

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

% **Date of decision: 13th July, 2018**

+ **CS(COMM) 179/2016 & IA No.3316/2016 (u/O 39 R-1&2 CPC)**

ENTERTAINMENT NETWORK (INDIA) LTD. Plaintiff

Through: Mr. Sandeep Sethi & Mrs. Pratibha M. Singh, Sr. Advs. with Mr. Sudeep Chatterjee, Ms. Jaya Mandelia, Ms. Nupur Lamba & Mr. Nikhil Lal, Advs.

Versus

HT MEDIA LIMITED Defendant

Through: Mr. P. Chidambaram, Sr. Adv. With Mr. Rajshekhar Rao, Ms. Meghna Mishra, Mr. Nakul Sachdeva, Mr. Ankit Rajgarhia, Mr. Naman Joshi & Ms. Julien George, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

IA No.3316/2016 (of the plaintiff under Order XXXIX Rules 1&2 CPC).

1. The plaintiff has instituted this suit *inter alia* for permanent injunction restraining the defendant from using any trade mark that is identical or deceptively similar of the plaintiff's trade mark 'PEHLA NASHA', either as a radio channel titled 'RADIO NASHA' or a trade mark, trading style, name, logo, part of name or in any other manner.
2. The suit came up first before this Court on 11th March, 2016 when the senior counsel for the defendant appeared and the hearing was adjourned to 14th March, 2016.
3. On 14th March, 2016, the counsel for the defendant handed over an affidavit and the proceedings were again adjourned to enable the counsel for

the plaintiff to respond thereto. On 17th March, 2016, though summons of the suit were issued but *ad interim* order of injunction as sought by the plaintiff not granted. The plaintiff preferred FAO(OS)(COMM) No.8/2016 against non-grant of interim order and which was dismissed vide order dated 21st March, 2016.

4. The defendant has filed its written statement and the counsels for the parties were heard on 26th July, 2016, 8th August, 2016, 29th August, 2016 and 27th October, 2016 when orders on this application were reserved.

5. It is the case of the plaintiff in the plaint, that (i) the plaintiff operates in the radio broadcasting and experiential marketing segment under its trade mark / brand name / logo 'RADIO MIRCHI' along with Mirchi logo; (ii) the plaintiff also operates its radio stations through its website www.radiomirchi.com and gaana.com; (iii) in the year 2014, radio channel Radio Mirchi launched its 24-hours non-stop free internet radio channel / station under the trade mark / brand name 'PEHLA NASHA'; the said channel is powered by Gaana.com which is a commercial music streaming service providing free and licensed music content to the public; (iv) the internet based radio channel of the plaintiff under the trade mark 'PEHLA NASHA' caters to the gap between retro and contemporary music hits and promotes and broadcasts content belonging to a specific period of time, being the 1990s; (v) the plaintiff has applied for trade mark registration of 'PEHLA NASHA' in various classes; (vi) that the plaintiff's free internet radio channel under the trade mark / brand name 'PEHLA NASHA' has gained immense popularity and recognition and has accumulated a wide listener base; (vii) that the defendant airs its radio channels through radio

station titled “Fever 104 FM” which is a direct competitor of the plaintiff’s Radio Mirchi; (viii) that the defendant, just prior to the institution of the suit has launched a new FM radio channel under the name / mark ‘RADIO NASHA’ wherein they are using nearly identical / deceptively similar mark as that of the plaintiff as its channel / brand name, to usurp the well established goodwill and reputation of the plaintiff; (ix) the plaintiff has learnt that the defendant has also applied for registration as trade mark of ‘RADIO NASHA’; (x) the plaintiff, on 22nd February, 2016, complained to the Ministry of Information and Broadcasting to not approve ‘NASHA’ as the brand name for any FM Broadcaster since the plaintiff was the prior adopter thereof; (xi) that the defendant’s mark / name ‘RADIO NASHA’ is completely devoid of any originality and creativity and is a blatant and deliberate attempt to copy the key element of the plaintiff’s mark ‘PEHLA NASHA’; (xii) the defendant is also advertising to be the first retro station playing music of 1970s to 1990s; and, (xiii) that the defendant is attempting to pass off its services as that of the plaintiff.

6. The defendant, in its affidavit handed over in the Court on 14th March, 2016, deposed (i) that the word ‘NASHA’ is a commonly used term in the field of music as well as internet music streaming websites and has been used prior to use by the plaintiff, by many third parties and who are continuing to use the same; (ii) names of music streaming websites Nasha 89, Nasha Records, Nepali Nasha, Haroon Ka Nasha, Nasha Music, Nasha Music Band, Nasha Entertainment, Pehla Nasha Radio, Tera Nasha, DJ Nasha Radio etc. along with dates of first user were given; thus word ‘NASHA’ could not be said to be distinctive of the plaintiff; (iii) the music broadcast over the defendant’s channel can be heard only by listeners who

have a device that can catch the frequency on which the radio station of the plaintiff is available in a specified area and the listeners do not have any choice of election of particular music; (iv) on the other hand, an internet based music streaming website is a very different medium from a radio station and requires the listener to have an internet connection which is only available on broadband, Wi-Fi, dongle etc.; the website providing services has a repertoire of songs already fed into it i.e. it is not live as in the case of radio; consequently the consumer logging into the website will not only be able to hear the song that is streaming at that point of time but he will also have the option of skipping the song and check for the song which he wishes to hear; (v) that the plaintiff's music streaming website is www.radiomirchi.com and not 'PEHLA NASHA'; www.radiomirchi.com has several pages on its website, one of which is called 'PEHLA NASHA'; when the listener accesses the radiomirchi website, he will have a choice of many pages in which he would see an option called 'ONLINE RADIO' and upon clicking on this 'ONLINE RADIO' a drop down menu would appear with ten other pages, one of which is 'PEHLA NASHA'; if the listener logs on this page, he will be able to access a repertoire of songs stored on the said page; (vi) website www.pehlanasha.com is registered by Gaurav Hemdev who is a resident of New York and www.pehlanasha.in is registered in the name of Abhishek Dua of Saharanpur, U.P; (vii) 'PEHLA NASHA' and 'RADIO NASHA' are distinguishable; and, (viii) the defendant on, 1st March, 2016 started its test transmissions after receiving all approvals and the channel 'RADIO NASHA 107.2 FM' was launched on 9th March, 2016.

7. The plaintiff, in the affidavit in response, deposed (i) that the online radio station of the plaintiff is operated in the same manner as a full-fledged

FM radio station and uses the same hardware, software, equipment etc. as is required to run a regular FM radio station; (ii) that the audio streams for the internet radio station 'PEHLA NASHA' of the plaintiff are created in the studio and thereafter broadcasted through servers on Gaana.com platform; (iii) the only distinction between FM radio station and Online radio station is regarding the medium of transmission; (iv) that none of names given in the affidavit of the defendant with 'NASHA' as a component thereof are radio stations; they are playlists and none of them are operational in India – particulars of each of them are stated; (v) that the website of the defendant radionasha.com also functions as an internet radio inasmuch as it has a section wherein any user can log in and listen to music online and which is identical to the plaintiff's 'PEHLA NASHA' which is powered by gaana.com; (vi) that the plaintiff is the prior adopter of the mark 'NASHA' as its trade mark for operating its online radio station from the year 2014 onwards, while the defendant has adopted the mark 'RADIO NASHA' only in march, 2016; (vii) while 'PEHLA NASHA' of the plaintiff has vast coverage and its listenership exists globally, 'RADIO NASHA' of the defendant has a limited reach in Delhi and the patrons are bound to get confused between two; (viii) the consumers / listeners of internet radio as well as FM radio are identical inasmuch with the advent of smart phone and tablets and portable antennas, a consumer / listener can access the two on the same device; and, (ix) the mark 'RADIO NASHA' is nearly identical / deceptively similar to the plaintiff's mark 'PEHLA NASHA'.

8. The contents of the affidavit aforesaid of the defendant having been summarized above, the need to detail the contents of written statement of the defendant is not felt.

9. The senior counsel for the plaintiff argued that (i) the plaintiff is the prior adopter w.e.f. 16th June, 2014 and has built a goodwill; the radio channel of the defendant was launched after nearly two years on 9th March, 2016; the services of the plaintiff and the defendant are identical and both play the same genre of songs; (ii) the distinction drawn by the defendant between its services and the services of the plaintiff does not exist; the defendant also runs 'RADIO NASHA' as an online radio station; (iii) the defendant has not given any justification for adoption of a similar mark; (iv) third party usage of the mark 'NASHA' is no defence; (v) the owner / operator of the radio channel is not announced on the radio channel and the listener cannot identify and / or distinguish between the sources of the radio station; (vi) the plaintiff has approached this Court at the earliest; (vii) the defendant itself having applied for registration of the mark 'NASHA' in various derivative / formative forms, cannot say that the same is generic; attention was drawn to screenshots of the website and social media accounts of the plaintiff to contend that the 'PEHLA NASHA' of the plaintiff has a large number of 'likes' and also a large number of advertisements; attention was invited to the application of the plaintiff as well as to the application of the defendant for registration, to contend that while the plaintiff claimed user since 16th June, 2014, the defendant claimed user since 5th January, 2016; and, (viii) that there is no other radio service under the name 'NASHA'.

10. The senior counsel for the plaintiff referred to (i) ***Procter & Gamble Manufacturing (Tianjin) Co. Ltd. Vs. Anchor Health & Beauty Care Pvt. Ltd.*** (2014) 211 DLT 466 (DB) granting protection to use of the expression / words 'ALLROUND PROTECTION' in relation to toothpaste, reasoning that the words "marks or indications which may serve in trade to designate

the kind, quality, quantity, intended purposes, values...of the goods”, in Section 9(1)(b) of the Trade Marks Act, 1999, cannot be read to include words / marks which designate the quality, intended purpose or values, not generic to the goods and services but unique to the goods of one and which may not be present in the same goods and services provided by another; (ii) McCarthy on Trademarks and Unfair Competition, 4th Edition, Volume 2, authoring in para 11.11 thereof that even a “common” word such as “apple” can be used as an arbitrary and inherently strong trademark on a product such as personal computers and that proof of secondary meaning is unnecessary; (iii) *Ahmed Oomerbhay Vs. Gautam Tank* 146 (2008) DLT 774 holding that ‘Postman’ may be generic if used by a courier agency but will be arbitrary if applied to edible oils and it was argued that though use of the mark ‘NASHA’ for alcoholic beverages may be said to be generic but is not generic for a radio channel; (iv) *T.V. Venugopal Vs. Ushodaya Enterprises Ltd.* (2011) 4 SCC 85 holding that it is only with respect to descriptive marks that secondary meaning needs to be pleaded and considered by the Court; (v) *Ishi Khosla Vs. Anil Aggarwal* 2007 (34) PTC 370 (Del) holding that adoption of the words ‘Whole Foods’, though generic in relation to health foods was different from the meaning of ‘Whole Foods’ as per English Dictionary and thus it could not be said that the words ‘Whole Foods’ were descriptive of the products being marketed and that the defendants themselves having applied for registration of the mark using the words ‘Whole’ and ‘Foods’ could not contend that the said words were incapable of registration as a trade mark; (vi) *South India Beverages Pvt. Ltd. Vs. General Mills Marketing Inc.* 2015 (61) PTC 231 (Del) (DB) holding that though a mark is to be considered in entirety, yet it is

permissible to accord more or less importance or 'dominance' to a particular portion of the mark and that the test of unwary consumers and substantial similarity is to be applied and it was contended that the dominant part of both the marks is 'NASHA' and the word 'PEHLA' in the mark of the plaintiff and 'RADIO' in the mark of the defendant are incapable of distinguishing the two; (vii) *Laxmikant V. Patel Vs. Chetanbhai Shah* (2002) 3 SCC 65 holding that the principal issue determinative of the grant of temporary injunction is, whose use was prior in point of time, whether the mark had acquired goodwill and the way in which the business may be carried on in future and it was argued that the business of the plaintiff as well as the defendant is a business of the modern world and the way in which it may be carried on in future will not necessarily be the same as it is being carried on today and thus the distinction between the two relied upon by the defendant is immaterial; and, (viii) *Baker Hughes Limited Vs. Hiroo Khushalani* 1998 PTC (18) 580 (Del) holding that initial confusion is likely to arise even amongst sophisticated and knowledgeable purchasers under a mistaken belief that two companies using the same corporate name, trading name or style are inter-related and that the sophistication of a buyer is no guarantee against likely confusion. Though the compilation of judgments of senior counsel for the plaintiff comprises of several other judgments also but the senior counsel for the plaintiff on being asked not to duplicate, restricted the arguments on the basis of aforesaid judgments. Mention in addition was made of *Allied Blenders & Distillers Pvt. Ltd. Vs. Shree Nath Heritage Liquor Pvt. Ltd.* (2014) 211 DLT 346, *Time Warner Entertainment Company LP Vs. A.K. Das* 1997 PTC (17) 453 (Del) and of the order dated

9th April, 2008 in CS(OS) No.601/2008 in *India TV Independent News Service Pvt. Ltd. Vs. Information TV.*

11. Per contra, the senior counsel / counsel for the defendant contended (i) the services of the plaintiff and the defendant are as distinct as chalk and cheese; (ii) while the service of the plaintiff can be accessed through internet, all over the world, the service of the defendant is a FM Radio available only within a distance of 20 kilometers and through a radio or transistor or a phone having the said facilities; (iii) that while for accessing the services of the plaintiff, Wi-Fi or internet connection is required, there is no such requirement for accessing the services of the defendant; (iv) there is an entirely different market for the services of the plaintiff and the defendant; (v) that the website of the plaintiff is not www.pehlanasha.com but is www.radiomirchi.com and on accessing the said website one has to go to the online radio platform and in the menu whereof 'PEHLA NASHA' is one of the choices; on accessing 'PEHLA NASHA' one is directed to gaana.com and which plays the music; (vi) that the services of the plaintiff cannot be accessed through a radio or a transistor; (vii) that the number of 'Likes' on 'PEHLA NASHA' of the plaintiff are not such as to show any goodwill for the service of the plaintiff; (viii) that the plaintiff has not given any particulars of advertisements through its service under the mark 'PEHLA NASHA'; (ix) with such few followers of the service of the plaintiff, the plaintiff cannot claim to have acquired a secondary meaning or even a reputation and all these aspects are to be subject matter of trial; (x) that the advertisements of 'PEHLA NASHA' relied upon by the plaintiff are on the own radio station of the plaintiff; (xi) others, whose particulars are given in the affidavit aforesaid, are also using the word 'NASHA'; (xii) that the

present suit is a counterblast to the application of the defendant for registration of 'RADIO NASHA'; and, (xiii) that the plaintiff was the competitor of the defendant in the bids for FM Radio in Delhi and the present suit is also an outcome of the trade rivalry and this is also evident from the fact that the suit was filed just before the FM Radio of the defendant under mark 'RADIO NASHA' was to be launched.

12. Reliance, by the senior counsel / counsel for the defendant was placed on:

- (A) My judgment in *Bright Enterprises Private Limited Vs. MJ Bizcraft LLP* 2016 SCC OnLine Del (4421) regarding the mark 'Prive' (I may mention that the same was overruled by the Division Bench in *Bright Enterprises Private Limited Vs. M.J. Bizcraft LLP* 2017 SCC OnLine Del 6394).
- (B) *Bhole Baba Milk Food Industries Ltd. Vs. Parul Food Specialties Pvt. Ltd.* (2012) 186 DLT 234 (DB) – holding that whether a common word has acquired secondary distinctiveness is primarily a question of fact and it was contended that 'NASHA' is a generic word meaning intoxicated.
- (C) *Hearst Communications, Inc. Vs. Dinesh Varyani* ILR (2009) IV Del 799 – also holding that whether a plaintiff has a reputation or goodwill is primarily a question of fact and has to be proved by cogent evidence.
- (D) *Goenka Institute of Education & Research Vs. Anjani Kumar Goenka* ILR (2009) VI Delhi 415 – holding that since other educational institutes were using the name 'Goenka', either *per*

se or with other words, it could not be said that the word 'Goenka' had become distinctive or acquired a secondary meaning vis-à-vis the plaintiff.

13. The senior counsel/counsel for the defendant also argued (i) that detailed reasons were given by this Court in order dated 17th March, 2016 and by the Division Bench in order dated 21st March, 2016 for refusing *ad interim* injunction and the plaintiff, save for placing on record rejoinder to the reply to the application under Order XXXIX Rules 1&2 of the Code of Civil Procedure, 1908 (CPC) pleading the increase in the number of its listeners, has not placed any other material on record and there is no reason for this Court to now, at this stage take a different opinion than the one taken at that stage; (ii) that the smart phone becomes a radio only with headphone and not otherwise; and, (iii) FM Radio is identified, particularly in moving vehicles, by frequency and not by name.

14. The counsel for the defendant however on specific query fairly admitted, a) that since the defendant had also applied for registration, the plea of the mark being generic was not open to it; and, b) that the plaintiff commenced use of the mark 'PEHLA NASHA' prior to commencement of use of the mark 'RADIO NASHA' by the defendant.

15. The senior counsel for the plaintiff, in rejoinder referred to (i) ***Satyam Infoway Ltd. Vs. Siffynet Solutions (P) Ltd.*** (2004) 6 SCC 145 holding that it is not essential for the plaintiff to prove long user to establish a reputation in a passing-off action and the question is of who gets there first; and, (ii) ***Neon Laboratories Limited Vs. Medical Technologies Limited*** (2016) 2

SCC 672 – also holding that temporary injunction can be granted in the light of “first in the market” test.

16. The senior counsel for the plaintiff also contended, that a) the plaintiff’s internet radio is available through internet and the defendant’s FM radio is available through airwaves and both can be accessed by hand held devices like smartphones; and b) today the various mediums of airwaves and sound cloud, internet are converging and the only question to be considered by the Court is of possible confusion. It was further argued that the defendant has not given any reason whatsoever for adopting a mark with the word ‘NASHA’ which forms the predominant part of the mark of the plaintiff. It was yet further contended that it is not even the case of the defendant that the defendant did not know of the plaintiff’s mark and that the defendant, who claims to be a fierce competitor of the plaintiff, is bound to have known the mark of the plaintiff. It was yet further contended that the defendant was earlier using the mark “Radio Fever” and it is inexplicable as to why the defendant has abandoned the mark with the word ‘Fever’ and opted for the mark similar to that of the plaintiff and the same alone spells *mala fides* of the adoption by the defendant. Attention was invited to ***Laxmikant V. Patel*** supra . It was yet further contended that the reputation of the plaintiff cannot be decided on the basis of the number of ‘Likes’ on the Facebook page of the plaintiff and inasmuch as every listener is not on Facebook. On the aspect of third party use, it was yet further informed that there is no radio by the name of ‘NASHA’ which was operative when the plaintiff adopted the mark or which is operative now.

17. The counsel for the defendant, on 27th October, 2016, under instructions stated that the defendant, during the pendency of this Suit will not launch another station by the name 'NASHA' and the defendant has presence only in Delhi and Bombay.

18. I have considered the aforesaid contentions.

19. As far as the argument of the counsel for the defendant, of the plaintiff being not entitled to interim injunction at this stage owing to having not been granted *ad interim* injunction is concerned, the same is to be noted to be rejected. Not only is it a settled principle of law that the observations, even if any made for refusing *ad interim* injunction in the form of *ex parte* injunction, even before the defendant has had an opportunity to file its written statement, are not to affect the decision of the application for interim injunction, as is being done now but the Division Bench in its order dated 21st March, 2016 aforesaid in the present case has expressly observed so.

20. The principal argument of the senior counsel / counsel for the defendant is of the difference in the product of the plaintiff and the defendant. However, the difference is not as of chalk and cheese as suggested by the senior counsel for the defendant or as between apples and oranges. Both, to earn revenue from advertising, are catering to the need of the patrons of free music. The senior counsel for the defendant, during the hearing, on specific query did not point out any difference in the genre of the music provided by the plaintiff and the defendant, save for stating that while the plaintiff is providing music of 1990s only, the defendant as per admission of the defendant itself is providing music not only of 1990s but of prior thereto also, from 1970s. However the said difference, in my opinion, also as

a patron of music, is not such which can be distinctive of the services of the two. The difference pointed out by the senior counsel for the defendant is in the mode of access to the music of the plaintiff and the music of the defendant. The said difference, in terms of apples and oranges, would be a difference of going to buy apples, to the supermarket / air-conditioned mall or to a street vendor / hawker / wholesale fruit market or *subzi mandi*. I have wondered, whether, again in terms of apples, it can be said that the trade mark of apples sold in a supermarket / mall and those sold in the *subzi mandi* by a street vendor, can be the same because the patrons accustomed to shopping for their fruits from a supermarket / mall are unlikely to ever stop by at a street vendor or a hawker or to go to a *subzi mandi* to buy apples. The answer obviously has to be no, inasmuch as there is no difference in the apples, whether sold in the supermarket / mall or by street vendor / hawker or in the *subzi mandi*. Thus in my opinion, it is immaterial that the music platform under the mark 'PEHLA NASHA' of the plaintiff is accessible from use of medium of Wi-Fi / internet and the music platform of the defendant under the mark 'RADIO NASHA' is accessible through the medium of radio / transistor and transmitted through frequency modulation airwaves.

21. Merit is also found in the contention of the senior counsel for the plaintiff that with the widespread use of smart phones having the facility of radio also, even music through airwaves, at least in the cities of Delhi and Bombay is accessed more through smart phones than through radios and transistors which, once an essential fixture in a household and to the extent of requiring licence, are today hardly found in any household. Thus, it cannot also be said that the instrument, through which the music under the mark

‘PEHLA NASHA’ of the plaintiff and music under the mark ‘RADIO NASHA’ of the defendant can be accessed are different or that the same obliterates the similarity / deceptive similarity.

22. Similarly, the procedure for accessing the respective music services enumerated in the affidavits supra of the defendant and which the senior counsel for the defendant also took sufficient time to explain, is not such which would make the product or the services different. The senior counsel for the defendant in contending so, overlooks the features of the smart phones, making both accessible with a single tap of the finger tip.

23. The High Court of Bombay, in *Sony Kabushiki Kaisha Vs. Shamrao Maskar* AIR 1985 Bom 327 was concerned with the challenge to the grant of the application of the respondent therein for registration of trade mark with the word ‘SONY’ for nail polish and dealing with the reasoning given by the Registrar of Trade Marks that none was likely to confuse the trade mark of the respondent qua nail polish with the trade mark of the petitioner therein in relation to electronic goods held that the trade channel through which the goods will be sold though is a vital factor but no single factor is conclusive on the point. Prior thereto also, a Division Bench of the same court in *Sunder Parmanand Lalwani Vs. Caltex (India) Ltd.* AIR 1969 Bom 24, also in the context of registration of trade mark, held that “likelihood must vary on the facts of each case. Human conduct is varied and complex. The importance of a particular fact or facts may vary in the perspective of the totality of the facts of each case. The importance of a particular fact may increase or diminish when considered in combination with different sets of facts. What has to be decided in a case is whether on the totality of the facts

of that case, it is likely that there would be deception or confusion. It would, therefore, be totally misleading to rely only on some individual fact or facts from a decided case and put emphasis on them without taking into account other facts in combination with which that particular fact was looked upon as yielding any principle. All factors which are likely to create or allay deception or confusion must be considered in combination.” Again, in ***Biochem Pharmaceutical Industries Vs. Biochem Synergy Ltd.*** (1998) 18 PTC 267 (Bom) the said High Court, this time while deciding an application for interim injunction in a suit for permanent injunction restraining infringement of trade mark, and finding ‘Biochem’ to be the mark of both, rejected the contention of the defendant that the business and the trade channels of the parties being different, no confusion would be caused and held that the fact that one was engaged in the business of manufacture and sale of pharmaceuticals and the other in the business of manufacture and sale of basic drugs, drug intermediaries, chemicals in bulk, though through different trade channels but since the goods could not be said to be poles apart, deception and confusion was imminent.

24. Supreme Court in ***Cadila Healthcare Ltd. Vs. Cadila Pharmaceuticals Ltd.*** (2001) 5 SCC 73, while also listing the factors relevant for adjudicating the claim of passing off, though listed (i) the nature of the goods in respect of which the mark is used, (ii) similarity in the nature, character and performance of the goods of the rival traders, (iii) the class of purchasers who are likely to buy the goods bearing the marks, and, (iv) the mode of purchasing the goods or placing the order for the goods, further held that weightage is to be given to each of the said factors depending upon the

facts of each case and the same weightage cannot be given to each factor in every case.

25. Thus it is not as if, on account of the factor of different trade channels and/or mode of accessing, interim relief is required to be declined. Though I have otherwise also not found the differences but even if the argument of the senior counsel for the defendant of the differences were to be accepted, the same alone cannot in the facts of the present case be a factor for denial of interim injunction if otherwise the plaintiff were to be found to be entitled thereto.

26. In the face of the admission of the defendant of the plaintiff being the prior adopter of the mark 'PEHLA NASHA' by at least about two years before the defendant, the reason for the defendant to adopt the mark 'RADIO NASHA' indeed becomes intriguing. The defendant has not only not pleaded but the counsels for the defendant also had no explanation for the defendant adopting the mark 'RADIO NASHA'. Considering the past rivalry between the parties, with the counsel for the defendant himself calling the plaintiff a 'trade rival' of the defendant and the senior counsel for the plaintiff contending that the defendant in the past also has infringed the mark of the plaintiff, it can certainly be concluded that the defendant was aware of the music service 'PEHLA NASHA' of the plaintiff. Even otherwise, in today's day and world, trade marks especially for services as that of the plaintiff and the defendant have acquired importance several times more than what they did in yesteryears. Today, even for naming a child a large number of considerations viz. how will it be liked by the opposite gender, how will it be received in school, college and working life etc. prevail. The defendant, must

have engaged professionals for coining the mark 'RADIO NASHA' for its service. It can at this stage safely be assumed that the defendant hoped, either to cause loss or harm to the plaintiff by incorporating the word 'NASHA' in its mark or to gain from the goodwill of the plaintiff. In either situation, the intention of the defendant would qualify as 'not *bona fide*' and the plaintiff would be entitled to interim injunction.

27. This Court in *Yahoo! Inc. Vs. Akash Arora* (1999) 78 DLT 285 was concerned with a suit for permanent injunction restraining the defendant therein from operating any business in and / or selling / offering for sale and in any manner dealing in any services or goods on the internet or otherwise, under the trade mark / domain name 'yahooindia.com'. Dealing with an application for interim relief, it was held that where the parties are engaged in common or overlapping fields of activity, the competition would take place and if the two contesting parties are involved in the same line or similar line of business, there is grave and immense possibility for confusion and deception and probability of sufferance of damage. It was further held that where services are through internet, a very alert vigil is necessary and a strict view is to be taken for its easy access and reach by anyone from any corner of the globe. The argument, that internet users are sophisticated users and only literate people who are able to ascertain can approach the actual Internet site that they intend to visit, was rejected.

28. That brings me to the question of similarity / deceptive similarity of the marks 'PEHLA NASHA' and 'RADIO NASHA'.

29. The unwary customer / consumer in the context of music services is not the one who is a dedicated follower of either the plaintiff or the

defendant but the one who has either for some days listened to the music of one and after a long time desires the same experience or the one who has heard praise from another of service, either of the plaintiff or the defendant. Such a consumer / patron, is more likely to remember the word 'NASHA' in association with music service. Though again, in yesteryears, such a consumer / patron was more likely to go back to the person from whom he had heard the praise to find the full particulars but today, is more likely to google the word 'NASHA' with music or radio. I have done the same and found that when one types the words "Nasha Music" on the search engine, though it also unearths the music service 'DJ Nasha' at <https://www.bbc.co.uk> but thereafter lists 'PEHLA NASHA' and then 'RADIO NASHA'. The purpose of granting protection to trade marks is to prevent the said consumer / customer / patron from going to one while desiring to or being referred to the other.

30. Supreme Court, in *Satyam Infoway Ltd.* supra held that the use of the same or similar domain name may lead to a diversion of users which could result from such users, mistakenly accessing one domain name instead of another. It was held that ordinary consumers/users seeking to locate the functions available under one domain name may be confused if they accidentally arrived at a different but similar web site which offers no such services; such users could well conclude that the first domain name owner had misrepresented its goods or services through its promotional activities and the first domain owner would thereby lose its customer. The contention, that confusion was unlikely because the two operate in different fields with the business of one limited to network marketing and the other of software

solution and connected activities, was rejected emphasizing the need to maintain an exclusive symbol for access.

31. The word 'NASHA' is a word of Hindi language and means intoxication and/or mania and which need not always be of alcohol and can also be of anything or anyone. The plaintiff, by adopting the said word in its mark for music services, is attempting to lure the patrons to get intoxicated and addicted to its music and will certainly suffer if any of its patrons, owing to the confusion aforesaid, is directed to the service of the defendant.

32. 'NASHA' is the dominant part of the mark of the plaintiff with the word 'PEHLA' therein being unlikely to be remembered.

33. Supreme Court in *Parle Products (P) Ltd. Vs. J.P. & Co., Mysore* (1972) 1 SCC 618, held that a mark is likely to be remembered by the idea it conveys and it is too much to expect the consumers to remember the exact details of the marks. It was further held that marks are remembered rather by general impressions or by some significant detail than by any photographic recollection of the whole. It was yet yet further held that variations in detail might well be supposed by customers to have been made by the owners of the trade mark they are already acquainted with, for reasons of their own. It was thus held 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. Again, in *Ramdev Food Products (P) Ltd. Vs. Arvindbhai Rambhai Patel* (2006) 8 SCC 726, the said position was reiterated. Reference in this regard can also be made to the dicta of this Court in *Atlas Cycle Industries Ltd. Vs. Hind Cycles Ltd.* ILR (1973) I Delhi 393 (DB) and *Izuk Chemical Works Vs. Babu Ram Dharam Prakash* 2007 (143)

DLT 245. I have in *Allied Blenders* supra and appeal whereagainst was dismissed by the Division Bench vide judgment reported as *Shree Nath Heritage Liquor Pvt. Ltd. Vs. Allied Blenders & Distillers Pvt. Ltd.* 2015 (221) DLT 359 also ventured into the scientific and psychological research on the recollection of marks by human mind.

34. Merit is also found in the contention of the senior counsel for the plaintiff, of the world of technology moving at a fast pace and the differences as existing today between airwaves and internet disappearing or merging. We are already talking of single remotes for all electronic gadgets in the house and office and of Artificial Intelligence taking over many of the functions. Thus the distinction, if any existing today in the availability of the services of the plaintiff and the defendant under the subject marks is likely to disappear in the very near future. Moreover the plaintiff, after acquiring more goodwill in the mark 'PEHLA NASHA' cannot be prevented from also providing services of an FM Radio under the said mark since both fall in the same class of goods / services in which goods and services are classified under the Trade Mark laws. For this reason also, the balance of convenience is in favour of the plaintiff and against the defendant. The loss of even one patron confusing the defendant for the plaintiff would be irreparable.

35. The application thus succeeds. The plaintiff is thus found entitled to interim injunction.

36. I have lastly considered, whether my delay in pronouncing this judgment can come in the way of grant of temporary injunction to which the plaintiff has been found entitled and have on pondering not found it to be so. It is not as if the defendant, all this while has not been aware of the pending

order / judgment. If the defendant, notwithstanding the same, has continued the said business and acquired goodwill with respect thereto, has done so at its own peril and the delay in passing the order / judgment cannot be a ground in favour of the defendant.

37. The application is thus allowed.

38. The defendant, during the pendency of the suit, is restrained from using the mark 'RADIO NASHA' or any other mark similar or deceptively similar to the mark 'PEHLA NASHA' of the plaintiff in relation to broadcasting, re-broadcasting, radio broadcasting and internet broadcasting services. However it is deemed appropriate to make the said injunction effective with effect from 30 days of the passing of this order / judgment so that the defendant has sufficient time to effect the change.

39. The application is disposed of.

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40. List for further proceedings on 23rd July, 2018.

राजिव साहय एन्ड लॉ

RAJIV SAHAI ENDLAW, J.

JULY 13, 2018

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