

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved On : 01.09.2010
Pronounced on 28.01.2011

+

I.A. No.9089/2010 in CS (OS) 1407/2010

TATA SONS LIMITED

..... Plaintiff

Through: Mr. Vinod Bobade, Sr. Advocate
with Mr. Praveen Anand, Mr. Hari Shankar,
Mr. Dhruv Anand and Mr. Achuthan Sreekumar, Advocates.

versus

GREENPEACE INTERNATIONAL & ANR

..... Defendants

Through: Mr. Saikrishna Rajgopal with Mr. J. Sai Deepak and Mr.
Siddharth Chopra, Advocates for D-2.
Mr. Sujoy Kumar with Mr. Arindam Ghose and
Mr. Ashish Verma, Advocates for D-1.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

- | | | |
|----|---------------------------------------------------------------------------|------|
| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes. |
| 2. | To be referred to Reporter or not? | Yes. |
| 3. | Whether the judgment should be reported in the Digest? | Yes. |

MR. JUSTICE S.RAVINDRA BHAT

%1. The plaintiff claims a decree for permanent injunction, and a decree for damages to the extent of ₹10 crores, against the defendants. This order will dispose of the plaintiff's application for temporary injunction.

2. The suit avers that the plaintiff is India's oldest and largest private sector employer, consisting of over 100 major operating companies, 28 of which are public limited and employing over 3,63,000 people. For the fiscal year 2008-09, Plaintiff's annual revenues exceed US \$70 billion of the nearly 65% was generated outside India and the balance 35% within India. The

revenue generated within India was equivalent to 2.1% of India's Gross Domestic Products at Current market price, and the exports per USD 6.3 billion, equivalent to 3.4% of India's exports. The plaintiff has over 3.5 million shareholders and its assets are valued at US\$ 51.7 billion. It is contended that TATA companies have laid the foundation in the industrial core sectors, pioneering the iron & steel, textiles, power, chemicals, hotels and automobile industries in India, and that the TATA brand encompasses diverse businesses and services such as computers and computer software, electronics, telecommunications, financial services, mutual funds, tea and publishing. It is further stated that the TATA group was ranked 13th in the list of World's 50 Most Innovative Companies by Business Week, for the year 2009. Further, the TATA brand has also been ranked 65th among top 100 brands worldwide, listed by Brand Finance, (an independent company focused on the management and valuation of brands) Global 500 Report March 2010. Further, for the year 2009, the Plaintiff was ranked as the world's 11th most reputed company according to a study compiled by United States based Reputation Institute. Documents pertaining to the 'well-known' status, reputation and goodwill enjoyed by the plaintiff company have been filed in the present proceedings.

3. It is stated that the plaintiff has been continuously and consistently using the trademark and trade name TATA, which is a rare and distinctive patronymic name possessing the distinctiveness of an invented word, for its own business activities and those of companies promoted by it. The use of the trademark and name TATA by the plaintiffs' predecessors in business dates back to 1868. The plaintiff contends that TATA has acquired an excellent reputation from the beginning and down the decades, it has consistently been associated with, and denotes the conglomeration of companies forming the TATA Group, colloquially also referred to as the House of TATA, which are known for high quality of products manufactured and or services rendered under the trademark / name TATA. The house of TATA consists of over 100 companies which use TATA as a key and essential part of their corporate name. The plaintiff refers to several overseas TATA companies, philanthropic bodies and autonomous units. The plaintiff claims proprietorship of the TATA trademark due to prior adoption, long continuous and extensive use and advertising, and the consequent reputation accruing to it. The plaintiff, as proprietor of the TATA mark enjoys exclusive rights.

4. In addition to the common law rights that have accrued to the plaintiff by virtue of the aforesaid facts, it is also the registered proprietor of several TATA formative trademarks in relation to various goods across various classes of the Fourth Schedule of the Trade Marks, Rules, 2002. A tabulated list of the plaintiff's trademark registrations is filed along with representative copies of a few trademark registration certificates. By virtue of the said registrations, the plaintiff has the exclusive right to use the trademark TATA in relation to the goods covered there under and to obtain relief in respect of the infringement of the registered trademarks. The Plaintiff also owns trademark registrations for the word TATA in over 50 countries besides India. Copies of trademark registration certificates etc. of the trademarks owned by the plaintiff company are filed in the present proceedings.

5. The Plaintiffs are also the proprietor of the trademark TATA as well as the "T within a circle" device; other trademarks with the TATA logo or the "T" device under various classes. Further the plaintiff also is copyright owner to various pictorial representations of the "T within a circle device" copies of certificate for use in legal proceedings and copies of certified true copies of trademark registration certificates etc., of the trademarks owned by the plaintiff company are produced along with the suit. The long and extensive use of the plaintiff's trademark TATA has resulted in its unparalleled reputation and goodwill and it has therefore acquired the status of a "well-known" trademark. The plaintiff alleges that it has successfully and vigorously enforced its trademark rights in the mark TATA in respect of various goods and services.

6. The Dhamra Port Company Limited (DPCL) is a 50 – 50 joint venture of Larsen and Toubro limited and TATA Steel limited (a publicly listed company of which the plaintiff is the promoter). DPCL was awarded a concession by Government of Orissa to build and operate a port north of the mouth of river Dhamra in Bhadrak district on BOOST (Build, Own, Operate, Share and Transfer) basis for a total period of 34 years including a period of 4 years for construction. It is stated that the Plaintiff/ DPCL have taken all the necessary permission and clearances from all appropriate government authorities to go ahead with the construction with the Dharma Port, which would be the most cost-effective and efficient port on the Eastern Coast of India. It is further submitted that various objections in regard to environment protection, pollution coastal zone regulation etc., had been raised, considered and dealt with by the appropriate regulatory authorities and appellate bodies.

7. The plaintiff submits that the first defendant, Greenpeace International is a non-profit organization, with a presence in 40 countries across, Europe, the America, Asia and the Pacific. Printouts from the Defendants web-site are filed in the present proceedings. The second defendant, Greenpeace India is the Indian affiliate of the first defendant. It is submitted that despite all regulatory clearances having been obtained for developing Dhamra as an eco-friendly port, the defendants have been raising concerns about the alleged probable dangers to the nesting and breeding of Olive Ridley Turtles by the proposed port at various quarters, being raised by the Defendants / third parties, which are based on false, frivolous and misleading facts. The plaintiff submits that the defendants have gone a step ahead and made an online game by the title “*Turtle Vs. TATA*”. A screenshot of the same is filed with the suit. It is stated that a mere look at the defendant’s game’s screenshot reveals how they have unauthorizedly used the plaintiff’s trade mark, “TATA” as well as the “T” within a circle device without the permission of the plaintiff thereby infringing its trade mark rights. The plaintiff further submits that the defendant has not only infringed the plaintiff’s trade mark rights, but is also maligning its reputation. A look of the Article titled “Campaign 2.0: Turtle Vs. Tata, the Game” published on June 29, 2010 in the WALL STREET JOURNAL (available at <http://blogs.wssj.com/indiarealtime/2010/06/29/campaign-20-turtle-vs-tata-the-game/>) illustrates this. A screen shot of the said article is produced with the suit. In the screen shot, the article states as follows :

“The aim of the colourful and noisy video game is to help the yellow turtles eat as many little white dots as possible without running into Ratty (presumably after Ratan Tata, chairman of the Tata Group), matty, Natty or Tinku”.

Further, by the impugned game “TURTLE Vs. TATA” the Defendants are spreading the following defamatory remarks and statements about the plaintiffs:

“... while dodging the TATA demons if you eat a power pill, you will be gifted with super-turtle powers to vanquish the demons of development that are threatening your home”

Copies of articles/documents and printouts pertaining to the defendant wherein such derogatory remarks against the plaintiff has been produced along with the suit.

8. The plaintiff submits the impugned game and the defendant’s use of the TATA mark and T device within a circle, amounts to defamation, with the ulterior motive of damaging its reputation. This is also motivated at prejudicing the plaintiff’s immense goodwill, as well as the

reputation of Mr. Ratan Tata, the Chairman of Tata Steel. The plaintiff also alleges that this is aimed (by the defendants) to create a false impression with members of the general public, about its activities. It is also urged, besides that the defendants have demonstrated their dishonesty by putting forth wrong facts and information to the public at large with the ulterior motive of maligning and defaming the TATA group.

9. It is urged that the Court has, under Order XXXIX, Rule 2, Code of Civil Procedure, ample powers to precisely issue a temporary injunction of the nature sought by the plaintiff. The plaintiff's senior counsel submits in this regard, that an *ad-interim* injunction can always be granted if the words used or the facts relied on by the defendant, in the impugned libel or defamatory statement, are false. He relies, for this purpose, on the ruling reported as *Thorley's Cattle Food Co. v. Massam*, (1880), 14 Ch. D. 781 (OA). The Court had, there, held that Courts have jurisdiction in an action of libel or slander to restrain by injunction either before or at the trial any further publication of such libel or slander, but before the trial such jurisdiction will be exercised with great caution. The Court also held that in order to obtain an interim injunction, the plaintiff must prove that the words complained of are untrue, and that therefore any subsequent publication by the defendant would be *mala fide*. The plaintiff also relied on *Slim v Daily Telegraph*, 1968 (1) All ER 497, where the Court indicated that the Court must scrutinize whether the defendant was actuated by malice, in order to determine whether the remedy of a temporary injunction was apt or appropriate, in the circumstances before it.

10. The plaintiff also submits that although the ordinary or normal rule in cases involving loss of reputation is to award damages after a full trial, the Court at the same time is sensitive if the intentions of the person leveling imputations or making defamatory statements or malicious are found to be false, and will not hesitate to grant injunction to prevent harm. It is argued that in this context the right to free speech cannot be construed as a license to publish defamatory matter as it would tarnish and injure the fair name and reputation of another, beyond repair. The plaintiff relies upon the judgment reported as *Harishankar v. Kailash Narain*, AIR 1982 M.P. 47; the judgment reported as *Southern Petro Chemicals Industries Corporation Limited v. A.S. Mani*, AIR 2001 Mad 119 and the judgment reported as *Shree Maheshwar Hydrel Power Corporation Ltd. v. Chitroopa Palit and Another*, AIR 2004 Bom 143.

11. The plaintiff's senior counsel submits that the defendant has intentionally and calculatedly targeted Tata Sons alone for the defamatory statements. It is submitted in this regard that Tata Sons is only 50% shareholder/stake holder in the joint venture for setting up of the port and which is for the benefit of the State of Orissa. Therefore, to target the Tata's by drawing the attention of the public to its trademark and the logo is not only malicious but untrue as the impression sought to be conveyed is that the entire project has been conceived, established and is owned by the Tata's. It is submitted that portraying the plaintiff as a demon in the game with pointed use of the "T" device is malicious, as it is intended to convey to the world at large the so called heartlessness in setting up the Dhamra Project. Had the intention of the defendant really been to express dissent, and if indeed they wanted to speak in hyperboles there was other legitimate means of doing so.

12. The plaintiff further argued that regardless of whether compensation can be granted at the final decree stage, the Court is not powerless when faced with the question of protecting the reputation and goodwill of a citizen or the corporation. It is further submitted that the real object of the game and the article portraying the plaintiff as diabolical is to convey to the world also that the Dhamra Port Project is endangering the life of Olive Ridley Turtles and a statement which is not only untrue but also palpably false. To support this, the plaintiffs rely upon an order dated 7th May, 2000, whereby the Environment Appellate Authority had specifically granted upheld the environment clearance, granted to the project, (by the Central Government, on 4th January, 2000) after going into all aspects of the issue. A copy of the order has been filed. It is also argued that once the State Government and the concerned Statutory Agency empowered to examine the ecological impact of the project have satisfied themselves in accordance with law, it is not open for anyone to level insinuations or impute motive on the plaintiff, suggesting that the project would result in extinction or widespread damage to the turtle species.

13. In support of their submission that the defendants could well have relied on other means of commenting or criticizing the Dhamra Project, the plaintiffs rely upon the following passage in *Shree Maheshwar case (supra)* :

“XXXXXX

XXXXXX

XXXXXX

51. The main challenge of the Respondents appears to be that the very Maheswar Hydro-Electric power project ought to be scrapped and in that light

the respondents, have been making all kinds of statements and impugations. The whole tenor of the respondents appears to be that the respondents are not agreeable to have such a power project at all the State of Madhya Pradesh. If that be so, the respondents cannot be justified in making wild allegations as pointed out hereinabove. If the respondents were to only legitimately criticize the Appellant Company, they could have very well done the same, however, using of such offensive terminology as indicated hereinabove, would seriously jeopardize the credibility and reputation of the Appellant Company, which would not be proper. The scrutiny of the material which has been relied upon by the learned Counsel for the respondents do not at all justify using of such expressions regarding the conduct of the Appellant Company. The contention of Mr. Desai, the learned Counsel for the respondents that the Hon'ble Financial Minister in the House of Parliament, has used the expression"; loot of public money" with regard to defaulters, and hence, the respondents are also entitled to use the same expression, cannot be accepted at all. It may be noted here that the statement made by the Hon'ble Finance Minister was within the four walls of the Parliament and hence, the same was privileged. The respondents, however, do not have any such privilege to make such a type of statement by using such expressions.

52. Even the tenor of use of such expressions in the said Press Note quoted hereinabove, which has been complained of do not indicate that the same has been made bona fide and in the larger public interest. If the respondents were keen about making the statement in large public interest, there were means and ways by which the same could have been communicated, but not by using of such highly damaging expression. The respondents also have not taken the reasonable precaution of ascertaining the truth before publication.

XXXXXX

XXXXXX

XXXXXX

55. As pointed out hereinabove, the learned Judge of the Bombay City Civil Court has ignored the settled principle of law in India, mis-applied the principle of law in the sense, merely on the basis of a plea of justification taken by the Defendants, the Plaintiffs ought to be denied the interim injunction. The position of law as per the above principle is prevalent in England. However, in India, the settled principle of law is that a mere plea of justification by itself would not be adequate, but it should be supported by sufficient material subject to scrutiny by the Court for its veracity, and that the statement made should be bona fide and should be made in the larger public interest and that the Defendants had taken reasonable precaution of ascertaining the truth.

56. In fact, the learned Judge of the Bombay City Civil Court, while declining the interim relief has observed that the Defendants have prima facie shown justification though not of each colourable term in their publication. The learned Judge has also observed that the facts of their publication may smack of distaste and prejudice, which it would do well for an organization of repute to refrain from. That is to say the learned Judge has held that the Defendants have made a

statement which cannot be fully justified and they ought to have refrained from making such a statement. If that be so, the learned Judge of the Bombay City Civil Court ought to have granted injunction in favor of the Appellant Company, and by not granting the said injunction, after the above conclusions, the learned Judge of the Bombay City Civil Court has acted rather arbitrarily and capriciously.

XXXXXX

XXXXXX

XXXXXX”

14. The plaintiff further argued that the mode of publishing the defamation in this case is also objectionable as anything posted on the internet has propensity to cause greater and lasting damage. They rely upon the judgment of this Court in *Yahoo Inc! v. Akash Arora*, 1999 PTC 201, the Ontario Court of Appeal’s judgment in *Barrick Gold Corp. v. Lopehandia*, 2004 CanLII 12938 (ON C.A.), as well as the decision reported as *Dowjones and Company Inc v. Jameel*, 2005 EWCA (Civ) 75. In this context, it is submitted that unlike publication in the print media which can cause the same intensity of the damage to the individual, the reach of the internet and its widespread accessibility means that any defamatory or libelous material posted on it, causes greater damage and harm to the injury of the subject. Therefore the Courts have to view this aspect from a wider perspective while considering the balance of convenience and the likelihood of irreparable prejudice to the plaintiff who is the subject of defamation.

15. The plaintiff lastly argued that the use of T device and the Tata mark, although not in the course of trade, will amount to trademark infringement of dilution or tarnishment if one applies the appropriate tests evolved by the United States Courts. The plaintiff relied upon Section 29 (4) of the Trade Marks Act, 1999 and submitted that “use” of trademark is not confined merely to the defendant engaging itself in a trade or commercial activity, but other forms of speech or representation, which would tarnish the plaintiff’s mark. In this regard the plaintiff relies upon the judgment reported as *The Coca-Cola Company v. Gemini Rising Inc.*, 346 F.Supp 1183 (1972) as well as *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*; 507 F.3d 252 (4th Cir 2007).

16. The Greenpeace India Society (the second Defendant, hereafter called “Greenpeace India”) is an independent global campaigning organization that acts to change attitudes and behavior, to protect and conserve the environment and to promote peace; it was established on 28th of June, 2004, and has consistently espoused environmental issues and the impact of

development at the cost of the environment. Greenpeace India alleges that the present suit is a strategic Lawsuit against public participation (popularly known as SLAPP suits), intended to silence, censor, and intimidate the answering defendant and other third parties, who are concerned with the negative impact of the Dhamra port project, has on one of the largest nesting grounds for the Olive Ridley Sea Turtle and two adjoining protected Areas. It is submitted that the present suit has been instituted with the only motive of stifling honest and *bona fide* criticism by threatening to burden the defendants with have financial consequences. The plaintiff by virtue of the present suit proceeding is seeking damages of ₹10 crores, which according to its own averments has no justification or basis. The plaintiff is intimidating the second defendant and others from participating and engaging in the debate over the impact on the environment and habitat due to the construction of the Dhamra Port Project, in the State of Orissa (hereinafter referred to as the Project), of which, the plaintiff's group company Tata Steel Ltd., is one of the promoters/ shareholders.

17. It is submitted that the Dhamra Port company limited (DPCL) is a joint venture between Larsen & Toubro limited and Tata Steel Ltd., the latter, a subsidiary company of the plaintiff, has undertaken a Project of constructing a massive deepwater industrial port north of the mouth of the river Dhamra, in Bhadrak district, in the State of Orissa. The construction of the port is less than 15 kilometres from Gahimatha, one of the world's largest Olive Ridley Sea Turtle nesting beaches, and just five kilometers from the Bhitarkanika National Park, India, second largest mangrove forest and home to the saltwater crocodile. The project is to become operational by August 2010. The defendants say that the port's ongoing expansion work is believed to have serious long-term environmental and social implications. It endangers the surrounding mangrove forests and the wildlife, particularly the endangered Olive Ridley Sea Turtles, a protected species under Schedule I of the Indian Wildlife (Protection) Act, 1972, and vulnerable, according to the International Union for Conservation of Nature Red Data Book. They are also protected under the Migratory Species Convention and Convention on International Trade on Endangered Species of Wild Flora and Fauna (CITES). It is urged that India is a signatory to both these conventions and that in 1997, the nesting beaches and habitats were granted legal protection as part of the Gahirmatha Marine Sanctuary. The close proximity of the port site poses a clear and significant risk to the Gahirmatha Marine Sanctuary and the surrounding turtle nesting and breeding habitats. There is a substantial risk to the survival and thriving of the endangered Olive Ridley turtles due to the damage caused on account of dredging, light and chemical pollution, oil

or chemical spills, continuous shipping traffic, danger of accident and secondary development on account of the port.

18. Greenpeace India urges that in view of significant threats to nearby protected areas, the endangered Olive Ridley Sea Turtles, the marine environment, and coastal communities, it has been highlighting the concerns through peaceful and non-violent means. It submits to having been working towards protecting one of the world's largest sea turtle mass nesting sites for the last five years. Greenpeace India claims being shocked on learning that the only assessment of the project was done over 10 years ago, without conducting any comprehensive environmental impact assessment study of the project, particularly compliance with the Forest (Conservation) Act, 1980. Greenpeace India, it is urged, also requested Tata Steel, Ltd. to consider relocating the port to a lesser ecologically sensitive site, away from turtle nesting and foraging grounds, and thereby comply with its commitments under the Principles of the UN Global Compact Initiative, of which the plaintiff is a participant. It is alleged that such requests have been of no avail. Greenpeace India submits that since the plaintiff and its group companies are perceived to be the main beneficiaries of the project, it and various other interested parties have been directing their protest and concerns to the TATA's. Greenpeace India also relies on a report voicing concerns about the negative impact of the Dhamra Port project on the environment and ecology, in the magazine "Scientists"; Greenpeace India relies on a report published in the year 2004, in which the Central Empowered Committee, (which has been set up by the Supreme Court) recommended that an alternative site be located for the port as the present site would seriously impact the Olive Ridley Turtles. Letters and correspondence by Greenpeace India, with various authorities, drawing attention to those concerns, are also relied upon. Greenpeace India contests the plaintiff's averments that the Dhamra Port project is legal, all relevant clearances have been obtained and that the criticism and protest against the project is without any basis of whatsoever nature. It is alleged that the plaintiff has deliberately suppressed from the Court that a proceeding as a part of Writ Petition No. 202 of 1995 relating to the project is pending before the Supreme Court of India, in which three reputed environmentalists, viz Mr. Bittu Sahgal, Mr. Shekar Dattatri and Mr. Romulus Whitaker have sought to intervene, through an application. It is submitted that the said interveners have raised serious concerns regarding the impact of the project on the endangered Olive Ridley turtles.

19. Greenpeace India claims that in order to raise awareness about various environmental issues and to garner public interest and participation in its such causes, it usually undertakes participatory campaigning. As a part of such campaigning, in relation to the project, the Defendant launched a Pac-Man inspired video Game TURTLES VERSUS TATA (hereinafter referred to as “the Game”), on the 30th anniversary of the game, to protest and garner public opinion against the project. The online game is designed as creative, peaceful and non-confrontational platform to draw attention to the threat that the Olive Ridley Sea Turtles are facing due to the Project. It is submitted that the message conveyed by the game is that the endangered Olive Ridley Turtle is in danger of losing its habitat at Gahiramatha because of the construction and setting up of the Port. The on-line game has been created to raise awareness about the danger that the project poses to local marine life in the region.

20. Greenpeace India alleges that a reading of the suit averments reveals that it is intended to be for alleged defamation rather than infringement of trademarks, which has also been joined with a view to address the deficiencies in the plaintiff’s claim for alleged defamation. It is submitted that the plaintiff itself has candidly stated in the plaint that the entities defamed are Dhamra Port Company Ltd. and Tata Steel Ltd. The other TATA entities have not been impleaded. It is submitted that the plaintiff has no *locus standi* to institute the proceeding for alleged defamation of the Dhamra Port Company Ltd., and the suit deserves to be dismissed on this ground. Without prejudice to this contention, Greenpeace India submits that its use of the TATA trademark and “T” device does not amount to trademark infringement, as it is not commercial usage, meant to profit or gain from the goodwill or reputation of such marks. It is alleged that a bare perusal of section 29 (4) of the Trade Marks Act 1999 would show that it envisages the use of a registered trademark, for purposes of criticism, fair comment and parody so that such use would not amount to infringement of trademark. The fact that use of a trademark for any of the aforesaid purposes, is justified under the ground of freedom of speech and expression is abundantly clear from the use of the words “*without due cause*” in Section 29 (4) of the Trade Marks Act, 1999. Further, in order to amount to dilution, as alleged in the suit, Section 29 (4) mandates that the use (of the mark in question) must be in the course of trade. It is submitted that the acts of Greenpeace India amount to a peaceful, creative and non violent/non confrontationist mechanism of registering protest and concerned against the project, which is perceived as a an environmental disaster in the making. The use of the TATA marks by the

second defendant is in a descriptive context so as to be in a position to criticize and protest against the role of the plaintiff and its group companies in the project. The use of the TATA mark and logo is essentially nominative in nature and cannot amount to infringement of trademark(s). It is submitted that criticism, objections and protest, albeit in a non-violent form is not necessary on account of what is perceived by the Greenpeace International and its volunteers to be an uncompromising and insensitive stand, adopted by the plaintiff's group companies. The use of the TATA marks, in the context and manner depicted in the game is, therefore, entirely justified, with due cause and more importantly, does not seek to take unfair advantage of the Tata marks, which are subject matter of the present suit. It is also submitted that Greenpeace India has not defamed the plaintiff or any person associated with it, and intends to focus public attention to the potential environmental dangers posed by the project to the ecology of the area in question. The game in question is merely depicting the challenges that Olive Ridley turtles would have overcome in order to survive in spite of the Project.

21. Greenpeace India submits that the reference to the word "Demons" is only with a view to emphasize and drive home the point that development through the project in question, tantamounts to a "demon" which threatens the existence and survival of the Olive Ridley. The juxtaposition of the word "demons" with TATA and with reference to the project, is merely hyperbole. The word "demons" have been used as an overtly emphatic expression primarily with the purpose of making a strong impact impression without intending it to be taken literally. When the word and indeed the entire game is viewed in this light, it can hardly be said to be defamatory. The game succinctly and creatively enables the registering of protest and concerns in relation to the future of the Olive Ridley turtles in the region and the juxtaposition of the word "Demons" with TATA and indeed with reference to the projects itself, as a mere hyperbole and must be seen and viewed in the context of fair criticism and comment which is guaranteed as freedom of speech and expression under the Constitution of India. Section 29 (4) of the Trade Marks Act, 1999, itself is so worded so as to enable the use of a trademark without amounting to dilution it is with due cause and in an entirely non-commercial context. It is submitted that the plaintiff and its group companies, having undertaken to embark on a sensitive and controversial project, having myriad environmental and other implications, ought not to be permitted to abuse the process of law to scuttle, suppress and muzzle fair comment and criticism, which is not only imminent but necessary and inevitable. It is submitted that the larger objective of the Game

being to arouse and mobilize public opinion and awareness, against a project that it honestly perceived as an environmental disaster in the making any restraining/ restriction on the game would amount to an unreasonable fetter and restriction on the fundamental right of freedom of speech and expression guaranteed under the Constitution of India. It is submitted that Greenpeace India is acting without malice. It is urged that Greenpeace India sees the Internet as an extremely powerful, inexpensive and speedy mechanism of mobilizing public opinion on a countrywide and global scale. It is submitted that the freedom of speech and expression guaranteed under the Constitution of India is without any restrictions circumscribed by limitations of medium (like the internet), provided the expression is otherwise legal. The fundamental rights and freedoms guaranteed under the Constitution of India, override and render irrelevant the rights and immunities that may be available to an entity or person under any other law, provided such expression could be justified as legal in the context of circumstances they were made. It is averred that the impugned game and the text attacked as libelous or objectionable are honest and justified criticism. Every citizen has a right to express his honest opinion about the correctness and consequences of a corporate entity engaged in matters of public interest. The defendant's criticism in the present matter is honest, with justifiable reasons on a matter of public importance and there is nothing in their conduct which demands restriction on it.

22. Greenpeace India relies on the judgment of the Supreme Court reported as *S. Rangarajan v. P. Jagajivan Ram*, 1989 (2) SCC 574 to submit that terms and expressions, in a defamation case, are not to be seen in isolation of their context, and the Court must allow a certain latitude to the author or maker who is exercising his right to free speech or fair criticisms in regard to matters of public concern. Counsel urged that the importance of free speech in a democracy, in matters of moment and issues that concern the people, cannot be undermined, and was recognized long ago in England, in *Bonnard v. Perryman*, [1891] 2 Ch 269, where it was held that exceptional caution has to be exercised by the Court while exercising jurisdiction to interfere by way of injunction. Counsel emphasized that in the said decision, the Court highlighted that—
“...The right of free speech is one which it is for the public interest that individuals should possess, and,.... Until it is clear that an alleged libel is untrue, it is not clear that any right at all

has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions...”

23. Next, Greenpeace India relied on *Greene v. Associated Newspapers Limited*, 2005 (1) All.ER 30, where it was held that if it is a known fact that the truth of defamation claims can only be tested at trial level then it would be appropriate for the Court not to award an interim injunction to the plaintiffs, as the other course would otherwise put an unreasonable burden on the concept of free speech. It was urged in addition, that the rule of caution enunciated in *Bonnard* (supra) has been approved and followed, by a Division Bench of this Court, in *Khushwant Singh v. Maneka Gandhi*, AIR 2002 Del 58. Learned counsel urged that this Court should also be mindful of the fact that the present suit, is an instance of a SLAPP SUIT, the sole objective of which is the plaintiff’s desire to muffle or stifle criticisms about the ecological damage threatened by the Dhamra Port Project. It was argued that though the Port is a joint venture, the real beneficiary after it comes up, is the Tata group, as it (the port) affords a proximate sailing point from which their products, such as steel, etc. can be shipped.

24. Refuting that the use of the T device and the TATA mark infringes the trademark, through dilution or amounts to unauthorized use, the defendants contend that on the contrary, the use is not for profit, or ridicule them (the marks) but to focus the public mind on the impact of the Tata’s on the project. Counsel relied on the ruling reported as *Esso Francaise SA v. Association Greenpeace France*, 2003 ETMR 66, holding that the right to free speech could not be subjected to restrictions at the behest of third parties’ intellectual property rights. Reliance was also placed on the South African Constitutional Court decision in *Laugh It off Promotions CC v. Freedom of Expression Institute*, (2005 ZAC 7; 2006 (1) SA 144 (CC) <http://www.saflii.org/za/cases/ZACC/2005/7.html>). The Constitutional Court had held that the parodific effect of trademark use cannot be de-contextualized, by the Court while examining a claim for trademark infringement, resulting in such use.

25. The first defendant, Greenpeace International, has filed a separate written statement. It argues that the second defendant, Greenpeace India is a separate an autonomous entity with which it (Greenpeace International) has a non-exclusive agreement permitting the latter to use the term “Greenpeace”. Greenpeace International also submits that it hosts a separate website. It

is argued on behalf of Greenpeace International that its arrangements with Greenpeace India are such that the latter takes independent decisions and is autonomous from the International organisation. Greenpeace International also urges that the objectionable game and website has not been published by it and not it be held responsible for the actions and publications of Greenpeace India, which are the subject matter of the present suit.

26. As is apparent from the above discussion, this case concerns the creation of an online game by Green Peace India called '*Turtle v. Tata*'. The principal objective of the game, as argued by Greenpeace India, is to bring to the public's notice the alleged destruction of the Olive Ridley Turtles' nesting habitat by the construction of the Dharma Port. This game has been fashioned in such a way, that the TATA logos essentially play the role of an antagonist. The turtle has to, in the game, strategically destroy the TATA logos. The plaintiff along with some third parties (The Wall Street Journal article) has interpreted the objective of the game as demonising of the TATA group. The other objection proffered by the learned counsel for the plaintiffs was that the construction of the Port (Dharma Port Company Limited) is a joint venture between TATA Steel and Larsen and Toubro, and thus the singling out of TATA Steel Company by Greenpeace India is an unfair reflection of the current factual situation, i.e. the joint venture. Furthermore, the plaintiff has also argued that the use of the TATA logo by the defendant is in violation of their common law rights *in rem* (proprietary rights) over the TATA logo. The arguments proffered by the learned counsel for the plaintiff are also that there is an implied defamation directed towards TATA Steel and thereby TATA Sons.

27. The defendant has categorically refuted the plaintiffs' submissions, and argued on two different levels. Firstly, the defendants in this case have argued that their use of the TATA logo is not in violation of S. 29 (4) of the Trade Mark Act 1999 (TMA). The defendant's arguments stem from the fact that S. 29 (4) of the TMA was drafted with the intention of curbing the use of registered trade mark by other parties in similar commercial interests, which in other words goes to show that registered trademarks per se are open to reasonable fair criticism, comment, and parody. The counsel for the defendant has further argued at a constitutional level; first being the Constitutional Fundamental Duties under Art 51A (g), and the second being the constitutional protection afforded under Art. 19(1) (a) to free speech. The second argument by

the defendant primarily consists of various environmental factors involved in the construction of the Dhamra Port by TATA Steel and Larsen and Toubro. Greenpeace India argues that the plaintiff has strategically circumvented and shown superficial compliance with various environmental laws. These arguments have been bolstered by the fact that the defendant has shown that there exists till date Writ Petition No. 202 of 1995 regarding the same matter in the Supreme Court, filed by leading environmentalists. Additionally the defendant has also pointed out that the construction of the Dhamra Port is in violation of statutory regulations for the protection of the Olive Ridley Turtles as enforced by the Wildlife (Protection) Act 1972, and also that the construction of the Dhamra Port has been successful as a result of the illegal acquisition of land under the Forest (Conservatory) Act 1980. The learned counsel for the defendant has also advanced an argument under the legal maxim of *locus standi*. The essence of the argument is that the House of TATA and the different TATA companies (including TATA Steel) are separate entities and thus have no *locus standi* for an alleged case of defamation and violation of the TMA against TATA Steel. The defendant further submits that the game, as well as use of the TATA logo and trademark do not amount to infringement, and are meant to be a parody. It is argued in this context that the use of the term “demon” is hyperbolic.

28. The English common law precedent on awarding interim injunctions in cases of defamation is set out by the case of *Bonnard* (supra). In *Bonnard* it was decided that an interim injunction should not be awarded unless a defence of justification by the defendant was certain to fail at trial level. The Court’s observations, widely applied in subsequent judgments are as follows:

“...[T]he subject-matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong. The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions... In the particular case before us, indeed, the libellous character of the publication is beyond dispute, but the effect of it upon the Defendant can be finally disposed of only by a jury,

and we cannot feel sure that the defence of justification is one which, on the facts which may be before them, the jury may find to be wholly unfounded; nor can we tell what may be the damages recoverable.”

Again, in *Fraser v. Evans*, [1969] 1 QB 349 Lord Denning MR stated the law as follows:

*“The court will not restrain the publication of an article, even though it is defamatory, when the defendant says he intends to justify it or to make fair comment on a matter of public interest. That has been established for many years ever since *Bonnard v. Perryman*. The reason sometimes given is that the defences of justification and fair comment are for the jury, which is the constitutional tribunal, and not for a judge. But a better reason is the importance in the public interest that the truth should out. ... There is no wrong done if it is true, or if [the alleged libel] is fair comment on a matter of public interest. The court will not prejudice the issue by granting an injunction in advance of publication...”*

Subsequently, in *Crest Homes Ltd. v. Ascott*, [1980] FSR 396 the Trial Judge granted an interlocutory injunction against the defendant who said that he would justify his assertions. Allowing the appeal and discharging the injunction, the Court (CA) held:

“(1) There was no reason to depart from the general rule that an interlocutory injunction will not be granted against a defendant in a libel action if he intends to plead justification unless the plaintiff can prove that the statement is untrue; (2) The plaintiff had not shown that the defendant’s statement was untrue...the line of authority is long and weighty that interlocutory injunctions in these cases will not be granted unless the plaintiff shows that the defence of justification will not succeed...”

In *Herbage v. Pressdram Ltd.*, [1984] 1 WLR 1160 Griffiths LJ restated the effect of the rule and then said (at p 1162H):

“These principles have evolved because of the value the court has placed on freedom of speech and I think also on the freedom of the press, when balancing it against the reputation of a single individual who, if wrong, can be compensated in damages.”

He refused to water the principles down. After summarizing an argument by counsel, which suggested that the combined effect of the Rehabilitation of Offenders Act 1974 and the decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] AC 396 justified a radical departure from the rule, he went on to say (at p 1163B):

“If the court were to accept this argument, the practical effect would I believe be that in very many cases the plaintiff would obtain an injunction, for on the American Cyanamid principles he would often show a serious issue to be tried, that damages would not be realistic compensation, and that the balance of convenience favoured restraining repetition of the alleged libel until trial of the action. It would thus be a very considerable incursion into the present rule which is based on freedom of speech.”

In *Holley v. Smyth*, [1998] QB 726, where the potency of the rule (in *Bonnard*) was reaffirmed the Court reiterated the principle as follows:

*“I accept that the court may be left with a residual discretion to decline to apply the rule in *Bonnard v. Perryman* in exceptional circumstances. One exception, recognised in that decision itself, is the case where the court is satisfied that the defamatory statement is clearly untrue. In my judgment, however, that is a discretion which must be exercised in accordance with established principles.”*

The *Bonnard* rule (against interim injunction restraining publication) was affirmed in *Martha Greene v. Associated Newspapers Ltd.*, [2004] EWCA Civ 1462, in the following terms, after quoting and relying on Halsbury’s Laws of England, 4th Ed, vol 28, para 167:

“The Law of Prior Restraint in Defamation Actions: the Rationale of the Rule

This survey of the caselaw shows that in an action for defamation a court will not impose a prior restraint on publication unless it is clear that no defence will succeed at the trial. This is partly due to the importance the court attaches to freedom of speech. It is partly because a judge must not usurp the constitutional function of the jury unless he is satisfied that there is no case to go to a jury. The rule is also partly founded on the pragmatic grounds that until there has been disclosure of documents and cross-examination at the trial a court cannot safely proceed on the basis that what the defendants wish to say is not true...”

....Because of the court’s reluctance to fetter free speech and because the questions that arise during the proceedings, such as whether the meaning is defamatory, whether justification or fair comment are applicable and as to malice, are generally for the jury, interlocutory injunctions are granted less readily in defamation proceedings than in other matters and according to different principles...”

29. From the above reasoning it follows that the Court will invariably not grant an interim injunction to restrain the publication of defamatory material as it would be unreasonable to fetter the freedom of speech before the full trial takes place, where each of the parties can argue in detail with the help of additional evidence. Similarly in this matter, it is incumbent

upon this Court to decide whether it would be reasonable to fetter the reasonable criticism, comment, and parody directed at the plaintiff, which to a large extent is protected by the Constitutional guarantee to free speech, to all the citizens of India. This point of view was also strengthened by a recent challenge to the old common law rule of *Bonnard* in the case of *Greene v. Associated Newspapers Limited*, 2005 (1) All.ER. 30, where it was decided that if it is a known fact that the true validity of the defamation claims will only be tested at trial level then it would only be appropriate for the Court not to award an interim injunction to the plaintiffs as it would otherwise put an unreasonable burden on the concept of free speech. After an elaborate survey of the law on the issue, it was held that:

*“This survey of the caselaw shows that in an action for defamation a court will not impose a prior restraint on publication unless it is clear that no defence will succeed at the trial. This is partly due to the importance the court attaches to freedom of speech. It is partly because a judge must not usurp the constitutional function of the jury unless he is satisfied that there is no case to go to a jury. The rule is also partly founded on the pragmatic grounds that until there has been disclosure of documents and cross-examination at the trial a court cannot safely proceed on the basis that what the defendants wish to say is not true. And if it is or might be true the court has no business to stop them saying it. This is another way of putting the point made by Sir John Donaldson MR in *Khashoggi*, to the effect that a court cannot know whether the plaintiff has a right to his/her reputation until the trial process has shown where the truth lies. And if the defence fails, the defendants will have to pay damages (which in an appropriate case may include aggravated and/or exemplary damages as well)”.*

30. That said, English common law has not completely abandoned the needs of a complainant in a case for defamation. *Woodward v. Hutchins*, 1977 (1) WLR 760 and *Frasier* (supra) taken together propound that when an interim injunction is denied to the plaintiff, he may pursue a claim in damages against the defendant; this is if the plaintiff has a reasonable belief that his name and status has been defamed. It was held (in *Woodward*) that:

“There is a parallel to be drawn with libel cases. Just as in libel, the courts do not grant an interlocutory injunction to restrain publication of the truth or of fair comment. So also with confidential information. If there is a legitimate ground for supposing that it is in the public interest for it to be disclosed, the courts should not restrain it by an interlocutory injunction, but should leave the complainant to his remedy in damages. Suppose that this case were tried out and the plaintiffs failed in their claim for libel on the ground that all that was said was true. It would seem unlikely that there would be much damages awarded for breach of confidentiality. I cannot help feeling that the

plaintiffs' real complaint here is that the words are defamatory; and as they cannot get an interlocutory injunction on that ground, nor should they on confidential information

31. However in the current suit, as the plaintiff has submitted that there is no recognized method of ascertaining the amount for damages for defamation (i.e. Rs 10,000,000). Therefore it is submitted that the amount of damages asked for by the plaintiff to a large extent is difficult to establish and award. The other point proffered by the Lord Denning in the cases of *Woodward* and *Frasier* (and also in *Greene*, subsequently) was that it would be unjust to fetter the freedom of expression, when actually a full trial had not taken place, and that if during trial it is proved that the defendant had defamed the plaintiff, then should they be liable to pay the damages. *Frasier* also stated that a successful claim for a permanent injunction at a later stage would obviously negate the amount of defamation created by the defendants at the pre-trial level. The *ratio* for not granting an injunction at an interim level is essentially because it would be too onerous on the defendant to either stop publication of the material or that it would be an unjust restriction on the freedom of expression.

32. This Court is also bound to follow the *Bonnard* principle, further, for the reason that in *Khushwant Singh*, a Division Bench had noticed, and followed it, although in a slightly different context, i.e. assertion of privacy and defamatory matter in the publication. Nevertheless, the *Bonnard* rule, as noted in *Fraser* and *Woodward* was applied. The Court is bound by precedent to defer to *Khushwant*.

33. The plaintiff had argued that the damage almost certainly likely to result to the plaintiff would be incalculable and uncompensable if the temporary injunction were to be refused. It was urged, in this context, that the plaintiff's global reputation as manufacturer and service provider in a range of products and services comprehends its brand image, as one which insists on excellence, and cares for people and the environment. Allowing the defendant to spread disinformation about its involvement in a project, the objective of which is to promote development and usher prosperity to the people of Orissa and the nation as a whole, and in the process tarnish the plaintiff's image would be disastrous as no amount of monetary damages can compensate the injury that would be caused, in the meanwhile. It was therefore urged that Order XXXIX, Rule 2 empowers the Court to issue appropriate orders of injunction to stop

continuing acts of defamation. The plaintiff bases its claim for injunction against the defendant, stating that the latter's insinuation, through the game and the write up, which forms part of the publication, that the project would cause destruction, (to the Olive Ridley turtle nesting grounds) is *mala fide*. The plaintiff argues that it is only a joint venture partner, and that the project had received all the necessary statutory clearances and government approvals. In the process of scrutiny by the Statutory Authorities and the Government, the question of environmental damage and adverse impact to the Olive Ridley turtles' nesting grounds and habitat had received careful scrutiny. In the circumstances, the defendant indulged in falsehood, while portraying that the habitat was endangered. Therefore, they cannot escape a temporary restraint order. The defendant argues, on the issue that the grant of approval does not mean that the likely or potential adverse impact on Ridley turtles' habitat is not there. They point to the concerns voiced by environmental activists, and their attempt to seek judicial redress through intervention in a pending case, before the Supreme Court. They also rely on a report by the Central Empowered Committee.

34. While the plaintiff's invocation of the Court's power under Order XXXIX, Rule 2 cannot be faulted, the sequitor to it, that it is entitled to injunction on account of the defendant's false or untrue statements, and therefore their *mala fides* is not as easy to deduce. The fact that it is not Greenpeace India alone which is voicing concerns about the alleged or potential destruction about the Olive Ridley turtles' habitat and nesting grounds, is clear because environmental experts appear to have written about it, and sought to intervene in Supreme Court proceedings. It is quite possible that the concerns are genuinely held beliefs, even backed by materials. That the project received clearances and approvals, only discloses the truth of that fact, i.e. that it was granted legal sanction and permission. Yet, it is open to all – especially more in a plural democracy such as in India, to hold views, based on whatever materials the person concerned is relying upon – that the project indeed is ecologically disastrous – potentially, notwithstanding the clearances issued or granted by the statutory and government agencies. Such beliefs and their articulation cannot be characterized as *mala fide*. As far as portraying the plaintiff as a demon is concerned, the Court is unpersuaded that it amounts to a *mala fide* expression. The defendant's position that the use of the term and depiction of the TATA logo

and device is hyperbolic, and exaggerative, appears to be more reasonable. It is not as if the plaintiff is being painted as demons, in all their activities; what is attacked through the game, and awareness sought to be spread is the *potential or likely destruction*, which the defendant believes would occur, if the Dhamra port project

35. In this context, it would be useful to notice *Texas Beef Group v. Winfrey*, 201 F.3d 680. At issue, in that case, was whether *The Oprah Winfrey Show* and one of its guests knowingly and falsely depicted American beef as unsafe in the wake of the British panic over “Mad Cow Disease.” The Court held that no knowingly false statements were made by the appellants. The Circuit Court (in appeal) observed that:

“His statement comparing Mad Cow Disease to AIDS was hyperbolic, and Winfrey highlighted the statement as “extreme” during the show’s broadcast. As this court noted in Peter Scalamandre & Sons, Inc. v. Kaufman, 113 F.3d 556, 562 (5th Cir.1997), “exaggeration does not equal defamation.” Lyman’s statements comparing the United States’ cattlemen’s and government’s reaction to BSE to that in Great Britain and bewailing the failure to take any “substantial steps” to prevent a BSE outbreak in this country were a sincerely held opinion supported by the factual premise that only a mandatory ban on ru minant-to-ruminant feeding would disperse with the danger...”

In another case, the use of hyperbole and exaggerated forms of speech, was held not to entitle a plaintiff claiming injunction against defamation. This was in *Peter Scalamandre & Sons, Inc. v. Kaufman*, 113 F.3d 556, 562 (5th Cir.1997). The facts there were that in 1989, New York City entered into a consent decree to cease disposing of its "sewer sludge" by dumping it into the ocean. Sewer sludge is what remains, in solid form, after wastewater from city sewers is processed and treated. New York City was in dire need of a new way to dispose of its sewer sludge, and Merco Joint Venture was formed to provide a solution to this dilemma. In 1992, the city contracted with Merco to dispose of up to thirty percent of the city's sewer sludge. Merco originally planned to ship the sludge to Oklahoma, and dispose of it by spreading it on grassland. However, Merco could not comply with Oklahoma environmental regulations in time to accommodate its contract. Merco promptly chose Sierra Blanca, a town in West Texas, as the new destination for the sludge. Merco obtained state permits to spread sludge in Texas in less than a month. Merco purchased a ranch in Sierra Blanca as a disposal site for the sludge shipments, which began arriving in July 1992. When sludge arrived from New York, Merco applied it to the ground at the ranch as a fertilizer. A TV feature was broadcast on this, with interviews and commentary by an Enviornment Protection Agency official. Merco sued the

official and the TV channel for defamation. The Trial Court granted relief; the Appellate (Circuit) Court reversed the judgment. It was held (by the Circuit Court) that the use of expressions such as “poison” and Merco’s activities were “*an illegal haul and dump operation*” were hyperbolic, and did not use to actual malice:

“18. Proving actual malice is a heavy burden. Proof that a defendant broadcast false statements will not alone show actual malice--the Supreme Court has made clear there is a significant difference between proof of actual malice and proof of falsity. Bose Corp., 466 U.S. at 511, 104 S.Ct. at 1965. Proof that a defendant spoke out of dislike, or with ill will towards another, also does not automatically meet the test of actual malice, even if his statements are shown to be false. Garrison v. Louisiana, 379 U.S. 64, 73, 85 S.Ct. 209, 215, 13 L.Ed.2d 125 (1964). If a publication is undertaken in good faith, failure to investigate the subject of that publication will not in itself establish actual malice. St. Amant v. Thompson, 390 U.S. 727, 733, 88 S.Ct. 1323, 1326-27, 20 L.Ed.2d 262 (1968). That a defendant publishes statements anticipating financial gain likewise fails to prove actual malice: a profit motive does not strip communications of constitutional protections. Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 667, 109 S.Ct. 2678, 2685-86, 105 L.Ed.2d 562 (1989). As long as a defendant does not act knowing his statement is false or with reckless disregard of its truth, actual malice will not be present.

19 There are no set criteria to measure when a defendant's actions constitute "reckless disregard" of the truth. The Court has noted that " '[r]eckless disregard' ... cannot be fully encompassed in one infallible definition." St. Amant, 390 U.S. at 730, 88 S.Ct. at 1325. "A 'reckless disregard' for the truth, however, requires more than a departure from reasonably prudent conduct." Harte-Hanks, 491 U.S. at 688, 109 S.Ct. at 2696. The standard for reckless disregard "is a subjective one--there must be sufficient evidence to permit the conclusion that the defendant actually had a 'high degree of awareness of ... probable falsity'." Harte-Hanks, 491 U.S. at 688, 109 S.Ct. at 2696 (quoting Garrison, 379 U.S. at 74, 85 S.Ct. at 215-16). The purpose of such a flexible standard is to ensure defendants have some degree of culpability before they are found liable for defamation. Herbert v. Lando, 441 U.S. 153, 171-72, 99 S.Ct. 1635, 1646-47, 60 L.Ed.2d 115 (1979).

20 In short, "the actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term." Harte-Hanks, 491 U.S. at 666, 109 S.Ct. at 2685. Culpability on the part of the defendant is essential. "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant, 390 U.S. at 731, 88 S.Ct. at 1325. That evidence is lacking here.”

Earlier, the US Supreme Court, in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), ruled that existing law adequately protected freedom of expression “*without the creation of an artificial dichotomy between ‘opinion’ and fact.*” In particular, it pointed to precedent providing “*that a*

statement on matters of public concern must be provable as false before there can be liability under state defamation law”... It was further held that:

“a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.” Id. at 20.

The Court further observed that “*rhetorical hyperbole*” is protected by doctrine requiring that allegedly defamatory statements (such as the characterization of a union dissident as a “*traitor*”) “*reasonably be interpreted as stating actual facts.*”

36. It must not be forgotten that the Court is, at this stage, merely weighing the arguments of parties without the benefit of rival evidence, made available after trial. While the plaintiff has been able to show that the relevant statutory clearances for the port project were available, at the same time, the defendant has placed on record the circumstance that the projects likely ecological adverse impact on Olive Ridley turtles has been spoken about by environmental experts, and is also subject matter of an intervention proceeding. The matter was also referred to the Central Empowered Committee. These justify the defendant’s position that there is another opinion, counter to that of the statutory authorities. If that is the case, the game is an instance where the defendant creatively (or reprehensively, depending from what is the perspective of the viewer) seeks to highlight the plight of the Olive Ridley turtles. The use of the TATA mark and logo, as *demonic*, is, in that context, *prima facie* exaggerative or hyperbolic, in respect of matters of public concern.

37. This Court next proposes to discuss the plaintiff’s argument that since the Internet domain or medium has a wider viewership, and is more readily accessible than other modes on which speech is expressed, the likelihood of injury if injunction is refused, is greater, and it is consequently, a significant factor to be dealt with, while weighing balance of convenience and irreparable hardship. The most relevant judgment relied upon by the plaintiff for this purpose, is the one of the Ontario Court of Appeals, in *Barrick Gold Corp.* The Court had observed that:

“Communication via the Internet is instantaneous, seamless, inter-active, blunt, borderless and far-reaching. It is also impersonal, and the anonymous nature of such communications may itself create a greater risk that the defamatory remarks are believed: see Vaquero Energy Ltd. v. Weir, [2004] A.J. No. 84 (Alta. Q.B.) at para. 17.

[32] *These characteristics create challenges in the libel context. Traditional approaches attuned to “the real world” may not respond adequately to the realities of the Internet world. How does the law protect reputation without unduly overriding such free wheeling public discourse? Lyrrisa Barnett Lidsky discusses this conundrum in her article, “Silencing John Doe: Defamation and Discourse in Cyberspace”, (2000) 49 Duke L.J. 855 at pp. 862-865:*

Internet communications lack this formal distance. Because communication can occur almost instantaneously, participants in online discussions place a premium on speed. Indeed, in many fora, speed takes precedence over all other values, including not just accuracy but even grammar, spelling, and punctuation. Hyperbole and exaggeration are common, and “venting” is at least as common as careful and considered argumentation. The fact that many Internet speakers employ online pseudonyms tends to heighten this sense that “anything goes,” and some commentators have likened cyberspace to a frontier society free from the conventions and constraints that limit discourse in the real world. While this view is undoubtedly overstated, certainly the immediacy and informality of Internet communications may be central to its widespread appeal.

Although Internet communications may have the ephemeral qualities of gossip with regard to accuracy, they are communicated through a medium more pervasive than print, and for this reason they have tremendous power to harm reputation. Once a message enters cyberspace, millions of people worldwide can gain access to it. Even if the message is posted in a discussion forum frequented by only a handful of people, any one of them can republish the message by printing it or, as is more likely, by forwarding it instantly to a different discussion forum. And if the message is sufficiently provocative, it may be republished again and again. The extraordinary capacity of the Internet to replicate almost endlessly any defamatory message lends credence to the notion that “the truth rarely catches up with a lie”. The problem for libel law, then, is how to protect reputation without squelching the potential of the Internet as a medium of public discourse [emphasis added].

[33] *These characteristics differentiate the publication of defamatory material on the Internet from publication in the more traditional forms of media, in my opinion.*

[34] *It is true that in the modern era defamatory material may be communicated broadly and rapidly via other media as well. The international distribution of newspapers, syndicated wire services, facsimile transmissions, radio and satellite television broadcasting are but some examples. Nevertheless, Internet defamation is distinguished from its less pervasive cousins, in terms of its potential to damage the reputation of individuals and corporations, by the features described above, especially its interactive nature, its potential for being taken at face value, and its absolute and immediate worldwide ubiquity and accessibility. The mode and extent of publication is therefore a particularly significant consideration in assessing damages in Internet defamation cases.*

.....

[44] *Secondly, the motions judge failed to appreciate, and in my opinion misjudged, the true extent of Mr. Lopehandia’s target audience and the nature of the potential impact of the libel in the context of the Internet. She was alive to the fact that Mr. Lopehandia “[had] the ability, through the Internet, to spread his message around the world to those who take the time to search out and read what he posts” and indeed that he had “posted messages on many, many occasions”. However, her decision not to take the defamation seriously led her to cease her analysis of the Internet factor at that point. She failed to take into account the distinctive capacity of the Internet to cause instantaneous, and irreparable, damage to the business reputation of an individual or corporation by reason of its interactive and globally all-pervasive nature and the characteristics of Internet communications outlined in paragraphs 28-33 above.*

[45] *Had the motions judge taken these characteristics of the Internet more fully into account, she might well have recognized Barrick’s exposure to substantial damages to its reputation by reason of the medium through which the Lopehandia message was conveyed...”*

Does internet use, for posting or publishing libellous material, call for a different standard – especially in considering a plaintiff’s claim for temporary injunction, is the question this Court has to address in the light of the plaintiff’s submission. Now, speech (or expression) can be in any form – printed, spoken, articulated through drama, poetry, mime, parody, or the like. The speaker can choose any medium he wishes to subject to its availability. Thus, material can be published in books, newspapers, magazines, or the underlying work performed in theatre, or films, or recited, or even sung. It can be recorded, and digitally stored in discs, tapes, and played or performed (or viewed) publicly or privately, later. Similarly, the content of articles or the views of someone can be broadcast over radio, or television, and repeatedly broadcast. The

viewership of each of these or the public accessing the content through these varied mediums can differ, depending on taste, cost, inclination, and so on. One generalization, which can safely be made, is that any publication or broadcast in the electronic media, especially on television, would have greater viewership, and more ready impact, since the effect is felt audio visually. In the case of printed matter, the reader has to go through, comprehend and assimilate the content.

38. In law, the essence of defamation is its tendency to through the defendant's statement, lower the plaintiff's reputation in the eyes of others. Four requirements for liability for defamation, are to be satisfied. The first is a false and defamatory statement must be made about another's reputation or business. What is necessary in a case of defamation is that the statement made is understood by others to be "of or concerning" the plaintiff. The publication should be made out to a third party. Generally, there is no liability if the defendant did not intend the publication to be viewed by anyone other than the plaintiff. The plaintiff must establish some extent of fault or negligence on the part of the defendant in publishing the statements. A plaintiff who is a public figure will have to show that the statements were made out of malice. The burden of proof is less demanding in case of a private individual. The statements must result in actual or presumed damage.

39. It would be apparent from the above discussion that publication is a comprehensive term, embracing all forms and mediums – including the Internet. That an internet publication has wider viewership, or a degree of permanence, and greater accessibility, than other fixed (as opposed to intangible) mediums of expression does not alter the essential part, i.e. that it is a forum or medium. Even the Ontario Court of Appeals, in *Barrick Gold*, while recognizing the wider impact and reach of cyber libel, did not moot a different standard for granting injunction, as is sought in this case. The Court there ruled, pertinently, that Internet publication of a libel, because of the libel's wider reach and viewership, has to be considered as an additional factor, while assessing damages. However, the judgment is not an authority to say that internet libels or cyber libels call for application of a different injunction standard, other than the *Bonnard* rule. The Court does not discern any such discussion; adopting such an argument would result

in the anomaly of discriminating between one medium of expression and another, in assessing whether to grant temporary injunction restraining publication – which is neither salutary, or as this Court suspects, Constitutionally sanctioned. In law, publication of a libel even to one is sufficient to impel a suit for damages; the wider reach of the publication or its greater accessibility is perhaps a ground for assessing the degree of damages. Formulating and adopting any other approach would result in disturbing the balance between free speech and the interest of any individual or corporate body in restraining another from discussing matters of concern, so finely woven in the texture of the *Bonnard* ruling.

40. The plaintiff has also claimed, that apart from outright defamation the defendant's actions have also acted in violation of the Trade Marks Act 1999. As mentioned earlier the Plaintiff claims that the defendant's use of the TATA logo in their games in violation of Section 29 (4) of the Act. A textual reading of the statute makes it clear that the intent of the draftsmen was that a breach of Section 29 (4) would take place when another commercial/entrepreneurial body is exploiting that same trademark. However in this case, neither of the defendants are involved in any profit making endeavor or competitive business with the plaintiff. Further, the defendants have proffered precedent that goes on to support the fact that a *bona fide* user of the trademark shall be an infringement of trademark law only when the user is a similar/competitive profit-making endeavour as the plaintiff (*Express Bottlers Service Pvt. Ltd. v. Pepsi Inc.*, 1989-PTC-14 (Calcutta High Court)). The Court is also of the opinion that the defendants argument that they can make reasonable comment, ridicule, and parody of the registered trademarks, is persuasive. In a factually similar case of *Boehringer Ingelheim Ltd and others v. VetPlus Ltd.*, [2007] EWCA Civ 583 in the UK Court of Appeal, where it was stated that an interim injunction would not be awarded against the defendant, even though the latter was involved in comparative advertisement which put the plaintiff's logo in bad light. The *ratio* behind this judgment was on similar lines as the *Bonnard* case, where too it was decided that until and unless the plaintiff can prove that it was certain that at a full trial the plaintiffs claim for a permanent injunction would be successful. The Court did observe that in trademark infringement actions there is no invariability to the application of the *Bonnard* principle. Refusing to grant injunction, the Court held:

“The general “threshold” which must be crossed by the claimant is that he will probably succeed at the trial. I do not see why that should not be the general rule for trade mark

infringement in a comparative advertising case. Indeed there is every reason why it should. A man who finds his trade mark disparaged by a rival trader in a comparative advertisement can obtain a prior restraining order only if he can show that it is more likely than not that the disparagement is wrong and misleading. Unless he can do that, then his rival, both for his own commercial interests and in the interests of the public, ought to be free to say that which he honestly believes.

49. Traders will have nothing to fear if they have sure foundations for claims they make about their products. Such traders will be able to obtain prior restraint orders because they will be able to cross the threshold. Traders who make claims for their products which they cannot readily and firmly justify will have to live with the risk that their rivals can honestly and reasonably call those claims into question pending a final resolution as to whether the claims are in fact good. Applying this reasoning, in the current case the defendant's use of the trademark was at a much lower degree of parody and ridicule, as the defendants are not involved in any kind of similar entrepreneurial/ business venture as the plaintiff is involved. Therefore the Court should be aware of the fact that the general tolerance level of another body using (defendants) a registered trademark to put forward its cause is at a high threshold..."

41. The defendant had submitted, on the strength of the ruling of the South African Constitutional Court in *Laugh it Off* (supra) that the use of the TATA mark and device was parodic. The term parodic is an adjective for "parody" which, according to the *Merriman Webster Dictionary* is "a literary or musical work in which the style of an author is closely imitated for comic effect or ridicule." The judges of the Court wrote separate concurring judgments. Moseneke, J. wrote the first judgment of the Court, vacating the injunction appealed against. Sachs, J. in a very perceptive and insightful opinion, concurred, adding that:

"71. In the present matter a graduate of a course in journalism decided to do battle with a number of corporate giants, calling his enterprise Laugh it Off and arming himself with T-shirts bearing parodied images and words brazenly pilfered from his opponents. One of his victims, South African Breweries [SAB], saw one of its well-known trademarks reproduced on T-shirts for public sale. The words 'Black Label' and 'Carling Beer', which accompanied the logo were transformed into 'Black Labour' and 'White Guilt'. In smaller lettering the slogans, 'America's Lusty Lively Beer' and 'Brewed in South Africa' were converted into 'Africa's Lusty Lively Exploitation Since 1652, No Regard Given Worldwide'. SAB did not laugh. Instead it went to the Cape High Court and sought, and obtained, an interdict restraining distribution of the T-shirts.

.....

.....

74. *It would in my opinion be unfortunate if SAB [and the others targeted by the T-shirts] were left with the impression that their case failed simply because they did not back it up with clip-board evidence to prove a measure of detriment. I believe the appeal should be upheld on more substantial grounds. Although the SCA judgment was thoughtfully crafted and raised all the basic considerations in what Moseneke J aptly describes as a novel if not vexed area of our law, I believe that when balancing the different interests involved it failed to appreciate why the parodic use of the trademark in the milieu in which Laugh it Off operated was central to its critical project. By de-contextualising both the nature of the mockery contained in the image and the context in which it was deployed, the SCA over-emphasised the fact that the T-shirts were sold at a profit, and attributed undue weight to the literal meaning of the words used. At the same time it gave far too little regard to the uniquely expressive weight of the parodic form used. The result was inappropriately to allow what were tenuous property interests to outweigh substantial expression rights.*
75. *At the heart of this matter lies the legal dilemma posed by the fact that Laugh it Off utilised the SAB brand, not adventitiously, but deliberately and precisely in order to challenge SAB's use of branding. It went further. It employed the enemy's brand to denounce the power of branding in general, and to confront the employment of trademark law, in our country as elsewhere, to suppress free speech. It was a calculatedly risky activity, with the sense of irreverence and provocation being intrinsic to the enterprise. If parody does not prickle it does not work. The issue before us, however, is not whether it rubs us up the wrong way or whether Laugh it Off's provocations were brave or foolhardy, funny or silly. The question we have to consider is whether they were legally and constitutionally permissible. I believe they were eminently so, and give my reasons.*

The paradox of parody

76. *Parody is inherently paradoxical. Good parody is both original and parasitic, simultaneously creative and derivative. The relationship between the trademark and the parody is that if the parody does not take enough from the original trademark, the audience will not be able to recognise the trademark and therefore not be able to understand the humour. Conversely, if the parody takes too much it could be considered infringing, based upon the fact that there is too much theft and too little originality, regardless of how funny the parody is.*
77. *Parody is appropriation and imitation, but of a kind involving a deliberate dislocation. Above all, parody presumes the authority and currency of the object work or form. It keeps the image of the original in the eye of the beholder and relies on the ability of the audience to recognise, with whatever degree of precision, the parodied work or text, and to interpret or 'decode' the allusion; in this sense the audience shares in a variety of ways the creation of the parody with the parodist. Unlike the plagiarist whose intention is to deceive, the parodist relies on the audience's awareness of the*

target work or genre; in turn, the complicity of the audience is a sine qua non of its enjoyment.

As Gredley and Maniatis write:

“The effect on the audience of parodic dislocation is often comic, provoking laughter, not necessarily at the expense of the parodied work or its author, but at the dislocation itself. Other reactions can include shock, disgust, anger or even simply intellectual pleasure at the recognition of the object work and at the skill and imagination of the parodist. . . . [It may be suggested] that the courts are prepared to tolerate genuine parody, especially in cases where the sole or primary injury to the copyright owner is to his amour propre.”

78. *In a society driven by consumerism and material symbols, trademarks have become important marketing and commercial tools that occupy a prominent place in the public mind.⁷⁵ Consequently, companies and producers of consumer goods invest substantial sums of money to develop, publicise and protect the distinctive nature of their trademarks; in the process, well-known trademarks become targets for parody.⁷⁶ Parodists may then have varying motivations for their artistic work; some hope to entertain, while others engage in social commentary, and finally others may have duplicitous commercial aspirations.⁷⁷ Rutz states that “[o]ften laughter is provoked not at the expense of the original work and its author, but at the dislocation itself. The public may find pleasure in recognising the parody’s object; on the other hand, reactions may be anger or shock, depending on the context in which the parody is set.”⁷⁸*

79. *The closer the object of the parody is to the parody itself, the more intense will the paradox be. ‘Target’ parodies seek to comment upon the text itself or its creator or owner, while ‘weapon’ parodies involve the use of that text to comment on something quite different. Jurists such as Posner and Kennedy J have suggested that weapon parodies involving the hijacking of a well-known image to attack something entirely unrelated, should not enjoy free speech protection. Another view is that whether the parody of a trademark targets the mark directly or uses it to hit at another target should not be decisive in itself, but merely one of the factors to enter the scales when free speech and property rights are balanced against each other. In either event some degree of paradox will exist to trouble the law.*

.....

Balancing free speech and trade mark protection

82. *The question to be asked is whether, looking at the facts as a whole, and analysing them in their specific context, an independent observer who is sensitive to both the*

free speech values of the Constitution and the property protection objectives of trademark law, would say that the harm done by the parody to the property interests of the trademark owner outweighs the free speech interests involved. The balancing of interests must be based on the evidence on record, supplemented by such knowledge of how the world works as every judge may be presumed to have. Furthermore, although the parody will be evaluated in the austere atmosphere of the court, the text concerned [whether visual or verbal or both] should be analysed in terms of its significance and impact it had [or was likely to have], in the actual setting in which it was communicated.

83. *It seems to me that what is in issue is not the limitation of a right, but the balancing of competing rights. The present case does not require us to make any determinations on that matter. But it would appear once all the relevant facts are established, it should not make any difference in principle whether the case is seen as a property rights limitation on free speech, or a free speech limitation on property rights. At the end of the day this will be an area where nuanced and proportionate balancing in a context-specific and fact-sensitive character will be decisive, and not formal classification based on bright lines.*

84. *The mere fact that the expressive activity has a commercial element should not be determinative itself. As the US Supreme Court observed in connection with an analogous copyright question:*

“If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble ... including news reporting, comment, criticism, teaching, scholarship, and research, since these activities ‘are generally conducted for profit in this country’. . . . Congress could not have intended such a rule, which certainly is not inferable from the common-law cases, arising as they did from the world of letters in which Samuel Johnson could pronounce that ‘[n]o man but a blockhead ever wrote, except for money.’”

Codero explains further:

“Both artists and advertisers have used the image or representation of cultural icons to comment on society, criticize the symbol, or sell merchandise. In our pop culture where salesmanship must be entertaining and entertainment must sell, the line between commercial and non-commercial speech has disappeared.”

86. *Of more significance is whether the activity is primarily communicative in character or primarily commercial. Thus, some degree of commerce should not in itself exclude the activity from free speech protection. Nor, however, should an element of social criticism on its own save an inherently commercial activity from a charge of unfairly causing detriment.*

87. Similarly, the fact that the message could have been conveyed by means other than parody should not be decisive or even significant, again depending on the facts. If this were not so there would be no scope at all for trademark parody, because the message could always be conveyed more directly, if less convincingly, by production of a leaflet or else a letter to the editor. In our consumerist society where branding occupies a prominent space in public culture, one does not have to be a 'cultural jammer' to recognise that there is a legitimate place for criticism of a particular trademark, or of the influence of branding in general or of the overzealous use of trademark law to stifle public debate. In such circumstances the medium could well be the message, and the more the trademark itself is both directly the target and the instrument, the more justifiable will its parodic incorporation be. Conversely, the more the trademark is used in arbitrary fashion and simply as a mere attention-seeking device for the lazy or the deceitful, the less justifiable will it be.
88. Another relevant factor to be placed on the scales would be the medium used and the context of its use. Thus, parodic illustrations in satirical columns, or editorial cartoons in newspapers or magazines, or a satirical programme on TV, are likely in any open society to enjoy a large measure of protection. The very same images in another context could be regarded as unfair. Thus, the fact that lampoons appear on T-shirts to be worn by young irreverent people who enjoy the idea of being gadflies, could be highly relevant.
89. Then there is the more vexed question of whether the fact that the parody is deemed unsavoury should deprive it of any serious degree of free speech protection. Siegrun Kane interprets the courts' focus on a parody's unsavouriness as follows:

"The less [the] redeeming social value in the use [of the parody], the greater the chances for injunctive relief. If, for example, the entertainment is lewd, lascivious, pornographic, disparaging or tasteless, watch out!"

At the same time it has frequently been emphasised that the courts should be extremely reluctant to evaluate a parody on the basis of whether they consider it to be funny or feeble. As the US Supreme Court said in *Campbell*:

"Whether, going beyond that, parody is in good taste or bad does not and should not matter to fair use. As Justice Holmes explained, '[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. . . . First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed."

89. *I have mentioned factors which I believe will be relevant to the balancing exercise. The list is by no means exhaustive. Nor should they be seen as a series of discrete hoops through which the litigants must pass in order to succeed. Rather, they are illustrations of the kind of considerations to be evaluated in a fact-sensitive and contextual manner and against the backdrop of the values of an open and democratic society....”*

In *Louis Vuitton Malletier S.A.* (supra) the US Circuit Court had to deal with Louis Vuitton’s claim that its marks, used for luxury products and accessories, were infringed by dilution, when the defendant’s Chewy Vuitton used a similar mark, with similar combination and similar logo, but in respect of dog toys. The defendant had argued that its marks were a parody of the plaintiff’s famous marks, and therefore, did not constitute infringement. After discussing the rival submissions, and the statute, i.e. the Trademark Dilution Act, the Court held that:

*“The TDRA, however, does not require a court to ignore the existence of a parody that is used as a trademark, and it does not preclude a court from considering parody as part of the circumstances to be considered for determining whether the plaintiff has made out a claim for dilution by blurring. Indeed, the statute permits a court to consider “all relevant factors,” including the six factors supplied in § 1125(c)(2)(B). Thus, it would appear that a defendant’s use of a mark as a parody is relevant to the overall question of whether the defendant’s use is likely to impair the famous mark’s distinctiveness. Moreover, the fact that the defendant uses its marks as a parody is specifically relevant to several of the listed factors. For example, factor (v) (whether the defendant intended to create an association with the famous mark) and factor (vi) (whether there exists an actual association between the defendant’s mark and the famous mark) directly invite inquiries into the defendant’s intent in using the parody, the defendant’s actual use of the parody, and the effect that its use has on the famous mark. While a parody intentionally creates an association with the famous mark in order to be a parody, it also intentionally communicates, if it is successful, that it is not the famous mark, but rather a satire of the famous mark. See *PETA*, 263 F.3d at 366. That the defendant is using its mark as a parody is therefore relevant in the consideration of these statutory factors.*

*Similarly, factors (i), (ii), and (iv) — the degree of similarity between the two marks, the degree of distinctiveness of the famous mark, and its recognizability — are directly implicated by consideration of the fact that the defendant’s mark is a successful parody. Indeed, by making the famous mark an object of the parody, a successful parody might actually enhance the famous mark’s distinctiveness by making it an icon. The brunt of the joke becomes yet more famous. See *Hormel Foods*, 73 F.3d at 506 (observing that a successful parody “tends to increase public identification” of the famous mark with its source); see also *Yankee Publ’g Inc. v. News Am. Publ’g Inc.*, 809 F. Supp. 267, 272-82 (S.D.N.Y. 1992) (suggesting that a sufficiently obvious parody is unlikely to blur the targeted famous mark).*

In sum, while a defendant’s use of a parody as a mark does not support a “fair use” defense, it may be considered in determining whether the plaintiff-owner of a famous mark has proved its claim that the defendant’s use of a parody mark is likely to impair the distinctiveness of the famous mark.”

In *Esso*, Greenpeace had been sued for use of the plaintiff's mark in its (the defendant's) website. The European Court rejected the claim for trademark infringement, and declined injunction, holding that use of ESSO and E\$\$O on the Greenpeace website, in the context of that organization's criticism of Esso's environmental policies, was a denominative use of its (Esso's) mark that did not infringe it.

42. The above analysis would show that the use of a trademark, as the object of a critical comment, or even attack, does not necessarily result in infringement. Sometimes the same mark may be used, as in *Esso*; sometimes it may be a parody (like in *Laugh it Off* and *Louis Vuitton*). If the user's intention is to focus on some activity of the trademark owners, and is "denominative", drawing attention of the reader or viewer to the activity, such use can *prima facie* constitute "due cause" under Section 29 (4), which would disentitle the plaintiff to a temporary injunction, as in this case. The use of TATA, and the 'T' device or logo, is clearly denominative. Similarly, describing the Tatas as having demonic attributes is hyperbolic and parodic. Through the medium of the game, the defendants seek to convey their concern and criticism of the project and its perceived impact on the turtles habitat. The Court cannot anoint itself as a literary critic, to judge the efficacy of use of such medium, nor can it don the robes of a censor. It merely patrols the boundaries of free speech, and in exceptional cases, issues injunctions by applying *Bonnard* principle. So far as the argument by the plaintiff that it is being "targeted" is concerned the Court notes that the defendants submit that the major gains through the port accrue to the Tatas.

43. In conclusion the Court notes that the rule in *Bonnard* is as applicable in regulating grant of injunctions in claims against defamation, as it was when the judgment was rendered more than a century ago. This is because the Courts, the world over, have set a great value to free speech and its salutary catalyzing effect on public debate and discussion on issues that concern people at large. The issue, which the defendant's game seeks to address, is also one of public concern. The Court cannot also sit in value judgment over the medium (of expression) chosen by the defendant since in a democracy, speech can include forms such as caricature, lampoon, mime parody and other manifestations of wit. The defendant may – or may not be able to establish that there is underlying truth in the criticism of the Dhamra Port Project, and the plaintiff's involvement in it. Yet, at this stage, the materials on record do not reveal that the only exception – a libel based on falsehood, which cannot be proven otherwise during the trial- applies in this

case. Therefore, the Court is of opinion that granting an injunction would freeze the entire public debate on the effect of the port project on the Olive Ridley turtles' habitat. That, plainly would not be in public interest; it would most certainly be contrary to established principles. To recall the words of Walter Lippman

"The theory of the free press is not that the truth will be presented completely or perfectly in any one instance, but that the truth will emerge from free discussion"

For these reasons, the Court is of opinion that the application for interim injunction, i.e. IA No.9089/2010 has to fail. It is accordingly, dismissed.

CS(OS) No. 1407/2010

The suit shall be listed before the regular Bench, according to Roster, for further proceedings, on 21st February, 2011.

January 28, 2011

(S.RAVINDRA BHAT)
JUDGE