IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT SRINAGAR

Reserved on: 03.06.2024
Pronounced on: 07.06.2024

FAO No.18/2024
CM No.3278/2024

EMERGE CLASSES PRIVATE LIMITED ... APPELLANT(S)

Through: - Mr. T. H. Khawaja, Advocate, with
M/S: Imam Abul Muiz & Naseer ul Akbar, Advocates.

Vs.

KASHMIR INSTITUTE OF EXCELLENCE AND OTHERS ...RESPONDENT(S)

Through: - Mr. Mubashir Mushtaq, Advocate.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The appellant, who happens to be the defendant before the trial court, has challenged order dated 16.05.2024 passed by learned 2nd Additional District Judge, Srinagar (hereinafter 'the trial court' for short) whereby, the trial court, while disposing of an application under Order 39 Rules 1 & 2 filed by the respondents/plaintiffs, temporarily restrained the appellant/defendant from using trade mark (device and logo) of the respondents/plaintiffs.

2) It appears that the respondents/plaintiffs filed a suit before the trial court against the appellant/defendant seeking certain reliefs which are reproduced as under:-

a) For permanent injunction restraining the defendant by itself or through its individual proprietors, promoters, directors, officers, agents, servants, representatives, assigns, heirs, successors and all others acting for and on its behalf from using, adopting, advertising, displaying etc. the trade marks "EMERGE – Infinity and Beyond" and "KIE" or any mark identical with or deceptively similar to the plaintiffs "EMERGE – KIE HOPE MISSIONe- Infinity and Beyond' mark in any manner whatsoever including as a part of the name and from doing other thing as may constitute infringement of plaintiff's registered trademark and passing off of the plaintiffs right in the plaintiffs said trade mark/trade name and acts of unfair competition.

b) Directing the defendant to deliver all the products, material and stationery and data details of social media pages of the defendant bearing impugned trade mark or any mark deceptively similar to the mark "EMERGE – KIE HOPE MISSIONe – Infinity and Beyond" including the advertising materials, display boards, sign board, trade literatures and goods etc. for the purpose of destruction/ erasure.

c) For grant of damages in sum of Rs.50,00,000 (rupees fifty lakhs only) from the defendant to the plaintiffs.

3) In the plaint, it was pleaded by the plaintiffs/ respondents that plaintiffs No.1 to 3 are reputed and renowned service providers in the field of education and imparting coaching to students of Class 8th to 12th and aspirants of Competitive Exams like NEET, JEE and its

allied services. According to the plaintiffs, plaintiff No.1 is the rightful owner/proprietor of trademark 'KIE' (device and logo) which is duly registered with the Registrar of Trade Marks, Government of India, Mumbai, and the said trademark is registered under Class 41 dealing in "Coaching Services". It has been pleaded that petitioner No.1 has a chain of coaching centres across Kashmir Valley running and operating under the brand name and trademark 'KIE' (*Kashmir Institute of Excellence*). It is also pleaded that plaintiff No.2 provides similar services under the brand name 'MissionE *coaching classes*' and is rightful owner of brand name '*MissionE*' whereas plaintiff No.3 provides its services under the brand name '*HOPE Classes'* and is rightful owner of the brand name known as 'HOPE Classes'. Regarding plaintiff No.4, it has been submitted that it is a company which provides services under the brand name "EMERGE KIE HOPE MISSIONE PVT. LIMITED" since January, 2024 and, as such, is rightful owner of the said brand and that it has applied for registration of the trade mark 'EMERGE'.

4) According to the plaintiffs, the aforesaid trademarks and brands are strong brands depicting the professional reputation of the plaintiffs in the field of providing coaching

to the students and these brands have gained much recognition and have acquired distinctive goodwill with the passage of time.

5) It has been pleaded that in November, 2023, the plaintiffs decided to amalgamate under one name for providing coaching services and the name to such amalgam was given as 'EMERGE - KIE HOPE MISSIONe'. According to the plaintiffs, the brand 'EMERGE' was launched on 6th January, 2024 in a huge gathering of students, tutors and the persons from the coaching industry and a memorandum of association was signed by the plaintiffs on the said date. It was decided that the company be registered by the name of 'EMERGE KIE HOPE MISSION-E PVT. LIMITED" and the plaintiffs applied for registration of the trademark. The members of the amalgam agreed to shun use of their respective individual brands for providing any coaching services.

6) According to the plaintiffs, they are using their brand name 'EMERGE - KIE HOPE MISSIONe – Infinity and beyond" on all its services and the said brand name has acquired popularity among the students, as a result of which business of the plaintiffs has grown manifold over the

time which is substantiated by the fact that in the scholarship test, four thousand students appeared. It has been submitted that the plaintiffs have spent a huge sum of money in carrying out extensive advertisements and publicity of its coaching centre under the brand name 'EMERGE - KIE HOPE MISSIONe – Infinity & Beyond' and by virtue of extensive prior use and vast publicity undertaken by the plaintiffs, they enjoy exclusive proprietary rights in the aforesaid brand name. In this regard, the plaintiffs have also annexed documents to substantiate their contentions.

7) According to the plaintiffs, the trade mark 'EMERGE - KIE HOPE MISSIONe – Infinity & Beyond' has become a popular name in the coaching service industry and, as such, the same is entitled to receive protection. It has been submitted that the word 'KIE' has been invented by plaintiff No.1 and is in use since 2013 and the same is a registered trademark of plaintiff No.1. By virtue of extensive and vast publicity of the trade marks, the plaintiffs enjoy exclusive proprietary rights therein.

8) It has been submitted that in the month of March/April, 2024, plaintiffs came to know that the appellant is using identical trademark in respect of the same

service of coaching in Srinagar region and is using the trade name/trademark "EMERGE Infinity & beyond – powered by KIE' in order to create a camouflage and deceive the people who aspire for better coaching services. It has been contended that the trade name being used by the defendant suggests that the services are being offered directly or in association with the plaintiffs and this creates deception in the minds of gullible students.

9) The plaintiffs have reproduced the logo and device along with the brand name in their use and the logo/device and the brand name in the use of the defendant in their plaint and according to them, these are deceptively similar and create confusion in the minds of the students. It has been further submitted that the defendant has registered social media pages in the name of 'Emerge Srinagar' which is identical to the trademark of the plaintiffs and this has been done to capitalize the goodwill and reputation of the plaintiffs. The plaintiffs have further contended that the trade name being used by the defendant/appellant is deceptively similar in appearance, presentation, design and get-up with the plaintiffs' trademark and it has been smartly suffixed as 'powered by KIE' even though the word 'KIE' is a registered trademark of plaintiff No.1.

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10) Thus, according to the plaintiffs, the defendant, by deceptively using the same trade name, as that of the plaintiffs, has misled and confused the public at large and tried to gain profit by using plaintiffs' goodwill and reputation in an illegal and unethical manner.

11) It seems that the defendant has not filed its written statement as yet, but he has filed a reply to the application for grant of injunction, wherein it has been submitted that the trademark 'EMERGE KIE HOPE MISSION E PRVIATE LIMITED' of the plaintiffs is not a registered trademark and it is yet to gain any traction in Kashmir Valley. According to the defendant/appellant, admittedly, the aforesaid trade name has been launched recently by the plaintiffs whereas the defendant/appellant has duly initiated the registration process for registration of trademark 'Emerge-infinity and beyond' with a specific logo with the competent authority. According to the defendant/appellant, there is no similarity between the name adopted by the plaintiffs and the name adopted by the defendant/appellant. It has been contended that the registered trademark 'KIE' of plaintiff No.1 is not being used by the defendant/appellant and even otherwise, as per their own case, the plaintiffs have formed an amalgam thereby changing the trade name and the brand. On this

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ground it is being urged that plaintiff No.1 cannot claim any exclusive use of trademark 'KIE' after giving up the said name and similarly plaintiffs cannot have any right to claim their exclusive use of the word 'Emerge'.

12) According to the defendant/appellant, the business of the plaintiffs is still at its inception and, as such, they cannot claim any goodwill in their favour in respect of the trade name/trademark which is being used by them. Thus, according to the defendant/appellant, no action for passing off can be initiated by the plaintiffs against the defendant.

13) It has been pleaded that the trademark/trade name that is being used by the defendant/appellant is entirely distinct from the name or logo which is proposed to be used by the plaintiffs and that there is no scope for deception, particularly having regard to the community to whom it is addressed and meant for. According to the defendant, there is no strong, prima facie, case in favour of the plaintiffs, as such, it was not open to the learned trial court to pass an interim injunction in their favour.

14) It seems that the learned trial court, after analyzing the pleadings filed by the parties and the documents on record, came to the conclusion that the trade name and logo of the

defendant appears to be deceptively similar with the trade name/logo of the plaintiffs and both these trade names relate to similar type of services. It has also been recorded by the learned trial court that the plaintiffs have, prima facie, shown that they are prior users of the trade name/trademark 'EMERGE - KIE HOPE MISSIONe – Infinity & Beyond' in the field of coaching services and that the said trademark/trade name has been blatantly copied by the defendant. After recording these observations, the learned trial court came to the conclusion that the plaintiffs have succeeded in showing a prima facie strong case in their favour and accordingly vide the impugned order, the defendant has been temporarily restrained from using the trademark (device and logo) of the plaintiffs.

15) I have heard learned counsel for the parties and perused the documents placed on record by the parties as also the grounds of challenge.

16) The appellant has challenged the impugned order, primarily, on the ground that the plaintiffs, as per their own showing, have established their amalgam by registration of the company on 10th April, 2024 and, therefore, the finding of the learned trial court that the plaintiffs have succeeded

in showing prior user of the trade name is contrary to records. It has been further contended that the plaintiffs have miserably failed to establish that they had acquired any goodwill or reputation of providing the service of coaching under the brand name which is the subject matter of the suit, as such, it was not open to the learned trial court to pass the order of interim injunction in their favour. Lastly, it has been argued that the trade name/trademark that is being used by the plaintiffs and the trademark/trade name that is being used by the defendant are distinctively dissimilar from each other and having regard to the community which is supposed to be the consumer of the services, there is no question of deception. It has been contended that since the services are meant for students community who are an educated lot, there is hardly any scope for deception even if it is assumed that there is any similarity between two trade names/trademarks.

17) Before proceeding to decide the merits of the grounds of appeal, it has to be borne in mind that in the instant case, the trade name/trademark which is under the use of plaintiffs and the trademark/trade name which is being used by the defendant are not registered Trademarks. Section 27 of the Trade Marks Act provides that no person is

entitled to institute any proceedings to prevent or recover any damages for infringement of any unregistered trade mark. However, sub-section (2) of the Section 27 protects the rights of action against any person for passing off goods or services as the goods of another person or as services provided by another person or the remedies in respect thereof. Thus, Section 27(2) of Trade Marks Act is a statutory recognition of a principle that remedy of passing off lies and is founded in common law. While action for passing off is a common law remedy, the action for infringement is a statutory remedy. Passing off actions, in respect of unregistered trade marks are permissible in light of the provisions contained in Section 27(2) of the Trade Marks Act.

18) The conditions which are required to be fulfilled for succeeding in an action for passing off relating to an unregistered trade mark have been discussed and deliberated upon by the Supreme Court in the case of **S. Syed Mohideen v. P. Sulochana Bai** (2016) 2 SCC 683. The relevant observations of the Supreme Court in the aforesaid judgment are reproduced as under:

> *"**30.1.** From the reading of Section 27(2) of the Act, it is clear that the right of action of any person for passing off the goods/services of another person and remedies thereof are not affected by the provisions of*

the Act. Thus, the rights in passing off are emanating from the common law and not from the provisions of the Act and they are independent from the rights conferred by the Act. This is evident from the reading of the opening words of Section 27(2) which are "Nothing in this Act shall be deemed to affect rights…."

30.2. *Likewise, the registration of the mark shall give exclusive rights to the use of the trade mark subject to the other provisions of this Act. Thus, the rights granted by the registration in the form of exclusivity are not absolute but are subject to the provisions of the Act.*

30.3. *Section 28(3) of the Act provides that the rights of two registered proprietors of identical or nearly resembling trade marks shall not be enforced against each other. However, they shall be same against the third parties. Section 28(3) merely provides that there shall be no rights of one registered proprietor vis-à-vis another but only for the purpose of registration. The said provision 28(3) nowhere comments about the rights of passing off which shall remain unaffected due to overriding effect of Section 27(2) of the Act and thus the rights emanating from the common law shall remain undisturbed by the enactment of Section 28(3) which clearly states that the rights of one registered proprietor shall not be enforced against the another person.*

30.4. *Section 34 of the Trade Marks Act, 1999 provides that nothing in this Act shall entitle the registered proprietor or registered user to interfere with the rights of prior user. Conjoint reading of Sections 34, 27 and 28 would show that the rights of registration are subject to Section 34 which can be seen from the opening words of Section 28 of the Act which states "Subject to the other provisions of this Act, the registration of a trade mark shall, if valid, give to the registered proprietor…." and also the opening words of Section 34 which states "Nothing in this Act shall entitle the proprietor or a registered user of registered trade mark to interfere…." Thus, the scheme of the Act is such where rights of prior user*

> *are recognised superior than that of the registration and even the registered proprietor cannot disturb/interfere with the rights of prior user. The overall effect of collective reading of the provisions of the Act is that the action for passing off which is premised on the rights of prior user generating a goodwill shall be unaffected by any registration provided under the Act. This proposition has been discussed in extenso in N.R. Dongre v. Whirlpool Corpn. [N.R. Dongre v. Whirlpool Corpn., 1995 SCC OnLine Del 310 : AIR 1995 Del 300] wherein the Division Bench of the Delhi High Court recognised that the registration is not an indefeasible right and the same is subject to rights of prior user. The said decision of Whirlpool [N.R. Dongre v. Whirlpool Corpn., 1995 SCC OnLine Del 310 : AIR 1995 Del 300] was further affirmed by the Supreme Court of India in N.R. Dongre v. Whirlpool Corpn. [N.R. Dongre v. Whirlpool Corpn., (1996) 5 SCC 714]*
>
> ***30.5.** The above were the reasonings from the provisions arising from the plain reading of the Act which gives clear indication that the rights of prior user are superior than that of registration and are unaffected by the registration rights under the Act."*

19) From the foregoing analysis of law on the subject, it is clear that in order to succeed in an action of passing off, it has to be shown that the plaintiff owns goodwill in the business and that there has been misrepresentation of his trade name/trade mark, as a result of which damage has occurred to the goodwill of the said plaintiff. It is also clear that the provisions of the Trade Marks Act provide that an action for passing off is dependent upon the right of prior user generating a goodwill and, in fact, the right of prior user

is superior than that of registration under the Trade Marks Act.

20) The High Court of Delhi in its judgment titled **FDC Limited vs. Faraway Foods Pvt. Ltd.** 2021 SCC OnLine Del. 1539, relying upon the ratio laid down by the Supreme Court in the cases of **Satyam Infoway Ltd. vs. Siffynet Solutions (P) Ltd.** (2004) 6 SCC 145 and **Cadila Health Care vs. Cadila Pharmaceuticals Ltd,** (2001) 5 SCC 73, culled out the following principles:

> *"(i) Passing off, though an action based on deceit, does not require the establishment of fraud as a necessary element to sustain the action. Imitation or adoption, by the defendant, of the plaintiffs trade mark, in such manner as to cause confusion or deception in the mind of prospective customers, is sufficient.*
>
> *(ii) The principles for grant of injunction, in passing off actions, are the same as those which govern the grant of injunctions in other cases, i.e. the existence of a prima facie case, the balance of convenience, and the likelihood of irreparable loss in issuing to the plaintiff, were injunction not to be granted.*
>
> *(iii) Proof of actual damage is not necessary, to establish passing off. However, proof of misrepresentation is necessary, even if intent to misrepresent is not approved. The question of intent may, nevertheless, be relevant, when it comes to the ultimate relief to be granted to the plaintiff.*
>
> *(iv) Passing off may be alleged by a claimant who owns sufficient proprietary interest in the goodwill associated with the product, which is really likely to be damaged by the alleged misrepresentation.*
>
> *(v) Grant of injunction, in cases where passing off is found to exist, is intended to serve two purposes, the first*

being preservation of the reputation of the plaintiff, and the second, safeguarding of the public against goods which are "passed off as those of the plaintiff.

(vi) The ingredients/indicia of the tort of passing off are the following:

(a) There must be sale, by the defendant, of goods/services in a manner which is likely to deceive the public into thinking that the goods/services are those of the plaintiff.

(b) The plaintiff is not required to prove long user to prove established reputation. The existence, or otherwise, of reputation, would depend upon the volume of the plaintiffs sales and the extent of its advertisement.

(c) The plaintiff is required to establish:

(i) misrepresentation by the defendant to the public, though not necessarily mala fide,

(ii) likelihood of confusion in the minds of the public (the public being the potential customers/users of the product) that the goods of the defendant are those of the plaintiff, applying the test of a person of "imperfect recollection and ordinary memory",

(iii) loss, or likelihood of loss, and

(iv) goodwill of the plaintiff, as a prior user.

Elsewhere, the five elements of passing off have been identified as (a) misrepresentation, (b) made by the trader in the course of trade, (c) to prospective customers or ultimate consumers of the goods or services supplied by him, (d) calculated to injure the business or goodwill of another (i.e. that such injury is reasonably foreseeable) and (e) actual damage, or the possibility of actual damage, to the business or goodwill of the plaintiff.

(vii) In cases of alleged passing off, the Court, while examining the likelihood of causing confusion, is required to consider, in conjunction, inter alia,

(a) the nature of the market,

(b) the class of customers dealing in the product,

(c) the extent of reputation possessed by the plaintiff,

(d) the trade channels through which the product is made available to the customer and

(e) the existence of connection in the course of trade. The Supreme Court has also held that, in passing off action on the basis of unregistered trade marks, the Court is required to assess the likelihood of deception or confusion by examining

(i) the nature of the marks, i.e. whether there were demands/label marks/composite marks,

(ii) the degree of similarity between the competing marks,

(iii) the nature of the goods,

(iv) the similarity in nature, character and performance of the goods of the rival parties,

(v) the class of purchasers, and the degree of care which they would be expected to exercise while purchasing the goods, and

(vi) the mode of purchasing the goods and placing orders.

(viii) That the defendant is not producing the goods manufactured by the plaintiff may not be relevant, where the plaintiff' s mark is found to have sufficient reputation.

(ix) Courts are required to be doubly vigilant where passing off is alleged in respect of pharmaceutical products, in view of the possibility of adverse effects resulting from administration of a wrong drug. For the said reason, the degree of proof is also lower, in the case of alleged passing of pharmaceutical products.

(x) Passing off differs from infringement. Passing off is based on the goodwill that the trader has in his name, whereas infringement is based on the trader's proprietary right in the name, registered in his favour. Passing off is an action for deceit, involving passing off the goods of one person as those of another, whereas an action for infringement is a statutory remedy

> *conferred on the registered proprietor of a registered trade mark for vindication of its exclusive right to use the trade mark in relation to the goods in respect of which registration has been granted. Use of the trade mark by the defendant is not necessary for infringement, but it is a sine qua non for passing off. Once sufficient similarity, as is likely to deceive, is shown, infringement stands established. Passing off, however, may be resisted on the ground of added material, such as packing, procurement through different trade channels, etc., which would distinguish the goods of the defendant from those of the plaintiff and belie the possibility of confusion or deception.*

21) In the backdrop of the aforesaid principles of law, let us now advert to the facts of the present case. The plaintiffs have, in their plaint, specifically pleaded that after amalgamating their entities in the month of November, 2023, they decided to adopt the brand name 'EMERGE KIE HOPE MISSIONe' and the same was launched on 6th January, 2024. To support this contention, they have produced before the trial court copies of various documents including newspaper cuttings and the copy of MOU dated 01.01.2024. It is not in dispute that the defendant had started using his trade mark/trade name 'EMERGE Infinity & beyond - Powered by KIE' from April, 2024. Thus, observation of the learned trial court that the plaintiffs have been able to show prior user of the trade name 'EMERGE -KIE HOPE MISSIONe-INIFITY & BEYOND' appears to be well-founded.

22) Learned counsel appearing for the appellant vehemently contended that even if it is assumed that the plaintiffs had launched their brand name in January, 2024, still then within this short period of few months, it is not possible that they would have acquired good-will in the business of coaching services. According to the learned counsel, not even a single batch of students has passed out from the plaintiffs' coaching center as yet so as to assess its brand value.

23) In the above context, it is to be noted that even prior to amalgamation, plaintiffs No.1 to 3 were running coaching centers under different brand names and, in fact, brand name 'KIE' of plaintiff No.1 was already a registered brand name under Trade Marks Act. It has been submitted that plaintiff No.1 was providing the services of coaching since the year 2013 under registered trade mark 'KIE'. Thus, when plaintiffs No.1 to 3, who were already in the field of coaching industry, came together, they brought with them the good-will of their business. Besides this, it has been pleaded that popularity of the plaintiffs' brand name is substantial among the students which is evidenced by the fact that about four thousand students appeared in the scholarship test and a number of students have initiated their registration.

24) At the stage of considering the question of grant of injunction, the trial court has only to consider the pleadings of the parties and it is only after the trial of the case that it can be decided whether the aforesaid assertions of the plaintiffs are substantiated by the evidence which they may lead during trial of the case. Therefore, at this stage, on the basis of the pleadings of the plaintiffs and the documents placed on record by them, it can be, *prima-facie,* concluded that they did possess the good-will in the field of coaching.

25) The next question that needs to be determined is as to whether the trade mark that is being used by the appellant/defendant is deceptively similar to the trade mark that is being used by the plaintiffs. In order to determine as to whether one mark is deceptively similar to the another, the broad and essential features of the two are to be considered. The Supreme Court while elaborating on this aspect of the matter has in the case of **Parle Products (P) Ltd. Vs. J. P. & Co. Mysore,** (1972) 1 SCC 618, observed as under:

> *"**9**. It is, therefore, clear that in order to come to the conclusion whether one mark is deceptively similar to another, the broad and essential features of the two are to be considered. They should not be placed side by side to find out if there are any differences in the design and if so, whether they are of such character as to prevent one design from being mistaken for the other. It would be enough if the impugned mark bears*

> *such an overall similarity to the registered mark as would be likely to mislead a person usually dealing with one to accept the other if offered to him. In this case we find that the packets are practically of the same size, the colour scheme of the two wrappers is almost the same; the design on both though not identical bears such a close resemblance that one can essily be mistaken for the other. The essential features of both are that there is a girl with one arm raised and carrying something in the other with a cow or cows near her and hens or chickens in the foreground. In the background there is a farm house with a fence. The word "Gluco Biscuits" in one and "Glucose Biscuits" on the other occupy a prominent place at the top with a good deal of similarity between the two writings. Anyone in our opinion who has a look at one of the packets today may easily mistake the other if shown on another day as being the same article which he had seen before. If one was not careful enough to note the peculiar features of the wrapper on the plaintiffs' goods, he might easily mistake the defendants' wrapper for the plaintiffs' if shown to him some time after he had seen the plaintiffs'. After all, an ordinary purchaser is not gifted with the powers of observation of a Sherlock Homes. We have therefore no doubt that the defendants' wrapper is deceptively similar to the plaintiffs' which was registered. We do not think it necessary to refer to the decisions referred to at the bar as in our view each case will have to be judged on its own features and it would be of no use to note on how many points there was similarity and in how many others there was absence of it."*

26) From the analysis of aforesaid legal position, it becomes manifest that for determining as to whether one mark is deceptively similar to another, it is to be assessed whether there is any overall similarity between the two which is likely to mislead a person dealing with one to accept the other if offered to him.

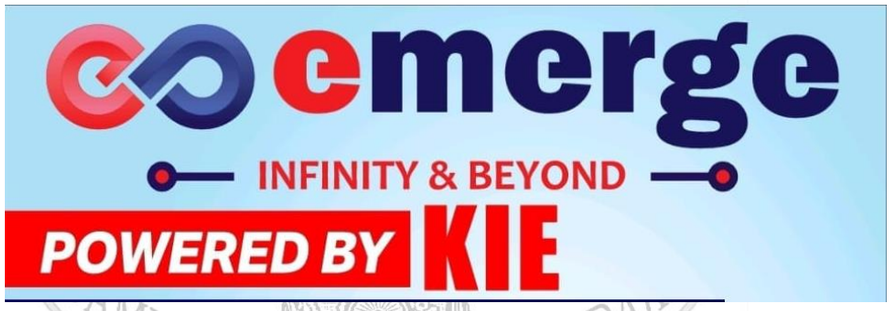
27) In the instant case, the plaintiffs in their trade mark have used the symbol 'Infinity', the word 'EMERGE' and

below it words 'INFINITY & BEYOND KIE HOPE MISSIONE' whereas the defendant/appellant is using the logo 'Infinity' with word 'Emerge' below it words 'INFINITY & BEYOND' and down below it words 'POWERED BY KIE'. For facility of reference, logos of both the parties are reproduced as under:

1. **Logo and brand name of the plaintiff**:



2. **Logo and brand name of the defendant**:



28) When we compare these two logos with each other, it is clearly reflected that the two marks are similar to each other. It also appears that the trade name and logo used by the appellant/defendant is deceptively similar to the trade name and logo of the plaintiffs.

29) As already stated, the brand name 'KIE' is the registered brand name of plaintiff No.1 and this brand name has been used by the defendant/appellant in its logo. By doing so, the student community is likely to get confused

that both the coaching centres, one being run by the plaintiffs and the other being run by the appellant/defendant, are being operated, directly or indirectly, by the brand 'KIE' which stands registered in the name of plaintiff No.1. This will certainly create confusion and deception in the minds of the student community. Thus, merely because some of the words appearing in the two logos do not match with each other, does not mean that these two logos are distinct from each other. Even a cursory look on both these logos would reveal that the defendant has used the design and logo which is deceptively similar to the design and logo which is under the use of plaintiffs.

30) In addition to the above, a perusal of the brand name/logo that is being used by the plaintiffs reveals that it is an amalgamation of the brand names/trade marks that were being used by plaintiffs No.1 to 3 while they were running coaching institutes individually prior to their amalgamation. The word 'KIE' is the registered trade mark of plaintiff No.1 whereas the word 'Mission-E' was owned by plaintiff No.2 and the brand name 'Hope Classes' was owned by plaintiff No.3. After the amalgamation, plaintiffs No.1 to 3 have given up these brand names and assigned the same to the new entity which has come into existence. Once these

trade marks/brands have been assigned by the plaintiffs No.1 to 3 to the new entity, the plaintiffs cannot only claim prior user of it but they can also claim the transfer of good-will of their brand names to the new entity. In this context, I am supported by the judgement of the Supreme Court in the case of **Dhariwal Industries Ltd. & anr. v. M. S. S. Food Products,** (2005) 3 SCC 63**.** The relevant observations of the Supreme Corut are reproduced as under:

> ***"7.*** *Section 27 of the Trade Marks Act, 1999 provides that nothing in that Act shall be deemed to affect the right of action against any person for passing off goods or services as the goods of another person or as services by another person or the remedies in respect thereof. Therefore, the fact that neither party has a registered trade mark as on the date of the suit cannot stand in the way of entertaining the claim of the plaintiff and granting the plaintiff an injunction in case the plaintiff is in a position to show prima facie that it was the prior user of its mark, that it had a prima facie case and that the balance of convenience was in favour of the grant of an interim injunction. It is provided in Section 39 of the Act that an unregistered trade mark may be assigned or transmitted with or without goodwill of the business concerned. It is, therefore, possible for a plaintiff or a defendant to show that an unregistered trade mark that was being used by another person earlier had been assigned to it and that it can tack on the prior user of its predecessor."*

31) Thus, not only has the new entity come into existence prior to the defendant/appellant thereby holding prior user of the brand name 'EMERGE KIE HOPE MISSIONE' 'but it also has acquired the good-will of the business of plaintiffs No.1 to 3 along with prior user of their brand names.

Therefore, all the ingredients for grant of an injunction in an action of passing off are fulfilled in the present case. The view taken by the learned trial court is perfectly in accordance with law.

32) It is a settled law that if the trial court has exercised its discretion in granting injunction, then jurisdiction of the Appellate Court to interfere is very limited. Interference can be made by the Appellate Court only in situations where it is satisfied that the trial court has acted arbitrarily or contrary to law or that findings of the trial court are perverse, capricious and palpably incorrect and are wholly untenable. If the view taken by the trial court is a possible view, the same cannot be interfered with by the Appellate Court.

33) In the light of the aforesaid legal position and the discussion made hereinbefore, there is no scope for this Court to interfere in the well-reasoned and lucid judgment passed by the learned trial court. The same, therefore, deserves to be upheld and is, accordingly, upheld. Resultantly, the appeal is dismissed.

(SANJAY DHAR)
JUDGE

Srinagar,
07.06.2024
"Bhat Altaf-Secy"

Whether the judgment is reportable: ***Yes/No***

FAO No.18/2024
CM No.3278/2024

Mohammad Altaf Bhat
I attest to the accuracy and
authenticity of this document

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