



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMMERCIAL IP SUIT NO.19 OF 2006

Anheuser Busch Inbev India Ltd.

...Plaintiff

Versus

Jagpin Brewerise Limited & Ors.

...Defendants

Mr. Ashutosh Kane, Ms Amruta Thakur and Ms Sumana Roychowdhary i/b W. S. Kane & Co. for Plaintiff.

CORAM : ARIF S. DOCTOR, J.
RESERVED ON : 20th NOVEMBER 2025
PRONOUNCED ON : 8th DECEMBER 2025

JUDGMENT:

1. The Plaintiff has filed the present suit seeking *inter alia* (i) permanent order of injunction restraining Defendant Nos. 1 and 2 (**"the Defendants"**) from infringing the Plaintiff's registered trade mark No.436744 i.e. "HAYWARDS 5000", as well as trade mark No.1521743 "FIVE THOUSAND" both registered in Class 32 by using the mark "COX 5000" (**"impugned trade mark"**) or any other trade mark deceptively similar to the Plaintiff's registered trade mark and (ii) from passing off the Defendants' goods as and for the Plaintiff's goods. The Plaintiff has also sought damages of Rupees Five Lakhs.
2. The First Defendant is a company incorporated under the Companies Act, 1956, and carries on the business of manufacturing, marketing and selling

beer. The Second Defendant is in the management and control of the First Defendant company.

3. The Third defendant, i.e., Shaw Wallace & Co. Limited was the Plaintiff's predecessor in title and was later deleted as a party to the Suit by an Order dated 13th March, 2013. The pleadings stood accordingly amended.

Brief Background

4. The Plaintiff is the registered proprietor of two trade marks, (i) the label mark "HAYWARDS 5000" bearing Registration No. 436744 (**"the label mark"**) and (ii) the word mark "FIVE THOUSAND" bearing Registration No. 1521743 (**"the word mark"**). Both the Plaintiff's registrations are in Class 32 and are in respect of beer. These marks are collectively referred to as (**"the said trade marks"**).
5. The trade mark "HAYWARDS 5000" was originally adopted in 1983 by the Plaintiff's predecessor in title, Shaw Wallace & Co. Ltd. (**"Shaw Wallace"**) who had in the year 1985, applied for and secured registration of the label mark under registration No.436744. It is the Plaintiff's case that since the year 1983 Shaw Wallace, and then the Plaintiff, including through licensees, have been continuously and extensively manufacturing and selling beer under the label mark "HAYWARDS 5000".
6. In 2003, pursuant to an order passed by the Delhi High Court in *Shaw Wallace and Co. Ltd. and Anr. vs Superior Industries Ltd.*¹, the Plaintiff's label mark "HAYWARDS 5000" was declared as a well-known trade mark

¹ 2003 (27) PTC 63

and has since been included in the list of well-known marks as maintained by the Registrar of Trade Marks.

7. By a Deed of Assignment dated 27th May 2005, Shaw Wallace assigned and transferred the registered label mark “HAYWARDS 5000”, together with the goodwill associated therewith, to the SKOL Breweries Ltd., as the Plaintiff was formerly known. On 27th May 2005, SKOL Breweries Limited filed Form TM-23 to enter its name in the Register of Trade Marks as the proprietor of the said label mark. This application was duly accepted.
8. Sometime in January 2005, the Plaintiff’s predecessor came to learn that the First Defendant was brewing, bottling and marketing beer (“**the impugned beer**”) under the trade mark “COX 5000”, of which “5000” formed an essential and leading feature. Aggrieved by the same, the Plaintiff’s predecessor, through its Attorneys, addressed a Cease-and-Desist Notice dated 18th January, 2005, calling upon the First Defendant to *inter alia* cease and desist the use of the impugned trade mark in respect of the impugned goods. The First Defendant responded to the Plaintiff’s predecessor’s aforesaid Notice vide their Advocate’s reply letter dated 1st February, 2005, denying the contents of the aforesaid Notice and refusing to comply with the requisitions contained therein.
9. The Plaintiff thus filed the present Suit on 24th August 2006.
10. By an order dated 21st September, 2006, this Hon’ble Court was pleased to grant the Plaintiff ad-interim reliefs in terms of prayer clauses (a), (b) and (c) of the Notice of Motion No. 2990 of 2006.
11. The Defendants challenged the said ad-interim order by filing Appeal No.

805 of 2006, which was dismissed by the Division Bench of this Court vide Order dated 15th November, 2006. Hence, the ad-interim order stood confirmed.

12.The Defendants then filed their Written Statement on 30th January 2007 in present Suit, *inter alia* raising a preliminary objection to the jurisdiction of this Court to entertain the present Suit.

13.The Plaintiff thereafter, in the year 2007, applied for registration of the word mark “FIVE THOUSAND” under Registration No. 1521743 in Class 32 *inter alia* in respect of ‘beer’.

14.The Plaintiff then, in the year 2007, also applied for registration of the word mark “FIVE THOUSAND”, which was subsequently granted in 2010 under Registration No. 1521743 in Class 32.

15.The Defendants, thereafter sometime in 2007, also filed an Application for Rectification² of the Plaintiff’s registered label mark No. 436744 in Class 32 before the Intellectual Property Appellate Board (“IPAB”).

16.On 14th September 2011, the IPAB, by a detailed order, rejected the Defendants’ Application for Rectification of the Plaintiff’s label mark.

17.The Defendants’ preliminary objection as to jurisdiction was then rejected by this Court by an Order dated 13th February 2012. This order was not challenged by the Defendant.

18.The following Issues which arose for determination were then framed by an Order dated 18th April 2013 which are as follows.

Issues

² ORA/170/2007/TM/KOL

1. *Whether the Plaintiff proves that by the use of the impugned trade mark 'COX 5000' or the impugned label shown at Exhibit 'L' to the Plaint in respect of beer, the Defendants have infringed the Plaintiff's registered trademark Nos.436744 and/or 1521743 both in Class 32?*
2. *Whether the Plaintiff proves that by the use of the impugned trademark 'COX 5000' or the impugned label shown at Exhibit 'L' to the Plaint in respect of beer, the Defendants are passing off their beer as and for the beer of the Plaintiff?*
3. *Whether the Defendants prove that the numeral '5000' is common to the trade and is hence 'public juris' for use in sale of beer?*
4. *Whether the Plaintiff is entitled to damages or in the alternative profits earned by the Defendants by the use of the impugned trademark 'COX 5000' or the impugned label shown at Exhibit 'L' to the Plaint?*
5. *Whether the Plaintiff is entitled to the reliefs of permanent injunction, as prayed?*
6. *What Order? What Relief?*

19.Despite being granted multiple opportunities, the Defendants failed to lead evidence in the Suit. Accordingly, vide its Order dated 10th June 2013, this Court treated the Defendants' evidence as closed. Subsequently, the Plaintiff's documents in evidence were marked, and the Plaintiff's Witness (PW-1) was cross-examined by the Defendants' Advocate. Thereafter, by an Order dated 18th January, 2016, this Court recorded that the cross-examination of Plaintiff's Witness (PW-1) was over, as the Plaintiff was not leading further evidence.

20.In February 2019, the Defendants filed Notice of Motion No. 500 of 2019 for stay of the Suit under the provisions of Section 124 of the Trade Marks Act, 1999. Thereafter, sometime in July 2019, the Defendants took out Chamber Summons No. 860 of 2019, seeking to amend the Written Statement. However, both the Notice of Motion and the Chamber Summons were dismissed for want of prosecution by an order dated 8th August

2024.

21. The Suit then came up for final hearing on 3rd January 2023, 26th August 2024, 9th June 2025, 24th June 2025, and 3rd November 2025, and on each of the said dates, none appeared on behalf of the Defendants. This Court, vide the order dated 3rd November 2025, listed the Suit for final hearing on 13th November 2025 and had directed the Plaintiff's Advocates to give notice of this date to the Defendants. Accordingly, the Plaintiff gave notice of the aforesaid date of hearing to the Defendants. The Plaintiff has also tendered an Affidavit of Service proving that the notice was duly served upon the Defendants. Despite this, the Defendants have not appeared.

22. It was thus that the matter was taken up for final hearing.

Submissions of Mr. Kane on behalf of the Plaintiff

23. Mr. Kane at the outset pointed out that the Defendants had, in the Written Statement, *inter alia*, taken the following defences: (i) the Defendants adopted the impugned trade mark "COX 5000" sometime in 2003 and have been using the same in respect of the impugned beer since then (ii) the rival marks, i.e. , "HAYWARDS 5000" and "COX 5000", are dissimilar (iii) the Plaintiff's label mark "HAYWARDS 5000", registered under No. 436744 in Class 32, has never been used by the Plaintiff, and the Plaintiff has abandoned the said registered label mark (iv) the Plaintiff cannot claim any right in respect of the numeral "5000", and the numeral "5000" is common to the trade (v) the registration of the label mark "HAYWARDS 5000" under No. 436744 in Class 32 does not grant the Plaintiff any exclusive right over the numeral "5000", and the said numeral "5000" has

been disclaimed.

24. Mr. Kane, however, pointed out that while the Defendants had taken these contentions in the Written Statement, the Defendants had not, despite being given multiple opportunities, any evidence in support of the case pleaded in the Written Statement.

25. He then made the following submissions, issue-wise.

Issue No. 1

“(1) Whether the Plaintiff proves that by the use of the impugned trade mark ‘COX 5000’ or the impugned label shown at Exhibit ‘L’ to the Plaintiff in respect of beer, the Defendants have infringed the Plaintiff’s registered trademark Nos.436744 and/or 1521743 both in Class 32?”

26. Mr. Kane submitted that the Plaintiff is the registered proprietor of both the label mark “HAYWARDS 5000” and the word mark “FIVE THOUSAND” in Class 32 in respect of “beer”. He pointed out that the Defendants’ application for cancellation of the Plaintiff’s registration of the label mark was dismissed by the IPAB vide a detailed order which remained unassailed by the Defendants. He submitted that to the best of the Plaintiff’s knowledge, the Defendants have not disputed the Plaintiff’s registration of the word mark “FIVE THOUSAND”. He thus submitted that the Plaintiff by virtue of the said registrations, had the statutory right to the exclusive use of the registered trade marks in respect of beer.

27. Mr. Kane then submitted that the Plaintiff’s label mark was a composite trade mark label comprising the word “HAYWARDS” and numeral “5000” both of which were the distinctive, essential and leading features of the

said label mark. He then pointed out that Section 28 of the Trade Marks Act, 1999, gives the registered proprietor of a trade mark, the exclusive right to use the registered trade mark. He thus submitted that in the present case, the Plaintiff's registration under No. 436744 for the label "HAYWARDS 5000" includes the numeral "5000", which was the leading and essential feature of the label mark.

28.Mr. Kane then pointed out that the Defendants' impugned trade mark "COX 5000", which contained the numeral "5000" as an essential feature, was identical to the numeral in the Plaintiff's label mark "HAYWARDS 5000", since it contained the same numeral "5000" as its leading and essential feature. He also pointed out that the rival goods are identical and it was thus that the Defendants had by the use of the impugned trade mark in respect of identical goods i.e., "beer", infringed both the Plaintiff's label mark as also the Plaintiff's word mark.

29.Mr. Kane submitted that the Defendants' contention that there can be no infringement because their mark "COX 5000" was distinct and distinguishable from the Plaintiff's trade mark "HAYWARDS 5000" was wholly untenable. He pointed out that even a cursory comparison of both the marks made clear that the leading, essential, and memorable feature of the impugned mark was the numeral "5000", which was identical to the essential feature of the Plaintiff's registered word mark "FIVE THOUSAND" as well as the Plaintiff's registered label mark "HAYWARDS 5000".

30.Mr. Kane further pointed out that this Court has, on multiple occasions, recognised that the numeral "5000" constituted the dominant and essential

feature of the Plaintiff's "HAYWARDS 5000" mark. In support of this submission, he relied upon the following decisions: *Shaw Wallace and Co. Ltd. & Anr. v. Mohan Rocky Spring Water Breweries Ltd.*³, *SKOL Breweries Ltd. v. Som Distilleries & Breweries Ltd.*⁴, *SKOL Breweries Ltd. v. Fortune Alcobrew Pvt. Ltd.*⁵ and *Sabmiller India Ltd. v. Jagpin Breweries*⁶.

31. Mr. Kane then submitted that infringement is established if the essential feature of a registered mark is adopted without authorisation. He also pointed out that when comparing the two competing marks, the Court must consider the overall and broad impression rather than a meticulous, side-by-side comparison. He submitted that the emphasis must be on the essential, dominant and memorable features of the mark, as these are what consumers are most likely to recall. He submitted that, if the essential features are reproduced, minor differences in details such as colour schemes, get-up or packaging do not suffice to avoid infringement. He submitted that the applicable test is that of the ordinary, unwary consumer of average intelligence and imperfect recollection, whose impression determines whether the rival mark is deceptively similar. In support of his contention he placed reliance upon the judgements in the case of *Reckitt & Colman of India Ltd. vs Wockhardt Ltd.*⁷, *Pidilite Industries Limited v. Jubilant Agri & Consumer Products Limited*⁸, *Jagdish Gopal Kamath v. Lime & Chilli Hospitality Service*⁹ and *James Chadwick & Bros. Ltd. v. The*

³ MIPR 2007 (2) 185

⁴ 2011 SCC OnLine Bom 1750

⁵ 2012 (6) Mh.L.J. 265

⁶ 2014 SCC OnLine Bom 4842

⁷ [Bombay High Court] Appeal No.1180 of 1991 in Notice of Motion No. 2141 of 1991 in Suit No. 2970 of 1991

⁸ 2016 SCC OnLine Bom 14093

⁹ 2015 SCC OnLine Bom 531

National Sewing Thread Co. Ltd.¹⁰

32. Mr. Kane then submitted that the Defendants' contention that the Plaintiff had never used and had therefore abandoned its registered label mark "HAYWARDS 5000" was wholly misconceived. He submitted that the Plaintiff had been openly, continuously, and exclusively using the trade mark "HAYWARDS 5000" registered under No. 436744, as well as several other label marks in which the leading, prominent, essential, and distinctive feature is the expression "HAYWARDS 5000". He submitted that these label marks were, in substance and overall commercial impression, the same as or substantially similar to the registered label "HAYWARDS 5000". He then placed reliance upon Section 55 of the Trade Marks Act, 1999, to point out that such use of a trade mark was specifically recognised. He also placed reliance upon the decision of this Court in *SKOL Breweries Ltd.* particularly paragraphs 19 and 20, which affirm that the use of a mark in a modified or updated label does not amount to non-use so long as its essential features remain intact. He thus submitted that the allegation of abandonment was therefore entirely untenable both in fact and in law.

33. Mr. Kane then submitted that the Defendants' adoption of the impugned mark was plainly dishonest and undertaken solely with the intention of exploiting the Plaintiff's tremendous reputation and goodwill. He pointed out that the Defendants had no plausible reason to adopt the numeral "5000" except to trade upon the established market recognition of the

¹⁰ AIR 1951 Bom 147

Plaintiff's well-known mark, "HAYWARDS 5000". He further submitted that the Defendants were under a duty to conduct a search of the Register of Trade Marks prior to adopting the impugned mark, and had the Defendants done so, the same would have revealed the Plaintiff's registrations. He submitted that the Defendants' failure to undertake even this basic due diligence, coupled with the adoption of a mark so closely approximating the Plaintiff's, made clear that the Defendants' conduct was tainted with dishonesty and mala fides. In support of his contention that the adopter of a trade mark is obliged to carry out a search of the Trade Marks Register, Mr. Kane placed reliance upon the decision of the Division Bench of this Court in *Bal Pharma Ltd. v. Centaur Laboratories Pvt. Ltd. & Anr.*¹¹, as well as a recent judgement of this Court in *Petrofer Chemie H.R. Fischer GMBH & Co. KG. and Anr. v. United Petrofer Limited*¹².

34. He thus submitted that the Plaintiff had successfully proved that the Defendants have infringed the Plaintiff's label mark as well as the word mark by using the impugned trade mark "COX 5000".

Issue No.2 –

"(2) Whether the Plaintiff proves that by the use of the impugned trademark 'COX 5000' or the impugned label shown at Exhibit 'L' to the Plaintiff in respect of beer, the Defendants are passing off their beer as and for the beer of the Plaintiff?"

35. Mr. Kane then submitted that the Plaintiff had, in addition to continuously and extensively using the label mark "HAYWARDS 5000" since its adoption in 1983, also widely advertised and publicised the said mark

11 2001 SCC OnLine Bom 1176

12 [Bombay High Court] Order in IA. No. 2143 of 2021 in COMIP Suit No. 275 of 2021

across India. He pointed out that the Plaintiff's beer was marketed and sold throughout the country through a large and well-established distribution network built up by the Plaintiff/the Plaintiff's predecessors. He then also pointed out that, owing to decades of substantial sales and extensive advertising in leading publications, periodicals, and other media, members of the trade and public have come to associate the label mark "HAYWARDS 5000" and, in particular, the numeral "5000" exclusively with the Plaintiff.

36. He submitted that the Plaintiff's uninterrupted and consistent use of the mark since 1983 has resulted in the acquisition of extraordinary goodwill, reputation and fame, placing the Plaintiff's marks in the category of famous trade marks that enjoy widespread recognition. Mr. Kane further emphasised that the well-known status of the Plaintiff's mark "HAYWARDS 5000" has been expressly recognised not only by this Court but also by the Delhi High Court in *Shaw Wallace & Co. Ltd. & Anr. v. Superior Industries Ltd.* He then submitted that such was the recognition of the Plaintiff's trade mark that the same has been included in the list of well-known marks maintained by the Registrar of Trade Marks.

37. Mr. Kane thus submitted that the Defendants' impugned trade mark, "COX 5000", being deceptively similar to the Plaintiff's well-known mark, "HAYWARDS 5000", would necessarily result in misrepresentation, and the Defendant, by adopting and using the very same numeral "5000" for identical goods, was leading members of the public and the trade to believe, wrongly, that the Defendants' beer originates from, or is in some manner connected with, the Plaintiff.

38.Mr. Kane further submitted that the Defendants vide their Written Statement, have claimed the use of the impugned mark “COX 5000” since the year 2003. However, the Defendants have not produced an iota of proof to substantiate such a user since 2003. The Defendants have not given any sort of explanation or reasoning to explain the adoption and use of the impugned mark for the impugned beer. The Defendants have not given credible rationale behind the impugned mark which contained essential and prominent feature, i.e., the numeral “5000”, which is identical to the prominent feature of the Plaintiff’s label mark.

39.He submitted that the Defendants were using the mark “COX 5000” in respect of identical goods, namely beer, and a mere glance at the photographs of the Defendants’ beer bottles and those of the Plaintiff's makes clear that the numeral 5000 is the central and eye-catching element of the impugned mark. The comparison of Plaintiff’s and Defendants’ products is as follows.

Plaintiffs’ Product –



Defendants’ Product –



He also pointed out that when compared with the Plaintiff's mark "HAYWARDS 5000", in which the numeral "5000" is the leading, essential and memorable feature, the Defendants' numeral "5000" is exactly the same as the Plaintiff's mark.

40. Mr. Kane then also pointed out that the impugned mark is applied on round bottles, and when viewed from certain angles, only the numeral "5000" of the mark appearing on Defendants' products is visible, and the same being identical to that of the Plaintiff's mark thereby causes a likelihood of deception. He thus submitted that in these circumstances, a consumer who encounters the Defendants' beer is likely to feel confused and may be misled into believing that the Defendants' product originates from or is associated with the Plaintiff's well-known "HAYWARDS 5000" beer.

41. He submitted that it is a settled principle of trade mark law that the Plaintiff is not required to prove actual instances of confusion, and a likelihood of confusion or deception is sufficient to prove passing off. In support of his contention, he placed reliance upon the decision of the Hon'ble Supreme Court in *Rustom & Hornsby Ltd. v. Zamindara Engineering Co.*¹³, paragraph 6 of which holds as follows:

"6. The action for infringement is a statutory right. It is dependent upon the validity of the registration and subject to other restrictions laid down in Sections 30, 34 and 35 of the Act. On the other hand the gist of a passing off action is that A

¹³ AIR 1970 SC 1649

*is not entitled to represent his goods as the goods of B but it is not necessary for B to prove that A did this knowingly or with an intent to deceive. It is enough that the get-up of B's goods has become distinctive of them and that there is, a probability of confusion between them and the goods of A. No case of actual deception nor any actual damage need be proved. At common law the action was not maintainable unless there had been fraud on A's part. In equity, however, Lord Cottenham L. C. in *Millington v. Fox* (1838) 3 My & Cr 338 held that it was immaterial whether the defendant had been fraudulent or not in using the plaintiff's trademark and granted an injunction accordingly. The common law courts, however adhered to their view that fraud was necessary until the Judicature Acts, by fusing law and equity, gave the equitable rule the victory over the common law rule."*

Issue Nos. 3, 4 and 5

"(3). Whether the Defendants prove that the numeral '5000' is common to the trade and is hence 'public juris' for use in sale of beer?"

"(4). Whether the Plaintiff is entitled to damages or in the alternative profits earned by the Defendants by the use of the impugned trademark 'COX 5000' or the impugned label shown at Exhibit 'L' to the Plaintiff?"

"(5). Whether the Plaintiff is entitled to the reliefs of permanent injunction, as prayed?"

42. Mr. Kane then submitted that the burden of proving Issue Nos. 3 and 4 lay upon the Defendants and that the Defendants had not led any evidence whatsoever in the matter, nor were there any admissions by the Plaintiff's witness in cross-examination by which these Issues could be deemed to have been answered in favour of the Defendants. He submitted that all these Issues would therefore necessarily have to be answered in the negative.

43. In dealing with Issue No. 3, Mr Kane pointed out that the Intellectual Property Appellate Board (IPAB) had, vide an order dated on 14th

September 2011, rejected the Defendants' Rectification Application and decided the said Issue in favour of the Plaintiff. He further pointed out that the Defendants, despite being given multiple opportunities, failed to produce any material on record in support of its contention that there were others who were using the numeral "5000" in relation to beer and therefore it is common to the trade. He submitted that as per settled law, the burden lies completely on the Defendants to prove that the numeral "5000" has become common to the trade of "beer" and reiterated that the Defendants had failed to discharge the said burden in the present case. In support of his contention that the burden of proving that the Plaintiff's trade mark is common in the industry is upon the Defendants. Mr. Kane placed reliance upon the judgements in the case of *Pidilite Industries Ltd. v. S.M. Associates & Ors.*¹⁴ and *Corn Products v. Shangrila Food Products*¹⁵.

44. In dealing with Issue No. 4, Mr. Kane submitted that by reason of the aforesaid acts of infringement and passing off, the Defendants have caused loss and/or damage to the Plaintiff, which the Plaintiff estimates at Rs.5,00,000/- (Rupees Five Lakhs Only). He thus submitted that the Plaintiff was entitled to either the damages estimated by the Plaintiff or another sum that this Court may consider appropriate. He submitted that in the alternative, the Plaintiff is entitled to all the profits earned by the Defendants by the use of the impugned trade mark.

45. While dealing with Issue No. 5, Mr. Kane then submitted that the Plaintiff had successfully proved that the Defendants had infringed both the label

¹⁴ 2003 SCC OnLine Bom 143

¹⁵ AIR 1960 SC 142

mark and the word mark and that the Defendants were passing off its beer as being that of the Plaintiff by using the impugned marks in respect of identical goods. He further submitted that the Defendants had also failed to establish that the numeral '5000' is common to the trade or is *public juris* in relation to "beer".

Reasons and Conclusion

46. After having heard Mr. Kane, Learned Counsel for the Plaintiff, and having perused the evidence on record and the case law upon which reliance has been placed, I find as follows:

A) At the outset, it is crucial to note that though the Defendants have taken several defences in the written statement, including prior adoption of the impugned mark, dissimilarity of the rival marks, non-use or abandonment by the Plaintiff, that the numeral "5000" is common to the trade, and suppression of material facts, consent, and estoppel, the Defendants have chosen not to lead any evidence to substantiate any of the pleas taken in the written statement.

B) *Conversely*, the Plaintiff has established, through certified copies obtained from the Register of Trade Marks, that the Plaintiff is the registered proprietor of (i) the label mark "HAYWARDS 5000" (having Registration No. 436744) and (ii) the word mark "FIVE THOUSAND" (having Registration No. 1521743), both being in Class 32 in respect of beer. *Crucially*, the rectification application filed by the Defendants to the

Plaintiff's label trade mark "HAYWARDS 5000" was dismissed by the IPAB vide a detailed order dated 14th September 2011, which order was never challenged by the Defendants and therefore is finalised. Furthermore, the Defendants have never disputed the validity of the registration of the wordmark "FIVE THOUSAND." Thus, the Plaintiff's registration in respect of both the label mark and the word mark stands admitted and unimpeached, entitling the Plaintiff to the statutory protection afforded to the registered proprietor of a trade mark under Sections 28 and 29 of the Trade Mark Act.

C) The Plaintiff's label mark is a composite mark in which both the word "HAYWARDS" and the numeral "5000" constitute essential, distinctive and leading features. Under Section 28 of the Trade Marks Act, the Plaintiff, as registered proprietor, enjoys the exclusive statutory right to use these marks for beer and to prevent others from using identical or deceptively similar marks and infringing the Plaintiff's statutory rights. From the evidence which has been placed before me, I am satisfied that the Plaintiff has established continuous, open and extensive use of the label mark "HAYWARDS 5000" since 1983. The evidence produced by the Plaintiff also bears out that the Plaintiff has consistently been using the label which is identical or materially similar to the registered label. Thus, under Section 55, such use constitutes valid use of the registered mark.

D) A bare perusal of the impugned mark adopted by the Defendants, i.e., “COX 5000”, leaves no doubt that the numeral “5000” is the dominant, essential, and memorable feature of the mark. The Defendants are using the impugned mark in respect of the very same goods, i.e., beer, for which the Plaintiff uses its registered trade marks. A visual comparison of the rival marks shows that the numeral is the most prominent and striking element in both marks, and since the numerals are identical, this confirms the Defendants’ attempt to copy the Plaintiff’s mark. The decisions in *Shaw Wallace v. vs Superior Industries Ltd.*, *SKOL Breweries v. Som Distilleries & Breweries Ltd* and *SABMiller v. Jagpin Breweries* have all held that “5000” constitutes the essential and distinctive feature of the Plaintiff’s label mark.

E) The fact that the Defendants have used the very same numeral i.e. “5000” in the impugned mark makes it abundantly clear that the Defendants have copied the prominent and distinctive feature of the Plaintiff’s registered marks. It is well settled that the test for passing off is the perception of an average consumer with imperfect recollection. In the facts of the present case, a consumer is highly likely to be confused or left in a state of wonderment regarding the origin of the Defendants’ beer and may readily assume an association with the Plaintiff’s product, since both marks prominently feature

the identical numeral “5000”. Accordingly, the mere use of a different prefix, namely “COX”, by the Defendants does not in any manner dilute or negate the likelihood of confusion.

F) It is well settled that the test for infringement requires the Court to assess the overall and broad impression of the marks rather than a meticulous, side-by-side comparison. What is to be considered are the essential, dominant and memorable features of the rival marks and not the minor differences in detail, as held in the case of *Reckitt & Colman v. Wockhardt Ltd.*, *Pidilite v. Jubilant Agri & Consumer Products Limited*, *Jagdish Kamath v. Lime & Chilli Hospitality Services* and *James Chadwick Bros. Ltd. v. The National Sewing Thread Co. Ltd.* Applying the principles laid down in these decisions, on an examination of the rival marks, i.e., the Plaintiff’s label mark and the impugned mark that the Defendants have used the very same numeral “5000” in a manner that is identical to the Plaintiff’s registered trade mark.

G) Furthermore, the circumstances also strongly suggest that the Defendants’ adoption of “5000” is plainly dishonest. The Defendants have not provided any explanation or reasoning for using the same numeral, i.e., “5000”. The Defendants also failed to indicate any independent use as well as market presence since 2007, though alleged. As held in *Bal Pharma v. Centaur* and *Petrofer v. United Petrofer*, a party adopting a

mark must first conduct a trade mark registry search, failing which dishonesty is inferred. The Defendants have provided no evidence of honest adoption or the basis for adopting “5000”. It is thus clear that the Plaintiff’s mark is a well-recognised trade mark and entered into the registered trade marks the Defendants have, in a calculated manner, tried to come as close to the said trade mark only in an attempt to ride on the Plaintiff’s immense reputation and goodwill.

H) The Defendants’ plea of non-use or abandonment is untenable. The Plaintiff has produced evidence which establishes long and continuous use of the trademark under the “HAYWARDS 5000” label. The Plaintiff’s reliance upon the decision of this Court in *SKOL Breweries v. Som Distilleries*, is entirely apposite since the said decision holds that use of labels substantially similar to the registered label constitutes use of the registered mark. In these circumstances, the essential feature of the Plaintiff’s registered marks having been used by the Defendants in respect of identical goods, the Plaintiff has established a case of infringement in respect of both of the Plaintiff’s trade marks.

I) On the issue of passing off, the Plaintiff has led clear and cogent evidence establishing that the Plaintiff has been using the trade mark “HAYWARDS 5000” or such similar marks continuously, openly, and extensively since 1983. The Plaintiff

has also demonstrated that the mark has been widely advertised and publicised across India and, *crucially*, included in the list of well-known trade marks maintained by the Registrar of Trade Marks. Both this Court in *Shaw Wallace and Co. Ltd. & Anr. v. Mohan Rocky Spring Water Breweries Ltd.* and the Delhi High Court in *Shaw Wallace & Co. Ltd. v. Superior Industries Ltd.* have also taken judicial note of the fact that the Plaintiff's trade mark HAYWARDS 5000 enjoys a high degree of recognition across India. Through decades of uninterrupted commercial use, extensive nationwide distribution, and sustained promotion, the Plaintiff has therefore built substantial goodwill and reputation in its mark.

J) As already noted in paragraph (E) above, the Defendants' adoption and use of the mark "COX 5000" for identical goods (beer), incorporating the very same numeral "5000", is inherently likely to mislead and confuse the average consumer. The very same numeral "5000" is identical to the one used by Plaintiff. The numeral part "5000" constitutes the essential and prominent feature of the Plaintiff's trade mark. Thus, any average consumer, with imperfect recollection, encountering the Defendants' product in the market is likely to be left in a state of wonderment or confusion as to the origin of the goods and to be led to believe that the same emanate from or have a connection with the Plaintiff. Mere use of a different prefix, i.e.,

“COX”, along with the same number would not enable the average consumer to differentiate between Plaintiff’s and Defendants’ products. Given the Plaintiff’s immense goodwill and reputation, such confusion and misrepresentation would lead to a real and tangible likelihood of damage to the Plaintiff’s goodwill, inasmuch as consumers or persons in the trade are likely to associate the Defendants’ beer with that of the Plaintiff.

K) It is well settled that, in an action for passing off, the Plaintiff is not required to prove actual confusion, and it is sufficient to establish a likelihood of confusion or deception. The Hon’ble Supreme Court held in *Rustom & Hornsby Ltd. v. Zamindara Engineering Co.*, that the real test to establish passing off is the overall impression created on the average consumer with imperfect recollection, and a Plaintiff is not required to show specific instances of deception if such deception is reasonably likely. As noted in (I) above, such likelihood is clearly established in the present case. The photographs of the Defendants’ bottles show that the numeral “5000” is the most prominent and eye-catching element of the impugned mark and is identical to Plaintiff’s use of the numeral “5000”. This similarity is further accentuated by the fact that both marks are used on round bottles, such that when viewed from different angles, it visually resemble the Plaintiff’s product, thereby raising the chances of confusion.

L) The burden of proving Issue No. 3 was on the Defendants. The Defendants, however, did not lead any evidence, nor has the Plaintiff's witness in evidence admitted the case of the Defendants on the basis of which any of these Issues could be said to have been proved. The contention that the numeral "5000" is common to the trade was rejected by the IPAB in its order dated 14th September 2011 dismissing the Defendants' rectification application.

M) Insofar as the claim for damages is concerned, I find that the Plaintiff has not led any evidence whatsoever to establish the quantification of the said amount or to demonstrate any actual loss suffered. No financial statements, sales figures, comparative market data, consumer complaints, or any material showing diversion of trade have been placed on record. Equally, the Plaintiff has not produced any evidence of the profits earned by the Defendants so as to sustain an order for rendition of accounts or award of profits. It is well settled that damages are not awarded as a matter of course and must be specifically proved. In the absence of any such proof, the Plaintiff's claim for damages cannot be granted. The present Suit, being a Commercial Suit, Section 35 of the Civil Procedure Code, 1908, as amended by Section 16 of the Commercial Courts Act, 2015 would apply, entitling the Plaintiff to an order of costs towards the legal fees and all other expenses incurred

in connection with the proceedings. Hence, having due regard to the Defendants' conduct in the present matter, the infringement established on record, and the Defendants' persistent abstention from the proceedings despite service, the Plaintiff is entitled to an order of permanent injunction and to costs.

47. In the aforesaid backdrop, I proceed to now answer the Issues as follows:

- i. For the reasons recorded in paragraphs (B) to (H) and (J) hereinabove, Issue No. 1 is answered in the affirmative.
- ii. For the reasons recorded in paragraphs (I) and (K) hereinabove, Issue No. 2 is answered in the affirmative.
- iii. For the reasons recorded in paragraphs (A) and (L) hereinabove, Issue Nos. 3 is answered in the negative.
- iv. For the reasons recorded in paragraph (M) Issue No. 4 is answered in the negative and Issue No. 5 is answered in the affirmative.

48. Thus the Suit is therefore decreed and disposed of in terms of prayer clauses (a) and (b) which read thus :

“(a) that the First and Second Defendants by themselves, their directors, servants, agents, stockists, and dealers, be restrained by a permanent order of injunction of this Hon'ble Court from infringing the registered trade mark bearing No. 346744 and or 1521743 both in Class 32 by using in relation to beer the trade mark "COX 5000" or the label shown at Exhibit "L"

hereto or any trade mark containing the numeral "5000" or any other trade mark deceptively similar to registered trade mark No.436744 and or 1521743 or in any other manner whatsoever;

(b) that the First and Second Defendants by themselves, their directors, servants, agents, stockists, and dealers, be restrained by a permanent order and injunction of this Hon'ble Court from manufacturing, selling, distributing, exhibiting for sale or advertising beer bearing the trade mark "COX 5000" or label shown at Exhibit "L" hereto or any trade mark containing the numeral mark "5000" or any other trade mark deceptively similar to the Plaintiff's trade mark "HAYWARDS 5000" and "FIVE THOUSAND" so as to pass off or enable others to pass off the said Defendants' beer as and for beer of the Plaintiff."

50. The Defendants shall pay costs of Rs. 10,00,000/- to the Plaintiff.

(ARIF S. DOCTOR,J.)