

*** HIGH COURT OF DELHI : NEW DELHI**

+ FAO (OS) No. 586/2009

Judgment reserved on: February 4, 2010

% Judgment delivered on: March 25, 2010

Shri Mukesh Khadaria
Trading as M/s Aggarwal Udyog
Chak 4B, K.K. Bhukar Ka
Tehsil Noahr, Distt. Hanumangarh
Rajasthan. ...Appellant

Through Mr. S.K. Bansal with
Mr. Anand V. Mishra, Advs.

Versus

DCM Shriram Consolidated Limited
An Indian Company having its office at
1st & 2nd Floor, Kirti Mahal Tower
19, Rajendra Place
New Delhi – 110 008.

Also has its registered office at:
6th Floor, Kanchenjunga Building
18, Barakhamba Road
New Delhi – 110 001. ...Respondent

Through Mr. Maninder Singh with
Mr. Naveen Kumar, Advs.

WITH

2. FAO (OS) No. 564/2009

Shri Ram Plaster
Taranagar Road, Sahawa
Rajasthan – 331 302. ...Appellant

Through Mr. N. Mahabir with
Mr. S. Gowthanan, Advs.

Versus

DCM Shriram Consolidated Ltd.
1st & 2nd Floor, Kirti Mahal Tower
19, Rajendra Place
New Delhi – 110 008.

...Respondent

Through Mr. Maninder Singh with
Mr. Naveen Kumar, Advs.

Coram:

**HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MS. JUSTICE MUKTA GUPTA**

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|---|-----|
| 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 |

MADAN B. LOKUR, ACJ

The question for our consideration is whether the learned Single Judge was right in granting an injunction restraining the Appellants from using the trademark “Shriram” while marketing their plaster of Paris and thereby passing off their goods as those of the Respondent. In our opinion, the answer must be in the affirmative. Accordingly, we dismiss the appeals and confirm the injunction granted by the learned Single Judge.

2. These appeals are directed against a common judgment and order dated 23rd October, 2009 passed by a learned Single Judge in CS(OS) No. 910/2009 and CS(OS) No. 1035/2009. Both the suits were

essentially treated by the learned Single Judge as actions for passing off. Admittedly, the broad facts in both the appeals are similar and therefore they were heard together and are being disposed of by a common decision.

3. The Respondent (DCM Shriram Consolidated Limited – for short DCM) is the registered proprietor of the trademark “Shriram” and “Shriram Nirman”. It has been marketing, for several decades, a variety of goods including fertilizers, chemicals, plastics, cement etc. It also markets plaster of Paris under its trademark and brand name as “Shriram Nirman” plaster of Paris. The goods are marketed in bags which also bear a logo with blue, red and black colour stripes on a white background. For the sake of convenience, the packaging in which the plaster of Paris marketed by DCM is photographed below:



4. According to DCM, the Appellant in CS (OS) No. 910/2009 was marketing plaster of Paris under the name and style of “Aggarwal Shriram” plaster of Paris with a picture of a kalash. The plaster of Paris in CS(OS) No. 1035/2009 was marketed by the Appellant under the name and style of “Shriram”. The photographs in this regard are given below:



5. It is quite obvious from a visual comparison of the packaging of the Appellants that they use “Shriram” which is the trademark of DCM. Of course, there are dissimilarities in the pictorial representation as well as differences in the language used in the packaging but what is prominent is “Shriram” which is the trademark of DCM. According to DCM, the Appellants were passing off their plaster of Paris as that of DCM. Hence, a suit for a permanent injunction was filed for restraining the Appellants from using the trade mark “Shriram” or any other deceptively similar mark on their goods.

6. **Visual similarity**: Since “Shriram” is used in all the bags, what is first required to be considered in this case of passing off is whether the added matter used by the Appellants is sufficient to distinguish their goods from those of DCM (see *Kaviraj Pandit Durga Dutt Sharma v. Navaratna Pharmaceutical Laboratories, AIR 1965 SC 980*).

7. Equally, it is not necessary or even advisable to identify and compare each similarity or dissimilarity. What is required to be seen is whether the overall impression on an unwary customer would be such that the plaster of Paris marketed by the Appellants could be confused with the plaster of Paris marketed by DCM. In this regard, in *Heinz Italia v. Dabur India Ltd., (2007) 6 SCC 1* the Supreme Court referred to *Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd., (2001) 5 SCC 73* wherein it was held that in a passing-off action, the similarities

rather than the dissimilarities have to be taken note of and the principle of “phonetic similarity” cannot be ignored. The test is as to whether a particular mark has gained acceptability in the market so as to confuse a buyer as to the nature of product he was purchasing.

8. Going beyond “phonetic similarity” and venturing into the area of “visual similarity”, the Supreme Court held (in paragraph 18 of the Report) that

“[T]he overall effect of the packaging has to be seen....
[The] mere fact that the respondents have time and again made small changes in their packaging is an attempt to continue to mislead the purchaser and to make it more difficult for the appellants to protect their mark, which the record shows has acquired an enviable reputation in the market which is sought to be exploited by the respondent.”
(emphasis supplied)

9. Considering the facts of this case in the light of the law laid down by the Supreme Court, we find that not only is the trademark “Shriram” copied by the Appellants, but the “overall effect of the packaging” leads to only one visual conclusion, namely, that the Appellants are marketing Shriram plaster of Paris which is confusingly similar to the product of DCM. As mentioned above, there are dissimilarities in the packaging used by the Appellants, but we should be (and are) concerned with the overall visual impact and not merely visual dissimilarities here and there. Applying this test, it is quite clear that the Appellants are attempting to visually pass off their goods as those of DCM.

10. **Likelihood of confusion:** Another factor that ought to be accounted for is the likelihood of confusion amongst the purchasers. As advised by the Supreme Court in *Cadila* we ought to take into consideration a man of average intelligence and imperfect recollection. Indeed, unless the goods are very highly priced or exclusive in some manner, the matter has to be approached from the view point both of villagers and townsfolk, literate as well as illiterate. This is because a trade may relate to goods largely sold to illiterate or semi-literate persons.

11. So far as the present case is concerned there is no dispute that plaster of Paris is commonly used by persons involved in constructions with many of the purchasers being either illiterate or semi-literate. Generally speaking, therefore, it is easy for such a customer to get confused with two similar looking brands of plaster of Paris. The question is whether on the facts of this case, such a confusion was intended.

12. To answer this question, we need to go into the background of the contesting parties. This is because there could be independent bona fide concurrent use of the same trademark.

13. The Shriram group of companies has a broad representative reputation in the field of fertilizers, chemicals, agricultural products, building and construction products etc. The name, Shriram is actually

the name of the late Lala Shriram who was an eminent industrialist, philanthropist and educationist who had championed the cause of industrial research as well as technical and professional education in India. He was responsible for establishing the Shriram College of Commerce, Lady Shriram College, Delhi School of Economics, Shriram Centre for Performing Arts etc. The name Shriram is closely linked to and associated with DCM for the last several decades. In this background, we cannot rule out the possibility that someone would want to generally encash or derive an economic benefit from the established reputation of the Shriram group of companies.

14. **Fraudulent user:** It was observed by the House of Lords in *Re an Application by Alex, Pirie and Sons Ltd., (1933) 50 R.P.C. 147* that:

“....though the respondents were honest in their user in the sense that they never intended to cause confusion or to pass off their goods as the goods of the appellants, yet inasmuch as they knew of the appellants’ mark when they adopted their own and that the marks have been used on the same goods in the same market, the user of the respondents’ mark cannot be treated as honest...”

We need, therefore, to examine the reason given by the Appellants for using the trademark “Shriram” to determine if it is an honest user. In our opinion, the reason given by the Appellants is rather specious inasmuch as it is submitted that Bajrang Lal Pareek adopted “Shriram” as a trademark being an ardent devotee of Lord Shri Ram and he himself is named Bajrang Lal [in CS(OS) No. 1035/2009]. In the other case

[CS(OS) No. 910/2009] there is no explanation offered.

15. As noted by the Supreme Court in *Laxmikant V. Patel v. Chetanbhai Shah*, (2002) 3 SCC 65:

“According to Kerly (Law of Trade Marks and Trade Names, 12th edition, para 16.16) passing-off cases are often cases of deliberate and intentional misrepresentation, but **it is well settled that fraud is not a necessary element of the right of action, and the absence of an intention to deceive is not a defence**, though proof of fraudulent intention may materially assist a plaintiff in establishing probability of deception.” (emphasis supplied)

16. Therefore, however innocent the user by the Appellants may be of the trademark “Shriram” it is not easy to rule out the possibility that the Appellants may be trying to take advantage of the reputation of DCM and use the trademark “Shriram” with a motive that could be suspect. This possibility cannot be ruled out because the Appellants have entered the same market with the same goods with a visually similar packaging. Surely, this cannot be a coincidence.

17. Consequently, we conclude for the purpose of an interim injunction, that given the class of consumers of plaster of Paris, they are likely to be confused (if not deceived) by the visually similar packaging of both the parties. Since DCM is an established player in the market having used “Shriram” for a considerable period, there is little doubt that the Appellants intended to benefit from the reputation of DCM. This, in our opinion, is impermissible and fraudulent conduct and the

Appellants' protestations of innocence cannot be accepted.

18. **Delay**: It was submitted by learned counsel for the Appellants that DCM had issued a cease and desist notice on 14th February, 2007 against the infringement of its trademark "Shriram" [in CS(OS) No.910/2009]. The suit for permanent injunction was filed only in May 2009. Based on this fact, two submissions were made, namely, that the cease and desist notice was suppressed and therefore an injunction ought not to have been granted in favour of DCM and that there was a delay of more than two years in approaching the Court for relief because of which an injunction ought not to have been granted in favour of DCM.

19. While dealing with the issue of concealment and delay, it is necessary to take note of two facts highlighted by learned counsel for the Appellants: firstly, the Appellant in CS (OS) No. 910 of 2009 is itself the registered proprietor of the trademark "Aggarwal Shriram", and secondly, that trademark has been used by the Appellant since 2000 (though according to DCM it has been in use only since 2002). In so far as the first fact is concerned, it is not really relevant for the time being since we are not dealing with an issue of infringement but of passing off. That apart, the Supreme Court held in *N.R. Dongre v. Whirlpool Corpn., (1996) 5 SCC 714*:

“12. Shri Kapil Sibal, the learned counsel for the appellants, conceded fairly at the outset that a passing-off action is maintainable in law even against a registered owner of the trade

mark and, therefore, the fact that the defendants have obtained a registration (subject to the outcome of a pending appeal) is by itself not sufficient to render the suit not maintainable. However, he qualified this statement by adding that the existing registration in favour of the defendants is a significant fact in favour of the defendants even at the interlocutory stage in the suit for deciding whether a temporary injunction should be granted against the defendants.

20. On the above conclusion reached on the facts of this case, it is unnecessary to refer to the several decisions cited at the Bar to indicate the settled principles of law regulating grant or refusal of interlocutory injunctions and the scope for grant of such an injunction in a passing-off action even against the proprietor of a registered trade mark. None of those decisions lay down that in a passing-off action based on the right in common law distinct from the statutory right based on a registered mark, an injunction cannot be granted even against an owner of the trade mark in an appropriate case. It is for this reason, Shri Kapil Sibal fairly conceded this position at the outset and relied on the fact of registration in favour of the defendants only for the limited purpose indicated earlier. The surviving controversy at this stage was confined only to the legality and propriety of an interlocutory injunction granted on the facts of this case.”

The second fact would be relevant for the purposes of the grant of relief (or refusal to grant relief) and not for the purposes of deciding the issues raised before us.

20. On the principles for grant of an injunction, learned counsel for the Appellants referred to paragraph 47 of *Gujarat Bottling Co. Ltd. v. Coca Cola Co., (1995) 5 SCC 545*. The relevant passage reads as follows:

“Under Order 39 of the Code of Civil Procedure, jurisdiction of the Court to interfere with an order of interlocutory or temporary injunction is purely equitable and, therefore, the Court, on being approached, will, apart from other considerations, also look to the conduct of the party invoking the jurisdiction of the Court, and may refuse to interfere unless his conduct was free from blame.

Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the Court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief. His conduct should be fair and honest. These considerations will arise not only in respect of the person who seeks an order of injunction under Order 39 Rule 1 or Rule 2 of the Code of Civil Procedure, but also in respect of the party approaching the Court for vacating the ad interim or temporary injunction order already granted in the pending suit or proceedings.”

In this context, it was submitted that the conduct of DCM, particularly on the issue of delay and concealment did not entitle it to the grant of an injunction.

21. Reference was also made to *The Fairdeal Corporation (Pvt.) Ltd v. Vijay Pharmaceuticals, 1985 PTC 80* wherein a learned Single Judge observed that “I would, certainly, have not granted an ex-parte injunction had it been brought to my notice that the plaintiff was well aware of the alleged infringement by the defendant as far back as February, 1981.” Similarly, reference was made to a Division Bench decision in *B.L. & Co. v. Pfizer Products Inc, 2001 PTC 797* particularly paragraph 17 which reads as follows:

“17. As regards the delay in institution of the suit and its effect for the purpose of grant of ex parte restraint, the settled legal position is that while the delay in institution of a suit for an action for passing off may not be fatal, it is one of the important and relevant considerations before granting an ex parte/interlocutory injunction. Reference in this regard is invited to the ‘THE LAW OF PASSING-OFF’ by Christopher Wadlow. Learned Author while dealing with the motions of interlocutory relevance has observed as under:-

“Delay in applying for interlocutory relief is a very serious matter. As a rule of thumb, delay of up to about a month, or perhaps six weeks, generally has no adverse effect on an inter partes application and delay of up to twice that period need not be fatal if it can be explained and the plaintiff’s case is otherwise strong. On an ex parte application even delay of a few days can be critical. Unjustified delay of more than a few months is almost always fatal to the plaintiff’s case, even though delay of this order has no effect on the plaintiff’s right at trial. Unlike many of the issues which can arise on motion, the existence of delay does not normally admit or much argument. Delay, if present, is therefore a short, safe and simple basis for refusing relief. This means that applications for interlocutory injunctions in which there is significant delay are unlikely even to get as far as a hearing, and those that do are quite likely to be refused without going into the merits or the balance of convenience.”

Finally, in the context of delay, reference was made to *Shri Gopal Engg. v. POMX Laboratories, AIR 1992 Delhi 302* where a delay of one year and a few months was held (relying on *Century Electronics v. C.V.S. Enterprises, 1983 FSR 1* in which a delay of four months was held sufficient to deny interim relief) to be fatal to the grant of an interlocutory injunction.

22. On the question of concealment, reference was made to *Satish Khosla v. Eli Lilly Ranbaxy, 1998 1 AD (Delhi) 927* in which decision reference was made to *S.P. Chengalvaraya Naidu v. Jagannath, AIR 1994 SC 853* to the effect that “A litigant, who approaches the Court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital

document in order to gain advantage on the other side he would be guilty of playing fraud on the Court as well as on the opposite party.”

23. On the other hand, learned counsel for DCM referred to *Pankaj Goel v. Dabur India Ltd. 2008 (38) PTC 49*. In this decision, a Division Bench of this Court considered both *B.L. & Co.* and *Gujarat Bottling* and concluded in paragraph 24 of the Report that “... passing off is a recurring cause of action and delay being a defence in equity would not be available if the Defendant’s conduct is fraudulent – as is in the present case. Consequently in the present case, delay and so called concurrent use, if any, cannot be a ground for refusing interim injunction.”

24. Our attention was also drawn to a fairly recent decision rendered by a Division Bench of this Court in *Amar Singh Chawalwala v. Shree Vardhman Rice & General Mills, 2009 (40) PTC 417*. In paragraph 21 of the Report, reliance was placed on a decision of a learned Single Judge in *Hindustan Pencils Pvt. Ltd. v. India Stationery Products, 1989 PTC 61* which in turn referred to an observation from *Whitman v. Disney Productions, 263 F2d 229* that “delay by itself is not a sufficient defence to an action of interim injunction but inordinate delay would amount to laches.” It was then held that the appellant therein was entitled to an injunction since the delay in that case did not amount to acquiescence. It must, however, be remembered that both

Hindustan Pencils and ***Amar Singh*** were cases of infringement and not passing off, while ***Pankaj Goel*** was a case of passing off.

25. It is clear from the above that there are two views with regard to dealing with delay in approaching the Court for an injunction. One view that even minimal delay of a few months would disentitle the plaintiff from an injunction order while the other view is that delay in approaching the Court would not necessarily disentitle the plaintiff from obtaining an order of injunction. In our opinion, no hard and fast rule can be laid down in this regard and each case of delay must be judged on its own facts. In some cases, the delay may be entirely bona fide while in some the delay may be completely unexplained, while in other cases the delay may amount to waiver or acquiescence. Whatever the reason for delay, if it is inordinate and amounts to laches, the Court would have to be extremely circumspect in granting an ex parte injunction and later confirming it.

26. The theory of a continuing cause of action referred to above is no longer available to get over an allegation of delay. This theory has been rejected by the Supreme Court in ***Khoday Distilleries Ltd. v. Scotch Whisky Assn., (2008) 10 SCC 723*** in the following words –

“A contention is sought to be raised that the purported wrong committed by the appellant being a continuing one would not attract the doctrine of laches, acquiescence or waiver. The doctrine of continuing wrong has nothing to do with the refusal on the part of a statutory authority or a court of law to

exercise its discretionary jurisdiction on the ground of laches, acquiescence or waiver.”

Therefore, the question of delay would have to be dealt with by the Trial Judge without importing any such theory into it.

27. Notwithstanding this, we are of the view that one factor that always ought to be taken into consideration by the Trial Judge in deciding the question of delay is the interest of the consumer or the damage that may be caused to a consumer by not granting an ex parte injunction. The interest of the consumer has been referred to and relied on in two decisions of this Court, namely, in *Hindustan Pencils* and *Austin Nichols v. Arvind Behl*, *ILR (2005) 2 Delhi 1007*. The Supreme Court has also dealt with this issue in *Cadila* more particularly in the context of medicinal products where, if medicines are passed off to a consumer, the repercussions could be extremely serious.

28. Looked at from this broad perspective, it appears to us that even though DCM has delayed in approaching the Court for the grant of an injunction, on the facts of this case, this delay would not be fatal. There are several reasons for this. Firstly, the conduct of the Appellants has not been bona fide as already mentioned above. It is quite clear that the Appellants have impermissibly sought to cash in on the reputation and goodwill of DCM to sell their own goods.

29. Secondly, the interest of the consumer or the purchasing public would be jeopardized if DCM is non-suited only on the ground of delay. In this context, it has been pointed out to us by learned counsel for DCM that the process of manufacturing plaster of Paris is that gypsum is mined in lumps; then it is crushed and converted into a powder form; thereafter it is calcined and eventually it is pulverized and converted into plaster of Paris. Learned counsel for DCM has shown us a price circular dated 23rd May, 2003 issued by the Rajasthan State Mines and Minerals Ltd. As per this circular, the costliest ex pit gypsum is Rs.193/- per metric ton. According to the calculations made by DCM (which are on the record), if this gypsum is converted into plaster of Paris then the ultimate cost, including transportation, labour, electricity, etc. would result in plaster of Paris being available at Rs. 970/- per metric ton. To this would need to be added sales tax, factory overheads, indirect costs, bagging, etc. taking the cost of plaster of Paris to more than Rs.1,000/- per metric ton.

30. As against the above calculated cost of plaster of Paris, the rate at which the Appellants have been selling plaster of Paris is not clear from the various invoices shown to us. Prima facie, on a perusal of the invoices (the contents of which could not be duly explained), the Appellants are selling their plaster of Paris at about Rs.600/- per metric ton which is far below the cost price. According to learned counsel for DCM, either the Appellants are selling sub-standard plaster of Paris or

they are selling something else as plaster of Paris. Either way, the consumer is being taken for a ride or misleading invoices have been filed in this Court.

31. While we are not required to comment on the invoices because this is eventually a matter of evidence, we do feel, *prima facie*, that all is not well with the pricing policy of the Appellants and that in all probability the consumer is being befooled. That being the position, it would not be appropriate for us to ignore the interest of the consumer or ignore the allegation that the Appellants are selling goods that are not what they purport to be. The damage already caused to the consumer has been quite considerable and it is to protect the future interest of the unwary consumer that even if there is some delay in DCM approaching this Court for an injunction, that delay should be overlooked.

32. Finally, we are not inclined to interfere with the exercise of discretion by the learned Single Judge. The Supreme Court held in ***Ramdev Food Products (P) Ltd. v. Arvinbhai Rambhai Patel (2006) 8 SCC 726*** (paragraph 126 of the Report) :

“The grant of an interlocutory injunction is in exercise of discretionary power and hence, the appellate courts will usually not interfere with it. However, the appellate courts will substitute their discretion if they find that discretion has been exercised arbitrarily, capriciously, perversely, or where the court has ignored the settled principles of law regulating the grant or refusal of interlocutory injunctions. This principle has been stated by this Court time and time again. [See for example *Wander Ltd. v. Antox India (P) Ltd.* [1990 Supp SCC 727], *Laxmikant V. Patel v.*

Chetanbhai Shah [(2002) 3 SCC 65] and Seema Arshad Zaheer v. Municipal Corpn. of Greater Mumbai [(2006) 5 SCC 282].”

The view taken by the learned Single Judge does not appear to be perverse, capricious or arbitrary. We, therefore, find no reason to take a contrary view on the matter.

33. **Concealment:** In *S.J.S. Business Enterprises (P) Ltd. v. State of Bihar, (2004) 7 SCC 166* the Supreme Court observed in paragraph 13 of the Report as follows:

“As a general rule, suppression of a material fact by a litigant disqualifies such litigant from obtaining any relief. This rule has been evolved out of the need of the courts to deter a litigant from abusing the process of court by deceiving it. But the suppressed fact must be a material one in the sense that had it not been suppressed it would have had an effect on the merits of the case. It must be a matter which was material for the consideration of the court, whatever view the court may have taken.”

34. Looked at in this light, we do not find that the failure of DCM to mention the cease and desist notice given to the Appellants to be a material fact, such that its non-disclosure ought to non-suit DCM. This is particularly because the Appellants did not even bother to reply to the notice. It would have been a different matter altogether if the Appellants had given a reply. In that event, the contents of the notice and the reply thereto would have been material since the case of the Appellants (defendants before the learned Single Judge) would have been before the learned Judge who would have taken the disclosed facts

into consideration for granting or refusing to grant an ex parte injunction. But since the Appellants did not reply to the cease and desist notice, its non-disclosure is not fatal – rather the failure of the Appellants to reply to it could have been used by DCM to its advantage.

35. We may also note the explanation given by DCM that the Appellant in CS(OS) No. 910/2009 is a small unit whose product was not traceable in the market after the cease and desist notice. Therefore, the matter was not pursued any further until it again came to the knowledge of DCM from trade sources that the said Appellant is again selling its product under a trade mark that is confusingly similar to the trade mark “Shriram” of DCM.

36. **Prior user:** The final contention of learned counsel for the Appellants was that they have been in the business of marketing plaster of Paris since 2000 and this fact has been completely overlooked by the learned Single Judge. By claiming prior use of “Shriram” the Appellants seek to deny to DCM their claim of passing off.

37. In this context it is necessary once again to turn to the invoices filed on record. We find that insofar as the Appellant in CS (OS) No. 910/2009 is concerned, it has been marketing its goods under the name and style of Aggarwal Udyog. The invoices show that it is a manufacturer of plaster of Paris and gypsum powder. All the invoices

that have been filed upto the year 2008 show that there is no mention of “Aggarwal Shriram” except by way of a rubber stamp on the invoice. It is only from 2008 onwards that the invoices of Aggarwal Udyog show that it is a manufacturer of “Aggarwal Shriram” plaster of Paris and gypsum powder. We are of the view that learned counsel for DCM is right in his submission that even if the Appellant in CS (OS) No. 910/2009 commenced its business of marketing plaster of Paris in 2000, it did not regularly use the brand name “Shriram” or “Aggarwal Shriram” till about 2008. It is, therefore, not correct on the part of learned counsel for the Appellants to contend that they have been in the business of marketing Aggarwal Shriram plaster of Paris since 2000. We may note that we have not gone into the allegation made by learned counsel for DCM that the use of the rubber stamp was only to build up evidence by the Appellant in CS(OS) No. 910/2009 in support of its case.

38. It is quite possible that prior to 2008 the Appellants were sporadically marketing plaster of Paris under the brand name “Shriram” as it appears from the cease and desist notice issued in February, 2007. But, as submitted by DCM, the Appellants seem to have stopped this passing off upon receipt of the cease and desist notice. The theory sought to be propounded by learned counsel for the Appellants that his clients were in the business of marketing plaster of Paris since 2000 is only partially correct inasmuch as the Appellants might have been

marketing plaster of Paris since 2000 but they began regularly marketing plaster of Paris using the trademark “Shriram” of DCM only in 2007/2008. Therefore, under no circumstances can the Appellants claim prior use of the trademark “Shriram” as against DCM.

39. **Conclusion:** We find no reason to disagree with the learned Single Judge. DCM has made out a prima facie case for the grant of an injunction and even the balance of convenience lies in favour of the prayer of DCM being granted – if not for itself, then at least for the sake of consumers of plaster of Paris. Similarly, irreparable harm and injury would be caused to the consumer and DCM if the plaster of Paris of the Appellants is permitted to be passed off as that of DCM.

40. There is no merit in both the appeals. They are dismissed with Rs.15,000/- costs in each appeal.

41. Needless to say, any expression of opinion is only for the purpose of deciding the appeals before us. Our observations will not bind the learned Single Judge in the final disposal of the pending suits.

(MADAN B. LOKUR)
ACTING CHIEF JUSTICE

MARCH 25, 2010
dk/kapil

(MUKTA GUPTA)
JUDGE