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**CASE COMMENTS - PHONEPE VS BHARATPE**

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**Chhavi Dhawan\*****INTRODUCTION**

The plaintiff, PhonePe, and the defendant, BharatPe, both provide online payment services through their respective apps that can be downloaded for internet-based transactions. However, BharatPe's services are only available to merchants, while PhonePe's services are accessible to anyone who downloads the app. PhonePe alleged that BharatPe's use of the mark 'BharatPe' and the suffix "Pe" amounts to trademark infringement and passing off. PhonePe sought a permanent injunction from the High Court of Delhi to prohibit BharatPe from using any deceptive variant of 'PhonePe' that is identical or similar to PhonePe's trademark for payment services or any other manner that infringes PhonePe's trademark or implies that their services are associated with PhonePe's. <sup>1</sup>However, the Delhi High Court denied PhonePe's request for an interim injunction against BharatPe for the use of the same and identical suffix "Pe" in its application. The Court stated that PhonePe cannot claim exclusive rights over the "Pe" suffix as it is only a part of a registered trademark, and infringement cannot be based solely on a portion of a trademark. <sup>2</sup>

**ARGUMENTS****Plaintiff's Contentions**

- PhonePe has been registered as a trademark in Classes 9, 35, 36, 38, and 42 since March 2016. The trademark, which can be represented in English or Devanagari, has been in use since 2015. The app has been downloaded by approximately 10 crore people.
- The Devanagari "पे" translates to "Pe," which can be creatively adapted to mean "Pay." "Pe" is a made-up word that does not exist in the English language and has no apparent definition. When combined with "Phone," which is a common dictionary term, "Pe" becomes the distinctive and prominent characteristic of the PhonePe trademark.

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<sup>1</sup> PhonePe Private Limited vs Ezy Services & Anr, IA No. 8084 of 2019 in CS (COMM) No. 292 of 2019

<sup>2</sup> <<https://updates.manupatra.com/roundup/contentsummary.aspx?iid=31978>> 'accessed 5 March 2023.'

- Numerous articles and advertisements, as well as participation in public events such as VIVO IPL 2019 and celebrity endorsements, attest to the reputation and goodwill that PhonePe has built over the years.
- The defendant's software, BharatPe, offers identical services and can be downloaded from the same platforms as PhonePe, namely Google Play and Apple App Store. BharatPe began using the mark only in 2018, by which time PhonePe's reputation and goodwill had been well established.
- The capital "P" in "Pe" emphasizes the "Pe" suffix, which is a common feature of both trademarks. Therefore, the defendant's trademark is deceptively similar to PhonePe's trademark.
- A customer with an average intellect and imperfect memory would notice the "Pe" suffix in the defendant's mark and associate it with PhonePe due to its similarity with the latter's trademark.
- The defendant's trademark infringes on PhonePe's trademark, as the former duplicates the significant and unique "Pe" suffix and the services provided are identical to those of PhonePe.<sup>3</sup>
- The defendant did not provide any explanation for adopting the "Pe" suffix, which was creatively invented by PhonePe. The use of the "Pe" suffix in BharatPe's trademark used in the expression 'Bharat Pe Sab Chalta Hai' was an afterthought, as the defendant did not respond to PhonePe's cease and desist notice.
- The defendant's mark includes a purple color scheme that is similar to PhonePe's mark.<sup>4</sup> This is a clear case of trademark infringement under Section 29 (2) (b) of the Trademarks Act, 1999.<sup>5</sup>

### Defendant's Contentions

- Plaintiff is not a registered owner of the words "Pe", "Pay" or Devanagari "पे". Plaintiff registered the entire word 'PhonePe' and other variations of the said mark.
- Defendant claims that they adopted and used the 'BharatPe' trademark in good faith since August 1, 2016. The domain name was registered in the founder's name on

<sup>3</sup> Yashvardhan Ranat, 'Explained PhonePe v BharatPe Trade Mark Dispute Pe Pay As You Go' (*SCC OnLine Blog*, 19 May 2021) <<https://www.sconline.com/blog/post/2021/05/19/explained-phonepe-v-bharatpe-trade-mark-dispute-pe-pay-as-you-go/>> accessed on 7 March 2023

<sup>4</sup> <[https://www.livelaw.in/pdf\\_upload/chs15042021sc2922019091924-392391.pdf](https://www.livelaw.in/pdf_upload/chs15042021sc2922019091924-392391.pdf)> 'accessed 7 March 2023.'

<sup>5</sup> Trade Mark Act, 1999

November 15, 2017, and the online payment services under the same brand started in August 2018.

- The term 'BharatPe' was coined by the defendants and is inherently distinctive for the goods and services provided by them. The idea behind the brand was to create a unique Quick Response (QR) code for merchants to facilitate payments across various consumer Unified Payments Interface (UPI) based applications, such as Google Pay, Paytm, WhatsApp Pay, Amazon Pay, Samsung Pay, and PhonePe. It is for this reason that the defendants used the slogan "Bharat Pe Sab Chalta Hai". BharatPe's app had over 50,000 downloads by the end of December 2020.
- When comparing competing trademarks, they must be compared as a whole. Therefore, the plaintiff cannot allege infringement based solely on the suffix "Pe" in their 'PhonePe' trademark.
- Neither the plaintiff nor the defendant used "पे" or "Pe" as an independent mark in their commercial activities. The key elements of their competing trademarks were the words 'Phone' and 'Bharat,' which differ phonetically and visually.
- After filing the lawsuit, the plaintiff obtained the trademark "CardPe" by assignment dated September 19, 2019, and also confirmed that "CardPe" was the prior user of the formative mark, which contradicts their argument of being an innovator.
- The plaintiff admitted in their plaint that the suffix "Pe" is just a misspelling of the word "Pay" and is used to phonetically pronounce "Pay." Such typos that are identical to the original misspelled term do not confer any legal or exclusive rights unless the word has a secondary meaning.<sup>6</sup>
- According to Section 17 of the Trademark Act<sup>7</sup>, a trademark does not confer any proprietary right over any part of the mark unless it is separately registered. The registration of the 'PhonePe' logo does not grant the plaintiff any right over the suffix "Pe". When viewed as a whole, the plaintiff's and defendant's marks are completely different.
- The Trade Mark Registry also did not raise any objections while examining the defendant's applications for registration under Section 11 of The Trademark Act.<sup>8</sup>

<sup>6</sup> Yashvardhan Ranat, 'Explained PhonePe v BharatPe Trade Mark Dispute Pe Pay As You Go' (*SCC OnLine Blog*, 19 May 2021) <<https://www.sconline.com/blog/post/2021/05/19/explained-phonepe-v-bharatpe-trade-mark-dispute-pe-pay-as-you-go/>> accessed on 7 March 2023

<sup>7</sup> TMA 1999

<sup>8</sup> TMA 1999

## TESTS LAID DOWN BY THE SUPREME COURT OF INDIA FOR DETERMINING TRADEMARK INFRINGEMENT

1. Anti-Dissection Test: Sections 15 and 17 of the Act<sup>9</sup> say that when a mark is made up of many elements, that mark should be treated as a whole (an indivisible unit) until and unless a part of that complex mark is subject to separate trademark protection, the owner will not have exclusive rights on any part of the complex mark. The fundamental premise of the anti-dissection test is that a typical potential purchaser will be more swayed by the intricate mark as a whole, rather than its components. This test discourages the practice of engaging in "technical gymnastics" to identify minor differences between conflicting points.<sup>10</sup> It was held in *Cadila Health Care Ltd vs Aureate Healthcare Pvt Ltd and Ors*<sup>11</sup> that a comparison must be made between the two marks as a whole when dealing with misrepresentation or deception. Defendant's trademark, PANTOBLOC, was found to be deceptively similar to Plaintiff's trademark PANTODAC.

2. Dominant Test: The principle of the dominant feature was established in *S.M. Dyechem Ltd v. Cadbury (India) Ltd*<sup>12</sup> which states that if another trader uses one or more of the essential features of a mark, it is considered an infringement even if they do not use the entire mark. In the case of *SABMiller India Ltd vs Jagpin Breweries Ltd*<sup>13</sup>, the plaintiff owned the trademark 'FIVE THOUSAND,' while the defendant claimed ownership of the 'COX 5001' trademark for beer. The court determined that the plaintiff would suffer irreparable harm if the defendant continued to use the COX 5001 mark, and therefore, the balance of convenience favored the plaintiff.

### JUDGEMENT

The Hon'ble High Court of Delhi observed that trademark infringement and passing off of goods and services can only be charged to the mark as a whole. An exclusive claim for only a part of the Trademarks cannot be claimed. The registration of a trademark does not grant any exclusive rights to the trademark owner over any part of the registered trademark. The owner

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<sup>9</sup> TMA 1999

<sup>10</sup> Anoop Verma, Garima Raonta, Pulkit Doger, 'Rule of Anti Dissection vs Rule of Dominant Features a Legal Conundrum' (*Lakshmisri*, 24 July 2021) <<https://www.lakshmisri.com/insights/articles/rule-of-anti-dissection-v-rule-of-dominant-feature-a-legal-conundrum/>> accessed on 8 March 2023

<sup>11</sup> I.A. No. 800 of 2011 and I.A. No. 4580 of 2011 in CS (OS) No. 123 of 2011

<sup>12</sup> C.A. No. 3341 of 2000 (Arising out of SLP (C) No. 15398 of 1999)

<sup>13</sup> 2014(5) Bom CR721

of a registered trademark may not claim exclusive rights on the description or the descriptive mark even if misspelled unless the mark has acquired a distinctive character in the mind of the consumer. In this case, the Court did not find any secondary meaning of "Pe" as such that might have been acquired in the minds of consumers by its use after the grant of the trademark registration of 'PhonePe'.

Furthermore, the court found that the trademarks 'PhonePe' and 'BharatPe' were composite, "Pe" is used by the plaintiff to refer to "Pay", because of the nature of the services provided by the plaintiffs and the defendants, "Pay" is a descriptive mark, and if the Plaintiffs had used the sign "Paid" instead of "Pe", they would still not be able to file a lawsuit. The Court found except "Pe" suffix, there is nothing confusingly or phonetically similar in the marks of the two parties including the nature of services provided by them. In addition, there is a triangular device symbol attached to "Pe", which is distinctive to the defendant's trademark and is not included in the plaintiff's registered trademark.<sup>14</sup>

While ratifying the dominant characteristic rule in *PhonePe Private Limited vs Ezy Services and Anr*, the Court held that the term "Pe" used in trademarks 'PhonePe' and 'BharatPe', was descriptive as it meant "Pay". Therefore, it cannot be considered the dominant element of those brands.<sup>15</sup> The application was dismissed. However, the defendants were required to keep the accounts of money earned through the use of the 'BharatPe' mark and submit a semi-annual audit report, before the Court.<sup>16</sup>

## CONCLUSION

PhonePe and BharatPe are two digital payment platforms in India that offer users the convenience of making transactions online. While PhonePe is a digital wallet and online payment platform owned by Flipkart, BharatPe is a merchant-focused payment platform that provides small and medium-sized businesses with payment options, loans, and insurance. PhonePe has partnerships with leading banks in India, allowing users to link their bank accounts to the platform and make seamless transactions. On the other hand, BharatPe offers a

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<sup>14</sup> Nikhil Mishra, 'Exclusivity on Parts of Trade Marks an Analysis With Reference to Pe and Kind' (*Manupatra*, 4 June, 2021) <<https://articles.manupatra.com/article-details/Exclusivity-on-parts-of-Trade-Marks-An-analysis-with-reference-to-Pe-and-Kind>> accessed 8 May 2023

<sup>15</sup> Anoop Verma, Garima Raonta, Pulkit Doger, 'Rule of Anti Dissection vs Rule of Dominant Features a Legal Conundrum' (*Lakshmisri*, 24 July 2021) <<https://www.lakshmisri.com/insights/articles/rule-of-anti-dissection-v-rule-of-dominant-feature-a-legal-conundrum/>> accessed on 8 March 2023

<sup>16</sup> <[https://www.livelaw.in/pdf\\_upload/chs15042021sc2922019091924-392391.pdf](https://www.livelaw.in/pdf_upload/chs15042021sc2922019091924-392391.pdf)> 'accessed 8 March 2023'

range of payment options, including UPI, QR code payments, and credit/debit card payments, to enable merchants to accept digital payments from customers.<sup>17</sup>

PhonePe's plea for seeking a permanent injunction against BharatPe for using the "Pe" suffix in its application was denied by the Delhi High Court. Justice C Hari Shankar, a single-judge bench, dismissed PhonePe's plea, reasoning that the suffix "Pe" alone does not grant exclusive rights to PhonePe. The Judge further stated that there was a misleading similarity between the plaintiff's and defendant's suffixes which was that both had the same purple color. Therefore, there is no provision for an interim order against the defendant. The application made by Plaintiff was rejected by the Delhi High Court, citing insufficient evidence. Judge Shankar said: "The evidence presently at hand is insufficient to come to a definitive conclusion that the "Pe" suffix would, in the public consciousness, indelibly be associated with the plaintiff's services."<sup>18</sup>

The conflict between the two Fintech Companies has persisted since 2018 when BharatPe was introduced. PhonePe served its initial legal notice to BharatPe in August 2018, seeking the removal of the "Pe" suffix.<sup>19</sup> In January 2021, PhonePe filed a lawsuit against BharatPe, alleging trademark infringement due to the similarity between BharatPe's logo and user interface with PhonePe's. The Delhi High Court initially ruled in favor of PhonePe, but the two companies eventually settled in May 2021. As part of the settlement, BharatPe agreed to make certain changes to its logo and design to make it more distinct from PhonePe's, and both companies agreed to refrain from making derogatory comments about each other.<sup>20</sup>

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<sup>17</sup> Yashvardhan Ranat, 'Explained PhonePe v BharatPe Trade Mark Dispute Pe Pay As You Go' (*SCC OnLine Blog*, 19 May 2021) <<https://www.sconline.com/blog/post/2021/05/19/explained-phonepe-v-bharatpe-trade-mark-dispute-pe-pay-as-you-go/>> accessed on 9 March 2023

<sup>18</sup> Nupur Thapliyal, 'Cannot Claim Exclusivity on Pe Suffix Delhi High Court Refuses to Grant Interim Relief to PhonePe in its Plea Against BharatPe' (*Live Law*, 27 May 2021) <<https://www.livelaw.in/news-updates/cannot-claim-exclusivity-on-pe-suffix-delhi-high-court-refuses-to-grant-interim-relief-to-phonepe-in-its-plea-against-bharatpe-173174>> accessed 9 March 2023

<sup>19</sup> Kriti Bhalla, 'Has the Legal Battle between PhonePe and BharatPe Over Pe Been Going on For Too Long' (*The BUSINESS INSIDER*, 27 October 2021) <<https://www.businessinsider.in/business/startups/news/has-the-legal-battle-between-phonepe-and-bharatpe-over-pe-been-going-on-for-too-long/articleshow/87299198.cms>> accessed 9 March 2023

<sup>20</sup> Yashvardhan Ranat, 'Explained PhonePe v BharatPe Trade Mark Dispute Pe Pay As You Go' (*SCC OnLine Blog*, 19 May 2021) <<https://www.sconline.com/blog/post/2021/05/19/explained-phonepe-v-bharatpe-trade-mark-dispute-pe-pay-as-you-go/>> accessed on 9 March 2023