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TRADE DRESS: A THREAT TO CONSUMER TRUST- Rijul Seth¹**INTRODUCTION**

The consumer market in today's time and age is suffering from a glut of products and services; hence, in such a setup, the consumer would prefer products that have built a sense of trust and goodwill among the consumers. The products often use designs, packaging, shapes, and colors to stand out against other brands. This distinct feature of a product is called trade dress. An example of trade dress would be the distinct red packaging of Coca-Cola, which allows the consumer to identify the same at first glance. However, in recent times, there has been growth in manufacturers trying to pass off their products as belonging to a reputed brand and duping customers. This is not only a violation of the customer's trust but also has severe implications for the brand, whose reputation and revenue take a hit.

UNDERSTANDING THE CONCEPT OF TRADE DRESS

The concept of trade dress is not explicitly described under any provision in the Trademarks Act of 1999. Instead, trade dress is offered protection under the common law of passing, which includes the aspect of packaging, shaping of goods, color combination etc. further, the concept of trade dress can be interpreted under *section 2(zb) of the Indian Trademark Act, 1999* which prescribes it as a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of other and may include shape of goods, their packaging and combination of colors.² The courts in India have rightfully taken cognizance of the concept of trade dress while adjudicating cases involving trademark violations.

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²Section 2(zb) The Indian Trademark Act, 1999.

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However, since there is no explicit mention of trade dress in the Act, it is entirely up to the courts to decide what does and does not constitute trade dress. Now, in the landmark judgment of *Christian Louboutin Sas V/s Mr. Pawan Kumar & Ors.*, 2017, the owner of Christian Louboutin Sas sued the Respondent, a local manufacturer who used red soles identical to the one used by Christian Louboutin. In this case, the Hon'ble Delhi High Court opined that the Petitioner was the registered owner of the red sole. Further, the court declared trade dress to possess the status of a well-known mark similar to that of an actual trademark.³ However, in a surprising turn of events the court in *Christian Louboutin Sas V/s Abudekar & Ors.*, 2018 the court refused the grant of the trademark on the ground that any mark that consists of any single color cannot be considered for trademark infringement as per the definition under section 2(m) of the Trademarks Act, 1999.⁴ The court further stated that in the case of *Christian Louboutin Sas V/s Mr. Pawan Kumar & Ors.*, the provisions of *section 2(m) and section 30(2)(a) of the Act* were not considered.⁵ It is important to note that *section 30(2)(a) of the Act* states that a registered trademark is not infringed where the use of goods or services indicates the kind, quality, quantity, intended purpose, value, geographical origin, time of production of goods or the rendering of services or other characteristics of goods or services. This provision is important as the Hon'ble Court uses this provision to bypass *proviso section 9(1) and section 32 of the Act*, which allowed the Plaintiff to trademark a single color; here, the court opined that sellers are not prohibited from using the color red on their footwear if the color is serving a non-trademark purpose.⁶ However, there is no clarification on how one could ascertain whether the color of a particular product is serving a non-trademark function. It is pertinent to note that the court has failed to appreciate that a global luxury brand like Christian Louboutin Sas has garnered a lot of goodwill due to its style and quality products. I believe the court here has erred in its reasoning as it is pertinent to note that the iconic red sole is an integral part of the brand's style and trademarked the same. Hence, a case can be made that it helped customers distinguish Plaintiff's product from the rest of the products in the market. Further, the Hon'ble court also overlooked the fact that as

³ *Christian Louboutin Sas V/s Mr. Pawan Kumar & Ors.*, 2017 CS (COMM) 714/2016

⁴ *Christian Louboutin SAS Vs. Abubaker and Ors.*, 2018 CS(COMM) No. 890/2018

⁵ *Christian Louboutin SAS Vs. Abubaker and Ors.*, 2018 CS(COMM) No. 890/2018

⁶ Jain S, 'Trade Dress Protection- Salient Features, Functions and Importance' (lexindis.com). <https://lexindis.com/wp-content/uploads/2020/11/TRADE-DRESS-PROTECTION.pdf>.

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per the proviso of *section 9(1) of the Act*, which states that a trademark shall not be refused registration if, before the date of application for registration, it has acquired a distinctive character as a result of the use made of it or is a well-known trademark.⁷ I believe that this oversight on the part of the court is detrimental as not adhering to the proviso would mean that other brands associated with a particular color, like Coca-Cola- red or Pepsi- Blue, would risk losing their uniqueness in terms of packaging. It is also important to note that the court has not considered the common law principle of passing off. The principle of passing off states that nobody has the right to represent his good as the good of somebody else.⁸ In the present case, I believe it is clear that by using a red sole, Defendant was trying to pass off his goods as belonging to Plaintiff's Brand. Hence, even if we consider that there lies no remedy regarding the same in the *Indian Trademark Act, 1999*, the common law principle objects to the use of widely recognized characteristics of one party by another for their gain. Further, it is important to note that it has been clearly stated in the *Draft Manual of Trade Marks and Procedure, 2015*, that a single color may be registerable as a trademark if it is very unusual and peculiar in a trade and is recognized by traders and consumers alike that is it serves as a badge of origin for that class of goods.⁹ Now, let's take this definition and apply it to our case. The use of Red Sole is primarily associated with the Plaintiff's brand as most brands use black soles rather than Red Sole, and the said use of Red Sole is associated with and recognized by consumers and traders as belonging to the Plaintiff's brand. This distinction made in the draft shows that there is an idea in the mind of the legislature to include a single color within the ambit of Trademarks, hence even if all the previous arguments are negated, the fact that this judgment goes against the ideals and path that the legislature had decided for trademark laws in India goes on to show that the particular judgment is bad in law and will not stand the test of time.

THE WAY FORWARD

I would like to suggest the test enshrined in the case of *Merwans Confectioners Pvt. Ltd. V/s M/s Sugar Street & Ors., 2019*, where the court stated that the test of likelihood of misunderstanding,

⁷ Section 9(1) Indian Trademark Act, 1999

⁸ Perry V/s Truefitt (1842) 6 Beav. 66.

⁹ Draft Manual of Trademarks and Procedure, 2015

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deception, or any confusion that might affect the buying decisions of the end consumers should be applied to determine whether or not there has been a trademark infringement with regards to trade dress of the product.¹⁰ In the present case, it is reasonable to assume that the use of Red Sole by the Defendant would likely confuse the consumer's mind, whose decision might be affected by the misrepresentation. I believe that the case in question here has set a dangerous precedent as now, many companies like Samsung, Coca-Cola, Pepsi, etc., which the consumer can quickly identify by merely observing the color of the product, are at risk of losing their identity in the Indian Marketplace as they all have a singular color scheme and are therefore, as per the judgment not protected under trademark, this will have far-reaching ramifications as not only will it lead to confusion among consumers it will also lead to loss of goodwill and revenue for the companies in question. Further, it will also lead to increased litigation as naïve consumers based on the color associate a reputable brand with mightyby-products that are of subpar quality and might sue either the original brands or the companies trying to pass off these brands maliciously; this, in turn, will put a lot of pressure on consumer courts. Hence, in conclusion, I would like to state that it is essential that the judiciary and lawmakers strive to protect the interest of reputed brands, especially at a time when our country is seeking to become a global manufacturing hub, as such litigations about trademark infringement might leave a sour taste in the mouths of MNCs, who might get weary of entering the Indian marketplace.

¹⁰Merwans Confectioners Pvt. Ltd. V/s M/s Sugar Street & Ors., 2019 CS(L) No. 1100 of 2019

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