$~1

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

Reserved on: 13th May, 2022

Date of decision: 7th July, 2022

\+ **CS(COMM) 144/2022 & I.A. 3585/2022**

BRIGHT LIFECARE PVT. LTD. ..... Plaintiff

Through: Mr. Vikas Khera, Mr. Ved Prakash, Ms. Vishal Sharan, Advocates [redacted]

versus

VINI COSMETICS PVT. LTD. & ANR. ..... Defendants

Through: Mr. Chander Lall, Sr. Advocate with Mr. Anish Chawla, Ms. Ananya Chugh Mr. Bhav Arora, Advocates [redacted]

CORAM:
JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The question before the Court in the present matter is- can an advertising campaign and its various elements be protected under intellectual property law? If so, in what manner?

2. The Plaintiff- Bright Lifecare Pvt. Ltd. is a company engaged in the business of manufacturing and trading of health supplements, nutraceuticals and food products. It has filed the present suit claiming infringement of its various rights under the laws of copyright, trademarks, passing off, *etc.* One of the products of the Plaintiff is a protein supplement which is sold in a series of products under the MuscleBlaze (MB) trademark. Defendant No.1 is a company involved in the business of manufacturing and merchandising of pharmaceuticals, ayurvedic and cosmetic products under the house mark

'VINI'. Defendant No.1 claims to have a strong presence in the deodorant and perfume segment in the Indian market. Some of its brands are FOGG, OSSUM, and WHITETONE. Defendant No.2 has been impleaded as it owns, maintains and runs www.youtube.com which is an online video streaming platform on which Defendant No.1's advertisements are aired, that allegedly infringe the rights of the Plaintiff.

3. The Plaintiff's case is that in March of 2018 it started an advertising campaign in the form of a video titled "ZIDDI HOON MAIN" on various online platforms including YouTube etc. The said video was followed by another video in Tamil on 4th April, 2018. Similarly, further videos were released in May, 2018 and November, 2018. The videos released by the Plaintiff used various forms of the words 'ZIDD' and 'ZIDDI' to describe a quality of persons who do not give up despite various challenges. The said advertising videos which are available for viewing on YouTube have attracted crores of views. Some of the videos have attracted more than 1-2 crore views. The trademark 'ZIDD' and slogans consisting of the mark `ZIDDI', in various variants and marks associated therewith are also registered in various classes. 'ZIDDI' marks and slogans used by the Plaintiff are- 'ZIDDIS DON'T WAIT', 'ZIDDI HOON MAIN', 'ZIDD WARS', 'NAAM HAI ZIDDI', 'PHIR SE ZIDD KAR'.

4. In January, 2022, the Plaintiff came across advertisements of a deodorant product named 'REALMAN' of Defendant No.1 which, as per the Plaintiff, were conceptually, visually similar to the Plaintiff's advertisements. It is also the case of the Plaintiff that for the said advertisement campaign, Defendant No.1 has adopted the mark/tagline 'ZIDDI PERFUME' which is deceptively similar to the mark of the

Plaintiff. It is the case of the Plaintiff that by the impugned adoption and use of similar scenes in the advertisements and the mark 'ZIDDI PERFUME', Defendant No.1 has infringed the trade mark rights of the Plaintiff and also infringed the copyright involved in the cinematograph works. To prove similarity between the advertisements of the Plaintiff and Defendant No.1, the Plaintiff has put forth a comparative chart in the plaint showing identical scenes from Plaintiff and Defendant No.1's advertisements to argue that the commercials of Defendant No.1 infringe the rights of the Plaintiff.

Theme of Plaintiff's Commercials/Advertisements

5. There are four commercials which are the subject matter of the present suit- Commercial No.1 of [redacted] *(hereinafter "P1");* Commercial No.2 of the Plaintiff *(hereinafter "P2")*; Commercial No.3 of Defendant No.1 *(hereinafter "D1")*; Commercial No.4 of Defendant No.1 *(hereinafter "D2")*. In addition, there are videos which have been shown by Defendant No.1 to buttress the argument that the idea of 'ZIDD/ ZIDDI' being used in the context of sports related activities is not original and is common place. To better appreciate the arguments of ld. Counsel for both the parties, it is important to first capture the themes of all the four advertisements which are relevant in the present suit.

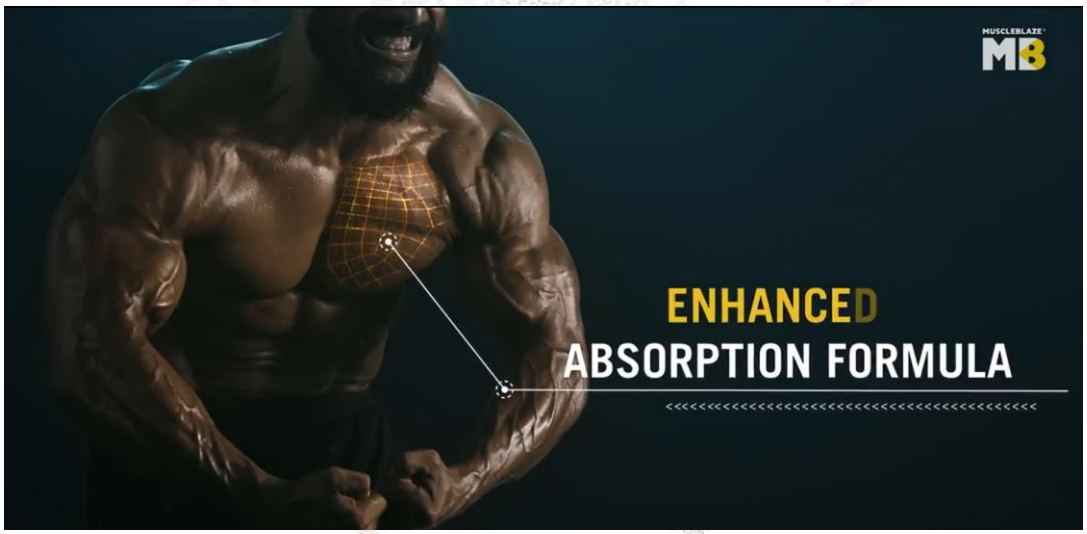
A. Theme of the Plaintiff's commercial – P1

6. This is a video which is approximately one minute long. It begins with the shadow of a man showing his biceps with the expression 'MUSCLE BLAZE MB PRESENTS' written on the screen. The advertisement commences with the idea that body-building requires a lot of effort as it is usually not inherited by the Indians. It depicts a man, who is profusely sweating while working out. It shows the protagonist who is

lifting a very heavy automobile tyre and working out on various gym equipment. The entire commercial is in a dark setting with very few lights. In the same commercial, a second protagonist is shown working out with a "gym rope". The second protagonist is also shown punching a boxing bag. The two frames of the man lifting the tyre and working on the gym rope are set out below:

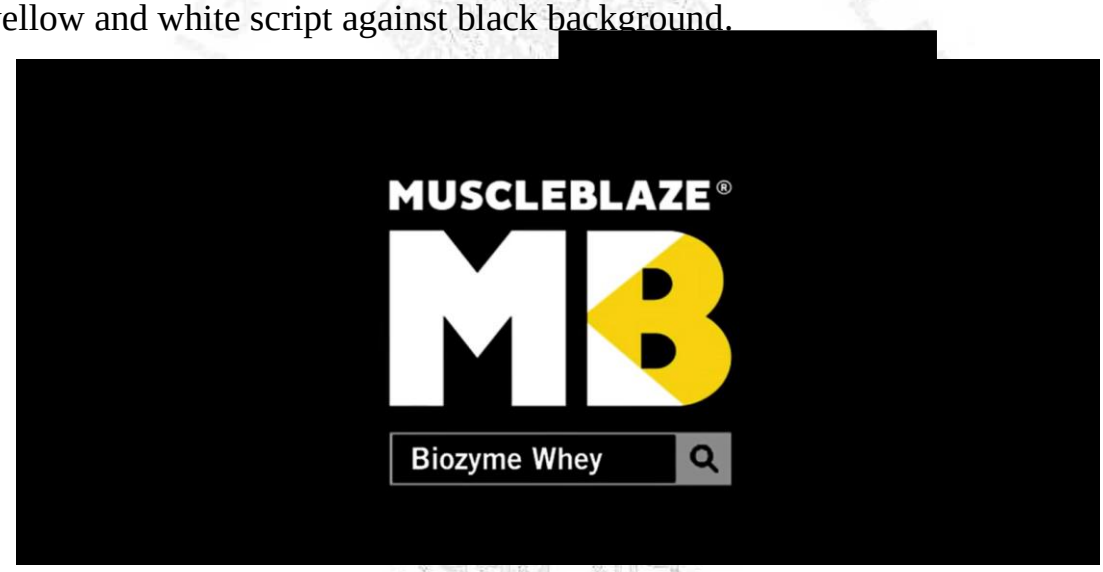
7. The product 'Muscle Blaze MB Biozym Whey Isolate' is depicted prominently at the end of the advertisement in the following manner:

8. The words 'enhanced absorption formula' are used to depict the characteristics of the product.



9. The same is written in yellow and white colour combination on a black background. It is also claimed that the product is clinically tested on Indian bodies which is again written in yellow and white color combination.

10. The last frame of the advertisement ends with the name of the product "Muscle Blaze MB Biozym Whey" written prominently on the screen in yellow and white script against black background.



11. In a nutshell, the overall theme of the commercial is that the persons who work out in gym for building their bodies would need extra protein, which is provided by the Plaintiff's product.

B. Theme of second commercial the Plaintiff – P2

12. This is a commercial which is approximately 3 minutes long. The protagonists in this commercial are several in number. The first protagonist is a boxer, who is depicted getting injured in a boxing bout. Second

protagonist is a cyclist who is hit by a truck and injured. The wife and child of the boxer, who is injured, leave him and a third actor, who believes in gyming, takes the first protagonist to a gym. The cyclist is also seen undergoing physiotherapy for the injured leg. Both the protagonists are shown, how by their sheer 'ZIDD', they are able to make themselves stronger and fitter. In this context, the word 'ZIDD' is used in various lines of the background song to show how they are overcoming their sorrow with their 'ZIDD'. The cyclist is shown to be back on his feet and cycling. The boxer is also shown running and boxing. All the protagonists are shown consuming the Plaintiff's product. Slogans such as "PHIRSEZIDDKAR" are used which are written in yellow and white colour. [redacted] frame from the advertisement is set out below:

13. At the end of the commercial 'Muscle Blaze MB' in yellow and white color combination against black background is again depicted.

14. The elements in the Plaintiff's commercials/ advertisements/promotions on the basis of the two videos can be captured as having the following features:

(1) The product 'MuscleBlaze' [redacted] mers or for injured persons.

(2) The depiction of 'ZIDD' as a quality and as a part of various catch phrases and slogans to depict resilience and perseverance continuously runs across the commercials.

(3) In commercial P1, the setting of the commercial is in dark/black background where the protagonists are depicted.

(4) The protagonists are shown either working out in the gym or doing a lot of physical effort, for example with rope and weights, boxing, cycling, running.

(5) The colour combination prominently used while depicting the mark / product in both the commercials is black background with yellow white writing.

<u>Theme of Defendant No.1's Commercials/Advertisements</u>

15. Defendant No.1- Vini Cosmetics Pvt. Ltd. manufactures, promotes

and sells ‘REAL MEN MANLY FRAGRANCE’ deodorants, which are described as ‘ZIDDI PERFUME’ in both of their commercials which are impugned in the present suit. There are several commercials which Defendant no.1 has launched for its product. However, only two commercials are impugned in the present suit as having images and frames that are imitative of the Plaintiff’s commercials.

C. Theme of first impugned commercial of Defendant - D1

16. This commercial of Defendant No.1 is a twenty-one second video. The commercial shows the protagonist in a gym, which has a dark background with a few lights. The protagonist is in the middle of the gym working out with a rope, which is yellow in colour. He is shown building his muscles and profusely sweating. The message in the commercial is that the product of the Defendant i.e., perfume/deodorant can counter the odor resulting from profuse sweating. The words ‘ZIDDI PERFUME’ are shown written in yellow colour with black background towards the end of the commercial. Some screen shots of Defendant No.1’s advertisement are set out below:

D. Theme of commercial of Defendant – D2

17. The second video of Defendant No.1 is a twenty-two second video, which again shows that the protagonist [redacted] working in a gym in front of a boxing bag, which is yellow in colour. The setting is in dark background with some white light. The protagonist is again sweating. The words 'ZIDDI PERFUME' are again shown in this commercial written in yellow colour with black background. The relevant still from the video advertisement is depicted below:

Submissions

18. Mr. Vikas Khera, ld. Counsel for the Plaintiff at the very outset submits that the Plaintiff has filed the present suit for the infringement of its rights in the marks 'ZIDD'/'ZIDDI' as also copyright in its cinematograph films. The submission of ld. Counsel for the Plaintiff is that the advertising campaign around the mark 'ZIDDI' has the following elements:

i. Various slogans/expressions using the word 'ZIDDI'.

ii. The distinct style of writing the word 'ZIDDI' in a black and yellow combination.

iii. To portray resilience and perseverance the distinctive elements used in the commercials [redacted] gym setting, depiction of how workout is being done etc.,

19. Mr. Khera, ld. Counsel, submits that various celebrities have endorsed the Plaintiff's product including Jasprit Bumrah, Neeraj Chopra, Tiger Shroff, and Shikhar Dhawan. Such endorsements have created a niche position for the 'ZIDDI' campaign. Various slogans used by the Plaintiff also include -

- ZIDDI DON'T WAIT,
- NAAM HAI ZIDDI,
- ZIMMEDAR ZIDDI,
- ZIDDI HOON MAIN,
- PHIR SE ZIDD KAR,
- SHOW YOUR ZIDD,
- YOU CAN TAKE THE ZIDDI OUT OF THE GYM, BUT YOU CANNOT TAKE THE GYM OUT OF THE ZIDDI.

20. He submits that a comparison of the advertisement campaign of the Plaintiff and Defendant No.1 would show that the entire concept, look and feel of the expression 'ZIDDI', including the colour combination of black and yellow have all being copied by Defendant No.1. Though, Defendant No.1 is selling perfumes under the brand name 'REALMAN', the use of the tagline- 'ZIDDI PERFUME' would create a connection between Defendant No.1's product and the Plaintiff in the minds of the consumer. He relies upon the comparative frame by frame analysis of the advertisements to argue that not just the idea but even the expression has been copied by Defendant No.1. The entire campaign of the Plaintiff has been imitated by Defendant No.1. It is further submitted by the ld. Counsel that the mark of the Plaintiff is registered in Class 38 and Class 44 and which include advertisement services. In support of his claim of infringement, the ld. Counsel places reliance upon the following two judgments-

1. ***MRF Limited v. Metro Tyres Ltd. 262 (2019) DLT 734.***
2. ***Procter & Gamble Manufacturing (Tianjin) v. Anchor Health & Beauty Care Pvt. Ltd. 211 (2014) DLT 466***.

21. On behalf of the Plaintiff, it is further urged that apart from lifting of a frame of the film, copyright exists in the script, screenplay, sound track, dialogue video images, lyrics etc., of the film. Thus, even if some portion of the film or the idea behind it is lifted, there would be infringement of copyright in the cinematograph film. Reliance is placed by the Plaintiff on the judgement of the Calcutta High Court in ***Shree Venkatesh Films Pvt. Ltd. & Ors. v. Vipul Amrutlal Shah [G.A. No. 2153 of 2009 decided on 1st September, 2009]***.

22. Ld. counsel also again takes the Court through the comparison of the

various screenshots from the Plaintiff's and Defendant No.1's commercial to show how the atmosphere in which the advertisements are made is identical. Similar dark background with a yellow colour rope in a gym setting has been used by Defendant No.1. The Plaintiff has used the mark 'ZIDDI' in various forms and slogans even though the mark is not registered. Defendant No.1 is also using the same mark as 'ZIDDI PERFUME, ZIDDI SHORTS' with hashtags. Thus, in view of the largescale publicity given by the Plaintiff to the 'ZIDDI' campaign of its protein drink using various celebrity and endorsement the 'ZIDDI' campaign is associated exclusively with the Plaintiff. He, further, relies upon ***South India Beverages Pvt. Ltd. v. General Mills Marketing Inc. & Anr. (2015) 61 PTC 231*** and [redacted] ***Procter & Gamble Manufacturing (Tianjin) Co. Ltd. (supra)*** to argue that the word 'ZIDDI' is the prominent part of the Plaintiff's mark and slogan which is entitled to protection though the same is yet to be registered as a separate word mark.

23. On behalf of Defendant No.1, Mr. C.M. Lall, ld. Senior Counsel submits that the Plaintiff and Defendant No.1 are not competitors. Defendant No.1 is in the business of manufacture and sale of perfumes and deodorants. The Plaintiff cannot claim any monopoly on the use of the word 'ZIDD' or 'ZIDDI' as the same has been used in earlier campaigns and films. He relies upon the following:

i) A song in the movie 'Mary Kom' which uses the expression & title 'Ziddi Dil';

ii) An advertisement of Parel-G products titled 'Ziddi Choriya';

iii) An advertisement for a gym called 'Dronacharya's The Gym' where the expressions 'Ziddi Kalakaar', 'Main Ziddi Hoon' are used.

24. The ld. Senior Counsel then makes a comparison between the Plaintiff's and Defendant No.1's videos. He submits that Plaintiff's first video is a long video which covers various activities such as exercise using ropes, boxing, cycling, running and gyming, etc. Thus, no monopoly can be claimed on all such activities. Secondly, the first impugned video of Defendant No.1 shows normal scenes in a gym where a person is working out using a rope and is perspiring. Such scenes are common to various advertisement. Ld. Senior Counsel further submits that:

i) In the Plaintiff's advertisements, the feature of being 'ZIDDI' or adamant/stubborn/persistent is attributable to the protagonist, whereas in Defendant No.1's [redacted] quality is attributed to the product and not to the protagonist;

ii) That there is no similarity in the theme of the two advertisements.

iii) The quality of the perfume of being one that is long lasting despite a heavy workout is being described by Defendant No.1 by use of the term 'Ziddi'. Thus, descriptive usage is protected under Section 30 of the Trademarks Act, 1999.

iv) Reliance is placed upon ***R.G. Anand v. Deleux Films AIR 1978 SC 1613*** to argue that there is no copyright in an idea and, unless and until, there is lifting of frames or specific images which form part of the film, there cannot be any violation of the copyright in a cinematograph film. It is, further, argued that there is no pleading in the plaint *qua* any other copyrighted work such as the script, screenplay, dialogue which has been copied by Defendant No.1. Thus, no relief is liable to be granted in respect of such underlying works. Finally, it is

argued that the Plaintiff's intention, in the present case, is to claim monopoly in an idea in respect of exercising in the gym with a rope and boxing bag which cannot be recognized in law.

v) Words such as 'ZIDD/ZIDDI' are laudatory words over which no monopoly can be granted. He relies upon the judgments of ***Pernod Ricard India Pvt. Ltd. v. Frost Falcon Distilleries Ltd. [CS (COMM) 94/2021 decided on 2nd March 2022]*** and ***Sooth Healthcare Pvt. Ltd. v. Dabur India Ltd. [CS (COMM)18/2022 decided on 3rd March, 2022].*** It is also submitted that the Plaintiff does not have any registration in respect of perfumes and deodorants in Class-3.

<u>Analysis and findings</u> [redacted]

25. In the present suit, the prayer is cast in very wide terms. But on the basis of submissions, it is clear that the Plaintiff impugns primarily two commercials of Defendant No.1, the themes of which have been captured above. According to the Plaintiff, Defendant No.1 has lifted various ideas and their expressions in the commercials which are being launched by it for promoting its product 'REALMAN DEODORANTS MANLY FRAGRANCE' which is called as 'ZIDDI PERFUME' in its advertisement campaign.

26. The first and the foremost issue that the Court needs to consider is whether advertising campaigns of this nature are capable of getting protection. Admittedly, both the parties do not use the concept of 'ZIDD' or 'ZIDDI' as trademarks for their products. The Plaintiff has obtained trademark registrations under various classes including 35, 37, 41, 38 for slogans and expressions used in the promotion of its 'MuscleBlaze Whey Protein Supplement' product. The said words and slogans/expressions are:

S. No.	Mark	Registration No.	Class
1.	ZIDD	3768930	37
2.	ZIDD	3767711	44
3.	ZIDD WARS	4289307	5
4.	ZIDD WARS	4289326	29
5.	ZIDD WARS	4289331	30
6.	ZIDD WARS	4289332	35
7.	ZIDDI HOON MAIN	3787444	5
8.	ZIDDI HOON MAIN	3787522	9
9.	ZIDDI HOON MAIN	3787523	16
10.	ZIDDI HOON MAIN	[redacted]	25
11.	ZIDDI HOON MAIN	3787571	35
12.	ZIDDI HOON MAIN	3787573	38

27. The Plaintiff also uses other expressions with the theme of 'ZIDDI', namely, 'ZIDDIS DON'T WAIT', 'ZIDDI MUNDE', 'TRUE ZIDDIS', 'ZIMMEDAR ZIDDI', 'YOU CAN TAKE THE ZIDDI OUT OF THE GYM BUT CANNOT TAKE THE GYM OUT OF THE ZIDDI'. Some of the celebrities who endorsed the products are also promoted by adding the words 'ZIDDI' within their names such as 'AKASH ZIDDI SABLE', 'ARYAN ZIDDI PASHA', etc. The entire campaign of the Plaintiff was launched in 2018 and a perusal of the plaint shows that the advertising commercials of the Plaintiff have been an enormous success especially on online platforms. Some of the Plaintiff's video commercials have received more than two crore views and a detailed table in this regard has been placed

in the plaint.

28. Advertisement 'P1' was created by one M/s Spring Marketing Capital which has assigned all the rights in the said advertisement to the Plaintiff vide clause 7 of the service agreement dated 24th February, 2019. Copy of the said agreement is relied upon by the Plaintiff. As per the said agreement, the mandate given to the agency was to make 'ZIDDI' a strong brand plank that connects the consumer with the Plaintiff and help Plaintiff build a distinctive brand. Advertisement video 'P2' was created by one Freckledface Culture Lab under the title "MuscleBlaze PHIR SE ZIDD KAR" for the Plaintiff. The rights in the said cinematograph film have been assigned to the Plaintiff and a no objection certificate has been issued by Freckeldface Culture Lab to that effect. The videos of the Plaintiff's advertising campaign and marketing campaign have, apart from being available on YouTube, are also promoted on the Instagram handle of the Plaintiff.

29. The suit in the present case is thus based on the following three elements:

i) The entire concept, look and feel of the expression 'ZIDD' and 'ZIDDI' being used by the Plaintiff for its advertising campaign has been copied by Defendant No.1 in its advertisements for deodorants;

ii) Copying of few frames from the advertising commercials of Plaintiff which shows similarity with some frames of Defendant No.1's commercials. Hence the infringement of Plaintiff's copyright and other rights in its advertisement campaign;

iii) Passing off by the Defendants due to use of the expression 'ZIDDI PERFUME' in a similar advertisement campaign.

30. In the opinion of the Court, the distinctive elements of Plaintiff's 'ZIDDI' advertisement campaign are:

i) Use of the words 'ZIDD' and 'ZIDDI' as a quality of the persons who are portrayed in the commercials i.e., the people who show perseverance, strength and commitment;

ii) Commercials of the Plaintiff portraying persons working out in a gym atmosphere with a dark background coupled with a typical background music which highlights their character of perseverance and 'ZIDD';[redacted]

iii) The overall use of the colour combination of white and yellow lettering in the Plaintiff's campaign with a dark background;

31. The question before the Court is whether these elements of the Plaintiff's campaign merely constitute an idea or do they constitute expression of an idea. The settled legal position is that there can be no copyright in an idea but only in its expression. This idea-expression dichotomy is the subject matter of innumerable decisions worldwide but the rule itself is unexceptionable. The manifestation of an idea into an expression in an advertising campaign is a long process which involves not only `sweat of the brow' but even more. It requires an understanding of the product, its qualities, features, what is to be highlighted, manner of highlighting the product, capturing of the theme, weaving of a story, adding creative elements, deciding on endorsees, how to capture the story, shooting of the video and other imagery, studio set up and finally connecting the entire campaign to the consumer.

32. However, a mere idea behind the commercial is not protectable. Only the elements of expression incorporated in the commercial are protectable. Parties which manufacture and sell products expend enormous time, effort, energy and investment in creation of advertising campaigns. They usually engage creative agencies and advertising agencies who render them the services for making these campaigns. Such campaigns are a result of painstaking effort of creative directors, artists, lyricists, slogan writers, cartoonists etc., who work in collaboration with marketing teams for making such campaigns. Thus, these campaigns and commercials are extremely thought out, deliberate and also determine the success/failure of a product. Even a ten second commercial involves enormous creativity and originality. Thus, an advertising campaign including commercials are undoubtedly protectable under intellectual property law.

33. There is no doubt in the fact that the advertisement campaign of Defendant No.1 is not a literal imitation of the Plaintiff's advertisements. In such a case, to determine whether there has been infringement or not the Court needs to see if there is any substantial similarity between the respective works of the Plaintiff and Defendant No.1 which would be apparent to any ordinary observer. The Supreme Court in ***RG Anand (supra)*** after perusing various authorities, summed up the test of determination of copyright infringement in the following words:

> *"Similar observations were made in the case of Twentieth Century Fox Film Corporation v. Stonesifer 140 F 2d 579 which are as follows :-*
>
> > *In copyright infringement cases involving original dramatic compositions and motion picture productions, inasmuch as literal or complete*

> *appropriation of the protected property rarely occurs, the problem before the court is concrete and specific in each case to determine from all the facts and circumstances in evidence whether there has been a substantial taking from an original and copyrighted property, and therefore an unfair use of the protected work.... The two works involved in this appeal should be considered and tested, not hypercritically or with meticulous scrutiny, but by the observations and impressions of the average reasonable reader and spectator.... We find and conclude, as did the court below, that the numerous striking similarities in the two works cannot in the light of all the evidence be said to constitute mere chance. The deduction of material and substantial unlawful copying of appellee's original play in appellant's motion picture is more in consonance with the record [redacted] of the situation therein disclosed.*
>
> *This authority lays down in unmistakable terms the cases where an infringement of the copyright would take place and as pointed out that before the charge of plagiarism is leveled against the defendant it must be shown that the defendant has taken a substantial portion of the matter from the original and have made unfair use of the protective work. The two works involved must be considered and tested not hypercritically but with meticulous scrutiny."*

34. The said position has been reiterated by the Division Bench of this Court in ***India Tv Independent News Service Pvt. Ltd. v. Yashraj Films Pvt. Ltd. 192 (2012) DLT 502*** wherein the Division Bench held as under:

> *24. It is trite that the pre-requisite to copyright infringement is a demonstrable copying of the copyrighted work. But since not all copying is infringement, there must be substantial similarity between the two works. Courts have identified two types of substantial similarities: (i) Comprehensive non*

> *literal similarity; where Courts have strived to identify the 'fundamental essence of the structure', and it being copied, even where specific expression is not copied. (ii) Fragmented literal similarity, in which bits of specified expressions are copied, but the overall structure is not. It is in the latter, that Courts have employed de minimis holding that substantial similarity is present only if the amount of literal expression copied is more than de minimis. Thus, de minimis used in these cases is simply the opposite of 'substantial similarity' i.e. to say that the use is de minimis is to say that the alleged infringing work is not substantially similar to the original. This approach is to be found in the opinion reported as 307 F.Supp. 2d 928 Neal Publications v. F&W Publications Inc, a case where the defendant had copied a few phrases from the plaintiff's guide; the opinion reported as 388 F. 3d 1189 (9th Cir. 2004) Newton v. Diamond, where the notes were sampled by the Beastie Boys and the average audience was opined not to recognize the appropriation.*

35. As already highlighted above, the settled law is that there cannot be any exclusivity in respect of an idea but only the expression can be protected. The classic test to determine the scope of copyright protection as laid down by the Supreme Court in ***R.G. Anand (supra)*** is set out below:

> *"51. Thus, the position appears to be that an idea, principle, theme, or subject matter or historical or legendary facts being common property cannot be the subject matter of copyright of a particular person. It is always open to any person to choose an idea as a subject matter and develop it in his own manner and give expression to the idea by treating it differently from others. Where two writers write on the same subject similarities are bound to occur because the central idea of both are the same but the similarities or*

coincidences by themselves cannot lead to an irresistible inference of plagiarism or piracy. Take for instance the great poet and dramatist Shakespeare most of whose plays are based on Greek-Roman and British mythology or legendary stories like Merchant of Venice, Hamlet, Romeo Juliet, Jullius Caesar etc. But the treatment of the subject by Shakespeare in each of his dramas is so fresh, so different, so full of poetic exuberance, elegance and erudition and so novel in character as a result of which the end product becomes an original in itself. In fact, the power and passion of his expression, the uniqueness, eloquence and excellence of his style and pathos and bathos of the dramas become peculiar to Shakespeare and leaves precious little of the original theme adopted by him. It will thus be preposterous to level a charge of plagiarism against the great play-wright. In fact, thoughout his original thinking, ability and incessant labour Shakespeare has converted an old idea into a new one, so that each of the dramas constitutes a master-piece of English literature. It has been rightly said that "every drama of Shakespeare is an extended metaphor". Thus, the fundamental fact which has to be determined where a charge of violation of the copyright is made by the plaintiff against the defendant is to determine whether or not the defendant not only adopted the idea of the copyrighted work but has also adopted the manner, arrangement, situation to situation, scene to scene with minor changes or super additions or embellishment here and there. ***Indeed, if on a perusal of the copyrighted work the defendant's work appears to be a transparent rephrasing or a copy of a substantial and material part of the original, the charge of plagiarism must stand proved.*** *Care however must be taken to see whether the defendant has merely disguised piracy or has actually reproduced the original in a different form, different tone, different tenor so as to infuse a new life into the*

idea of the copyrighted work adapted by him. In the latter case there is no violation of the copyright.

52. Thus, on a careful consideration and elucidation of the various authorities and the case law on the subject discussed above, the following propositions emerge:
1. There can be no copyright in an idea, subject matter, themes, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyright work.
2. Where the same idea is being developed in a different manner, it is manifest that the source being common, similarities are bound to occur. In such a case the courts should determine whether or not the similarities are on fundamental or substantial aspects of the mode of expression adopted in the copyrighted work. If the defendant's work is nothing but a literal limitation of the copyrighted work with some variations here and there it would amount to violation of the copyright. In other words, in order to be actionable the copy must be a substantial and material one which at once leads to the conclusion that the defendant is guilty of an act of piracy.
3. One of the surest and the safest test to determine whether or not there has been a violation of copyright is to see if the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.
4. Where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises.
5. Where however apart from the similarities appearing in the two works there are also material and broad dissimilarities which negative the intention to copy the original and the coincidences appearing in

> *the two works are clearly incidental no infringement of the copyright comes into existence.*
> *6. As a violation of copyright amounts to an act of piracy it must be proved by clear and cogent evidence after applying the various tests laid down by the case law discussed above.*
> *7. Where however the question is of the violation of the copyright of stage play by a film producer or a Director the task of the plaintiff becomes more difficult to prove piracy. It is manifest that unlike a stage play a film has a much broader prospective, a wider field and a bigger background where the defendants can by introducing a variety of incidents give a colour and complexion different from the manner in which the copyrighted work has expressed the idea. Even so, if the viewer after seeing the film gets a totality of impression that the film is by and large a copy of the original play, violation of the copyright may be said to be proved."*

36. Apart from the issue of copyright in the frames of the commercials, in the present case the Plaintiff has chosen a very unique and creative way of using the ordinarily known words 'ZIDD' and 'ZIDDI' in a manner so as to portray how persons who consume Plaintiff's product are able to persevere and face the challenges of life. The use of the words 'ZIDD' and 'ZIDDI' in various forms, variants and derivative marks as also catchy expressions, slogans, etc. is quite distinctive of the Plaintiff's product and business. Thus, the Plaintiff's 'ZIDDI' campaign and connected videos are not merely meant for marketing and promoting the product i.e., the protein supplement, but in fact denote or connote the Plaintiff's business itself. Thus, viewed on its own strength, there can be no doubt that the Plaintiff's campaign is extremely distinctive of the Plaintiff's products and business.

37. Goodwill in an advertising campaign is protectable. This has been settled in various decisions. One of the oldest decisions is the Privy Council's decision in ***Cadbury-Schweppes v. The Pub Squash Co. Ltd***. ***[1981] RPC 429*** where it was categorically held that confusion or deception arising from descriptive material such as slogans and visual images in an advertising campaign can amount to passing off. The Privy Council relied upon various earlier decisions and observed as under:

> *"**The width of the principle now authoritatively recognised by the High Court of Australia and the House of Lords is, therefore, such that the tort is no longer anchored, as in its early nineteenth century formulation, to the name or trade mark of a produc[redacted] enough to encompass other descriptive material, such as slogans or visual images, which radio, television or newspaper advertising campaigns can lead the market to associate with a plaintiff's product, provided always that such descriptive material has become part of the goodwill of the product.** And the test is whether the product has derived from the advertising a distinctive character which the market recognises.*
> *But competition must remain free; and competition is safeguarded by the necessity for the plaintiff to prove that he has built up an 'intangible property right' in the advertised descriptions of his product, or, in other words that he has succeeded by such methods in giving his product a distinctive character accepted by the market. A defendant, however, does no wrong by entering a market created by another and there competing with its creator. The line may be difficult to draw; but, unless it is drawn, competition will be stifled**. The test applied by Powell J. in the instant case was to inquire whether the consuming public was***

> ***confused or misled by the get-up, the formula or the advertising of the respondent's product into thinking that it was the appellants' dissimilar product.*** *And he held on the facts that the public was not deceived.* ***Their Lordships do not think that his approach in law (save in one aspect as will later appear) to the central problem of the case can be faulted.*** *The real question in the appeal is, therefore, one of fact, whether the judge erred in the inferences he drew from the admitted primacy facts"*

38. On facts, however, in ***Cadbury-Schweppes Pty. Ltd. (supra)***, the Privy Council held that there may not be any passing off owing to the various other factors. The Privy Council was of the view that the intention of the Respondent was not to pass off its goods as that of the Appellant but to take advantage of the market developed by the advertising campaign for "Solo". The Council also held that the radio and television advertisement themes had not become distinctive feature and property of Appellant's in the sense in which the word "property" in used in such class of cases. The Privy Council emphasised the need of balancing rights of intellectual property holder and protection of free competition. The relevant excerpts from the judgment are reproduced below:

> *When the judge turned to consider the effect of the radio and television advertising he rejected the submission that either of the two themes used in these media had become the property of the appellants' in the sense in which the word "property" is used in this class of case. They were descriptive of the product (perhaps even "eloquently descriptive") but they never became a distinguishing feature. There was ample evidence to support his rejection of this submission, and their Lordships are in no position to substitute for*

his assessment of the effect of the "Solo" advertising campaign a different assessment or to challenge his analysis of the market, i.e., the character of the buying public.

In reaching his conclusion of fact that the respondent had "sufficiently" distinguished its product from "Solo", the judge had not only to conduct an elaborate and detailed analysis of the evidence, which he certainly did, but to bear in mind the necessity in this branch of the law of the balance to be maintained between the protection of a plaintiff's investment in his product and the protection of free competition. *It is only if a plaintiff can establish that a defendant has invaded his "intangible property right" in his product by misappropriating descriptions which have become recognised by the market as distinctive of the product that the law will permit competition to be restricted. Any other approach would encourage monopoly. The new, small man would increasingly find his entry into an existing market obstructed by the large traders already well known as operating in it.*

For these reasons their Lordships are of the opinion that the appeal fails, even if it be competent, the question to which they now turn.

39. In ***Koninklijke Philips Electronics NV v Remington Products Australia Pty Ltd***, ***(2000) 100 FCR 90*** while dealing with advertisements for shavers, the Federal Court of Australia observed as under:

> *"43. The appellants presented a number of arguments the common theme of which was that some persons might have built up in the past a favourable impression of triple rotary shavers without connecting them with the name Philips; if contemplating a purchase, they might assume the Remington is the shaver they had in mind (which, of course, would not have been a Remington), despite the prominence of the*

Remington brand. But arguments of this kind could always be raised when an incoming competitor seeks to break a monopoly. ***Of course, some people might, probably unjustifiably, and probably transiently, associate the new product in some way with the only product of that sort previously available. However, if anyone were misled as a result, it would not be by the conduct of the intruder upon the monopoly, but by virtue of an inherent problem of the situation. Nor is such a difficulty to be attributed to passing off, provided the goods in question are appropriately and clearly branded. Here, the Remington brand is prominent and virtually ubiquitous.***

44. In any case, arguments of this kind float, dream-like, in an atmosphere of unreality. It is not to be assumed that actual purchasers will, other than exceptionally, see the Remington shaver in circumstances so insulated from information that the suggested misconception might be nourished. Generally, Philips shavers (holding 30 per cent of the world market for electric shavers and, up to now, 100 per cent of the Australian market for rotary shavers) will be displayed in shops and stores alongside the newcomer. It will be plain to anyone that here are two rival brands.

45. ***Nor is there any more reality to the suggestion that the mere similarity of the goods, combined with a similar "masculine" tone pervading the advertising of each, might lead some persons to assume the Remington shaver is produced under licence, or is a sub-brand of Philips. The Remington brand is well-known in its own right, and, in Australia, sells more personal care products, though fewer electric shavers, than Philips. The public is thoroughly accustomed to competing brands of almost identical products, which may or may not have some link — or may not today, but may tomorrow, share an overall owner, by virtue of a takeover or***

> ***purchase***. *A similar suggestion, made in the Dr Martens case, was there described (at 148) as "fanciful" and "bizarre".*

40. In this case, the Australian Federal Court, thus, held that mere similarity in the advertisement cannot by itself result in passing off if the brand is prominently displayed on the products in question. The Court held that not every kind of confusion can be held to be passing off.

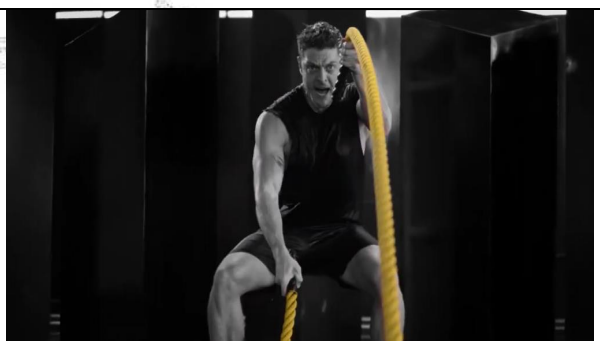
41. In the case of ***Glaxosmithkline Consumer Healthcare Ltd. v. Abbott Healthcare Pvt. Ltd. 2009 (40) PTC 437 (Cal)*** it was alleged that Plaintiff's slogan *"Taller, Stronger, and Sharper"* was copied by the Defendant from the Plaintiff's television commercial. In the said case, a ld. single judge of the Calcutta High Court observed as under:

> *"17.* ***There is no doubt as to the maintainability of the action, in the sense that such a right as the plaintiff canvasses can be seen as an intangible property right in the advertised description of a product by a manufacturer. It is possible that by virtue of an advertising campaign a manufacturer gives his product a distinctive character which the market exclusively associates with the product or the manufacturer. The test is to inquire whether there is a likelihood of confusion resulting from the manner in. which the first defendant's product has been advertised, particularly at the closing stage thereof and, whether the plaintiff is entitled to exclusive use of the idea.***
>
> *18. Laudatory epithets may be used by a manufacturer but to claim exclusivity a higher element of distinctiveness has to be demonstrated. A shoemaker may use an epithet indicating comfort, another for its longevity and a third for its quality. Every shoe manufacturer would attempt to promote its product by harping on one or the other or all of the three features*

> *in its promotional campaign. The more descriptive the epithets, the closer the resemblance of the epithets to the efficacy of the product, the more remote will be the presumption as to the exclusivity of the combined effect of the epithets."*

42. Thus, while distinctive elements in advertising campaigns can be protected by the Court, unless and until there is enormous distinctiveness and likelihood of confusion or deception, the Court would not grant an injunction against an advertisement campaign, as the same may stultify creativity. Thus, in law, an advertising campaign, if it signifies the source and has become distinctive of the Plaintiff, can be granted protection. The threshold for establishing distinctiveness would however be quite high. [redacted]

43. In the above legal context, the case of the Plaintiff is to be considered. The Plaintiff highlights two screenshots where a man exercising in a gym is shown to be boxing with the punching bag in dark background. In the second screenshot, a muscular person is exercising with heavy ropes in the dark background. The said screenshots are extracted herein below:

Stills from Plaintiff's advertisement campaign	**Stills from Defendant No.1's advertisement campaign**
	

44 Apart from the frames extracted above, the Court has viewed the competing commercials and is of the opinion that the viewing of the same is likely to give an ordinary viewer an impression of the said two commercials being connected or emanating from the same source. The overall theme of dark setting, persons working out, use of [redacted] and colour of yellow and black is present in the Plaintiff's and Defendant No.1's campaign. The third-party videos relied upon by Defendant No.1 using the mark 'ZIDDI' or the concept of 'ZIDD' are completely distinct from the Plaintiff's commercials and Defendant No.1's impugned commercials. There is no doubt that no monopoly can be granted over the concept and idea of 'ZIDD' and 'ZIDDI'. However, the portrayal of the same by picking almost identical elements, cannot be completely ignored by the Court. Defendant No.1 has a series of advertisements and commercials which are available online that showcase its product 'REALMAN DEODORANTS' as 'ZIDDI PERFUME'. All those commercials are not impugned before the Court. The only commercials which have been impugned are those which show similar or imitative actions being performed by the protagonist as in the Plaintiff's commercials. If a person has viewed the Plaintiff's commercials in the past, and gets a glimpse of the Defendant No.1's

commercial an impression can clearly be created that Defendant No.1's product is an extension of Plaintiff's range of products. One who is familiar with the Plaintiff's protein supplement and the corresponding commercials could well imagine that Defendant No.1's deodorants/perfumes also emanate from the same basket, owing to the substantial similarities in the commercials.

45. There can be no monopoly or exclusivity on the use of the word 'ZIDD' and 'ZIDDI' as an idea to show perseverance. However, the portrayal has to be different. There can also be no monopoly or exclusivity on showing a muscular person working out in a gym but the expression of the idea has to be different. Again, the portrayal of a person using a punching bag can also not be monopolized but the expression has to be different. In the impugned commercials, in the opinion of the Court, the expression is a colourable imitation of the Plaintiff's advertising commercial.

46. The protection accorded to expressions and slogans is well settled as held in ***Procter and Gamble (supra)***. The ld. Division Bench of this Court observed as under:

> *(vi) The use by the respondent/plaintiff of the expression "ALLROUND PROTECTION" in its advertisements and on its product is as a slogan or a tagline. Such slogans/taglines are definitely a trade mark within the meaning of Section 2(m) & (zb) of the Act, being capable of represented graphically and distinguishing the goods of one from another and used for indicating a connection in the course of trade between the goods and the person having right to use the mark.*
> *(vii) Our experience of life shows that such slogans or*

taglines as "ALLROUND PROTECTION" in advertisements, grab attention and are sometimes better known than the branded products themselves; such slogans/taglines/expressions are marketing and communication tools par excellence and directly impact the consumers by encouraging them to chose certain goods or services over others; such slogans/taglines/expressions, though may not directly designate particular goods or service but support it in commercial terms by enabling the public to link the slogan/tagline/expression to a specific company or to recall a brand--they are the first line of communication with the consumer;

(viii) The function of a slogan/tagline/expression is to crisply communicate the ability or nature of the goods or services; the same communicate to the consumers the qualities thereof; often [redacted] slogan/tagline/expression which lingers in the minds of the consumers and which remains as an after taste of an advertising campaign; slogans/taglines often become so distinctive of a product that the trademark affixed on the product may need no mention;

(ix) Slogans/expressions/taglines have indeed become an important tool in the branding and advertisement campaigns, specially in the visual media;

(x) An effective slogan/tagline/expression is memorable and impactful and make the customers feel good about what they are purchasing and foster more efficient purchasing decisions by creating distinction in consumers' minds;

(xi) Such slogans/taglines/expressions used repeatedly eventually come to identify the brand and contributes to the overall brand equity;

(xii) Slogans/taglines/expressions though can be descriptive but are not necessarily descriptive; it cannot however be lost sight of that the slogan/tagline, if descriptive, does not serve the purpose for which it is coined and does not justify the high cost incurred in

> *conceiving and popularizing the same. A distinctive as compared to descriptive slogan, conveys the company's and the product's essence as well as what it aspires to be and conveys the commercial expression to the consumers. It promotes memory recall;*

47. The defence of Defendant No.1 in response is that 'ZIDDI' is a laudatory word just like 'pride' and 'super' as held in ***Pernod Ricard (Supra)*** and ***Sooth Healthcare (supra)*** respectively. The word 'ZIDD' in Hindi language means the quality of being persistent, stubborn and 'ZIDDI' signifies someone who is stubborn; who exhibits perseverance. The expression 'ZIDDI' can have both positive and negative connotations. However, the manner of portrayal of the protagonists in the Plaintiff's [redacted] commercial is with a positive connotation. A similar connotation is used by Defendant No.1 in its commercials. The brand name of Defendant No.1's product is 'REALMAN' for deodorants but strangely Defendant No.1 calls the same as 'ZIDDI PERFUME'. Deodorants and perfumes belong to completely different product category and cannot be confused with each other. Notwithstanding the said fact, Defendant No.1 is entitled to use the word/expression 'ZIDDI' or connote the quality thereof, however, the manner in which it is used in the same colour combination, in the same dark background depicting muscular persons working out in a gym using a rope and punching bag is very evocative of Plaintiff's advertisement campaign. Defendant No.1 could not have independently created the commercials which are impugned in the present case. While the idea of working out, cannot be monopolised, the portrayal of various scenes ought to have been different and the expression from the Plaintiff's advertisement campaign ought not to have been copied. <u>In this case, in both the commercials, this</u>

Court is of the view that the creative expression of the Plaintiff's commercials has been imitated. In such cases, the Court has to see not merely the individual elements that have been alleged to be copied and whether they can be monopolised or not but the overall effect of Defendants commercial on an ordinary viewer. The impact of Defendant's commercial on a viewer is in a fleeting moment and not after a detailed microscopic analysis. Thus, the Court cannot also conduct a detailed microscopic analysis of Defendant No.1's commercials against the Plaintiff's commercials.

48. In the opinion of the Court, there is a considerable chance that an ordinary viewer who may be familiar [redacted] mercials and its products may connect Defendant No.1's product or presumes some sort of affiliation with the Plaintiff due to the commercials. If such a likelihood exists, then apart from copyright infringement, such a scenario could also result in passing off of Defendant No.1's product as belonging to the Plaintiff. The brand 'REALMAN' is different and is prominently portrayed on Defendant No.1's product but at the end of the commercial, the name of Defendant No.1 i.e., 'Vini' is portrayed in a completely different manner for a fleeting moment.

49. Thus, the Plaintiff's grievance is justified in these facts inasmuch as the theme, expression, and various distinctive elements of Plaintiff's advertisement campaign have been imitated by Defendant No.1 in the impugned commercials. The similarity in the theme and expression is quite prominent and palpable when one views the Plaintiff's commercial and thereafter views the Defendant No.1's commercial, especially owing to the overall look and feel of the two campaigns.

50. This Court notices that there are various other commercials which Defendant No.1 has launched for promoting its deodorants/perfumes 'REALMAN'. Though, they also use the expression 'ZIDDI PERFUME' in the same colour combination, those commercials are not evocative of the Plaintiff's advertising campaign. Thus, in the opinion of the Court, the two impugned commercials which are evocative of and very similar to Plaintiff's campaign are liable to be restrained in their present form. Under these circumstances, the following directions are issued:

i) The Defendants shall forthwith pull down the two impugned commercials from www.youtube.com and other platforms where they are available for viewing by the public; [redacted]

ii) Defendant No.1 is however free to modify the impugned commercials so as to remove the objectionable frames and thereafter re-launch the commercials so long as the distinction between the Plaintiff's campaign and Defendant No.1's commercial is clear and visible to the viewer.

iii) There is however no restraint, upon Defendant No.1 from using the word or expression 'ZIDD' or 'ZIDDI' in a manner so as to signify or describe long lasting nature of the deodorant/perfume in a manner which is not similar or identical to that of the Plaintiff, so long as it is not used as a trade mark.

51. ***I.A.3585/2022*** under Order XXXIX Rule 1 & 2 is disposed of in the above terms.

PRATHIBA M. SINGH
JUDGE

JULY 07, 2022/*Rahul/Dk/SK*