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

% *Date of Decision: 31st August, 2026*

\# **CNR No. DLHC010194022025**

\+ C.O. (COMM.IPD-TM) 93/2025

ASR MARKET VENTURES PRIVATE LIMITED .....Petitioner
Through: Ms. Abhilasha Nautiyal, Mr. Vignesh T. Raj and Mr. Tarun Tripathi, Advocates.

versus

FITSHIP PRIVATE LIMITED & ANR. .....Respondents
Through: Ms. Vindhya S. Mani and Mr. Kartikay Singhal, Advocates for R-1.
Ms. Arunima Dwivedi, CGSC with Ms. Himanshi Singh, Advocate for R-2.

\# **CNR No. DLHC010194902025**

\+ CS(COMM) 320/2025

ASR MARKET VENTURES PRIVATE LIMITED .....Plaintiff
Through: Ms. Abhilasha Nautiyal, Mr. Vignesh T. Raj and Mr. Tarun Tripathi, Advocates.

versus

FITSHIP PRIVATE LIMITED .....Defendant
Through: Ms. Vindhya S. Mani and Mr. Kartikay Singhal, Advocates.

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J.

1. This judgment will dispose of the rectification petition filed by the Petitioner/ASR Market Ventures Private Limited against Respondent No.1/Fitship Private Limited being C.O. (COMM.IPD-TM) 93/2025 as also I.A. 9122/2025 in CS(COMM) 320/2025 filed under Order XXXIX Rules 1

and 2 CPC for interlocutory injunction. For the sake of convenience, Petitioner is referred to as 'ASR' and Respondent No. 1 is referred to as 'Fitship', hereinafter.

<u>C.O. (COMM.IPD-TM) 93/2025 and I.A. 9159/2025</u>

2. By this petition, ASR seeks cancellation of registration of the impugned mark Fit Feast bearing Registration No. 5154387 in Class 30, registered in favour of Fitship with a further direction to Respondent No. 2/Registrar of Trade Marks to remove the entry of the mark from the Register of Trade Marks.

3. To the extent relevant, case of ASR is that it is a private limited company incorporated on 05.03.2012 and is engaged in fitness and lifestyle business, offering a comprehensive platform providing wellness services and products and running a network of gyms, fitness centres and personalized fitness solutions, besides offering access to expert nutritionists and doctors, AI-led coaching and customized wellness plans, thereby revolutionarizing the health and fitness regime. ASR's services and products are offered under different and distinct trademarks including FITFEAST, FITPASS, FITCOACH, FITHEAL, STOGA etc. Through its fitness portal www.fitpass.co.in, dating back to 2015 and mobile app based platform, ASR *inter alia* offers online membership pass for accessing over 8,100 fitness centres, gyms, fitness studios and yoga studios spanning over 75 cities across India, wherein members have the flexibility to choose from over 2,25,000 workout sessions, ranging from yoga to swimming to marshal arts and pilates etc. ASR's innovative approach and quality services, backed by thorough research and investments from renowned institutional investors such as Franchise India Holdings, Frost International, Shooting Star and

Mumbai Angels, has made ASR a leader in fitness and lifestyle industry. The diverse range of specialized services/products provided by ASR, as detailed in the petition, are as follows:-

> *"A. **FITFEAST**: Nutrition and healthy food related services, including customized meal plans with recipes, wellness plans, nutritionist services, wellness information and tracking tools such as meal log, water tracker, and calorie counter.*
>
> *B. **FITCOACH**: AI-driven fitness coaching and workout companion.*
>
> *C. **FITPASS-TV**: At-home live workout sessions led by expert trainers from across the globe.*
>
> *D. **FITHEAL**: Access to doctor e-consultations, health check-ups, and e-pharmacy cash vouchers.*
>
> *E. **FITSHOP**: One stop shop for premium fitness equipment and high-quality nutritional supplements.*
>
> *F. Goods offered in collaboration with third parties, such as the 'Noise x Fitpass Pulse Grand 3' smart watch which includes a membership to, inter alia, the Petitioner's FITFEAST.*
>
> *G. The Petitioner is also using its trademarks such as BFF and STOGA for goods such as food products (makhana and sattu flour), fitness equipment and yoga mats."*

4. It is averred that ASR coined and adopted the trademark FITFEAST in 2017 and has used the mark since then for providing nutrition and healthy food related services, including customized meal plans with recipes, wellness plans, nutritionist services, wellness information and tracking tools such as meal log, water tracker and calorie counter. FITFEAST is an invented word with no dictionary meaning and being arbitrary in relation to the services for which it is used, the mark is entitled to high degree of protection. Owing to long, continuous and extensive use of the FITFEAST mark, it has cemented its place in the minds of customers and members of trade as originating from ASR and none else.

5. It is stated that ASR provides extensive information about its FITFEAST services, including pricing availability and key features on its

website www.fitpass.co.in and its mobile app, available on Android and iOS platforms. FITPASS app has gained widespread popularity with over six million downloads and an impressive 4.5 star rating based on over 22,300 reviews on the Google Play Store. FITFEAST mark prominently features across the website and mobile app and additionally, ASR also offers its services under the FITFEAST mark on third party e-commerce platforms, including Amazon.in, thereby expanding accessibility for users. Over the years, ASR has entered into many collaborations with different entities offering its services including those under the FITFEAST mark, such as Agreements in 2019 with Bank of Baroda and State Bank of India as also joint ventures with Aditya Birla Health Insurance, Amway, Air India, Vistara Airlines, Advantage Club and ICICI Bank etc.

6. It is stated that the success and popularity of ASR's FITFEAST services is evident from the steady and continuous increase in number of users over the years and consequently, the sales turnover *albeit* ASR is unable to bifurcate the revenue earned from the services rendered under FITFEAST from the overall turnover, since separate invoicing is not done. The advertising, marketing and promotional expenses are also indicators of the goodwill and reputation garnered by ASR over the years and the details of eligible users, revenue earned and promotional expenses are as follows:-

Period	Total Eligible Users
2017-2018	383
2019-2020	1,79,929
2020-2021	2,14,940
2021-2022	11,61,505
2022-2023	49,07,110
2024-2025 (till date)	77,80,411

Financial Year	Revenue in INR (Approx.)
2017 – 2018	95,49,311.82
2018 – 2019	1,85,70,793.12
2019 – 2020	5,39,10,482.99
2020 – 2021	3,68,44,809.76
2021 – 2022	2,43,01,260.00
2022 – 2023	29,02,09,060.00
2023 – 2024	34,55,77,170.00

Financial Year	Expenditure in INR (Approx.)
2017 – 2018	1,08,78,505.72
2018 – 2019	77,42,393.54
2019 – 2020	1,13,22,582.07
2020 – 2021	55,67,850.81
2021 – 2022	50,93,280.00
2022 – 2023	4,56,91,580.00
2023 – 2024	10,73,93,940.00

7. It is stated that ASR's services have been consistently recognized by peers in the fitness industry as also customers and lauded in many popular business magazines. Illustrative list of awards received includes ET Now Best Brands 2024; Mobile Health Application Award at the IHW Digital Health Awards 2024; and Times 40 under 40 Awards 2023. ASR and its trademarks have featured in leading publications, newspapers such as Times of India as also on channels such as ABP News, CXO Today, Media News 4U. ASR promotes its services under FITFEAST marks through robust online and social media presence and in addition to website www.fitpass.co.in, ASR also operates official accounts, channels and handles across various social media platforms, including YouTube, Instagram, Facebook, X and LinkedIn, where the FITFEAST mark is prominently displayed and advertised. ASR has a substantial online presence

with over 79,0000 followers on Facebook, 73,500 on YouTube, over 32,000 on Instagram, over 2,600 on X and over 24,000 on LinkedIn. FITFEAST is therefore synonymous and exclusively associated with ASR by members of public and consumers. To secure statutory protection, ASR has filed trademark applications seeking registration of FITFEAST mark, which are currently pending and details are as follows:-

Mark	Application No.	Class	Date of Application	Use claim
FITFEAST	6934009	9	31 March 2025	12.06.2017
FITFEAST	6934010	42	31 March 2025	12.06.2017
FITFEAST	6934011	44	31 March 2025	12.06.2017

8. It is stated that Fitship is the registered proprietor of the mark in Class 30 and registration was granted on 05.04.2022. ASR learnt of the dishonest adoption and use of nearly identical/deceptively similar mark by Fitship in 2024 but the extent of use was not known and hence investigation was conducted, which revealed listings of its high protein snacks including protien sachet, peanut butter, protien chips, dessert protien bar and whey protien shake under the mark on third party platforms, which were being marketed as healthy snacks. Fitship was also found advertising, promoting and offering for sale its products on its own website www.fitfeast.in and third party e-commerce platforms such as Amazon.in, Flipkar, Zepto, JioMart and Meesho. A WHOIS search of the domain name www.fitfeast.in revealed that it was registered on 09.09.2021 through Hosting Concepts B.V. d/b/a Openprovider *albeit* the registrant

details were and are masked by the Domain Name Registrar. Fitship has also filed trademark application for a device mark FitFeast in Class 30 on 24.02.2025 on 'proposed to be used' basis, which is pending. Details of impugned registration are as follows:-

Mark	Application No.	Class	Date of Application	Use claim
FitFeast	6875333	30	24.02.2025	Proposed to be used

<u>Contentions on behalf of ASR:</u>

9. ASR is an honest and prior adopter and owner of the coined and arbitrary trademark FITFEAST and is aggrieved by the wrong entry of the impugned mark Fit Feast on the Register of Trade Marks, without sufficient cause and is hence, the 'person aggrieved' as envisaged under Section 57 of the Trade Marks Act, 1999 ('1999 Act') and entitled to file the present petition. Impugned registration is liable to be cancelled as being violative of Section 11(3) of 1999 Act. The mark FITFEAST was adopted in 2017 and has been used since then in relation to nutritional and healthy food related services, which include customized meal plans, nutritionist services, wellness information, tracking tools as also gyms and gym related services. Having been in the same industry of health and fitness, Fitship was aware of the goodwill and reputation of ASR and the mark FITFEAST at least from 2017 and yet it chose to adopt the mark Fit Feast, which is

phonetically identical and visually deceptively similar to ASR's FITFEAST mark and even obtained registration on 30.09.2021 on a 'proposed to be used' basis, in violation of provisions of 1999 Act.

10. Owing to prior adoption and long, extensive and uninterrupted use of the FITFEAST mark, ASR has acquired common law rights in the said mark and is entitled to prevent third parties from using an identical or a deceptively mark in relation to identical, similar and/or allied and cognate services/goods. ASR has garnered enviable goodwill and reputation in the FITFEAST mark, which is demonstrated by substantial revenues generated, promotional expenditure incurred, social media presence, awards received, collaborations entered into. Impugned products in respect of which Fitship has obtained registration are *'snack food products specifically including extruded products, bakery products and savouries, chips (cereal products), chocolates, flour and preparations made from cereals; bread, pastries and confectionery, bakery products'*, which are closely related to the services offered by ASR under the FITFEAST mark being nutrition and healthy food related services, including customized meal plans with recipes, wellness plans, nutritionist services, wellness information and tracking tools such as meal log, water tracker and calorie counter. ASR also sells health related products under other marks and it is common knowledge that persons seeking health and wellness solutions, not only avail fitness services of gyms, pilates etc. but also follow nutrition and dietary plans and thus on seeing FITFEAST mark on the impugned products, will associate them with ASR. Therefore, owing to rival marks being deceptively similar and rival services and products being allied/cognate, confusion is inevitable. Fitship has adopted the impugned mark only to come close to ASR to encash on its immense goodwill and reputation. This misrepresentation to members of

public that the goods sold by Fitship have an association with ASR is causing irreparable damage to ASR's reputation and goodwill and amounts to passing off.

11. Likelihood of a false impression of association being created between the products of Fitship and ASR's fitness and wellness services is further exacerbated by the fact that: (a) Fitship has adopted the nearly identical mark subsequent to the adoption of FITFEAST by ASR and much after it has built immense and substantial reputation and goodwill; (b) both parties market their respective goods/services to the same demographic of health conscious consumers including fitness enthusiasts and the trade channels such as Amazon.in and online promotional platforms involving social media influencers etc. are common; (c) as per prevailing market trend, many third party entities provide both health and wellbeing services and dietary products under a single brand; and (d) ASR constantly enters into collaborations and joint ventures and consumers would assume that Fitship's products under FITFEAST are a result of another collaboration of ASR.

12. Dishonest adoption and use of Fit Feast mark by Fitship is resulting in significant dilution of ASR's FITFEAST mark as also loss of its distinctive character. The impeccable reputation enjoyed for past eight years is now at risk of being injured and this is evident from the Instagram search result '#FITFEAST', which yields mixed results for ASR's services and Fitship's goods. Fitship has no plausible reason or justification for adopting a nearly identical mark, save and except, to pass off its goods. This is a classic case of passing off and actionable under common law and

registration of the mark ought to be cancelled since Section 11(3) of 1999 Act proscribes registration of a mark, the use of which is liable to be prevented by virtue of any law, in particular, the law of passing off protecting an unregistered mark used in the course of trade.

13. The impugned registration also falls foul of Section 11(1) of 1999 Act. ASR's FITFEAST mark is an 'earlier trade mark' owing to its prior adoption and continuous use since June, 2017. Fitship filed its application for registration of its mark only on 30.09.2021 on 'proposed to be used' and thus admittedly, the adoption and use of the impugned mark is post that of ASR's adoption and use. The mark is deceptively similar to ASR's FITFEAST mark and the services offered by ASR under the said mark and the high protein snack products meant for good health and wellness sold by Fitship are related and/or have a trade connection and/or are allied/cognate. Thus, there is likelihood of confusion amongst members of public as also likelihood of association of the impugned mark with ASR's earlier trade mark FITFEAST and ought not to have proceeded for registration and its registration be cancelled under Section 11(1) of 1999 Act, to obviate any further chances of confusion or association.

14. Fitship has adopted a deceptively similar mark being well aware of the repute enjoyed by ASR in its FITFEAST mark, only to establish association or a commercial nexus with ASR and encash on the goodwill and reputation for unlawful gains. This is 'bad faith' adoption and the

impugned mark is liable to be removed from the Register by virtue of provisions of Section 11(10)(ii) of 1999 Act. Additionally, the impugned mark is vulnerable owing to provisions of Section 9(2)(a), which explicitly bars registration of any trademark which is of such nature as to deceive the public or cause confusion. There is significant confusion amongst members of public due to use of the deceptively similar mark by Fitship for allied/cognate products and as a matter of fact, the Instagram search result for '#FITFEAST' is already yielding mix results. Potential customers are being deceived into believing that health products offered under the marks emanate from the house of ASR or have an association or are sold under a new collaboration between ASR and Fitship.

Contentions on behalf of Fitship:

15. Rectification petition filed by ASR is misconceived and abuse of process of law and deserves to be dismissed. Fitship is a dynamic and fast-paced entity engaged in selling, marketing, distributing of and trading generally in health-focused snack products having high protein content and is driven by strong commitment towards promotion of nutrition and general health and wellness. mark was *bona fidely* adopted by Fitship and the adoption has its genesis in the personal experiences of its founder Mr. Aditya Poddar, who through sheer grit and determination underwent a personal health transition in 2016 and his journey through weight loss sparked a deep interest in nutrition, more particularly, role of proteins in a diet. Over a course of time, Mr. Poddar identified that there was a growing demand for health-friendly snacks amongst consumers, who were

looking for a balance between high protein content and taste and hence, in 2021 he conceived the idea of starting a company which would cater to this demand and this led to creation of Fitship Private Limited and adoption of the mark 

. Today, Fitship offers a diverse portfolio of products including protein bars, chips, shakes and peanut butters, all of which are healthy options and align with dietary needs. Fitship operates at the intersection of health, convenience and taste, targeting a wide demographic that includes fitness enthusiasts, athletes and working professionals.

16. Fitship has been using the 

mark extensively and openly for its business, so much so that the mark has become synonymous with Fitship and the public associates the mark with Fitship and none else. ASR wrongly alleges that adoption of the impugned mark is dishonest or *mala fide*. The decision to adopt the mark is a conscious decision taken after significant research, precaution, care and due diligence. Prior to commencement of the operations, the founder conducted comprehensive due diligence to ensure that use of the FITFEAST (device) trademark does not impinge on any third party's intellectual property rights. Specifically, search was conducted on publicly available data base of the Trade Marks Registry for any third party trademark registrations or pending applications for the FITFEAST marks. Search result revealed that there was no registration or even a pending application for any FITFEAST mark, including that of ASR, in any class of goods or services relevant to the business of Fitship or even associated with the food and nutrition sector. Furthermore, an independent search to determine availability of the domain name constituting the FITFEAST trademarks on public search platforms such as WHOIS etc., was also undertaken, which did not reveal any such domain name registration. In fact, as an exercise of abundant caution, an independent Google search through Google powered tools such as Google Trends was also conducted to ensure that FITFEAST was not in use even otherwise by any third party and the data reflected that up until 2021, the search volume for the term 'FITFEAST' on Google was negligible. It was only after this entire exercise was complete that Fitship applied for registration of the mark Fit Feast on 30.09.2021 in Class 30 on 'proposed to be used' basis and registration was granted.

17. Dishonesty in adoption of FITFEAST mark, if any, is on the part of ASR, who was not using FITFEAST as a trademark till Fitship's business flourished, as all business operations of ASR were under its trademark FITPASS. Interestingly, a significant uptick in search traffic occurred near 2022-2023, coinciding with proliferation of business of Fitship under the FITFEAST marks and prior thereto, there was negligible search volume of the word, indicative of minimal, if any, consumer attention towards any offering under the term 'FITFEAST', including of ASR. At the time of adoption of the mark by Fitship, there was no goodwill, reputation or brand recognition in the trademark FITFEAST of any third party including ASR, which could have been a hurdle in the adoption of the said mark by Fitship. Moreover, the list of related topics and queries on Google Trends, both pertain to products that are advertised, distributed and sold by Fitship exclusively under the FITFEAST trademark, such as peanut butter i.e., *'Fitfeast-Health Food Store in Gurgaon'*. Clearly, this is indicative of

goodwill and reputation of Fitship. Significantly, Mr. Poddar did not come across any standalone use of the mark FITFEAST or any formative mark to suggest prior adoption of the mark by any party, least of all ASR. In light of all this due diligence prior to adoption of the mark, it can hardly be urged by ASR that adoption of the impugned mark is dishonest and/or in bad faith and hence, Section 11(10)(ii) of 1999 Act is not attracted in the instant case.

18. Fitship conceived the unique and distinctive device 

in 2021 and began using it thereafter continously and extensively and today, the brand has become a household name in the segment of nutritional snacks, particuarly, for protien-based products. As a testament of the brand awareness among public and the expanse of its portfolio, the trademark has been registered and grants statutory protection to Fitship. The domain name www.fitfeast.in is also registered since 09.09.2021 and the website provides the consumers a one-stop window to peruse and purchase the products under the FITFEAST marks. ASR took no steps for registration of its FITFEAST marks for 8 years, fully conscious of the fact that the mark was not used and that ASR's identity, trademark or brand is FITPASS and it was only after the registration of Fitship's mark and its extensive use generating huge goodwill, that ASR applied for registration on 31.03.2025.

19. The contention that registration of the impugned mark violates Section 11(3) of 1999 Act is misplaced. ASR has been unable to make out a case of passing off. In order to succeed in a claim for passing off, the trinity test i.e., presence of goodwill and reputation, misrepresentation and damage to goodwill and reputation, has to be satisfied, however, ASR has failed miserably in establishing the three ingredients. Mere reputation in a mark is not sufficient for passing off and goodwill, which is the advantage of a good

name and connection of a business, must also be shown to exist. Documents placed on record by ASR do not demonstrate that it used the mark FITFEAST as a trademark or in a manner so as to generate any independent goodwill or reputation thereunder and to the contrary evidence that ASR has consistently advertised, promoted and predominantly used the mark FITPASS for its services and that use of FITFEAST is so minimal and mostly with FITPASS that it does not function as a source identifier, which is the function of a trade mark. The use of FITFEAST is far from achieving a position where a person of average intelligence and imperfect recollection would recollect FITFEAST and/or associate any independent goodwill, reputation or brand significance with the ASR brand *per se*. Moreover, there are no standalone rights of ASR in the generic prefix 'FIT' and therefore, it cannot restrain any other third party from using the same as part of its mark, absent any secondary significance in it.

20. ASR has provided figures of sales and promotional expenditure, however, none of these relate individually to FITFEAST and admittedly, cover the entire business under the mark FITPASS. It is trite that goodwill accrued over the entire business cannot be presumed to be goodwill associated with a specific mark in the absence of standalone recognition. FITFEAST, whenever scantly referred for ASR's services, is under the umbrella of FITPASS as part of subscription plans or advertisement campaigns. There is lack of substantial material on record reflecting independent advertisement, customer reviews or social media presence exclusively with respect to FITFEAST and clearly, customers are never directly exposed to the FITFEAST mark. The third party e-commerce platform listings also relate to FITPASS as the source identifier and the alleged user data of FITFEAST is unsubstantiated with documentary

evidence. ASR's business model depends purely on customer's logins to FITPASS service subscription and even the social media presence and advertising media documents placed on record, predominantly show user of FITPASS trademark and similar pattern is visible in Instagram and Facebook platforms. It was only in the year 2024 that ASR became active in using FITFEAST when realisation dawned that Fitship had garnered immense reputation and goodwill. Furthermore, even the invoices on record are issued under the mark FITPASS or some under FITSHOP but none is under FITFEAST. It is trite that a sporadic or intermittent use is not enough to prove goodwill and reputation of a threshold required to restrain a third party in a claim of passing off. *Sans* existence of goodwill and reputation in FITFEAST mark, no case of passing off is made out.

21. ASR has also failed to establish the alleged misrepresentation by Fitship. The mark was adopted after due diligence including independent search on Google and website of Trade Marks Registry as also after verification of online and social media presence of any similar mark. At the time of adoption of the FITFEAST mark by Fitship in 2021, there existed no standalone use of FITFEAST mark on any website, social media account, customer review etc., least of all of ASR, showing the mark as a source identifier with any goodwill or reputation and therefore, there was no need or reason for Fitship to even attempt to misrespresent to the public that its products had any association with ASR as the objective of misrepresentation is to encash on other party's goodwill and reputation.

22. ASR has failed to establish any likelihood of confusion amongst members of public, which is the fallout of misrepresentation by erring party in a claim for passing off, owing to the alleged deceptive similarity between the two marks of the rival parties. Courts have consistently laid down

parameters to determine likelihood of confusion viz.: (a) nature of marks; (b) degree of resemblance; (c) nature of goods and services; (d) nature, character and performance of rival offerings; (e) class of purchasers/consumers; and (f) mode of purchasing. Without prejudice to the contention that ASR has never used FITFEAST in a trademark sense, none of these factors stand satisfied in present case. The rival marks are not deceptively similar and bare look shows that the overall commercial impression is materially different inasmuch as Fitship's mark is a stylized and artistic device mark with distinctive visual elements, font, layout and trade dress, whereas ASR's mark is a simplicior word mark. Nature and commercial character of services on one hand and products on the other hand are different. ASR uses the mark FITFEAST for its digital and platform-based services, including access to nutritionists, dietary guidance and wellness tracking tools, while Fitship uses the mark exclusively in relation to packaged food and protein snack products. ASR's services are accessed through subscriptions or digital platforms under the brand FITPASS, whereas Fitship's goods are purchased directly under the FITFEAST mark, both online and through independent retail outlets and there is no connection or overlap in the trade channels. ASR's engagement on Amazon.in occurred as late as in 2024. The mode of access to FITFEAST services is exclusively through FITPASS subscription pass online and/or through FITPASS app and consumers are discerning and well informed and know what health and wellness plans/services they have to subscibe to and/or whether the protein snacks of Fitship have any connection with ASR and there is no scope of confusion.

23. The third essential ingredient of the tort of passing off i.e damage is also not substantiated in the absence of use of FITFEAST as a trademark

and existence of goodwill therein. Documents on record demonstrate the enviable reputation and goodwill built by Fitship, owing to continuous and extensive use of the mark over the last almost five years by focusing on the quality and effectiveness of high protien and tasteful snacks and increase in its reach and presence in the market through strategic marketing and effective distribution techniques. The mark FITFEAST is today associated with Fitship alone and the company has built a loyal and ever-growing customer base. The substantial goodwill, which the brand has accumulated since its inception can be seen from the steady and phenomenal increase in promotional expenditure as also sales figures from 2021-2022 to financial year 2025 (until April), as below:-

YEAR	PROMOTIONAL, MARKETING AND ADVERTISING EXPENSES (IN INR)
2021-22	2,30,919
2022-23	29,42,750
2023-24	34,60,700
2024-25	46,63,125
FY 2025 (*Until April*)	9,58,382

YEAR	TOTAL SALES FIGURES (IN INR)
2021-22	2,22,962
2022-23	93,96,110
2023-24	1,35,44,950
2024-25	2,28,97,827
FY 2025 (*Until April*)	26,75,004

24. The exponential growth of the goodwill in FITFEAST mark of Fitship is corroborated by endorsement of the brand by Mr. Axar Patel in 2025, the celebrated Indian cricketer who has also joined in as an investor. Several other professionals including Mr. Apurva Chamariya, Mr. Tarun Bhargava, Mr. Karan Jinal are part of ACLR8, an investor group, which has backed

Fitship and invested in it. A testament to the brand value attained by Fitship is that the company closed its seed-funding round, raising over Rs. 5 crore at a valuation exceeding Rs. 26 crore. Fitship's proactive market presence is also evident through its participation in various industry exhibitions and trade fares and engagements in market surveys as also wide media coverage of its products under the FITFEAST trademarks in national newspapers such as Times of India, Business Standard, The Print, The Tribune etc. With this level of goodwill attained by Fitship, it cannot even be comprehended that Fitship needs to encash on ASR's goodwill and resultantly, there can be no damage to its goodwill and none has been shown, even remotely. Once the ingredients of passing off are not made out, case of ASR for cancelling registration of Fitship's mark under Section 11(3) of 1999 Act fails.

25. ASR has equally failed in substantiating its case under Section 11(1) of 1999 Act. Firstly, ASR has not specifically pleaded as to whether it relies on sub-Sections (1)(a) or (1)(b) of Section 11 and even otherwise, no case is made out under either of the two provisions. In fact, ASR is not even entitled to invoke the provisions of Section 11, which is premised on rights flowing from an 'earlier trademark' inasmuch as ASR has not obtained any trademark registration in any class for the mark FITFEAST nor it falls within the purview of an applicant under Section 18 of 1999 Act. Additionally, there is no similarity in the services of ASR and the products of Fitship so as to cause any confusion. ASR has never used FITFEAST in a trademark sense as a source identifier and predominantly uses FITPASS for its business, invoices as also on social media platforms and on its own website. The mere fact that both parties use online platforms or have an overlap of health-conscious consumers cannot by itself lead to a conclusion of likelihood of confusion and none has been shown, save and except, a

solitary Instagram post which shows mixed search results. The third party collaborations on which much has been emphasised by ASR, significantly show use of the trademark FITPASS and not FITFEAST and therefore, no challenge can be made to Fitship's registration in FITFEAST under Section 11(1) of 1999 Act and most of Agreements are post-adoption and registration of the mark by Fitship. *Per contra,* Fitship has placed on record enough material to substantiate its honest adoption of the impugned mark after due diligence and no case is made out for bad faith adoption under Section 11(10)(ii) of 1999 Act. The mark has been registered after following due procedure and ASR did not file any opposition at the relevant stage and time. Reliance on Section 9(2)(a) is equally misconceived as the impugned mark is not inherently likely to cause confusion or deception and having adopted FITFEAST, it is not even open to ASR to raise this ground.

26. Learned counsel for Fitship relied on the following judgments:-

(a) ***Inder Raj Sahni Proprietor M/S Sahni Cosmetics v. Neha Herbals Private Limited and Another, 2025 SCC OnLine Del 3341:*** To give rise to a protectible right, use of a mark must be used in the legal sense contemplated under the trademark law such that it identifies the source of the goods;

(b) ***BPI Sports LLC v. Saurabh Gulati and Another, 2023 SCC OnLine Del 2424***; ***Kia Wang v. Registrar of Trademarks and Another, 2023 SCC OnLine Del 5844; Bhupinder Singh Vohra v. The State of Haryana and Others, 1968 SCC OnLine P&H 74:*** Bad faith adoption;

(c) ***Vishal Gupta and Others v. Rahul Bansal, 2025 SCC OnLine***

Del 4398; ***Vasundhra Jewellers Pvt. Ltd. v. Vasundhara Fashion Jewellery LLP and Another, 2025 SCC OnLine Del 5660:*** Mere priority of use is not enough to establish goodwill;

(d) ***Sanjay Gupta and Vinay Gupta v. Vineet Jain, Proprietor of Vijaypal Vineet Kumar and Co, 2026 SCC OnLine Del 1862***; ***Starbucks (HK) Limited and another v. British Sky Broadcasting Group and others, (2015) 1 WLR 2628:*** Mere reputation is not sufficient and there must be both reputation and goodwill to prove a claim of passing off;

(e) ***Pernod Ricard India Private Limited and Another. v. Karanveer Singh Chhabra, 2025 SCC OnLine SC 1701; Harrods Limited v. Harrodian School Limited, [1996] RPC 697; Reckitt & Colman Products Ltd. v. Borden Inc., (1990) 1 WLR 491:*** Principles and ingredients of passing off;

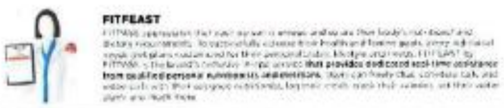
(f) ***Mountain Valley Springs India Private Limited v. Baby Forest Ayurveda Private Limited (Formerly Known as M/s. Landsmill Healthcare Private Limited) and Others, 2024 SCC OnLine Del 3665***; ***Britannia Industries Ltd. v. Cremica Agro Foods Ltd., 2008 SCC OnLine Del 881:*** Goodwill in the dominant mark cannot be said to permeate every product under the brand; and

(g) ***Nandhini Deluxe v. Karnataka Cooperative Milk Producers Federation Limited, (2018) 9 SCC 183***; ***Vishnudas Trading as Vishnudas Kishendas v. Vazir Sultan Tobacco Co. Ltd., Hyderabad and Another, (1997) 4 SCC 201; FDC Limited v. Docsuggest Healthcare Services Pvt. Ltd. & Anr., 2017 SCC OnLine Del 6381:*** Similarity or dissimilarity of goods/services, uses of the rival goods, users of the rival goods, physical nature of the goods, trade channels etc. are important objective tests for deciding the claim of passing off.

Rejoinder contentions of ASR:

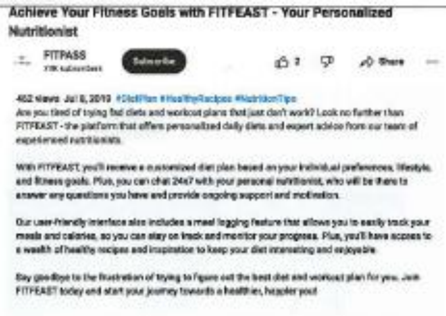
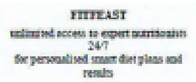
27. ASR reiterated the submissions made during the initial arguments with particular emphasis on the prior ownership and adoption of the FITFEAST mark as also its status as a coined and arbitrary word for the services offered by ASR. It was highlighted that ASR has been using FITFEAST for its health and wellness services since June, 2017 and Fitship had dishonestly adopted the nearly identical mark. To respond to the contention of Fitship that the predominant mark of ASR is FITPASS and there is a scant use of FITFEAST and that too not as a source identifier, Court was taken through a plethora of documents, which allegedly, demonstrate the use of FITFEAST mark from 2017 in the course of trade as a trademark. Reference was made to documents such as: (a) email dated 12.06.2017 from ASR's Director to FranCop for expansion of business; (b) email from FranCop attaching a standee design for a physical event at Pragati Maidan in 2017; (c) screenshot from ASR's brochure shared with investors in 2017; (d) promotional brochure in August, 2017; (e) news article published by BW Disrupt in August, 2017 showing addition of services under FITFEAST mark; (f) flyer attached with email dated 21.08.2017 from franchise India to ASR bearing the FITFEAST mark endorsed by brand ambassador Mr. Abhinav Bindra; (g) email chain between ASR and Paytm; and (h) photographs at a physical event, purportedly, demonstrating use of FITFEAST as a trademark. For ready reference, some of the screenshots are as follows:-

S.No.	Illustrative Documents Evidencing Goodwill and Reputation in the 'FITFEAST' Mark	Nature of Document	Location of Document on the Court record

2.		Standee design attached to email dated 12 June 2017 from Franchise India to the Petitioner for a physical event conducted by Franchise India at Pragati Maidan for the Petitioner in 2017.	Document 15 filed under index dated 16 July 2025 at printed page 129.
3.		Brochure attached to email dated 16 June 2017 from Franchise India to the Petitioner.	Document 14 filed under index dated 16 July 2025 at printed page 123.
5.		Screenshots capturing a WhatsApp conversation between the Petitioner's co-founder and investors, and the brochure containing the 'FITFEAST' mark as shared, further evidence the mark's use in the course of trade and its growing goodwill.	Document 7 at printed page 19. The "FITFEAST" mark is at printed page 26.
7.		FITPASS Corporate poster dated 17 August 2017 bears a clear mention of the "FITFEAST" mark, showing the mark's goodwill and reputation.	Document 8 at printed pages 32 and 34.
9.		Flyer attached with email dated 21 August 2017 from Franchise India to the Petitioner bearing the Petitioner's prior FITFEAST trademark as endorsed by the Petitioner's brand ambassador at the time, Olympian Abhinav Bindra	Document 13 filed under index dated 16 July 2025 at printed page 116.

<table>
<tr>
<td>14.</td>
<td>


</td>
<td>Screenshots retrieved from the Internet Archives clearly demonstrate the Petitioner's use of the 'FITFEAST' mark on its official website, www.fitpass.co.in, continuously from 2018, thereby evidencing the longstanding and uninterrupted use of the mark in the course of trade, and the goodwill and reputation acquired by the 'FITFEAST' mark during this period.</td>
<td>Document 15 at printed pages 79 – 88</td>
</tr>
<tr>
<td>16.</td>
<td>1. FITFEAST
We rang in 2017 with a huge update by introducing Nutritionist Services on the app with some of the best nutritionists and dietitians in town to guide our followers. It turned out to be the perfect addition to the workouts users were already attending!</td>
<td>Printout of the Petitioner's blog first published in January 2018 and available on wayback machine.</td>
<td>Document 2 filed under index dated 16 July 2025 at printed page 4.</td>
</tr>
<tr>
<td>19.</td>
<td>
</td>
<td>A printout of a screenshot from a YouTube video published on 8 July 2019 through the Petitioner's official YouTube channel clearly shows the use of the 'FITFEAST' mark, evidencing its continued use in the course of trade and contributing to the goodwill and reputation associated with the mark.</td>
<td>Document 24 at printed page 180</td>
</tr>
</table>

			
			
23.		An extract from Annexure A to the agreement dated 12 March 2020 executed between the Petitioner and Max Bupa Health Insurance Company Limited reflects the inclusion and use of the 'FITFEAST' mark as part of the Petitioner's services, thereby evidencing the mark's commercial presence and further attesting to the goodwill and reputation it has garnered in the health and wellness sector.	Document 28 at printed page 264

28. Reliance was placed on the following judgments for different legal propositions:-

(a) ***Laxmikant V. Patel v. Chetanbhai Shah and Another, (2002) 3 SCC 65:*** Passing off cases are cases of deliberate intention and misrepresentation though fraud is not a necessary element of the right of action and absence of intention to deceive is not a defence;

(b) ***Satyam Infoway Ltd. v. Siffynet Solutions (P) Ltd., (2004) 6 SCC 145:*** It is not essential to prove long user to establish reputation in a passing off action and misrepresentation does not mean that

Plaintiff has to prove any *mala fide* intent on the part of the Defendant and what has to be established is the likelihood of confusion in the mind of actual or potential consumers;

(c) ***S. Syed Mohideen v. P. Sulochana Bai, (2016) 2 SCC 683:*** Prior user is considered to be superior than any other right. Trademark registration is no defence to a passing off action and passing off right is a broader remedy than that of infringement. Trademark registration merely recognises the rights which are already pre-existing in common law and does not create any right;

(d) ***Marico Limited v. Agro Tech Foods Limited, 2010 SCC OnLine Del 3806:*** Issue of *prima facie* validity of a trademark registration can be considered at the interim stage;

(e) ***V Guard Industries Ltd. v. Crompton Greaves Consumer Electricals Ltd., 2022 SCC OnLine Del 1593:*** The 1999 Act does not recognise the concept of 'sub-branding';

(f) ***FMI Limited v. Midas Touch Metalloys Private Limited, 2025 SCC OnLine Del 4:*** It is settled position of law that whether a mark is used as a brand or a sub-brand is immaterial as the 1999 Act does not recognise a sub-brand;

(g) ***Havells India Limited v. Cab-Rio Industries and Others, 2025 SCC OnLine Del 901:*** Even though the mark REO was used by the Plaintiff with the house mark HAVELLS, if the former is used on a standalone basis and not a sub-brand, the mere use of the house mark will not distinguish the mark of Defendants;

(h) ***FDC Limited v. Docsuggest Healthcare (supra):*** Allied/cognate goods or services are those which are not identical but can be said to be related or similar in nature such as medicines being pharmaceutical preparations of the Plaintiff registered in Class 05 and the services rendered by the Defendants for booking of appointments of doctors, diagnostics, spas and salons registered in Classes 35 and 42. Classification of goods/services is not the criterion for deciding the question of similarity in goods/services;

(i) ***Bourjois Limited v. Naunihal Singh & Ors., 2012 SCC OnLine Del 5980***: Cosmetic products and spa and saloon services were found to be allied and cognate to each other and Court also considered the likelihood of diversification of services based on market players providing both cosmetic products and saloon/spa services;

(j) ***Wipro Enterprises Private Limited v. Himalaya Wellness Company and Others, 2024 SCC OnLine Del 6859***: Ayurvedic uterine tonic and intimate hygiene wash were found to be allied and cognate and interim injunction granted by the learned Single Judge was upheld by the Division Bench;

(k) ***Mayo Foundation for Medical Education & Research v. Bodhisatva Charitable Trust and Others, 2023 SCC OnLine Del 3241:*** If the adoption of a mark is dishonest, delay alone cannot be a ground to deny injunction. Defendants' hospitals and educational services were found to be allied and cognate to Plaintiff's medical journals and periodicals; and

(l) ***T.V. Today Network Limited v. COGNATE and Others, 2021 SCC OnLine Del 3244***: Court noted that the significant part of the impugned tweet were the hashtags deployed as India Today etc. and thus, the same will be shown in search results on Twitter, if one was to use the said hashtag and/or any other hashtag listed in the tweet and therefore, directed blocking of the impugned tweets.

29. Heard learned counsels for the parties and examined their rival submissions.

30. By this petition, ASR seeks cancellation/removal of registration of the mark Fit Feast in Class 30 granted in favour of Fitship, on multiple grounds under Section 11(1), 11(2), 11(3), 11(4), 11(10)(ii) and 9(2)(a) of 1999 Act. However, objections under Section 11(2) and 11(4) were not seriously pressed during arguments. The petition is predicated on ASR's rights flowing from adoption and use of the mark FITFEAST, in relation to services offered for nutrition and healthy food related services, including customized meal plans with recipes, wellness plans, nutritionist services, wellness information and tracking tools such as meal log, water tracker and calorie counter.

31. Admittedly, ASR's mark FITFEAST is not registered and applications for registrations in Classes 09, 42 and 44 filed on 31.03.2025 with user claim from 12.06.2017, are pending. ASR has placed on record details of revenue earned from 2017-2018 to 2023-2024 as also the advertising and marketing expenses for the same years and the number of eligible users, however, admittedly, figures pertaining to revenue and marketing expenses are of the entire business of ASR and it is stated in the petition that ASR is unable to bifurcate in respect of the mark FITFEAST as the said services are invoiced along with other services.

32. On the other hand, the impugned mark Fit Feast is registered

in Class 30 and registration goes back to 30.09.2021 on a 'proposed to be used' basis for products, which are protein rich snacks such as protein sachets, peanut butter, protein chips, dessert protein bar and whey protein shake. Fitship has placed on record its revenues and marketing expenses in respect of sale of these products under the mark for the period 2021-2022 to Financial Year 2025 (until April).

33. Coming to the first ground of rectification raised by ASR under Section 11(1) of 1999 Act, it is ASR's case that impugned mark is identical to ASR's FITFEAST mark, which is an 'earlier trademark' and the rival products being closely related or at least allied/cognate, there is every likelihood of confusion on the part of public as also association with the earlier mark of ASR. Prior adoption and user of FITFEAST is claimed from June, 2017. Fitship has contested this position in law and on facts, urging ASR has not obtained registration in any class for the FITFEAST mark and does not fall within the purview of an applicant under Section 18 of 1999 Act and most importantly, ASR has never used FITFEAST in a trademark sense and thus the said provision is inapplicable.

34. Section 11(1) of 1999 Act proscribes registration of a trademark if it is identical with an 'earlier trademark' and there is similarity of goods/services covered by the trademark or where the trademark sought to be registered is similar to an earlier trademark, there being identity or similarity with goods/services covered by the trademark, because of which there is likelihood of confusion on the part of the public, which includes likelihood of association with the earlier trademark. Admittedly, ASR's mark FITFEAST is not a registered mark *albeit* registration applications are pending. FITFEAST is also not covered by an application relatable to

Section 18 or Section 36E or Section 154 of 1999 Act. Therefore, ASR's FITFEAST cannot be classified as 'earlier trademark' for purpose of Section 11(1). In this context, I may allude to a judgement of this Court in ***BPI Sports (supra),*** where a petition was filed under Section 57 of 1999 Act seeking rectification of the Register of Trade Marks by removal of trademark 'BPI SPORTS' registered in favour of Respondent No.1 therein for health food supplements etc. and the Court denied the relief of rectification, holding as under:-

> ***"18.*** *Without going into the niceties of the differences between these expressions as employed in Section 57(2), it is clear that, into whichever category the case may fall, the mark must be shown to be incapable of registration on one of the absolute grounds envisaged by Section 9 or on one of the relative grounds for refusal to register envisaged in Section 11. Section 9 of the Trade Marks Act, admittedly, does not apply in the present case. However, the plaint avers that the impugned mark is liable to be removed from the register as it was not entitled to registration under any of the clauses (1), (2) and (3) of Section 11 of the Trade Marks Act.*
>
> *xxx xxx xxx*
>
> ***21.*** *The plaint invokes sub-sections (1), (2) and (3) of Section 11 of the Trade Marks Act.*
>
> ***22.*** *In my view, none of these provisions would apply.*
>
> ***23.*** *Sub-sections (1) and (2) of Section 11 are both applicable where the mark, of which registration is sought, is identical with, or similar to, an "earlier trade mark". The expression "earlier trade mark" is defined, in the Explanation following Section 11(4), for the purposes of the entire Section 11, thus:*
>
> > *"Explanation.— For the purposes of this section, earlier trade mark means—*
> >
> > > *(a) a registered trade mark or an application under Section 18 bearing an earlier date of filing or an international registration referred to in Section 36-E or convention application referred to in Section 154 which has a date of application earlier than that of the trade mark in question, taking account, where appropriate, of the priorities claimed in respect of the trade marks;*
> > >
> > > *(b) a trade mark which, on the date of the application for registration of the trade mark in question, or where appropriate, of the priority claimed in respect of the application, was entitled to protection as a well-known trade mark."*

__24.__ The petitioner's BPI SPORTS trade mark is neither a registered trade mark, nor a trade mark covered by an application relatable to Sections 18, 36-E or Section 154 of the Trade Marks Act. Nor does the petition so aver.

xxx xxx xxx

__26.__ There is, admittedly, no declaration of the petitioner's mark as a "well-known trade mark". Given the fact that the petitioner has entered the Indian market only in 2019, it is extremely questionable as to whether the petitioner's BPI SPORTS mark qualifies as a well-known trade mark on the basis of criteria that envisaged in Section 11(6).

__27.__ The petitioner's marks, therefore, do not qualify as "earlier trade marks" for the purposes of Section 11. Sub-sections (1) and (2) of Section 11 would not, therefore, apply in the present case."

35. In ***Kia Wang (supra),*** Petitioner sought rectification/cancellation of registration of the trademark ROCKPAPA (device) on the ground that Respondent had adopted a similar mark for similar/identical goods. Observing that Petitioner's mark ROCKPAPA (device) could not be classified as earlier trademark since the mark was neither a registered trademark in India nor a trademark covered by application under Sections 18/36E/154 of 1999 Act, Court denied the relief on this ground *albeit* the Petitioner succeeded on other grounds. Therefore, ASR cannot succeed in seeking cancellation of registration under Section 11(1) as ASR's FITFEAST mark is not an 'earlier trademark' within the meaning of Section 11(1) of 1999 Act.

36. The next ground for cancellation raised by ASR is under Section 11(3)(a) of 1999 Act, which prescribes that a trademark shall not be registered if or to the extent its use in India is liable to be prevented by virtue of any law in particular the law of passing off protecting an unregistered trademark used in the course of trade. It is on this ground that extensive arguments were canvassed on behalf of the respective parties. It is imperative at this stage to note, at the cost of repetition, that the main plank of defence of Fitship is that ASR has failed to demonstrate that it has used

the mark FITFEAST in the sense of a trademark indicating trade origin and consequently, failed to demonstrate that it has generated any independent goodwill or reputation thereunder. It was asserted that the documents filed by ASR clearly demonstrate that it has consistently advertised, promoted and predominantly used the mark FITPASS for its services and if at all, the use of the mark FITFEAST is as one of the many other services that it offers and renders under other marks such as FITSHOP, FITCOACH etc. In the absence of use of the mark as a trademark and goodwill and reputation therein, the main ingredient of the tort of passing off is not met and hence, Section 11(3)(a) cannot be invoked by ASR. ASR, on the other hand, has strenuously contested this position and urged that the mark FITFEAST has been continuously, uninterruptedly and openly used at least since June, 2017, as a trademark for its services pertaining to customized meal plans, wellness information, nutritional plans, tracking tools etc. and the use is independent of the use of the mark FITPASS. Therefore, the neat question that arises for consideration is whether ASR has successfully made a case of passing off so as to seek cancellation of impugned mark under Section 11(3)(a).

37. The history of passing off litigation is generally traced to the judgment of the House of Lords in ***Reckitt & Colman (supra),*** wherein it was held that the law of passing off can be summarised in one short general proposition i.e., no man may pass off his goods as those of another and three elements of the tort were delinated as: goodwill or reputation attached to the goods or services which he supplies, in the mind of the purchasing public; misrepresentation by the Defendant leading or likely to lead the public to believe that goods or services offered by him are those of the Plaintiff; and

Plaintiff must demonstrate that he suffers or in a *quia timet* action, that he is likely to suffer damages by reason of the erroneous belief engendered by Defendant's misrepresentation. In ***Toyota Jidosha Kabushiki Kaisha v. Prius Auto Industries Limited and Others, (2018) 2 SCC 1*** *albeit* dealing with a trans-national passing off action, the Supreme Court held as follows:-

> ***"27.*** *The following passage from Kerly's Law of Trade Marks and Trade Names [Kerly's Law of Trade Marks and Trade Names Thomson, 14th Edn., Sweet & Maxwell South Asian Edn., 2005.] noticed in S. Syed Mohideen [S. Syed Mohideen v. P. Sulochana Bai, (2016) 2 SCC 683 : (2016) 2 SCC (Civ) 201] may be reiterated herein for a clear exposition of the principles laying down the test for judging an action of passing-off in the Indian jurisdiction. The provisions in the Indian Trade Marks Act, 1999 incidentally are analogous to those in the U.K. Trade Marks Act, 1994*
>
> > *"15-034. Subject to possibly one qualification, nothing in the Trade Marks Act, 1994 affects a trader's right against another in an action for passing-off. It is, therefore, no bar to an action for passing-off that the trade name, get up or any other of the badges identified with the claimant's business, which are alleged to have been copies or imitated by the defendant, might have been, but are not registered as, trade marks, even though the evidence is wholly addressed to what may be a mark capable of registration. Again, it is no defence to passing-off that the defendant's mark is registered. The Act offers advantages to those who register their trade marks, but imposes no penalty upon those who do not. It is equally no bar to an action for passing-off that the false representation relied upon is an imitation of a trade mark that is incapable of registration. A passing-off action can even lie against a registered proprietor of the mark sued upon. The fact that a claimant is using a mark registered by another party (or even the defendant) does not of itself prevent goodwill being generated by the use of the mark, or prevent such a claimant from relying on such goodwill in an action against the registered proprietor. Such unregistered marks are frequently referred to as 'common law trade marks'."*
>
> *(emphasis supplied)"*

38. In ***Turning Point & Anr. v. Turning Point Institute Private Ltd., 2018 SCC OnLine Del 10257,*** the Division Bench of this Court captured the legal position pertaining to an action based on the common law right of passing off as follows:-

*“**12.** “Passing off” is, therefore, a specie of unfair trade competition, in which one person seeks to pass of his goods, or services, as those of another, by using the trademark, or name, of the letter, or a mark, or name, which is deceptively similar to that of the latter. It is an act calculated to lead to deception, aimed at obtaining an economic benefit, by capitalising on the reputation and goodwill amassed by the other person over a period of time. It is regarded as an action for deceit. In order to succeed in a “passing off” action, the plaintiff has necessarily to establish, apart from prior user of the trademark or name in question, the “trinity” of misrepresentation (deliberate or otherwise), goodwill and damage. Relief, in a passing off action, is always against the later user of the mark, or name, and never against the prior user thereof.*

***13.** Establishment of the existence of “goodwill”, as an ingredient to sustain an action for passing off, necessarily requires the plaintiff to demonstrate that the trade name, or mark has become so closely associated with his goods, or services, as to acquire a secondary meaning, specifically relatable to the goods or services of which he, and he alone, is the source. “Goodwill” has to be established by proving that the public associates the name, or mark, with the goods or services provided by the person bringing the action of passing off. “Reputation” is different, and distinct, from “goodwill”. “Goodwill” would have to be established by referring to an existing customer base, sales and advertisement. The length of user is not strictly relevant, where the question of goodwill is involved.*

***14.** In cases where the area of activity of the plaintiff and the defendant is the same, and the mark or name adopted by them similar, the only question required to be examined, in order to assess whether a case of “passing off” is, or is not, made out, is that of prior user.*

***15.** While examining whether, in a case of alleged passing off, an interlocutory injunction requires to be granted, the court is required to bear in mind the competing considerations of protection, i.e. the need to protect the plaintiff against the defendant passing off its goods, or services, as those of the plaintiff, by adopting the mark or name of the plaintiff, and the opposing need to protect the defendant against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The balance of convenience has to be assessed by weighing these two factors, one against the other. Also, the court is required to be mindful of the fact that the considerations that would prevail would be different, wherein injunction is sought against a running entity, which has already commenced its business, as against a case in which injunction is sought against an entity which is yet to start functioning.”*

39. In the same judgment, the Division Bench referred to the words of Lord Macnaghten in ***Inland Revenue Commissioners v. Muller & Co.s’***

Margarine Ltd., [1901] A.C. 217: ***"****It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom*.". It is now settled that the three essential ingredients of passing off action are goodwill and reputation, misrepresentation and damage. To succeed in a claim of passing off, the Plaintiff must establish that Defendant has used a deceptively similar/similar trade mark/trade dress/packaging for similar/identical/allied and cognate goods in which Plaintiff has a formidable goodwill and reputation and has made a misrepresentation in the course of trade to members of public, calculated to injure and damage the goodwill and reputation. In the heart of the action for passing off is the use of mark/trade dress/packaging of the Plaintiff and existence of a protectible goodwill, which the Plaintiff has been able to generate by using the mark/trade dress in question in the course of its business dealings as a source identifier and although long user is not a *sine qua non* but a prior adoption and user indicating formidable goodwill and reputation is. In ***Toyota Jidosha (supra),*** the Supreme Court relied on a decision of the UK Supreme Court in ***Starbucks (supra),*** where it was held that mere reputation was not enough to constitute goodwill and claimant has to show that goodwill exists in the form of customers, which would imply user. The principles that emerge from judicial precedence in respect of passing off were summarised by a Coordinate Bench of this Court in ***FDC Limited v. Faraway Foods Pvt. Ltd., 2021 SCC OnLine Del 1539,*** as follows:-

> ***"75.*** *From the aforenoted decisions, the following clear principles emerge:*
>
> *(i) Passing off, though an action based on deceit, does not require the establishment of fraud as a necessary element to sustain the action. Imitation or adoption, by the defendant, of the plaintiffs trade mark, in such manner as to cause confusion or deception in the mind of prospective customers, is sufficient.*

(ii) The principles for grant of injunction, in passing off actions, are the same as those which govern the grant of injunctions in other cases, i.e. the existence of a prima facie case, the balance of convenience, and the likelihood of irreparable loss in issuing to the plaintiff, were injunction not to be granted.

(iii) Proof of actual damage is not necessary, to establish passing off. However, proof of misrepresentation is necessary, even if intent to misrepresent is not approved. The question of intent may, nevertheless, be relevant, when it comes to the ultimate relief to be granted to the plaintiff.

(iv) Passing off may be alleged by a claimant who owns sufficient proprietary interest in the goodwill associated with the product, which is really likely to be damaged by the alleged misrepresentation.

(v) Grant of injunction, in cases where passing off is found to exist, is intended to serve two purposes, the first being preservation of the reputation of the plaintiff, and the second, safeguarding of the public against goods which are "passed off as those of the plaintiff.

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

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

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

(c) The plaintiff is required to establish

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

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

(iii) loss, or likelihood of loss, and

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

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

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

(a) the nature of the market,

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

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

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

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

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

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

(iii) the nature of the goods,

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

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

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

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

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

(x) Passing off differs from infringement. Passing off is based on the goodwill that the trader has in his name, whereas infringement is based on the trader's proprietary right in the name, registered in his favour. Passing off is an action for deceit, involving passing off the goods of one person as those of another, whereas an action for infringement is a statutory remedy conferred on the registered proprietor of a registered trade mark for vindication of its exclusive right to use the trade mark in relation to the goods in respect of which registration has been granted. Use of the trade mark by the defendant is not necessary for infringement, but it is a sine qua non for passing off. Once sufficient similarity, as is likely to deceive, is shown, infringement stands established. Passing off, however, may be resisted on the ground of added material, such as packing, procurement

through different trade channels, etc., which would distinguish the goods of the defendant from those of the plaintiff and belie the possibility of confusion or deception…..”

40. Some other facets in the context of passing off and to the extent relevant to the present petition are required to be captured. The Division Bench of this Court in ***Vishal Gupta (supra),*** relying on an earlier judgment of the Division Bench in ***Satyam Infoway (supra),*** held that if goodwill or reputation is not established by the Plaintiff, no other issue would need further examination and also that priority of user by itself and sole ground cannot sustain a finding of passing off or justify injunction on that basis. Relevant paragraphs are as follows:-

> ***“9.*** *For passing off, the primary ingredients that have to be satisfied are the existence of goodwill, the attempt of the defendant to pass off the defendant's product as the product of the plaintiff and resultant damage that has resulted to the plaintiff. We may refer, in this context, to a recent judgment of the Supreme Court in Brihan Karan Sugar Syndicate (P) Ltd. v. Yashwantrao Mohite Krushna Sahakari Sakhar Karkhana, which sets out the ingredients of passing off in the following paragraphs:*
>
> > *12. There is a finding recorded by the High Court in the impugned judgment that the labels used on the bottle of country liquor sold by the appellant and the labels on the bottle of country liquor sold by the respondent are similar. At this stage, we may note the legal position regarding the factual details which are required to be proved in a passing off action. Firstly, we may refer to a decision of this Court in Satyam Infoway Ltd. v. Siffynet Solutions (P) Ltd. Paras 13 to 15 of the said decision read thus:*
> >
> > > *“13. The next question is, would the principles of trade mark law and in particular those relating to passing off apply? An action for passing off, as the phrase “passing off” itself suggests, is to restrain the defendant from passing off its goods or services to the public as that of the plaintiff's. It is an action not only to preserve the reputation of the plaintiff but also to safeguard the public. <u>The defendant must have sold its goods or offered its services in a manner which has deceived or would be likely to deceive the public into thinking that the defendant's goods or services are the plaintiff's</u>. The action is normally available to the owner of a distinctive trade mark and the person who, if the word or name is an invented one, invents and uses it. If two trade rivals claim to have individually invented the same mark, then the trader who is*

able to establish prior user will succeed. The question is, as has been aptly put, who gets these first? It is not essential for the plaintiff to prove long user to establish reputation in a passing off action. It would depend upon the volume of sales and extent of advertisement.

14. The second element that must be established by a plaintiff in a passing off action is misrepresentation by the defendant to the public. The word "misrepresentation" does not mean that the plaintiff has to prove any mala fide intention on the part of the defendant. Of course, if the misrepresentation is intentional, it might lead to an inference that the reputation of the plaintiff is such that it is worth the defendant's while to cash in on it. An innocent misrepresentation would be relevant only on the question of the ultimate relief which would be granted to the plaintiff Cadbury-Schweppes (Pty) Ltd. v. PUB Squash Co. (Pty) Ltd., Erven Warnink Besloten Vennootschap v. J. Townend & Sons (Hull) Ltd.. What has to be established is the likelihood of confusion in the minds of the public (the word "public" being understood to mean actual or potential customers or users) that the goods or services offered by the defendant are the goods or the services of the plaintiff. In assessing the likelihood of such confusion the courts must allow for the "imperfect recollection of a person of ordinary memory".

15. The third element of a passing off action is loss or the likelihood of it."

(emphasis supplied)

13. Thus, the volume of sale and the extent of advertisement made by the appellant of the product in question will be a relevant consideration for deciding whether the appellant had acquired a reputation or goodwill.

14. At this stage, we may also refer to the decision of this Court in Toyota Jidosha Kabushiki Kaisha. In this decision, this Court approved its earlier view in S. Syed Mohideen v. P. Sulochana Bai that the passing off action which is premised on the rights of the prime user generating goodwill, shall remain unaffected by any registration provided in the Act. In fact, this Court quoted with approval, the view taken by the House of Lords in Reckitt & Colman Products. The said decision lays down triple tests. One of the tests laid down by the House of Lords was that the plaintiff in a passing off action has to prove that he had acquired a reputation or goodwill connected with the goods. Thereafter, in para 40 of Toyota case, this Court held that if goodwill or reputation in a particular jurisdiction is not established by the plaintiff, no other issue really would need any further examination to determine the extent of the plaintiff's right in the action of passing off."

(Italics in original; underscoring supplied)

> ***10.*** *We find that the impugned order does not examine any of these aspects at all. There is, in particular, no specific finding regarding the acquisition, by the respondent-plaintiff, of sufficient goodwill, as could sustain a claim of passing off.*
>
> ***11.*** *The impugned order proceeds on the mere premise that the respondent would be entitled to an injunction as the user, by the respondent, of the mark OM AMAR SHAKTI/SARKAR OM AMAR SHAKTI is prior to the user, by the appellant, of the mark MATA AMAR SHAKTI. Priority of user by itself cannot sustain a finding of passing off or justify grant of injunction on that basis."*

41. Significantly, in ***Sanjay Gupta (supra),*** the Division Bench observed that the party alleging passing off must establish accumulation of goodwill by use of marks asserted and that too, prior to the adoption of the rival mark by the opposite party, to sustain a case of passing off, a legal position settled earlier in ***Toyota Jidosha (supra).*** In this context, I may also refer to the judgments in ***Vasundhra Jewellers (supra)*** and ***Kedar Nath Mishra v. Invision Medi Sciences Pvt. Ltd., 2026 SCC OnLine Del 3635,*** where the same proposition of law was highlighted. In fact, in ***Sanjay Gupta (supra),*** Court also observed that even if the two rival trade dresses in question were, *arguendo,* to be treated as similar to each other, Appellant would additionally have to establish accumulation of goodwill by use. The manner in which goodwill has to be established, both at the *prima facie* stage and the final stage in a suit also stands authoritatively settled by the Supreme Court in ***Brihan Karan Sugar Syndicate Private Limited. v. Yashwantrao Mohite Krushna Sahakari Sakhar Karkhana, (2024) 2 SCC 577,*** as follows:-

> ***"12.*** *There is a finding recorded by the High Court in the impugned judgment [Yashwantrao Mohite Krushna Sahakari Sakhar Karkhana v. Brihan Karan Sugar Syndicate (P) Ltd., 2021 SCC OnLine Bom 14020] that the labels used on the bottle of country liquor sold by the appellant and the labels on the bottle of country liquor sold by the respondent are similar. At this stage, we may note the legal position regarding the factual details which are required to be proved in a passing off action. Firstly, we may refer to a decision of this Court in Satyam Infoway Ltd. v. Siffynet Solutions (P) Ltd. [Satyam Infoway Ltd. v. Siffynet Solutions (P) Ltd., (2004) 6 SCC 145] Paras 13 to 15 of the said decision*

read thus : (Satyam Infoway case [Satyam Infoway Ltd. v. Siffynet Solutions (P) Ltd., (2004) 6 SCC 145] , SCC pp. 150-51)

> *"13. The next question is, would the principles of trade mark law and in particular those relating to passing off apply? An action for passing off, as the phrase "passing off" itself suggests, is to restrain the defendant from passing off its goods or services to the public as that of the plaintiff's. It is an action not only to preserve the reputation of the plaintiff but also to safeguard the public. The defendant must have sold its goods or offered its services in a manner which has deceived or would be likely to deceive the public into thinking that the defendant's goods or services are the plaintiff's. The action is normally available to the owner of a distinctive trade mark and the person who, if the word or name is an invented one, invents and uses it. If two trade rivals claim to have individually invented the same mark, then the trader who is able to establish prior user will succeed. The question is, as has been aptly put, who gets these first? It is not essential for the plaintiff to prove long user to establish reputation in a passing off action. It would depend upon the volume of sales and extent of advertisement.*
>
> *14. The second element that must be established by a plaintiff in a passing off action is misrepresentation by the defendant to the public. The word "misrepresentation" does not mean that the plaintiff has to prove any mala fide intention on the part of the defendant. Of course, if the misrepresentation is intentional, it might lead to an inference that the reputation of the plaintiff is such that it is worth the defendant's while to cash in on it. An innocent misrepresentation would be relevant only on the question of the ultimate relief which would be granted to the plaintiff [Cadbury-Schweppes (Pty) Ltd. v. PUB Squash Co. (Pty) Ltd., 1981 RPC 429 : (1981) 1 WLR 193; Erven Warnink Besloten Vennootschap v. J. Townend & Sons (Hull) Ltd., 1979 AC 731 : (1979) 3 WLR 68 : 1980 RPC 31 (HL)] . What has to be established is the likelihood of confusion in the minds of the public (the word "public" being understood to mean actual or potential customers or users) that the goods or services offered by the defendant are the goods or the services of the plaintiff. In assessing the likelihood of such confusion the courts must allow for the "imperfect recollection of a person of ordinary memory" [Aristoc Ltd. v. Rysta Ltd., 1945 AC 68 (HL)] .*
>
> *15. The third element of a passing off action is loss or the likelihood of it."*
>
> *(emphasis supplied)*

13. *Thus, the volume of sale and the extent of advertisement made by the appellant of the product in question will be a relevant consideration for deciding whether the appellant had acquired a reputation or goodwill.*

14. At this stage, we may also refer to the decision of this Court in Toyota Jidosha Kabushiki Kaisha [Toyota Jidosha Kabushiki Kaisha v. Prius Auto Industries Ltd., (2018) 2 SCC 1 : (2018) 1 SCC (Civ) 567] . In this decision, this Court approved its earlier view in S. Syed Mohideen v. P. Sulochana Bai [S. Syed Mohideen v. P. Sulochana Bai, (2016) 2 SCC 683 : (2016) 2 SCC (Civ) 201] that the passing off action which is premised on the rights of the prime user generating goodwill, shall remain unaffected by any registration provided in the Act. In fact, this Court quoted with approval, the view taken by the House of Lords in Reckitt & Colman Products [Reckitt & Colman Products Ltd. v. Borden Inc., (1990) 1 WLR 491 (HL)] . The said decision lays down triple tests. One of the tests laid down by the House of Lords was that the plaintiff in a passing off action has to prove that he had acquired a reputation or goodwill connected with the goods. Thereafter, in para 40 of Toyota case [Toyota Jidosha Kabushiki Kaishav. Prius Auto Industries Ltd., (2018) 2 SCC 1 : (2018) 1 SCC (Civ) 567] , this Court held that if goodwill or reputation in a particular jurisdiction is not established by the plaintiff, no other issue really would need any further examination to determine the extent of the plaintiff's right in the action of passing off.

xxx xxx xxx

***17.** For establishing goodwill of the product, it was necessary for the appellant to prove not only the figures of sale of the product but also the expenditure incurred on promotion and advertisement of the product. Prima facie, there is no evidence on this aspect. While deciding an application for a temporary injunction in a suit for passing off action, in a given case, the statements of accounts signed by the Chartered Accountant of the plaintiff indicating the expenses incurred on advertisement and promotion and figures of sales may constitute a material which can be considered for examining whether a prima facie case was made out by the appellant-plaintiff. However, at the time of the final hearing of the suit, the figures must be proved in a manner known to law."*

42. This judgment will be incomplete without reference to the landmark judgment of the Supreme Court in ***Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd., (2001) 5 SCC 73,*** where essential ingredients for determining a claim for passing off were elucidated as follows:-

*"**35.** Broadly stated, in an action for passing-off on the basis of unregistered trade mark generally for deciding the question of deceptive similarity the following factors are to be considered:*

(a) The nature of the marks i.e. whether the marks are word marks or label marks or composite marks i.e. both words and label works.

(b) The degree of resembleness between the marks, phonetically similar and hence similar in idea.

(c) The nature of the goods in respect of which they are used as trade marks.

(d) The similarity in the nature, character and performance of the goods of the rival traders.

(e) The class of purchasers who are likely to buy the goods bearing the marks they require, on their education and intelligence and a degree of care they are likely to exercise in purchasing and/or using the goods.

(f) The mode of purchasing the goods or placing orders for the goods.

(g) Any other surrounding circumstances which may be relevant in the extent of dissimilarity between the competing marks.

36. *Weightage to be given to each of the aforesaid factors depending upon facts of each case and the same weightage cannot be given to each factor in every case."*

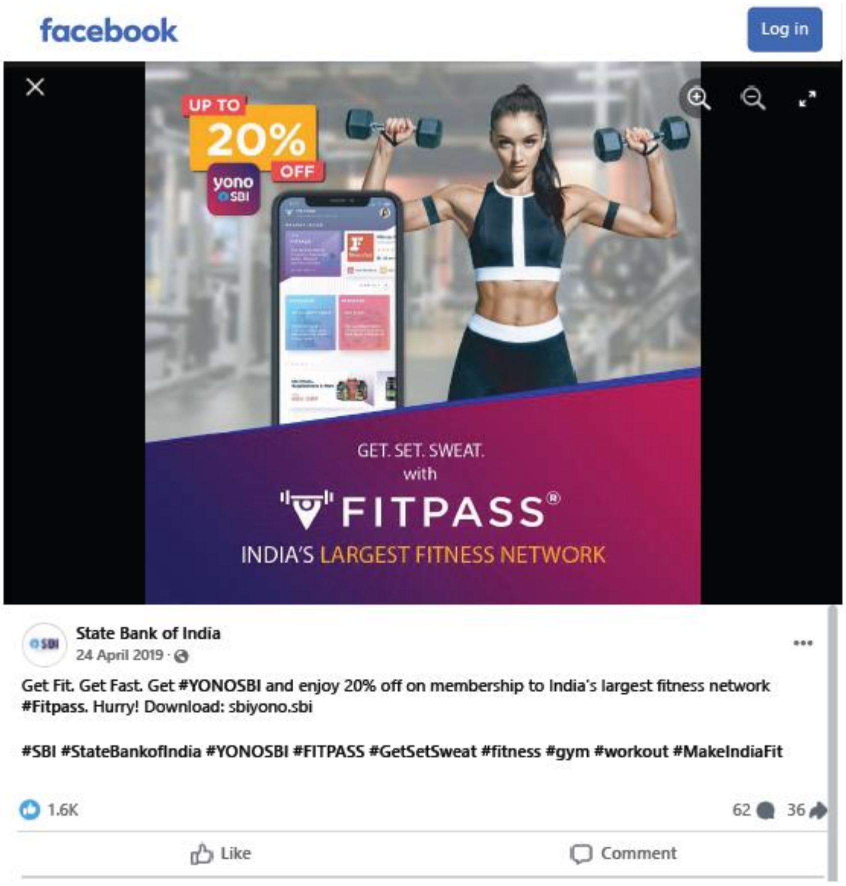
43. Another proposition, which is now well settled is that goodwill which is required to be established is in the mark/trade dress or the name and no doubt, in connection with the goods or services which the party alleging passing off provides. ***[Ref.: VIP Industries Limited v. Carlton Shoes Limited And Another, 2025 SCC OnLine Del 4620].*** The 'use' of the mark must be in the legal sense under the provisions of the Trade Marks Act such that it functions as a source identifier and a badge of origin, which the consumers and members of public recognise.

44. Coming back to the instant case, it needs to be determined whether ASR has succeeded in establishing that Fitship has indulged in passing off its goods as those of ASR and for which, the three ingredients goodwill and reputation, misrepresentation and damage will have to be established. ASR has placed on record several documents to show that it has used the mark FITFEAST as an independent mark in the trademark sense for services relating to nutritional and wellness plans etc. and user dates back at least to June, 2017. *Per contra,* Fitship has attempted to establish that ASR has been predominantly doing business under the mark FITPASS and FITFEAST has

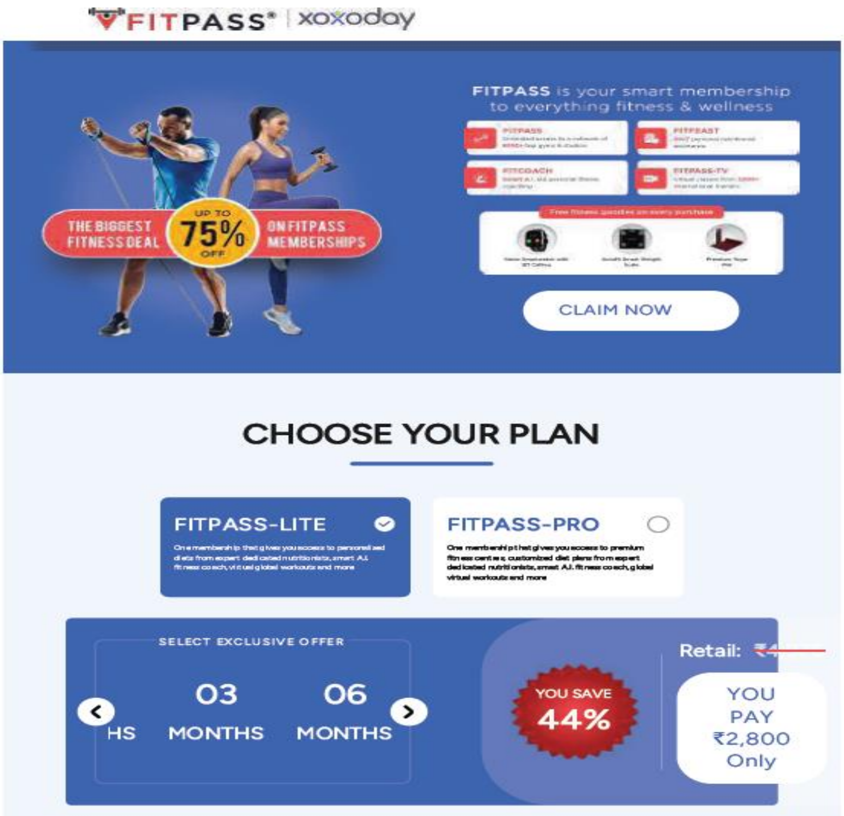
been very sporadically used and that too, only to showcase it as one of its many services under the names FITCOACH, FITSHOP etc.

45. From a perusal of the documents placed on record by ASR, this Court finds merit in the contention of Fitship. As noted above, use of a mark cannot be in abstract or vacuum and should be demonstrably of a kind which identifies the source of the goods of the proprietor i.e., serves as a source identifier and distinguishes them from those of the others, which means that it is a 'use in the trademark sense'. A party alleging passing off by the other party must show that through the use of the mark as a badge of origin, it has generated goodwill to an extent that it needs to be protected and the use must be prior and continuous, though it may not be very long but importantly, sufficient goodwill must exist on the date of adoption of the mark by the rival party. The mere fact of being a senior user i.e. priority of adoption is not enough for a passing off action *sans* actual use and consequent generation of sufficient goodwill on the relevant date, as held in ***Vishal Gupta (supra)*** and ***Vasundhra Jewellers (supra).***

46. The documents demonstrate that ASR has been consistently advertising, selling and promoting its services under the umbrella mark FITPASS and reference to the mark FITFEAST is scant and not in the manner of source identification and perhaps, it is for this reason that ASR is unable to provide separate figures of revenues earned and marketing expenditure in respect of the FITFEAST mark. As rightly flagged by Fitship, services under FITFEAST have never been offered as standalone services and have always been bundled with FITPASS subscription plans. As a testament to this, I may refer to few screenshots from the documents on record hereunder:-

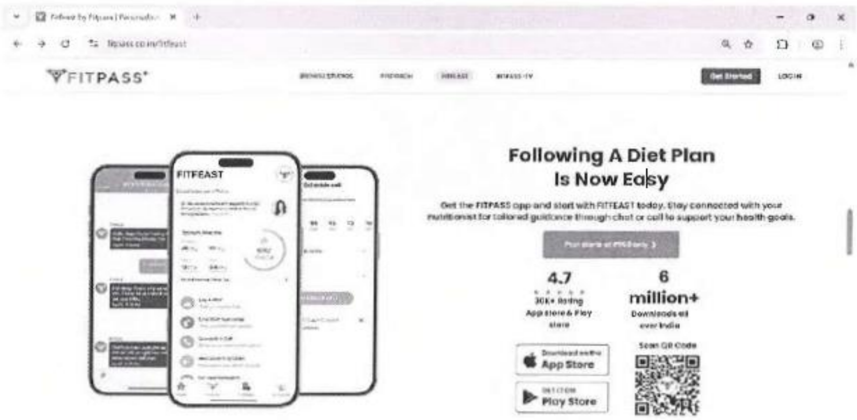


Signature Not Verified
Digitally Signed By:KAMAL KUMAR
Signing Date:02.09.2026 21:08:35



47. In fact, the documents heavily relied upon by ASR also demonstrate that FITPASS is the actual trademark under which, it conducts its business activities and FITFEAST serves only as reference to characterise one of the many services it provides. Fitship has categorically stated in the reply that the reference to ASR's website in the entire petition is as FITPASS website, accessible at www.fitpass.co.in and FITPASS mobile application, as a means to access ASR's offering under the FITFEAST mark. In fact, a stand is also taken that the FITFEAST services are accessible to public only through FITPASS portals and therefore, any consumer bearing an initial interest in the said services will have to recall FITPASS and not FITFEAST. It is also stated that even the collaboration for sale of smart watch '*Noise x Fitpass Pulse Grand 3*' involves FITPASS trademark and not FITFEAST and therefore, even third party collaborations are centred around the mark FITPASS. The page concerning the FITFEAST mark on its website

mentions 'FITFEAST by FITPASS'. If the consumer is to subscribe to the nutritional plan services, they are redirected to a page on ASR's website, which has no mention of FITFEAST and in this context, reference is made in the reply to a screenshot, which is as follows:-



Subscription portion available at the FITFEAST page of the Petitioner's website.

48. None of these averments have been categorically traversed by ASR despite filing a detailed rejoinder to the reply. In fact, Fitship has also stated in its reply that ASR itself takes a position that its features such as '*expert nutritionist and diet plan*' are part of their 'FITPASS 360' and 'FITPASS 180' plans and there is no denial to this position.

49. A similar trend emerges with respect to social media presence of ASR. All pages on Facebook, Twitter, LinkedIn, etc. operate under the mark FITPASS and not FITFEAST and any consumer with average intelligence will be able to arrive at ASR's page only be searching 'FITPASS' and the use of FITFEAST, as noted above, as a standalone use is scanty, sporadic and intermittent and as rightly urged by Fitship, the graph went up only after sales of Fitship under FITFEAST increased. There is no sales invoice on record, which indicates commercial use of FITFEAST by ASR and it bears repetition to state that the sales figures as also marketing expenses pertain to

the entire operation as an entity and not for FITFEAST, standalone. It is unfathomable that ASR is unable to produce a single invoice under FITFEAST, demonstrating use as a trademark if it has been offering services under the said mark allegedly from the year 2017 and/or the revenues earned or marketing expenses related thereto. The strength of the services provided by ASR, therefore, lies in the mark FITPASS and not FITFEAST and neither the pleadings nor the documents, support the claim of ASR of exclusivity of association of the mark FITFEAST in the minds of consumers. In the absence of any goodwill independently generated from the FITFEAST mark, the claim of passing off fails.

50. Coming to the documents relied on by ASR to show its goodwill and reputation in the FITFEAST mark, I am of the view, that none of these documents support the case of ASR. ASR has attempted to show user of FITFEAST from 2017 and in that context, has illustratively referred to a few documents in the rejoinder, which one presumes will be ASR's best case forward. Document-1 is an email dated 12.06.2017 to Director of one FranCorp/Franchise India, merely stating that FITPASS is missing in the Exclusive Services section and the core product is the ability to workout anywhere, anytime and FITFEAST, FITCOACH etc. are additional services that enable the user to stay fit. This document is a mere internal communication between two parties and does not demonstrate any commercial activity or sale or advertisement. Document-2 is a screenshot of a standee to the aforesaid email and prominently mentions 'Fitpass' Exclusive Services', under which, there is a reference to five services rendered by ASR and one of them includes FITFEAST. Documents-3, 4 and 5 are brochures attached to an email dated 16.06.2017 and do not reflect the purpose for which they were sent or used and significantly, reference is

'FITFEAST by FITPASS'. The corporate poster does not bear any imprinted date and it is not known, when and in what context, the same was published or used, if at all. Similarly, the news article titled '*New-age Techfirst Fitpass to Add More Services*' shows that ASR added several inept features as FITFEAST and FITCOACH and does not further its case of use of the mark.

51. ASR has placed on record agreements executed with third parties. Save and except, 5 agreements of which 3 are of the year 2019 and 2 of the year 2020, all other agreements are executed between 2022 to 2025. One agreement is dated 30.06.2021. Therefore, only 6 agreements are prior to the date of adoption of the impugned mark by Fitship and the date of its application for registration, however, even these agreements do not support the case of ASR that FITFEAST was used as a trademark. The other agreements are post-adoption on the mark as also the date of registration and are inconsequential to support the claim of passing off. Reliance of ASR on number of awards received in the course of business is also of no avail since all of these pertain to the services offered under FITPASS and bear no reference to FITFEAST. In this context, I may refer to the observations of the Division Bench in ***VIP Industries (supra),*** that the goodwill and reputation resides in the mark, of course, in relation to the goods *albeit* it may be mentioned that the case essentially pertained to transborder reputation. Relevant passages are as follows:-

> ***"112.*** *With great respect to Mr Sibal, we find no legal basis for this submission. While, as Judges, it is always a pleasure to develop the law, the law cannot be allowed to develop in directions which are opposed to the law as it exists today. The development of the law cannot be labyrinthine. We cannot distinguish between goodwill as applicable to "reputed" marks, as compared to goodwill as applicable to less reputed marks, for the purposes of passing off. The law does not recognise, or envisage, such distinct categories of goodwill. Goodwill either exists, or it does not exist. The ingredients which are required to be established, in order for a court to arrive at a finding that the name or mark carries the requisite goodwill in the minds of the public, are well established. There*

is, needless to say, no straitjacket formula in this regard, and the issue of whether, in a particular case, the requisite degree of goodwill does, or does not, exist, must necessarily depend on the facts and circumstances of that case. In all cases, however, the goodwill that is required to be established is in the mark, or name, no doubt when used in connection with the goods or services which the plaintiff provides. This principle applies, as much to marks such as Mercedes-Benz or Mont Blanc, as to "humbler" marks.

113. *As Mr Sethi correctly pointed out, Laxmikant V. Patel case [Laxmikant V. Patelv. Chetanbhai Shah, (2002) 3 SCC 65 : (2002) 110 Comp Cas 518] was concerned with the use of the mark "Muktajivan" when used for a modest colour studio, having no more than a reputation in the area, or the city, in which it was located. Nonetheless, the Supreme Court protected the mark against passing off.*

114. *We, therefore, cannot accept Mr Sibal's submission that, for a passing off action, the goodwill that is required to be proved is in the name or mark when used in connection with particular goods or services. Though, in every case, the name or mark would undoubtedly be used for providing goods are rendering services, the goodwill has to reside in the name or mark per se. So long as the plaintiff's name or mark carries goodwill, it is entitled to protection against passing off, and against every other person using the same, or a deceptively similar name, or mark, as would result in the consuming public regarding the goods or services provided by such other person as those provided by the plaintiff.*

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117. *We have already reproduced, supra, the tests of passing off which we have found to emerge from a cohesive reading of the various authorities on the point, in the decision of this Court in FDC case [FDC Ltd. v. Faraway Foods (P) Ltd., 2021 SCC OnLine Del 1539] . Without reiterating the said principles, it is clear that, where a plaintiff is seeking to establish goodwill, in the territory in which it alleges the tort of passing off to have been committed, on the basis of a mark or name which is otherwise used outside that territory, it has to show actual percolation of reputation and goodwill in that mark or name into the territory in which it alleges passing off to have taken place. While it may not be necessary for the plaintiff to have an office in that particular territory or country, it must have customers within such territory. Those customers must purchase the goods of the plaintiff, or avail the services of the plaintiff, rendered under such mark or name, when situated within that territory. It is not enough to show that such customers, when they proceeded abroad, were customers of the plaintiff. Thus, the plaintiff must be "present through its mark in the territorial jurisdiction" of the country of the defendant, even if the existence of a "real market" in that country is not necessary. This "presence" may be merely by reputation also, as in a situation in which the mark or name is extensively advertised in that country.*

118. *The concept is actually elementary, when one keeps in mind the basic principle of passing off. Passing off takes place when a defendant, by using the mark or name of the plaintiff, seeks to pass of his goods, or services as the goods, or services, of the plaintiff. The issue of trans-border reputation arises where the plaintiff is situated outside the territorial jurisdiction in which the defendant is located. Even in such a case, if the reputation and goodwill which is commanded by the plaintiff's mark is of such a degree that it has percolated into the territory of the defendant, and is "well-known" in that territory, the defendant is still seeking to capitalise on the reputation of the mark or name. This is because, if consumers within the defendant's territory are consciously aware of the reputation of the mark or name in question, even though it is exclusively, or even essentially, used outside the territory, they may presume, when such mark or name is used by the defendant, that the plaintiff has now established a presence in that territory. When dealing with India, for example, many reputed brands, and names, which earlier had no presence in India, though they commanded a global reputation, have now established a presence within India.*

119. *One may, for example, consider a mark such as Burger King. Till a decade or so ago, Burger King had no presence in India. Even so, it had a global reputation, and many consumers in India, who were fond of burgers, were aware of the existence of the Burger King franchise. If, therefore, some adventurous entrepreneur, in India, decided to set up a Burger King outlet, before Burger King officially established a presence in this country, it might have amounted to passing off, given the fact that Burger King had a global reputation, and that reputation had percolated into India, through promotional material, literature, advertisements, and the like, even if there was no physical Burger King outlet within this country. Of course, if Burger King were to bring a passing off action against such entrepreneur, the onus would be on Burger King to prove that its global reputation had percolated into India so that it could be said to enjoy trans-border reputation within this country.*

120. *We, therefore, entirely agree with the learned Single Judge that "the existence of goodwill and reputation has to be shown to exist in India and worldwide or global goodwill and reputation, sans any evidence of territorial goodwill and reputation, will be insufficient to succeed in a claim of passing off and thus yardstick to judge the claim of passing off will be "prior user" in India". Of course, mere priority of user in India may not be sufficient to sustain a claim of passing off unless the plaintiff ascertaining the claim is able to establish that such prior user has resulted in accumulation of goodwill and reputation in the mark that it seeks to assert.*

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122. *Having returned the aforenoted findings on law, the impugned judgment proceeds to apply these principles to the facts. The learned Single Judge has, in this context, held that:*

(i) neither CSL, nor VIP, was able to make out a case of trans-border reputation, prior to the commencement of the use, by them, of the CARLTON mark in India;

(ii) within India, CSL had priority of user, of the CARLTON mark; and

(iii) CSL had been able to prove, prima facie, existence of sufficient goodwill and reputation as would justify injuncting VIP from use of the CARLTON mark in respect of goods covered by Class 18.

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125. *The learned Single Judge holds in paras 57 to 61 (reproduced in para 37 supra) of the impugned judgment [Carlton Shoes Ltd. v. VIP Industries Ltd., (2023) 6 HCC (Del) 741] , that VIP has not been able to make out a case of sufficient trans-border reputation, prior to the commencement of the use, by it, in India, of the CARLTON mark. In so holding, the learned Single Judge notes that:*

(i) there was nothing to indicate that the promotional material, relied upon by VIP, was extensively and widely published or circulated in India, so as to result in spillover of the goodwill and reputation of the CARLTON mark, as used by CIPLC, into India;

(ii) prior to the use, by VIP, of the CARLTON mark for travel luggage in 2006, there was no material to indicate that any goods bearing the CARLTON mark, manufactured by VIP or CIPLC, had a customer base in India;

(iii) nor was there any indication that CIPLC or, prior thereto, Raxvale, had any presence in India or in the Indian market;

(iv) VIP had referred to certain advertisements and price lists dating back to the 1980s and 1990s, but there was no material to show that customers in India were aware of these advertisements or price lists; and

(v) there were no documents to evidence sales, in India, by CIPLC or Raxvale, of goods bearing the mark CARLTON, such as invoices, bills, delivery documents or photographs of stores.

The learned Single Judge observes that the earliest sales invoice placed on record by VIP, is dated 11-8-2006. She also notes that the invoices of 2006 and 2007 make no observation or reference to CARLTON. Even if VIP's stand that the AIRTEC Mark was a sub-brand of CARLTON, was to be accepted, it would indicate goodwill only as of 22-12-2006. Inasmuch as the use, by CSL, of the CARLTON mark was of 1992-1993 vintage, the learned Single Judge holds that there was no evidence, led by VIP, to show accumulation of any trans-border reputation or goodwill, in the CARLTON mark, prior to 1992-1993. Thus, she concludes, "absence or negligible presence of VIPs goods in question under the trademark

CARLTON in the Indian market space when Carlton started to occupy the space, defeats VIPs claim of passing off against Carlton".

126. *We have already set out Mr Sibal's submissions hereinbefore, and we do not find any submission which would serve to dent these findings of the learned Single Judge in the impugned judgment [Carlton Shoes Ltd. v. VIP Industries Ltd., (2023) 6 HCC (Del) 741] .*

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F. Priority of user, and goodwill, established by CSL

128. *As against this, the impugned judgment [Carlton Shoes Ltd. v. VIP Industries Ltd., (2023) 6 HCC (Del) 741] holds, in para 62 (reproduced in para 37), that CSL had placed material on record to indicate accumulation of goodwill of the CARLTON mark, as used by it in India, prior to the commencement of user of the CARLTON mark by VIP in 2006. The learned Single Judge refers, in this context, to:*

(i) sale invoices of the years 2003 to 2005 along with the list of 24 outlets of CSL, across Delhi, Gurgaon, Noida and Chandigarh;

(ii) certificates of sales figures of the revenue earned by use, by CSL, of the CARLTON mark in India during the period 1993 to 2018;

(iii) articles extensively figuring in high-profile magazines and newspapers widely published and circulated in India such as Cosmopolitan, Femina, Fashion Bloom, Apparel, Society, Outlook, The Tribune, The Pioneer, HT City, Business Standard, The Hindu, etc, dating back to March 2004;

(iv) presence on various e-commerce platforms;

(v) VAT registrations dating back to 1993; and

(vi) master data of production under the CARLTON marks by CSL from 2003.

129. *In response thereto, Mr Sibal submits that the material, to which the impugned judgment [Carlton Shoes Ltd. v. VIP Industries Ltd., (2023) 6 HCC (Del) 741] alludes in para 62, reference the use of the CARLTON mark, by CSL, for footwear or, at the best, handbags and purses, which were not allied, cognate or similar to travel luggage. The submission would apply, equally, to the master data, in which Mr Sibal submits that there is a sole entry pertaining to luggage, which, too, is of Chinese origin and is of 2010.*

130. *In view of our finding, earlier in this judgment, that the goodwill that is required to be established in order to sustain a claim of passing off is goodwill in the mark, and not goodwill in the mark as used for any particular goods or services, the submission of Mr Sibal must, of necessity, fail. Even if CSL had established goodwill, in respect of the CARLTON mark, for footwear, that by itself would suffice to maintain a plea for* *injunction against VIP using the CARLTON mark, even if it was for travel luggage.*

131. *We, moreover, are not in agreement with Mr Sibal that handbags and purses are not allied and cognate, or similar goods, vis-à-vis travel luggage. There is no real basis for this submission, except Mr Sibal's insistence that handbags and purses are fashion accessories. To our mind, handbags and purses are also receptacles in which persons carry items for use by them, though on a much smaller scale than travel luggage. Not everyone, it is obvious, uses a handbag as a fashion accessory, nor are all handbags, for that matter, capable of, or even meant for, such use. At least at a prima facie stage, keeping in mind the circumspection which the judgment of the Supreme Court in Wander Ltd. case [Wander Ltd. v. Antox India (P) Ltd., 1990 Supp SCC 727] requires us to maintain while sitting in appeal, we certainly cannot set aside the judgment of the learned Single Judge by accepting Mr Sibal's contention that handbags and purses are not allied and cognate to luggage. Even on merits, the submission appears to be highly debatable.*

132. *The finding of CSL having proved the existence of goodwill and reputation of the CARLTON mark, as used by it for more than 13 years prior to the commencement of user of the CARLTON mark by VIP for travel luggage, therefore, does not brook interference."*

52. A similar view was taken by the Coordinate Bench of this Court in ***Khadi & Village Industries Commission v. Girdhar Industries and Another, 2023 SCC OnLine Del 8446,*** where Defendant No.1 had adopted the mark GIRDHAR KHADI in 2001 with respect to soaps and detergents in Class 03 and Plaintiff sought interim injunction being a proprietor of the mark KHADI. Stand of Defendant No.1 was that there was no evidence of use of KHADI mark by Plaintiff prior to 2001 or even prior to 2005, when GIRDHAR KHADI was registered in its favour and the documents on record did not evidence actual use of KHADI mark for soap or detergents. Holding that existence of pre-existing goodwill and reputation, prior to commencement of user of the impugned mark by the Defendant is an indispensable *sine qua non* for a passing off action, Court on a *prima facie* view that KHADI was unable to demonstrate goodwill and reputation of the KHADI mark for soaps or detergents prior to 2005, Court declined

interlocutory injunction claimed on ground of passing off.

53. It would be useful to allude to another judgment of the Division Bench in ***Crocodile International Pte. Ltd. v. LA Chemise Lacoste and Another, 2026 SCC OnLine Del 923.*** Defendants' trademark was first registered in India in 1952 and then in 1990 and subsequently, they commenced used in India around 1998. Disputes arose when Defendants began using the standalone saurian device mark without the word mark CROCODILE and according to the Plaintiffs, the impugned mark was deceptively similar to their registered CROCODILE device mark. While the Division Bench found that a case of infringement of trademark and copyright was made out but claim for passing off was not, due to failure of the Plaintiffs to establish goodwill and reputation. Relevant passages are as follows:-

> ***"17.96*** *In Laxmikant V. Patel v. Chetanbhai Shah, the Supreme court further elaborated on the concept of passing off. It was held that the essential elements of a passing off action are the establishment of goodwill, misrepresentation, and damage or likelihood of damage to the plaintiff's goodwill, as follows:*
>
> > *"7. Though there is overwhelming documentary evidence filed by the plaintiff in support of his plea that he has been carrying on his business in the name and style of Muktajivan Colour Lab since long we would, for the purpose of this appeal, proceed on the finding of fact arrived at by the trial court and not dislodged by the High Court, also not seriously disputed before this Court that the plaintiff has been doing so at least since 1995. Without entering into controversy whether the defendants had already started using the word "Muktajivan" as a part of their trade name on the date of the institution of the suit we would assume that such business of the defendants had come into existence on or a little before the institution of the suit as contended by the defendants. The principal issue determinative of the grant of temporary injunction would be whether the business of the plaintiff run in a trade name of which "Muktajivan" is a part had come into existence* ***prior to commencement of its user by the defendants*** *and whether it had acquired a goodwill creating a property in the plaintiff so as to restrain the use of the word Muktajivan in the business name of a similar trade by a competitor i.e. the defendants.*

***

13. In an action for passing-off it is usual, rather essential, to seek an injunction, temporary or ad interim. The principles for the grant of such injunction are the same as in the case of any other action against injury complained of. ***The plaintiff must prove a prima facie case, availability of balance of convenience in his favour and his suffering an irreparable injury in the absence of grant of injunction.*** *According to Kerly (ibid, para 16.16) passing-off cases are often cases of deliberate and intentional misrepresentation, but it is well settled that* ***fraud is not a necessary element of the right of action****, and the absence of an intention to deceive is not a defence, though proof of fraudulent intention may materially assist a plaintiff in establishing probability of deception. Christopher Wadlow in Law of Passing-Off (1995 Edn., at p. 3.06) states that the plaintiff does not have to prove actual damage in order to succeed in an action for passing-off.* ***Likelihood of damage is sufficient****….”*

(emphasis added)

17.97 *Similarly, in Toyota Jidosha Kabushiki Kaisha (supra), the Court emphasized that the likelihood of confusion is a key factor in determining whether an action for passing off can be made out. The plaintiff must demonstrate substantial goodwill in the territory where the action is sought. If such goodwill is not established, further examination is unnecessary.*

17.98 *Adverting to the facts of the present case, Lacoste provided both documentary and oral evidence to establish its goodwill and reputation in India. The following evidence was presented:*

(i) Ex. PW 1/15 - Electronic evidence of advertisements and articles in magazines and newspapers was rightly deemed inadmissible due to the lack of a certificate under Section 65B of IEA, as per the principles laid down in Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal. Additionally, there were no witnesses to provide the necessary foundational evidence for such records and maintenance of the device concerned.

(ii) Ex. PW 1/16 - The Survey Report was rejected for two reasons: (a) it pertained to 2004, whereas reputation needed to be shown as of 1998, and (b) it lacked information regarding the methodology, sample size, and other relevant details.

(iii) Ex. PW 2/5 - The CA certificate was held to be inadmissible because it lacked the accompanying invoices, documents, ledgers, etc. hence, the same were not verified or cross-examined and because the concerned CA was also not summoned. Instead, the plaintiffs attempted to prove the authenticity through PW 2, who is admittedly not a CA.

__17.99__ Hence, following the principles laid down in Laxmikat V. (supra), to sustain a passing off claim, Lacoste was required to establish goodwill or reputation in India prior to and at the time of commencement Crocodile International's use of the impugned mark in 1998.

__17.100__ The learned Single Judge rejected Lacoste's claim for passing off, primarily due to the failure to prove, with admissible and reliable evidence, that Lacoste had substantial reputation or goodwill in India as of 1998.

__17.101__ The learned Single Judge held that press articles, advertisements, photos, and the survey report were produced as electronic records without the mandatory certificate required under Section 65B of IEA, therefore, rendering them inadmissible and ineffective.

__17.102__ Regarding the survey report (Ex. PW 1/16), it was held that it reflected public perception in 2004, whereas Lacoste was required to establish its reputation as of 1998. Additionally, the CA certificate pertaining to turnover and advertising was treated as insufficient because it lacked the necessary supporting documents, and the CA was not made available for examination or cross-examination.

__17.103__ Lacoste contended that requiring the CA certificate to be supported by all the underlying documents would defeat its purpose. However, the learned Single Judge rightfully held that the Supreme Court, in CBI v. V.C. Shukla, had affirmed that such documents must be corroborated to be considered credible evidence. It was held that "even correct and authentic entries in books of account cannot without independent evidence of their trustworthiness, fix a liability upon a person".

__17.104__ Furthermore, the learned Single Judge rightly observed that, at the final stage of trial, the evidence must be scrutinized more rigorously, as it directly impacts the final determination of the rights and liabilities of the parties. The court cannot rely solely on prima facie evidence at the final stage but must ensure that evidence complies with relevant procedural laws.

__17.105__ This Court concurs with the learned Single Judge's finding regarding the issue of passing off. Since the evidence presented by Lacoste relating to goodwill and reputation was found inadmissible, the Court does not need to examine the other elements of passing off, as per the decision in S. Syed Mohideen (supra).

__17.106__ Therefore, it is held that Lacoste has failed to establish a case for passing off.

__17.107__ This issue is decided in favour of the defendants and against the plaintiffs."

54. In ***Rexcin Pharmaceuticals P Ltd. v. Rekin Pharma P Ltd. and***

Another, 2026 SCC OnLine Del 3159, Coordinate Bench of this Court was dealing with a rectification petition filed under Section 57 of 1999 Act for cancellation of registration of the mark REKIN-SP at the instance of the Petitioner who was using the mark REXCIN and in which it had certain registrations, with user claim dating back to 16.12.2003. Defence of Respondent No.1 was that it was a *bona fide* and prior adopter of the mark, having used the same since 2017 in the course of trade for pharmaceuticals sold directly to end consumers and was also the registered proprietor of the mark in Class 05, whereas Petitioner had no registration in the mark REXCIN in Class 05 as also that there was no overlap in goods and services. Examining the documents placed on record by the respective parties, Court first took note of the fact that Petitioner's mark REXCIN was not registered in any class and no application for registration was pending and therefore, the mark was not an earlier trademark as contemplated under Section 11 of 1999 Act. On the user of the mark REXCIN, Court held that there was no material on record to demonstrate use of the mark REXCIN in relation to any pharmaceutical products. Sample invoices placed on record showed that the products sold through the invoices did not refer to the trademark REXCIN but merely reflected trading transactions with a third party and Petitioner's trade name. Similarly, the Chartered Accountant's certificates only showed the turnover of the Petitioner but did not evidence use of the trademark REXCIN for its products and in fact, the products produced for inspection by the Court during the course of hearing also did not show the mark REXCIN. In light of these observations, Court returned a finding that material on record unequivocally established that Petitioner had not used the mark REXCIN as a source identifier in relation to pharmaceutical products nor was it selling the products under the said mark at the time of adoption of the impugned mark REKIN-SP by Respondent No.1 in 2017 and even thereafter.

55. Significantly, the Court also found that Petitioner had not placed on record any details of expenses incurred on advertisement and promotion of the trademark REXCIN, as none would exist and this would be relevant to show that Petitioner was not using the mark as a trademark and therefore, there was no evidence of reputation and goodwill in the mark REXCIN in 2017, when Respondent No.1 adopted the impugned mark as a trademark for its products in Class 05. Noting the three essential ingredients of passing off action being goodwill, misrepresentation and damage, Court held that existence of goodwill generated by the claimant through the use of the mark as a source identifier in the course of business was central to a claim of passing off and it is only when the proprietor establishes such goodwill by prior and continuous use of the mark, it can maintain an action for passing off, of course, with the other two ingredients being fulfilled. It was further observed that in the absence of any use of the mark REXCIN as a badge of origin recognizable by consumers, the foundational element of passing off i.e. misrepresentation was wholly absent. Reiterating that Petitioner was unable to show use of the mark REXCIN as a trademark in relation to its pharmaceutical products and Respondent No.1 was the prior adopter of the impugned mark, Court held that claim of passing off was devoid of merit and accordingly, the objection raised by the Petitioner under Section 11(3)(a) of 1999 Act was held to be untenable.

56. The judgments relied upon by ASR do not further its case. There can be no quarrel with the proposition of law in ***Laxmikant V. Patel (supra)*** that in a passing off action, fraud is not a necessary element and absence of intention to deceive is not a defence *albeit* passing off cases are often cases

of deliberate and intentional misrepresentation and to this extent, reliance on the judgment is correct. However, it is not understood how this furthers the case of ASR. For succeeding in the case of passing off, ASR was required to show goodwill, misrepresentation and damage, but as noticed above, it has failed in proving goodwill in the mark FITFEAST and therefore, it is unnecessary to delve into the issue of misrepresentation and/or intent. Again, reliance on ***Satyam Infoway (supra)*** is correct to the extent that it is not essential to prove long use to establish reputation, however, in the instant case, ASR has not established reputation in the mark in question, for reasons aforesaid and therefore, the length of use is irrelevant to the present controversy.

57. Judgment of the Supreme Court in ***S. Syed Mohideen (supra),*** undoubtedly lays down the law that rights of a prior user are superior to any other right including the right of a registered proprietor but in the present case, prior use of FITFEAST as a trademark has not been established and therefore, the judgment is inapplicable. Judgment of the Division Bench of this Court in ***Marico Ltd. (supra),*** also does not apply to the present case as ASR has failed to prove that the registration of 

in favour of Fitship is violative of relative grounds or absolute grounds of refusal of registration under Section 9 and Section 11 of the 1999 Act, respectively. Judgment of this Court in ***V. Guard (supra),*** deals with sub-branding and does not help ASR, as it is neither parties' case that FITFEAST is used by ASR for its nutritional plan services as a sub-brand of FITPASS and for the same reason, judgment in ***FMI Limited (supra),*** also does not apply. Judgment in ***Havells India (supra),*** pertains to use of the mark REO with the house mark HAVELLS and issue in the said case was whether the use of the house mark was enough to distinguish the rival marks and does not help ASR since the rival marks in the present case are FITFEAST and and there is no use of a house mark.

58. In ***FDC Limited v. Docsuggest (supra),*** this Court held that allied/cognate goods/services are those which are not identical but can be said to be related or similar in nature and returned a finding that medicines in Class 05 and services pertaining to booking of appointments for doctors, diagnostics etc. were allied and cognate. In the instant case, the classification of goods is not relevant *sans* the existence of goodwill and reputation of ASR in the marks in question *albeit* this Court has held in earlier part of the judgment that the services of ASR under FITFEAST and the products of Fitship were in two different classes and the consumers in question are discernable with no scope of confusion, particularly, owing to the fact that subscribers of ASR can access the services under FITFEAST either through the mobile application under the trademark FITPASS or through website operating under the FITPASS trademark through the domain www.fitpass.co.in. Any consumer searching for such services online would be able to avail the services of ASR only once it is able to access the website or mobile app through FITPASS and such a consumer when confronted with the impugned products being high protein snacks under will be able to recall only the mark FITPASS and not the mark FITFEAST, under which ASR renders its services relating to nutrition plans etc. and there will be no likelihood of confusion in the mind of such a discerning consumer. Therefore, even assuming that the services of ASR

and goods of Fitship are allied and cognate, for the sake of argument, *sans* likelihood of confusion and existence of goodwill in the mark FITFEAST, no case of passing off can be made out and the judgment does not help ASR. For the same reason, judgments in ***Bourjois Limited (supra)*** and ***Wipro Enterprises (supra),*** dealing with allied and cognate goods will be inapplicable to the present case. The judgment in ***Mayo Foundation (supra),*** reinforces the principle laid down in ***Midas Hygiene Industries (P) Ltd. and Another v. Sudhir Bhatia and Others, (2004) 3 SCC 90,*** that delay alone cannot be a ground to deny injunction if the adoption of the mark is dishonest. In the instant case, Court has come to a finding that adoption of the mark 

by Fitship is not dishonest and the judgment is thus inapplicable. The judgment in ***T.V. Today (supra),*** cited by ASR deals with hashtags and its relevance to the present case is not understood.

59. In light of the judicial precedents and the factual foundation of the instant case, I am of the view that there is no material on record, which evidences use of the mark FITFEAST as a standalone mark by ASR indicating that it is a source identifier and consequentially, ASR is unable to establish the existence of goodwill and reputation in the said mark in 2021, when Fitship adopted the mark 

for its products being protein rich snacks. Hence, in the absence of goodwill and reputation in the mark FITFEAST, one of the essential ingredients of claim of passing off, ASR is unable to make out a case for cancellation of registration of the impugned mark under Section 11(3)(a) of 1999 Act.

60. There is also merit in the contention of Fitship that ASR is unable to

make out a case under Section 11(10)(ii). Fitship has detailed reasons for adopting the mark Fit Feast for its protein rich snacks. It is stated that the adoption of the mark has its genesis in the personal experiences of its founder Mr. Aditya Poddar, who through grit and determination underwent a personal health transition in 2016, wherein his journey through weight loss sparked a deep interest in nutrition awareness and role of protein and hence, in 2021, he conceived the idea of starting a company, which would cater to this need and the mark Fit Feast was adopted. Fitship offers a diverse portfolio of products under the mark Fit Feast and operates at the intersection of health and taste targeting a wide demographic. The mark was registered in 2021 after following the due procedure with the Trade Marks Registry. It is also brought forth that before adopting the mark, due diligence was exercised to ensure that adoption of the mark does not impinge on the intellectual property rights of a third party. Specifically, search was conducted on publicly available database of Trade Marks Registry for any third party trademark applications or registrations for FITFEAST trademarks and the search revealed that there were no registered marks or pending applications for FITFEAST mark including that of ASR, in any class of goods or services. An independent search was carried out to determine availability of any domain name constituting FITFEAST trademarks on public search platforms such as WHOIS etc., which also showed that there were no domain name registrations subsuming the FITFEAST mark. In fact, as an exercise of abandoned caution, an independent Google search through Google power tools such as Google Trends was also conducted to ensure that FITFEAST trademarks were not otherwise in use by any third party and the data indicated that up until 2021, the search volume for the term FITFEAST was negligible. It is also averred by Fitship that a significant uptick was observed in search traffic near 2022-2023 after Fitship's business expanded and proliferated considerably. In my view, this justifies the adoption of mark by Fitship as all possible due diligence was exercised before adopting the mark.

61. It is a matter of fact that in 2021, when Fitship adopted the mark, ASR had not even applied for registration of the FITFEAST mark and admittedly, the applications for registrations were filed only on 31.03.2025, well after the adoption and registration of the mark by Fitship. There is also substance in the contention of Fitship that if the mark was genuinely adopted and used by ASR in 2017 and was continuously used, why an application for registration was not filed for eight long years. This failure of ASR brings to my mind an observation of the Supreme Court in ***Pernod Ricard (supra),*** where it was observed that "*the life of a trademark depends upon the promptitude with which it is vindicated.*". While it is settled that it is not necessary for a passing off action to have registration, however, this is an added factor, which points to the fact that even ASR did not believe that FITFEAST was a trademark under which it was rendering services of nutrition plans etc. It may also be noted that admittedly, after Fitship applied for registration, ASR did not file any opposition for reasons best known to ASR and this reinforces the case of Fitship. Therefore, it is held that Fitship has not adopted the mark in bad faith and ASR has failed to make out a case under Section 11(10)(ii) of 1999 Act.

62. Be it noted that while ASR has pleaded grounds under Sections 11(4) and 12, none of them were pressed during course of hearing. Insofar as Section 9(2)(a) is concerned, ASR has wrongly understood and pleaded its case as one of confusion/deception arising out of its allegedly identical FITFEAST mark and has confused the objection under Section 9(2)(a) with an objection under Section 11(1). Section 9(2)(a) applies only where the mark is inherently confusing or deceiving and does not permit the Court to travel outside the mark for comparative analysis with an earlier mark, a determination envisaged under Section 11(1). There is no pleading that the impugned mark is inherently confusing/deceiving and perhaps, this is for the reason that ASR's own claim in the present petition is based on the mark FITFEAST. Therefore, there is no merit in the objection under Section 9(2)(a).

63. For all the aforesaid reasons, this petition for cancellation and rectification is dismissed and disposed of.

64. Pending application also stands disposed of.

<u>I.A. 9122/2025</u> <u>in</u> **<u>CS(COMM) 320/2025</u>**

65. This is an application under Order XXXIX Rules 1 and 2 read with Section 151 CPC filed by ASR seeking restraint against Fitship from using the impugned mark 

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66. The impugned mark of Fitship is registered and hence, interlocutory injunction is sought only on ground of passing off. While deciding the aforesaid rectification petition, this Court has taken a view that ASR has failed to make out a case of existence of goodwill and reputation in the mark FITFEAST, basis which it seeks restraint against Fitship from use of the

mark and has dismissed the rectification petition. In fact, a finding is rendered that ASR is unable to substantiate its claim that FITFEAST is used in the trademark sense. The three essential ingredients of tort of passing off are goodwill, misrepresentation and damage. In the absence of existence of goodwill in the mark FITFEAST in relation to ASR's services of nutrition and wellness plans etc. on the date when Fitship adopted the impugned mark , no *prima facie* case of passing off is made out by ASR. In the plethora of documents filed by ASR along with the plaint, there is no cogent material which even suggests *prima facie* that ASR was rendering services under FITFEAST mark as a standalone mark with an independent goodwill and reputation and as noted above, save and except, for some scant use of FITFEAST independently, most documents reflect that ASR operated predominantly under the mark FITPASS. ASR has not placed on record any sales invoice or CA certificate showing sales figures or marketing expenses separately for services under FITFEAST and in fact, there is a candid admission in the pleadings that ASR is unable to bifurcate and provide separate data for revenues earned and expenses incurred under the FITFEAST mark. On the other hand, Fitship has filed documents demonstrating adoption of the trademark from 2021 as also its use through bills and invoices, which reflect sales and payments received as also made to third parties towards promotional activities. Screenshots have been placed on record showing social media accounts and LinkedIn, Instagram and Facebook pages with the impugned mark, promotional campaign by one of the celebrated cricketers who is also an investor, listings on third party e-commerce websites such as Amazon, Flipkart, Zepto and listings on Blinkit, JioMart, Meesho etc., all of which clearly showcase the use of the mark in relation to Fitship's products i.e. high protein snacks etc., which are subject matter of this suit. Additionally, Fitship has also placed on record photographs of actual products being sold in the retail stores and advertisement library on Meta online records and e-mails pertaining to marketing campaigns apart from Diwali catalogues and copies of agreements with third parties such as Amazon, M/s Poptech Growth Private Limited and Shiprocket Limited, in respect of products under the impugned mark. Fitship has also placed on record screenshot of YouTube post by Shark Tank India and most importantly, Fitship has filed a CA certificate dated 27.06.2025 certifying the turnover from Financial Year 2021-2022 to May, 2025 under the mark . Articles in popular newspapers such as Times of India and magazines such as Business Standards have been filed evidencing actual sale of products under the mark. No evidence of actual confusion has been filed by ASR depsite the fact that Fitship is using the mark from 2021, save and except, a solitary Instagram post claiming that owing to the adoption of the impugned mark, there is mixed reaction amongst members of public, which to my mind, is not enough to grant injunction against Fitship in the absence of making out a case of goodwill and reputation even *prima facie*, in the mark FITFEAST. Therefore, it is held that ASR has been unable to prove one of the essential ingredients of passing off as also one of the requirements under the trinity principle of establishing of *prima facie* case for grant of interlocutory injunction against Fitship.

67. In light of the aforesaid, it is held that ASR is not entitled to interlocutory injunction, as prayed for and the application is dismissed with the usual *mantra* that any observation or finding in this judgment will have no bearing on the final adjudication of the suit.

CS(COMM) 320/2025

68. List before the Joint Registrar on 25.09.2026.

JYOTI SINGH, J.

AUGUST 31, 2026/***S.Sharma/YA***