the use in relation to goods or services indicates the kind, quality, quantity, intended purpose etc. or characteristics of goods or services. In my *prima facie* view, Defendants are not using the phrase NEVER GIVE IN in the trademark sense and hence, the claim for

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infringement cannot succeed. There is also merit in the contention of the Defendants that even assuming NEVER GIVE IN was used as trademark, since the registration in favour of the Plaintiff is in Classes 16 and 41, it cannot seek restraint against the impugned product which is in a wholly different category and class *sans* its case falling under Section 29(4) of 1999 Act.

52. Coming to the aspect of passing off, indisputably, it is a common law tort and is founded on reputation and goodwill of the asserted mark as also misrepresentation by the Defendants and an irreparable harm and injury to the goodwill and reputation. First and foremost, as noted above, Plaintiff is unable to establish reputation and goodwill in the standalone mark NEVER GIVE IN. In the absence of one of the ingredients of passing off, the claim of the Plaintiff must fail. Plaintiff is also unable to establish that the use of phrase NEVER GIVE IN by the Defendants is such that they intend to misrepresent to the public or members of trade that their product has any association or commercial nexus with the Plaintiff. Moreover, the manner and the context in which NEVER GIVE IN is used on the impugned product and/or for promotional activities, demonstrates that the phrase is employed as a motivational and promotional tagline and not as a badge of commercial origin which would establish any commercial nexus with the Plaintiff.

53. It is settled law for infringement it suffices if Defendant adopts the registered mark of the Plaintiff, as this statutory tort is based on mark to mark comparison, but the Defendant can escape liability in a passing off action if it shows that added matter is enough to distinguish the rival goods/services. ***[Ref.: Kaviraj Pandit Durga Dutt Sharma v. Navaratna***

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Pharmaceutical Laboratories, 1964 SCC OnLine SC 14]. In the instant case, Defendants are right in pointing out that the phrase NEVER GIVE IN is used in conjunction with the house mark TIGERFIRE, which occupies the primary and dominant position on the product and independently identifies the commercial source of the impugned product. Placement of the phrase is a significant circumstance demonstrating the purpose and function of the expression and cannot be taken in isolation and viewed separately. Therefore, in my *prima facie* view, no case of passing off is made out in the present case.

54. The judgments relied upon by learned counsel for the Plaintiff do not aid or further the case of the Plaintiff. The judgments in ***Argos Ltd (supra), The Eastman Photographic (supra),*** were cited for the proposition that some trademarks convey emotional feelings to allure potential customers. These judgments cannot be questioned on the legal proposition, however, as the judgments themselves indicate such marks are those which are either inherently distinctive or have acquired distinctiveness such that the public associates them with the proprietors alone, by virtue of their long use etc., such as FERRARI, MERCEDES BENZ, PRIUS, MONT BLANC, to refer to a few. In the context of reputation and dilution, reliance was placed on the judgment in ***O2 Holdings (supra)*** and it was asserted that even use of a sign such as O2 by the Defendant could be detrimental to the distinctive character or repute of the mark. To counter Defendants' argument that ordinary English or Hindi language words cannot function as a trademark, reliance was placed on ***Living Media (supra),*** where the controversy revolved around the mark 'AAJ TAK'. This case is inapplicable since Defendants are not using NEVER GIVE IN as a trademark and most

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importantly, Plaintiff is unable to bring its case under Section 29(4) *qua* the mark NEVER GIVE IN.

55. Defendants have taken a serious preliminary objection for vacating the *ex parte* ad interim injunction that there is deliberate suppression, misrepresentation and falsehood committed by the Plaintiff inasmuch as firstly, this suit was filed without serving any legal notice on the Defendants or effecting advance service and secondly, an artificial urgency was created by alleging that Defendants were intending to launch the product in the market contrary to the actual fact that the impugned product was already launched and was available in the market when the suit was filed and this was in the knowledge of the Plaintiff, which is substantiated by the documents which were filed with the plaint itself being at pages 632, 644-646 and 648-649, which are social media posts and news articles/media coverage evidencing launch of Defendants' product. Sale invoices filed with the Defendants' documents show actual sales well before the suit was filed and the extent of popularity of the product is substantiated by sales of approximately Rs.1.6 crores within three months from launch in December, 2025. In fact, Defendants' product has already become second leading brand in premium vodka segment. It was also urged that a basic internet search would have revealed launch of the product in the domestic market. The launch event was prominently covered by media and entertainment publications and was attended by several prominent Bollywood personalities. Plaintiff cannot feign ignorance in view of the massive publicity of the launch of the product in the public domain.

56. Counsel for the Plaintiff, on the other hand, refuted the allegations of

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concealment and misrepresentation with equal vehemence. It was denied that Plaintiff misled the Court into believing that the impugned product was not available in the market for sale and was about to be launched, contrary to its knowledge otherwise. Plaintiff correctly stated that there was aggressive promotion of the product using the mark NEVER GIVE IN by the Defendants through circulation of literature, campaigns, narratives etc. and that so far the product was not physically launched. Defendants' own documents indicate that the product was initially launched through promotional campaigns and the actual physical product was to roll out later and therefore, the averment in paragraph 46 of the plaint that in last week of November and beginning of December, 2025, Plaintiff's attention was drawn to publicity literature freely available on media and social media site is not incorrect. There is a difference in launch of a product and publicity campaigns and its physical availability in the market. Moreover, the invoices filed by the Defendants to evidence its sales show miniscule sales in few shops in Mumbai, Goa and Gurugram and Plaintiff is not expected to have knowledge of sales in small shops in the country, being located in Himachal Pradesh.

57. Having given my thoughtful consideration to the preliminary objection, I am of the view that there is no wilful concealment or misrepresentation by the Plaintiff. Holistic reading of plaint shows that there are averments that in last week of November and beginning December, 2025, Plaintiff's attention was drawn by members of the civil society like former students, teachers, parents to publicity literature on internet and social media sites of alcoholic beverage vodka being promoted by Defendants bearing the mark NEVER GIVE IN. Reference is also made to a

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journal Ambrosia and Defendants' own website as also social media platforms like Instagram and Twitter and news media platforms like News18 India, Spirits, Bollywood Helpline, where use of the impugned mark was shown in respect of impugned goods. Having so stated, Plaintiff further avers that Defendants are advertising, promoting and intend to sell commercially the impugned product under the impugned mark. Therefore, there is a clear narrative of Plaintiff's knowledge of the aggressive promotion campaigns in the plaint. Plaintiff has also stated that to its belief, Defendants have so far not physically launched the impugned goods in the market and Plaintiff has not come across any such physical goods in the market. Conjoint reading of paragraphs 47 to 50 along with screenshots extracted in the plaint and documents filed with the plaint does not lead to a conclusion that there was any deliberate intent to suppress material or to misguide the Court. If paragraph 49 is read in the context in which it appears, the words '*not physically launched*' connote that the intent was to state that goods were not physically available in the market and this is preceded by the words '*to the best of the Plaintiff's belief*'. Going by the invoices filed by the Defendants, I am of the view that there is no suppression as Plaintiff cannot reasonably be expected to have knowledge of Defendants' sales undertaken through small retail outlets scattered across 3-4 States.

58. For all the aforesaid reasons, I.A. 10828/2026 under Order XXXIX Rule 4 CPC filed by Defendants No.1 to 4 is allowed and *ex parte* ad interim injunction granted in favour of the Plaintiff vide order dated 20.03.2026 is hereby vacated. I.A. 6537/2026 under Order XXXIX Rules 1 and 2 CPC filed by the Plaintiff is dismissed. Defendants shall, however, maintain

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accounts of the sales of the impugned product and file a six-monthly affidavit to this effect.

59. Both applications stand disposed of.

JYOTI SINGH, J.

NOVEMBER 23, 2026/YA

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