

Lowenbrau Ag and anr. Vs. Jagpln Breweries Ltd. and anr.

Lowenbrau Ag and anr. Vs. Jagpln Breweries Ltd. and anr.

SooperKanoon Citation : sooperkanoon.com/680310

Court : Delhi

Decided On : Jan-14-2009

Reported in : 2009BusLR360(Del); 157(2009)DLT791; LC2009(1)356

Judge : Sanjiv Khanna, J.

Acts : Trademarks Act, 1999 - Sections 9, 9(1), 27(2), 28, 30(1), 30(2), 31, 31(2), 32, 34, 35, 124, 124(1) to 124(4), 124(5) and 159(5); Trade Mark and Merchandise Marks Act, 1958

Appeal No. : I.A. Nos. 11355 and 13772/2007 in CS(OS) No. 1810 of 2007

Appellant : Lowenbrau Ag and anr.

Respondent : Jagpln Breweries Ltd. and anr.

Advocate for Def. : Shailen Bhatia and ; Ekta Nayar Saini, Advs.

Advocate for Pet/Ap. : Sudhir Agarwal, Sr. Adv.,; Hemant Singh,; Mamta Jha,;

Judgement :

Sanjiv Khanna, J.

1. This Order will dispose of the application for interim injunction, I.A. No. 11355/2007 and the application for vacation of the ex parte interim injunction order, IA No. 13772/2007.

2. Lowenbrau AG and In Bev India International Pvt. Ltd. (hereinafter collectively referred to as the plaintiffs, for short) have filed the present suit for permanent injunction, rendition of accounts, mandatory injunction in form of delivery up against Jagpin Breweries Ltd and Lowenbrau Buttenheim (hereinafter collectively referred to as the defendants, for short). The plaintiffs claim exclusive right to use the mark/word 'LOWENBRAU', device of lion and seek a restraint order against the defendants from using the mark 'LOWENBRAU', device of lion or any other trade mark or device mark identical or deceptively similar. By an ex parte injunction order dated 3rd October, 2007 the defendants have been restrained from manufacturing, selling and advertising under the mark/word 'LOWENBRAU', device of lion or any other trade mark/device mark identical or deceptively similar to the said mark or device.

3. Lowenbrau A.G., plaintiff No. 1 and Lowenbrau Buttenheim, defendant No. 2 are entities incorporated under the laws of Germany. Both of them manufacture beer, which is sold in Germany and other countries. The beer manufactured by the plaintiff No. 1 is sold under the mark/name 'LOWENBRAU' with or without other word/mark, while the beer manufactured by the defendant No. 2 is sold under the mark 'LOWENBRAU BUTTENHEIM' along with other words/marks in Germany and other countries.

4. Both the plaintiff No. 1 and the defendant No. 2 claim substantial turnovers and sales in Germany and other third countries. There is also no dispute that the plaintiff No. 1 and defendant No. 2 are not presently involved in any litigation on the right to use the mark/word 'LOWENBRAU' in any country except in India. Both parties agree that there was litigation in Germany in respect of right to use the mark/word 'LOWENBRAU' which was decided more than 100 years back in 1903 in favour of the defendant No. 2. It was held that the mark/word 'LOWENBRAU' cannot be monopolised as there were a number of breweries in Germany who had been using the said word/mark for a long time and therefore the mark/word 'LOWENBRAU' cannot be used to differentiate beer of one brewery from another.

5. Faced with the above factual background, the plaintiffs have based their claim/cause on infringement of the registered mark/word 'LOWENBRAU' and their

statutory rights under the Trademarks Act, 1999 (hereinafter referred to as the Act, for short). It may be however noticed that the cause title of the plaint states that the suit of the plaintiffs is both for infringement and passing off.

6. The plaintiff No. 1's mark/word 'Lowenbrau Export - Bier' was registered in 1960 with the disclaimer qua the mark/word 'LOWENBRAU' and device of lion. Subsequently, the plaintiff No. 1 got the mark/label 'Lowenbrau munchen' registered in India in 1972. In 1994, the plaintiffs got the mark/word 'LOWENBRAU' registered in India but this time without any disclaimer. Similarly in 1969, the plaintiffs have got the mark black stylised lion registered in India. In nutshell, the case of the plaintiffs is that the defendants cannot use the mark/word 'Lowenbrau Buttenheim' as the plaintiff No. 1 is the registered proprietor of the mark/word 'LOWENBRAU' without disclaimer and therefore in terms of the statute, i.e. the Act, the defendants have no right to use the mark/word 'LOWENBRAU' in India. It was submitted that the use of the mark/word 'LOWENBRAU' by the defendants outside India is irrelevant and the defendants cannot take advantage/benefit of territorial use of the mark/word 'LOWENBRAU' outside India to defeat the statutory rights of the plaintiffs. The plea of prior user, it was stated, is not available to the defendants as the mark was used by the defendants for the first time in India in 1999 and on that date the plaintiff No. 1 was already the registered owner of the mark 'LOWENBRAU'.

7. At this stage, only interim applications for injunction/vacation have to be disposed of on the basis of prima facie case, balance of convenience and irreparable harm and loss. Factual disputes are a matter of trial and de-registration/cancellation of registration of the mark/word 'LOWENBRAU' in favour of the plaintiff No. 1 is a matter to be decided by the Registrar and in appeal.

8. The Act including the earlier enactment Trade and Merchandise Marks Act, 1958 were enacted to provide for registration and better protection of trade- marks and for prevention of use of fraudulent marks. The Act was also passed to amend and consolidate the law relating to trade mark. Historically, protection of intellectual property rights in form of trade- mark, etc. is a common law right. The object of the trade mark legislations is to provide registration, to confer certain

statutory rights to enable the registered proprietor to sue for infringement rather than merely passing off. The two rights, Common Law rights and statutory rights are inter-connected and the test of deception remains the same. The distinction between the two as explained by the Supreme Court in *Ruston Hornsby Ltd. v. The Zamindara Engineering Co.* reported in : [1970]2SCR222 is that in case of registration Courts are not required to examine whether infringement is likely to deceive or cause confusion and actual deception or actual damage need not be proved. The test is whether the defendant's mark is same or imitation of the registered mark. In case of passing off Courts have to examine and decide whether the defendant is selling goods so marked as to be designed or calculated to lead purchasers to believe that the goods are the plaintiff's goods.

9. Conscious of the Common Law rights, the statutory legislations relating to trade-marks have protected unregistered owners of marks from action or claims by registered owners. While conferring statutory rights, the Act consciously did not affect right of action against any person for passing off or remedies in respect thereof. There is no penalty for those who do not register their mark. Section 27(2) of the Act reads as under:

No action for infringement of unregistered trade mark-

1) xxx

2) Nothing in this Act shall be deemed to affect 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.

10. It will be appropriate to refer to the observations of the Supreme Court in *The Registrar of Trade Marks v. Ashok Chandra Rakhit Ltd.* reported in : [1955]2SCR252 :

8. The third thing to note is that the avowed purpose of the Section is not to confer any direct benefit on the rival traders or the general public but to define the rights of the proprietor under the registration. The registration of a trade mark confers substantial advantages on its proprietor as will appear from the Sections grouped

together in Chapter IV under the heading 'Effect of Registration'. It is, however, a notorious fact that there is a tendency on the part of some proprietors to get the operation of their trade marks expanded beyond their legitimate bounds. An illustration of an attempt of this kind is to be found in *In re Smokeless Powder Co.'s Trade Mark*. Temptation has even led some proprietors to make an exaggerated claim to the exclusive use of parts or matters contained in their trade marks in spite of the fact that they had expressly disclaimed the exclusive use of those parts or matters. Reference may be made to *Greers Ltd. v. Pearman and Corder Ltd.* commonly called the 'Banquet' case. The real purpose of requiring a disclaimer is to define the rights of the proprietor under the registration so as to minimise, even if it cannot wholly eliminate, the possibility of extravagant and unauthorised claims being made on the score of registration of the trade marks.

11. Section 28 of the Act while referring to rights conferred on registration begins with the words 'registration of trade-marks shall, if valid,...' Rights under Section 28 flow when the registration of the mark is valid. Registration is only prima facie evidence of its validity Refer, *P.M. Diesels Pvt. Ltd. v. Thukral Mechanical Works* reported in : AIR1988 Delhi282 .

12. Section 124 of the Act reads:

124. Stay of proceedings where the validity of registration of the trade mark is questioned, etc.

(1) Where in any suit for infringement of a trade mark-

(a) the defendant pleads that registration of the plaintiff's trade mark is invalid; or

(b) the defendant raises a defence under Clause (e) of Sub-section (2) of Section 30 and the plaintiff pleads the invalidity of registration of the defendant's trade mark, the court trying the suit (hereinafter referred to as the court), shall,-

(i) if any proceedings for rectification of the register in relation to the plaintiff's or defendant's trade mark are pending before the Registrar or the Appellate Board, stay the suit pending the final disposal of such proceedings;

(ii) if no such proceedings are pending and the court is satisfied that the plea regarding the invalidity of the registration of the plaintiffs or defendant's trademark is prima facie tenable, raise an issue regarding the same and adjourn the case for a period of three months from the date of the framing of the issue in order to enable the party concerned to apply to the Appellate Board for rectification of the register.

(2) If the party concerned proves to the court that he has made any such application as is referred to in Clause (b) (ii) of Sub-section (1) within the time specified therein or within such extended time as the court may for sufficient cause allow, the trial of the suit shall stand stayed until the final disposal of the rectification proceedings.

(3) If no such application as aforesaid has been made within the time so specified or within such extended time as the court may allow, the issue as to the validity of the registration of the trade mark concerned shall be deemed to have been abandoned and the court shall proceed with the suit in regard to the other issues in the case.

(4) The final order made in any rectification proceedings referred to in Sub-section (1) or Sub-section (2) shall be binding upon the parties and the court shall dispose of the suit conformably to such order in so far as it relates to the issue as to the validity of the registration of the trade mark.

(5) The stay of suit for the infringement of a trade mark under this Section shall not preclude the court from making any interlocutory order (including any order granting an injunction, directing account to be kept, appointing a receiver or attracting any property), during the period of the stay of the suit.

13. A defendant can set up a defence challenging validity of registration as provided in Section 124 of the Act but the civil court trying the suit is mandated to stay the suit when in defence plea of invalidity of registration is raised, to await outcome of the rectification proceedings and if no proceeding is pending and the court is satisfied that the plea of invalidity is prima facie tenable, adjourn the case for a period of three months from the date of framing of the issues to enable the

defendant to approach the authorities for rectification of the registration. Thereafter on filing of an application for rectification trial in the suit is to be stayed till disposal of the rectification proceeding (see, Section 124(2) of the Act). Sub-section 4 of Section 124 states that the suit will be disposed of on the basis of the order passed by the authorities and the question of validity of registration will be binding on the court. Sub-section (5) to Section 124, however, stipulates that the civil court will be competent to pass an interlocutory order even when procedure under Sub-sections 1 to 4 is to be followed and order of the Registrar/authorities is awaited and the suit is stayed.

14. In view of Section 124(5) of the Act, this Court is competent to adjudicate and decide the interlocutory application for injunction. While deciding the interlocutory application in view of language of Sections 28 and 124 of the Act, the Court is competent to take prima facie view on the question of validity of registration of the mark in favour of either side. Merely because the mark is registered, injunction will not automatically follow, when validity of registration is questioned in the written statement/pleadings. While deciding whether injunction should be granted or not, a tentative view is required to be taken on the question of validity of registration and principles for grant of injunction applied. However, final decision on validity of registration is to be taken by the authorities and not by the civil court. Registration is prima facie regarded as valid but mere registration alone is not conclusive and is not binding on the civil court when the application for injunction is considered and decided. Onus however, will be on the party which questions validity of registration to show that the registration is prima facie and tentatively bad or invalid.

15. Section 31 of the Act reads:

Section 31. Registration to be prima facie evidence of validity-

(1) In all legal proceedings relating to a trade mark registered under this Act (including applications under 57), the original registration of the trade mark and all subsequent assignments and transmissions of the trade mark shall be prima facie evidence of the validity thereof.

(2) In all legal proceedings, as aforesaid a registered trade mark shall not be held to be invalid on the ground that it was not a registrable trade mark under Section 9 except upon evidence of distinctiveness and that such evidence was not submitted to the Registrar before registration, if it is proved that the trade mark had been so used by the registered proprietor or his predecessor in title as to have become distinctive at the date of registration.'

16. The said Section has to read harmoniously with Sections 28 and 124 of the Act. At the stage of interim application the court is required to examine question of validity. Registration is prima facie evidence of validity but not conclusive even at this stage. Sub-section 2 to Section 31 of the Act, stipulates that registration of the mark will not be held to be invalid on the ground that the mark could not have been registered under Section 9 of the Act except upon evidence of distinctiveness and there was failure to submit such evidence before the Registrar, provided evidence is filed in the legal proceedings to prove that the mark had acquired distinctiveness on the date of registration. Legal proceedings will include Suits filed by the registered owner of the mark against third parties. Section 32 of the Act, states that if a mark stands registered contrary to Section 9(1) of the Act and registration is bad for lack of distinctiveness on the date of registration, the party can defend the challenge by showing that they have acquired a distinctive character after registration but before commencement of the legal proceedings. These Sections also show that question of distinctiveness can be examined at the stage of grant of interim injunction by the courts.

17. Section 9(1) of the Act is reproduced below:

9. Absolute grounds for refusal of registration

(1) The trade marks

(a) which are devoid of any distinctive character, that is to say, not capable of distinguishing the goods or services of one person from those of another person;

(b) which consist exclusively of marks or indications which may serve in trade to designate the kind, quality, quantity, intended purpose, values, geographical origin

or the time of production of the goods or rendering of the service or other characteristics of the goods or service;

(c) which consist exclusively of marks or indications which have become customary in the current language or in the bona fide and established practices of the trade, shall not be registered:

Provided that a trade mark 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 trade mark.

18. Thus whether there was violation and failure to meet conditions of Section 9(1) of the Act, can be examined and a tentative opinion formed by the court for deciding the interim application.

19. One of the grounds on which registration of a mark can be challenged is fraud. Fraud with reference to registration of trade mark has been interpreted by Bombay High Court in Indo Pharma Pharmaceutical Works Pvt. Ltd. v. Farbenfabriken Bayer Aktiengesel reported in 1976 Bom.L.R. 1972 to mean:

What is meant by fraud in the context of Section 32(a) has not been precisely defined. It might be a fraud for a person to procure registration of a trade mark of which he knows he is not entitled to claim the exclusive use for instance, if he knows that it is in use by another trader if an applicant is aware that there is another party, who ought to be registered, the assertion may be regarded as a deliberate attempt to deceive the Registrar which would amount to fraud such as to prevent registration in Part A from becoming conclusive after seven years.

20. It is an admitted case of the plaintiffs that the registration granted in 1960 was subject to disclaimer qua the mark/word 'LOWENBRAU' and the device of lion. There is hardly any evidence or material placed on record by the plaintiffs to show and establish that the plaintiffs had started extensive marketing of their product (beer) in India and the mark/word 'LOWENBRAU' came to acquire distinctiveness and association with the plaintiff No. 1 and disclaimer was withdrawn. Therefore withdrawal of disclaimer/condition in 1994 (or 1972 as alleged in the plaint) cannot

prima facie be justified. The plaintiffs have not given their sale figures in India for the period 1960 onwards. Intermittent and minuscule sales in duty free shops, select hotels in the facts of the present case are not sufficient to create and establish distinctiveness.

21. It is the case of the defendants that registration in 1972 was in respect of label 'Lowenbrau Munchen' and the said contention appears to be correct. On 18th Oct., 1994 the word/mark 'LOWENBRAU' was registered without any disclaimer in favour of the plaintiff No. 1 with their particulars mentioned in the certificate as 'Lowenbrau AG (a company duly organised under the laws of Germany) Nymphenburger Strasse 4D-80335 Munchen Germany, manufacturer and merchant'. At the same time, the 1960 registration with disclaimer on 'LOWENBRAU' and device of lion still continues and has been repeatedly extended.

22. The defendants to question validity of the registration and violation of Section 9(1) of the Act, in addition to disclaimer made/admitted by the plaintiff No. 1 themselves, have evidence in form of judgment of a competent court in Germany in which the plaintiff No. 1 was denied exclusive right to use the mark/word 'LOWENBRAU'. The defendants have also placed on record ample evidence to show that the mark/word 'LOWENBRAU' is extensively used by several brewers of beer in Germany. It is not only the plaintiff No. 1 and the defendant No. 2 but there are several others who are using the said mark for beer. The mark/word 'LOWENBRAU' does not distinguish or distinctive of the plaintiffs, the defendants or any of the parties dealing with beer. Users of the said mark/word or the source, is distinguished by addition of other words or use of suffix or prefix with the word 'LOWENBRAU'. There is no evidence that selective availability of the plaintiffs or the defendants products in duty free shops, exclusive hotels etc. in India in the present case was sufficient to create distinctiveness qua them in respect of the mark 'LOWENBRAU' in India. The trans-border factor and distinctiveness has been examined alongwith the issue of prior user.

23. Prior user and honest and concurrent user are good defences to a suit based on action for infringement of the registered mark.

24. Section 34 of the Act stipulates that a registered user or proprietor cannot interfere with or restrain a third person from using a mark identical or resembling the registered mark which he has continuously used from a date prior to the plaintiff's first use or from the date of registration, whichever is earlier. Who had first used the mark/word 'LOWENBRAU' in India is a disputed question of fact. Extent, quantum and nature of sale to claim and justify prior user rights is a mixed question of law and facts. Plaintiffs have not stated their total turnover in India. Defendant No. 2-Company was incorporated in the year 1999. Subsequently it entered into a joint venture agreement with defendant No. 1 for manufacture of beer under the mark/word 'LOWENBRAU BUTTENHEIM' in India. It is the case of the defendants that it has been selling beer under the mark/word 'LOWENBRAU BUTTENHEIM' in India since 1999 and in 2003 the licence was granted to defendant No. 1 by the Excise Department also. It is also the case of the defendants that beer under the mark/word 'LOWENBRAU BUTTENHEIM' was sold in India earlier also. Sales of the defendants it appears are substantially higher than the sales of the plaintiffs.

25. Learned Counsel for the plaintiffs had submitted that prior user in India alone is the determining factor and user outside India is not relevant for Section 34 of the Act. This is disputed by the defendants. This legal proposition cannot be answered in absolute terms which will be universally applicable. Answer depends upon facts of each case, extent of use in time, quantity, area of use, whether the mark has become common to trade, or to a geographical source/origin etc.

26. As per the plaintiffs the mark/word 'LOWENBRAU' in German stands for lion's drink or drink of a lion. The defendants however claim that the said words in German also stands for house of beer. In Germany it is commonly used for beer and German beer is sold world over by the said name.

27. Both parties are German Companies. Both of them have been using the mark/word 'LOWENBRAU' all over the world and are distinguished by other mark/word on their label/mark and not by use of the mark/word 'LOWENBRAU' or device of lion. In the present case, two international brands, both of Germany origin and marketing and selling beer across the world, want to expand and market

beer in India. In these circumstances the position as it exists abroad and usage abroad cannot be ignored. The mark/word 'LOWENBRAU' has been extensively used in Germany for beer and even the plaintiffs do not deny that it has become descriptive and generic word in the said country and other places where German beer is sold and consumed. The mark/word 'LOWENBRAU' is a part of public juris in Germany and in most countries with German beer and is not distinctive of a particular manufacturer. In view of this factual background, including the litigation in Germany, I do not think in the present case, the question of prior use can be judged or decided on the basis of user in India alone. Indian market is opening up and foreign or multinational brands have moved and/or are likely to move. Similarly, Indian brands are likely to move out and expand into markets abroad. National and manmade borders and boundaries are gradually getting diluted and the entire world is now seen as a common market. It may not be, therefore, proper to ignore ground realities and position in the home country and abroad in the present case specially when there is ample evidence and material to show that the mark/word 'LOWENBRAU' is public juris and a generic word standing for 'German beer' and is not distinctive for any source. Trans-border reputation has been accepted and recognised in India even when the products are not being marketed and sold in India. It is clarified that in a given case prior user in India may be relevant for applying Section 34 of the Act, depending upon parties involved, nature and type of the mark, its adoption and extent and nature of use abroad etc. Each case therefore may have to be decided on its own merits and factual background. In the present case however while applying Section 34 of the Act, the position as prevailing in the parent country and abroad should not be ignored and the prior user has reference to user in India and abroad. Plaintiffs cannot claim different treatment and rights in India viz. the entire world where both parties are using the mark/word 'LOWENBRAU'. It will be unjust and unfair.

28. *Aktiebolaget Jonkoping Vulcean v. S.V. Palanichany Nadar and Ors.* reported in : AIR1969 Cal43 , relied upon by the plaintiffs is distinguishable. In the said case the appellant therein was a Swedish Company that was earlier marketing safety matches under the registered mark 'Three Stars' but due to Government policy was prohibited from selling safety matches in India. The Indian company had sought cancellation of the registration of the mark on the ground of non-user. In

that context reference was made to English decisions to decide the question whether non-use of the trade-mark was due to special circumstances. The Court also examined the question of abandonment with reference to non-user. It was observed that while examining the question of cancellation of registration, use and advertisement abroad, outside the territory of India is not of assistance. It was further held that the trade mark law is a municipal law which is not extra territorial in nature and is confined to territorial limits of India. The question involved in the said case related to cancellation of registration in India. In the present case however, the question relates to the common law rights of the defendants and the extent to which these are protected under the Act. If the proposition or the claim of the plaintiffs is to be accepted then even a claim under common law rights of passing off based on trans-border reputation cannot be accepted. Trans-border reputation is accepted and is a legal right which can be enforced in India. Section 34 of the Act accepts common law rights of an unregistered user of identical or resembling trade mark, provided he is a prior user. It may be noticed that the English Law on trans-border reputation when the foreign manufacturer does not have business interest in the said country is somewhat different. Goodwill is treated local and advertisements in periodicals, media, internet and travel abroad were not considered sufficient in many cases. Normally the English Courts insist on a minimal business interest in the said country. (See, pages 456 to 462 in Kerly's Law of Trade Marks and Trade Names, Fourteenth Edition).

29. Concurrent and honest user was a valid defence against an action for infringement under the Trade Mark and Merchandise Marks Act, 1958. Legal rights of a third party to use a mark without causing infringement of a mark registered under the said 1958 Act, is protected under Section 159(5) of the Act. Defendants will be entitled to benefit and defend this action relying upon honest and concurrent use. Even otherwise Sections 9(1), 30(1) and (2) and 35 of the Act do recognise honest concurrent use and on the conditions mentioned therein being satisfied, defend a suit for infringement. Honest and concurrent user is always recognised as a defence to action alleging infringement.

30. Section 30(1) of the Act stipulates that a person cannot be prevented from using a registered trademark provided the use is in accordance with honest

practices in industrial or commercial matters and does not take unfair advantage of or is detrimental to the distinctive character or repute of the trade mark. Similarly Section 30(2) of the Act permits use of trade mark in relation to goods or services indicating quality or geographical origin. Section 35 of the Act also protects a person, who bonafidely uses a mark, which describes character or quality of his goods or services. It is the contention of the defendants that word 'LOWENBRAU' has become synonymous with beer of German origin and source. The defendants have filed substantial evidence and material in support of the said contention. The defendants have prima facie established that the mark 'LOWENBRAU' is being bonafidely used by them and some others all over the world and is bona fide description of the character or quality of the goods i.e. the beer, manufactured by a German company or German Beer. Honest and concurrent user outside India by the defendants and others is practically admitted by the plaintiffs. For the reasons stated above, in the facts of the present case honest and concurrent user outside India alongwith the plaintiffs, without any objection for last 100 years, is a valid defence when both parties want to expand into India. Reference in this regard can be made to the decision of this Court in SPL Ltd. v. Himalyan Drug Co. Limited reported in : AIR1998 Delhi126 in which it was observed:

Any symbol, word or get up commonly used by traders in connection with their trade and in respect of which no particular trader can claim an exclusive right to use may be considered common to that particular trade, or public, juris. Further words, expressions, or devices which are descriptive of particular goods are open to use by all persons engaged in the trade. Such matters which are generally of a non distinctive character may or may not be in actual use at any particular time. What is important is that the trading public has a right to use them in connection with their business.

21. Whether a matter is or is not common to the trade is a question of fact. A feature which is common to one trade may not be so to a different trade. Similarly a mark may continue to be trade mark in some countries and public Jurisdiction in others. A mark which was common to the trade at one time may in course of time become distinctive and vice versa. A word or words used by a number of firms as part of their designation may be considered as words in common use (See: Law of

31. The above facts also reveal that the balance of convenience does not justify grant of interim injunction. The defendant No. 1-Company was incorporated in 1999 and the defendant No. 2 has been marketing their products since 2003-04. In the first year the sales were more than 9000 cases, which increased to more than 68000 cases in 2004-05. In 2005-06 its sales came down to more than 9000 cases again to go up nearly 34000 cases in 2006-07. The plaintiffs filed the present Suit in October 2007, after the defendants had already set up their factory and started marketing their products. The plaintiffs are yet to start production in India and their turnover in India is not disclosed. The defendants have pleaded acquiesce and estoppel alongwith delay. Both the parties are Germans and have been marketing their products world wide using the mark/word 'LOWENBRAU' without objection from the other. The balance of convenience does not therefore support the plaintiffs' claim for grant of injunction. If both the parties can sell beer all over the world with the common mark/word 'LOWENBRAU' but can be distinguished from each other, there is no reason/cause why they cannot concurrently sell beer in India using the same mark/word 'LOWENBRAU'. There are other distinguishing features in their marks and labels to separate them. There are no special grounds or reasons why a consumer of beer in India will not be able to distinguish between the two beers and will be deceived. Plea of passing off cannot be sustained.

32. In view of the above findings, the ex parte stay order is vacated. I.A. No. 11355/2007 is dismissed and I.A. No. 13772/2007 is allowed. The defendants will be also entitled to cost which is assessed at Rs. 20,000/-. Observations and findings in this order are tentative/prima facie and will not be binding on the Registrar and appellate authorities under the Act and the suit will be decided without being influenced by the present findings. List before the regular Bench for further orders/directions on 28th January, 2009.