

HIGH COURT OF DELHI AT NEW DELHI

Decided on : 19th October, 2015

HALDIRAM BHUJIWALA & ANR. Appellants

Through: Mr. C. Mukund and Mr.Ashok Kumar
Jain, Advocates.

Versus

ANAND KUMAR DEEPAK KUMAR & ORS. ... Respondents

Through: Mr. Amarjit Singh & Mr. Mahendra S. Rana, Advocates.

WITH

+ CM(M) 532/2013 & C.M. Nos.7956-7958/2013

HALDIRAM BHUJIWALA & ANR. Petitioners

Through: Mr. C. Mukund and Mr.Ashok Kumar
Jain, Advocates.

Versus

ANAND KUMAR DEEPAK KUMAR & ORS. ... Respondents

Through: Mr. Amarjit Singh & Mr. Mahendra S. Rana, Advocates.

AND

+ FAO 496/2012 & C.M. Nos.20603-20604/2012

HALDIRAM (INDIA) PRIVATE LIMITED Appellant

Through: Mr. Amarjit Singh & Mr. Mahendra S.
Rana, Advocates.

Versus

HALIDRAM BHUJIAWALA & ANR. Respondents

Through: Mr. C. Mukund and Mr. Ashok Kumar
Jain, Advocates.

CORAM:

HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J.

1. This order shall dispose of F.A.O. No.470/2012 titled *M/s. Haldiram Bhujawala & Anr. Vs. Anand Kumar Deepak Kumar & Ors.*, C.M. (M) No.532/2013 titled *Haldiram Bhujawala and Anr. Vs. Anand Kumar Deepak Kumar & Ors.* and F.A.O. No.496/2012 titled *Haldiram (India) Pvt. Limited vs. Haldiram Bhujawala and Anr.*

2. In F.A.O. No.470/2012 titled *Haldiram Bhujawala & Anr. Vs. Anand Kumar Deepak Kumar & Ors.*, the order dated 27.09.2012 passed by the learned Additional District Judge in I.A. No.1675/2012 under Order 39 Rule 1 & 2 CPC in TM No.02/2011 [earlier C.S. (OS)]

No.635/1992] titled *Anand Kumar Deepak Kumar & Ors. v. M/s Haldiram Bhujiawala & Anr.* is under challenge.

3. In F.A.O. No.496/2012 titled *Haldiram Bhujiawala & Anr. Vs. Anand Kumar Deepak Kumar & Ors.*, the appellant has challenged clause 43 (1) (a) and (b) of the order dated 27.9.2012 passed by the learned Additional District Judge in I.A. No.1675/2012 under Order 39 Rule 1 & 2 CPC in TM No.02/2011 [earlier C.S. (OS) No.635/1992].

4. In C.M. (M) No.532/2013 titled *Haldiram Bhujiawala & Anr. Vs. Anand Kumar Deepak Kumar & Ors.*, the order dated 21.01.2013 passed by the learned Additional District Judge on an application of the appellant/defendant seeking review of the order dated 27.09.2012 passed on I.A. No.1675/2012 under Order 39 Rule 1 & 2 CPC in TM No.02/2011 [earlier C.S. (OS) No.635/1992] is under challenge.

5. As a matter of fact, the reading of the impugned order dated 21.01.2013 shows that the averments made in the review application were not within the parameters of Order 47 Rule 1 of the CPC and it was a fresh attempt to argue the application for grant of stay which was rightly rejected by the learned ADJ.

6. It has been also noted by the court that on the day when the review application was pressed, the appellant had already filed an appeal (FAO 470/2013) in the High Court which was pending adjudication. It was observed that the appellant was in fact availing both the remedies that is appeal and review and thus, was held to be guilty of abuse of the processes of law and was visited with a cost of Rs.25,000/- out of which Rs.10,000/- was to be paid to the legal aid.

7. I am of the considered view that the order of rejection of review is not a substantive order and thus cannot be assailed under Article 227 of the Constitution. More so, when the main order dated 27.9.2012 is already under challenge, therefore, this CM (M) is liable to be dismissed and is accordingly dismissed.

8. In F.A.O. No.496/2012 titled *Haldiram (India) Pvt. Ltd. vs. Haldiram Bhujawala & Anr.*, the order dated 27.09.2012 passed by the learned Additional District Judge in I.A. No.1675/2012 under Order 39 Rule 1 & 2 CPC in TM No.02/2011 [earlier C.S. (OS) No.635/1992] titled *Anand Kumar Deepak Kumar & Ors. v. M/s Haldiram Bhujawala & Anr.* to the extent granted liberty to the respondents to use the trade

mark Haldiram Bhujawala along with 'V' Logo as reflected in Trade Mark No.330375 till decision of rectification in Para 43(1)(B) of the said order, is under challenge. It may be pertinent here to mention that at the time when the impugned order dated 27.9.2012 was passed, the plaintiff in the suit, who are the appellants also in this appeal, had filed cancellation petition of the Trade Mark Registration No.330375 which was obtained by Rameshwar Lal and Prabhushankar Aggarwal. During the pendency of this appeal, the cancellation petition of the appellant (in FAO No. 496/2012) has been decided in their favour by the Intellectual Property Appellate Board and the TM Registration No.330375 which was in the name of Rameshwar Lal and Prabhushankar Aggarwal has been cancelled vide order dated 26.04.2013. Subsequently, a writ was filed in High Court of Calcutta by the defendants (respondent in FAO No. 496/2012) challenging the order dated 26.4.2013 passed by the Intellectual Property Appellate Board (IPAB) but the court did not stay the assailed order and thus, the registration of the trademark no. 330375 stands effectively cancelled.

9. Therefore, the defendants/respondents (in the appeal No.496/2012) cannot use the trademark even for that limited period anymore as has

been permitted by the learned trial court in clause 43 1(a) and (b) of the impugned order, which part of the order has been assailed in this appeal. Thus, so far as the present appeal is concerned, it has become infructuous by the subsequent developments which have been brought to the notice of the court orally by the learned counsel for the plaintiff/appellant Mr. Amarjit Singh and which are not disputed by Mr. Mukund, the learned counsel for the defendant/respondent.

10. So effectively, court is left with only one appeal, that is, F.A.O. 470/2012 in which stay has been granted under Order 39 Rule 1 & 2 CPC against the appellants (Haldiram Bhujawala and Anr.) restraining them from using the trade mark/name Haldiram Bhujawala with 'V' logo in whole or in parts or in any form whatsoever, except otherwise in conformity with the clause 43 (1)(a) and (b) of the impugned order dated 27.09.2012 till the finalization of rectification/cancellation proceedings by the IPAB or till the final disposal of the suit or unless the impugned order is varied.

11. In order to avoid confusion as to the status of the parties, they would be referred to in this order by the title of plaintiffs and defendants as were originally reflected before the trial court.

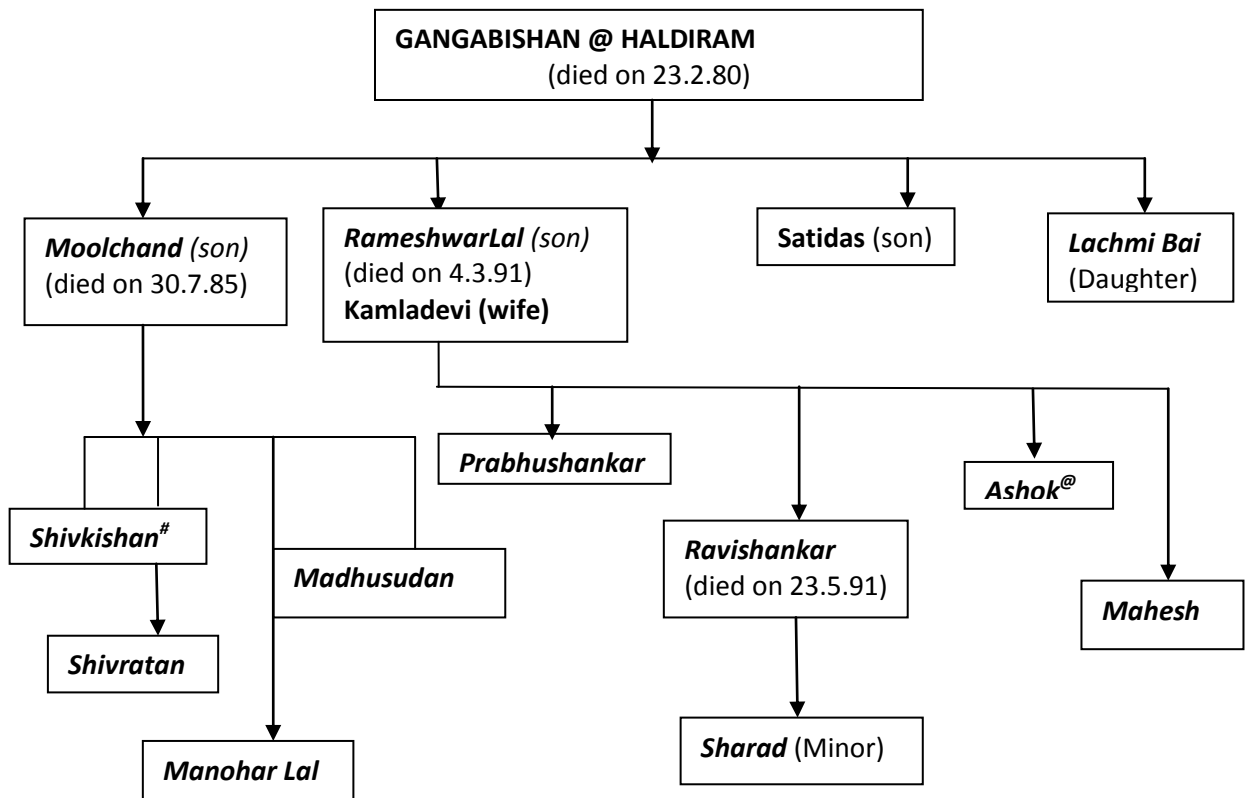
12. Briefly stated the facts leading to filing of the present appeal are that Anand Kumar Deepak Kumar as Plaintiff No.1, Shiv Kishan Agarwal as Plaintiff No.2 and M/s Haldiram India (Private) Limited as Plaintiff No.3 had filed a suit for injunction against Haldiram Bhujawala, Defendant No.1 and Ashok Kumar, Defendant No.2.

13. It may be pertinent mentioned that the suit was originally initiated in the year 1991 and has a chequered history of going from the trial court right up to the Apex Court and was thereafter remanded back to the trial court for adjudication of the application under Order 39 Rule 1 & 2 (I.A. No.1675/2012) which culminated into passing of the impugned order dated 27.09.2012 which is under challenge in the appeals filed before this court.

14. This case has become a classic case of a snake and ladder game and the family feud for sharing the trade name only with a lust to gain more money on both the sides. There is no doubt that it takes almost a

generation to set up a business and when the business is established, the successive generations start fighting between/amongst themselves as the greed takes over. This is exactly what has happened with the progeny of Ganga Bishan @ Haldiram who was the initiator of the business what has come to stay as a brand or a class by the name of ‘Haldiram’ in Indian fast food, sweets and namkeens etc. It may also be pertinent here to give a pedigree table of the family which is as under:

PEDIGREE



Plaintiff No.2 in original suit

@ Defendant No.2 in original suit

15. Ganga Bishan @ Haldiram died on 23.02.1980, but, Mool Chand Aggarwal and Rameshwar Lal Aggarwal (both since deceased), sons of Ganga Bishan, whose descendants are fighting now, continued to do the business set up by Ganga Bishan @ Haldiram till 1991 in their respective territories. Rameshwar Lal Aggarwal expired on 04.03.1991. On 10.12.1991 for the first time the plaintiffs, who are three in number, namely, Anand Kumar, Deepak Kumar and the business concern filed a suit claiming to be the registered proprietors of the trademark Haldiram Bhujawala based on the registration No.285062 and also claiming priority to the adoption or use through their predecessor in interest Ganga Bishan @ Haldiram. The case which was set up in the plaint was that Haldiram Bhujawala trade name with 'V' logo was being used by them since 1965. But when the defendants had set up a defence in the written statement that Rameshwar Lal Aggarwal (since deceased) father of the defendant, Ashok Kumar, was the inventor, originator and the adopter of the trade mark Haldiram Bhujawala from 1958, the plaintiff amended their plaint that Ganga Bishan was using the trade name from 1941 when he was young and it was only in 1965 that 'V' logo was invented and he started using the same.

16. The plaintiff opened a shop in 1983 in Chandani Chowk, Delhi under the name and style of M/S Anand Kumar Deepak Kumar. Subsequently in a civil suit instituted by them, a restraint order was sought against Ashok Kumar Aggarwal, defendant No.2 and defendant No.1 namely Haldiram Bhujawala preventing them from opening a shop in Delhi in 1991 contrary to the terms and conditions of a dissolution deed dated 16.11.1974 and committing acts of infringement and passing off.

17. Ganga Bishan @ Haldiram while he was alive had constituted a partnership firm in 1956 under the name and style of M/S Chand Mal Ganga Bishan to carry on the business of manufacturing and selling the aforesaid edible articles. In the year 1969 the partnership consisted of Moolchand, Shivkishan, Ganga Bishan and Smt. Kamla Devi (w/o Rameshwar Lal). Prior to 1969 Rameshwar Lal was himself a partner of Chand Mal Ganga Bishan. The firm has been stated to be trading under the trade name Haldiram Bhujawala. Subsequently in 1965 the firm conceived and adopted Haldiram Bhujawala –HRB (logo) as represented in ‘V’ devise as a trademark which was duly registered on 27th January 1981 in class 30 vide trademark No.285062.

18. On 16.11.1974, the partnership firm was dissolved and the registered trade mark bearing No.285062 is stated to have fallen exclusively to the share of one of the partners namely Moolchand who was allowed to use the said trade mark in whole of the country except the territory of West Bengal.

19. So far as West Bengal was concerned, Kamla Devi w/o Rameshwar Lal was permitted to use the aforesaid trade mark exclusively within the said territorial limit. It was in terms of clause 3, 7 & 8 of the dissolution deed dated 16.11.1974 that the transfer of the registered trademark No.285062 was allowed in the name of Moolchand and later in the name the name of his successors in 1985 by the Registrar of Trademarks by carrying out appropriate proceedings.

20. In this agreement of dissolution, following was the status of the parties. The first party was Ganga Bishan, second Moolchand, third Shivkishan and fourth Kamla Devi. The exact language of clause 3, 7 & 8 read as under :

“3. That the Second Party shall be entitled to carry on the said business under the name and style of MESSRS: CHANDMAL GANGABISHAN also trading as HALDIRAM

BHUJIAWALA having its head office at Bhjia Bazar, Bikaner and/or at such other place or places, as he may think fit and proper under the said trade name or style. The trade mark “HRB – HALDIRAM BHUJIAWALA” shall be utilized by the party hereto of the Second Part throughout India except in the territory of West Bengal. The territory of West Bengal shall be utilized by the party hereto of the Fourth Part and/or by her representatives. The other partners shall have no objection in using the trade mark by the parties hereto of the Second and Fourth Parts as mentioned above.

.....

7. That the Second Party shall be at liberty to carry on the business either as a sole-proprietor or may invite partners and carry on the business in partnership and deal with the trade mark “HRB – HALDIRAM BHUJIAWALA” Regd. At No.285062 in Class 30 in any manner, he may deem fit and proper.

8. That parties hereto of the First, Third and Fourth Parts shall have no objection if the Regd. Trade Mark No.285062 in Class 30 is transferred in the name of the Second Party in the records of the Registrar of Trade Marks by taking proper proceedings.”

21. The case which was set up by the plaintiff was that the aforesaid trademark Haldiram Bhujawala was invented and adopted by Ganga Bishan Aggarwal in 1941 and continued to be used by him initially individually then through the partnership. So long as he was alive and continued to be a part of the partnership firm M/s. Chand Mal Ganga

Bishan of which Ganga Bishan, his sons Moolchand and Rameshwar Lal and daughter in law Kamla Devi happened to be a party, till the time the partnership firm was dissolved on 16.11.1974. After dissolution of the aforesaid partnership trademark with respect to the entire territory of India except West Bengal fell to the share of Moolchand exclusively whilst for the state of West Bengal the rights in the same were given to Kamla Devi and her representative which included her husband Rameshwar Lal and sons etc., who are the defendants in the suit.

22. In 1991 when the defendant tried to open a shop in Karol Bagh contrary to the terms of the dissolution deed, problems ensued leading to the filing of a suit for injunction by the plaintiffs, seeking restraint against defendants, that is, against Haldiram Bhujawala and Ashok Kumar. The defendants had contested the claim on the ground that the dissolution deed was signed under undue influence by Kamla Devi which stand was sought to be amended by raising a plea that the said dissolution deed was forged and fabricated. Incidentally, the aforesaid amendment, though was allowed by the trial court was set aside by the first appellate court i.e. High Court. Appeal filed by the defendants was also dismissed by the Apex Court with a direction that this stand of forgery for the time being

be kept aside and the issues be framed on the plea of undue influence but the defendants were permitted to cross-examine the witnesses without there being a formal plea of forgery being on record and in case they are able to prima facie show to the court that such a plea is made out then in that event, an additional issue on that score may be framed.

23. These are the broad spectrum of facts though the facts are given in detail in the impugned order and are not being reproduced herein for the sake of brevity. In essence, the question at the ad interim stage to be decided is whether the learned ADJ was right in passing a restraint order against defendants prohibiting them from using the trademark/ name Haldiram Bhujawala with 'V' logo in whole or in parts or in any manner whatsoever except as per the exception carved out by the Ld. ADJ in the clause 43 (1)(a) and (b) of the impugned order, in the light of dissolution deed dated 16.11.1974 on the basis of which they were to confine their activities only to the stage of West Bengal.

24. I have heard Mr. Mukund, the learned counsel for the defendant/appellant for considerable length of time. I have also heard Mr. Amarjit Singh and Mr. Mahendra Rana also for different

plaintiffs/respondents. I have also considered the record filed, written submissions submitted by both the sides thoughtfully.

Argument of conducting mini trial

25. The first contention which has been raised by Mr. Mukund, the learned counsel for the defendant, is that while deciding an application under Order 39 Rules 1 & 2 CPC, the court is not expected to hold a mini trial and decide the suit itself. It has been contended that by passing an ad interim order against the defendants restraining them from using the trademark Haldiram Bhujawala vide order dated 27.9.2012, the learned Trial Judge has conducted a mini trial without permitting the parties to adduce their respective evidence and adjudicating the real lis between the parties.

26. The learned counsel for the defendants has relied upon the judgments of the Supreme Court in *Anand Prasad Agarwalla vs. Tarkeshwar Prasad and Ors.*; (2001) 5 SCC 568 and *Hindustan Petroleum Corporation Limited v. Sriman Narayan and Anr.*; (2002) 5 SCC 760.

27. I have considered both these judgments. There is no dispute about the proposition of law which has been laid down by the Apex Court in these two judgments that while deciding the application under Order 39 Rules 1 & 2 CPC, the court should not hold a mini trial at that stage and then grant an ad interim order by way of temporary injunction. The question which arises for consideration is whether it can be said that in the instant case, the learned Trial Judge had held a mini trial before passing an order in favour of the respondent.

28. Mr. Singh and Mr. Rana have contested this submission of the defendant. It has been contended by them that the facts of the case are so complex that it is bound to result in a detailed discussion of the submissions. Further, it has been stated that the prolonged litigation in deciding the application has also created an impression as if a mini trial is being held.

29. There is no merit in the contention of the learned counsel for the defendant that the court has held a mini trial. If one sees the stand of the defendant herein, it has kept on shifting from time to time. To illustrate this example originally it has been their stand that the dissolution deed

signed on 16.11.74 has been signed by Kamla Devi under undue influence which was latter on changed to the same being forged by the plaintiffs. Sometimes, the defendants have claimed the ownership of the trade mark through their grandfather Ganga Bishan and sometimes, they have claimed the right to use the trade mark through their father Rameshwar Lal, who is claimed to be the inventor and originator of the trade mark. The learned Additional District Judge had to deal with all these points which have been raised by the defendants. Obviously when such a wide spectrum of contentions are raised by the defendants themselves and the court is called upon to deal with the same by a detailed reasoning, it is not open to the defendants to complain about the same by raising a plea that a mini trial is being held.

30. Even before this court also all those submissions which were raised before the trial court have been raised. Once a party raises the point, the court is obligated to deal with the same. As a matter of fact, the defendant has been responsible for continuously shifting his stand especially with regard to the dissolution deed signed by their mother. Therefore it can't be said that a mini trial has been conducted. Because

of these reasons, I feel that this contention of the learned counsel is bereft of any merit.

Principles governing the grant of injunction not adhered to

31. The second contention of the learned counsel for the defendant is that the principles which have to be adhered to for grant of injunction have not been observed. The learned counsel has referred to various judgments of the Supreme Court with regard to principles governing the grant of ad interim injunction under Order 39 Rules 1 & 2 CPC. It will be worthwhile to refer to the said judgments as well as the observations passed in those judgments before we analyze the facts of the present case, whether the trial court has fallen in this error or illegality while deciding the application under Order 39 Rule 1 & 2 CPC in favour of the plaintiff.

32. The first judgment which has been referred to by the learned counsel for the defendant is *Mool Chand Yadav and Anr. Vs. Raza Buland Sugar Company Limited, Rampur and Ors.*; (1982) 3 SCC 484. In the said case, the bone of contention was one room in a building known as Hari Bhawan which was occupied by Mool Chand Yadav, who is described as General Manager of UP State Sugar Corporation Limited,

Rampur Unit. The dispute which had arisen was as to whether Hari Bhawan is a property which vested in Corporation and whether the Corporation was entitled to occupy it and whether a part of it can be used by its GM.

33. A suit came to be filed by the respondent/Raza Buland Sugar Company Limited, Rampur against Mool Chand Yadav or the officers of the Corporation from occupying the said Hari Bhawan. In the said suit, Mool Chand Yadav and the Corporation officers were injuncted from occupying the Hari Bhawan. An appeal was filed against the said order which was pending. Subsequently, an application was filed that Mool Chand Yadav and the officers of the Corporation had flouted the orders of the court and thus they were allegedly guilty of contempt and they should be punished in accordance with law. An application came to be filed by Mool Chand Yadav who was granted a month's time to vacate the premises. An appeal was preferred against the said order which was pending. The Division Bench of the Allahabad High Court refused to stay the operation of the order by virtue of which Mool Chand Yadav was granted a month's time to vacate the premises. This is how the special leave petition came to be filed in apex court. The apex court in the

backdrop of these facts observed that judicial approach requires that during the pendency of the appeal the operation of an order having serious civil consequences must be suspended.

34. On the strength of the aforesaid judgment, it seems perhaps the contention of the learned counsel for the defendant is that as in the aforesaid case, the learned trial court had injuncted the appellant/defendant from using the trade name Haldiram Bhujawala during the pendency of the suit and this is the question which deserved to be tried and decided on merits, therefore, on the basis of the appeal having been filed by the defendant in the present case, operation of the aforesaid ad interim order injuncting the defendant from using the trade mark of Haldiram Bhujawala deserves to be stayed during the pendency of the suit.

35. This reasoning given by the defendant is totally bereft of any merits. The reason for this is that in the present case there is overwhelming *prima facie* evidence to show that the use of trademark/ name Haldiram Bhujawala with 'V' logo is assigned or inherited by the plaintiff for the entire country except the State of West Bengal.

36. The second judgment which has been relied upon is *Wander Limited and Anr. Vs. Antox India Pvt. Limited*; 1990 (Supp) SCC 727 in which it has been held as under:

“Usually, the prayer for grant of an interlocutory injunction is at a stage when the existence of the legal right asserted by the plaintiff and its alleged violation are both contested and remain uncertain till they are established at the trial on evidence. The court, at this stage, acts on certain well settled principles of administration of this form of interlocutory remedy which is both temporary and discretionary. The object of the interlocutory injunction , it is stated is to protect the plaintiff against injury by violation of his rights for which he could not adequately be compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the "balance of convenience lies". The interlocutory remedy is intended to preserve in status quo, the rights of parties which may appear on a prima facie. The court also, in restraining a defendant from exercising what he considers his legal right but what the plaintiff would like to be prevented, puts into the scales, as a relevant consideration whether the defendant has yet to commence his enterprise or whether he has already been doing so in which latter case

considerations somewhat different from those that apply to a case where the defendant is yet to commence his enterprise, are attracted.”

“The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the Appellate Court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by the court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the Trial Court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion.”

After referring to these principles Gajendragadkar, J. in Printers (Mysore) Private Ltd. vs. Pothan Joseph; MANU/SC/0001/1960: [1960] 3 SCR 713 said:

... These principles are well established, but as has been observed by Viscount Simon in Charles

Osention & Co. v. Johnston the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case.

The appellate judgment does not seem to defer to this principle.

An infringement action is available where there is violation of specific property-right acquired under and recognized by the statute. In a passing-off action, however, the plaintiff's right is independent of such a statutory right to a trade mark and is against the conduct of the defendant which lends to or is intended or calculated to lead to deception. Passing-off is said to be a species of unfair trade competition or of actionable unfair trading by which one person, through deception, attempts to obtain an economic benefit of the reputation which another person has established for himself in a particular trade or business. The action is regarded as an action for deceit. The tort of passing-off involves a misrepresentation made by a trader to his prospective customers calculated to injure, as a reasonably foreseeable consequence, the business or goodwill of another which actually or probably, causes damage to the business or goodwill of the other trader. Speaking of the legal classification of this form of action, Lord Diplock said :

“Unfair trading as a wrong actionable at the suit of other traders who thereby suffer loss of business or goodwill may take a variety of forms to some of which separate labels have become attached in English law. Conspiracy to injure a person in his trade or business

is one, slander of goods another but most protean is that which is generally and nowadays, perhaps misleadingly, described as "passing off". The form that unfair trading takes will alter with the ways in which trade is carried on and business reputation and goodwill acquired. Emerson's maker of the better mousetrap if secluded in his house built in the woods would today be unlikely to find a path beaten to his door in the absence of a costly advertising campaign to acquaint the public with the excellence of his wares" See Erven Warnink B.V. v. J. Towhand & Sons (Hull) Ltd. 1979 All E.R. 731."

37. I have copiously referred to the judgment cited by the learned counsel for the defendant because of the fact to understand that the ratio laid down in the said judgment cannot be simply applied mechanically to the factual matrix of the instant case. The Wander's case (supra) dealt with a claim based upon "continuous use" culminating into an issue of passing off whereas the instant case involves two deceptively similar registered trademarks and therefore the said judgment does not support the case of the defendant.

38. Apart from the aforesaid two judgments which have been cited before this court, another judgment which is also referred to in the impugned order in this context is *Gujarat Bottling Co. Ltd v. Coca Cola*

Company & Ors; (1996) 16 PTC 89 (SC) wherein it has been observed as under:

“.....The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the 'balance of convenience' lies.”

39. The learned counsel for the defendant has cited *Morgan Stanley Mutual Fund vs. Kartick Das; (1994) 4 SCC 225* on the question of grant of stay. I have gone through the said judgment; however, I am unable to appreciate as to how the observations passed by the Apex Court in the said judgment are helpful to the defendant in the light of the facts of the present case. In the aforesaid judgment the question involved before the Apex Court was as regards the definition of the word ‘consumer’ under the provisions of SEBI while as in the instant case, the question of grant of injunction is involved in the backdrop of the Trademarks Act. It has been repeatedly observed by the Apex Court that while applying the

principles of law laid down in a particular judgment, there must be examination of facts of the two cases, namely, the reported as well as the case in hand and find some amount of similarity so as to make the proposition of law applicable. Therefore, as in the instant case, there is no *pari materia* or nexus between the facts of these cases; I find that this judgment is of no help.

40. In *Colgate Palmolive (India) Limited vs. Hindustan Lever Limited*; (1999) 7 SCC 1, the Apex Court had examined the question of grant of interlocutory injunction and had observed that the following basic principles must be observed by the court before such an injunction is granted.

“24. We, however, think it fit to note herein below certain specific considerations in the matter of grant of interlocutory injunction, the basic being-non-expression of opinion as to the merits of the matter by the Court, since the issue of grant of injunction usually, is at the earliest possible stage so far as the time frame is concerned. The other considerations which ought to weigh with the Court hearing the application or petition for the grant of injunctions are as below:-

(i) Extent of damages being an adequate remedy;

(ii) Protect the plaintiff's interest for violation of his rights though however having regard to the injury that may be suffered by the defendants by reason therefor;

(iii) The court while dealing with the matter ought not to ignore the factum of strength of one party's case being stronger than the others;

(iv) No fixed rules or notions ought to be had in the matter of grant of injunction but on the facts and circumstances of each case - the relief being kept flexible;

(v) The issue is to be looked from the point of view as to whether on refusal of the injunction the plaintiff would suffer irreparable loss and injury keeping in view the strength of the parties case;

(vi) Balance of convenience or inconvenience ought to be considered as an important requirement even if there is a serious question or prima facie case in support of the grant;

(vii) Whether the grant or refusal of injunction will adversely affect the interest of general public which can or cannot be compensated otherwise.”

41. A perusal of the judgments cited and the facts of the case in hand do not show in any manner that the learned ADJ has not followed any of the principles of law which governs the grant of injunction. It is not in dispute that while deciding the question of grant of injunction, the three basic parameters, namely, existence of a prima facie case, balance of convenience being in favour of the party concerned and that in the event of the ad interim injunction not being granted in its favour, it is likely to

suffer an irreparable loss, are the conditions which are required to be established. In the instant case, seen on this parameter, if we analyze the evidence which has been produced by the plaintiff as well as by the defendant before the learned trial court in this protracted litigation till now then I have absolutely no hesitation in holding that *prima facie* the plaintiffs have been able to establish all the three requirements which are *sine qua non* for grant of an interim injunction. This argument of the defendant is therefore without any merit and deserves to be rejected.

Concealment of material facts

42. The third argument of the learned counsel for the defendant has been that there is concealment of facts by the plaintiffs. It is stated that the conduct of the plaintiff has also to be seen while granting or refusing the ad interim injunction to the plaintiff. Reliance in this regard has been placed on case titled *Mandali Ranganna & Others vs. T. Ramachandra & Others*; (2008) 11 SCC 1, *Biswaroop Roy Choudhary vs. Karan Johar*; (2006) 131 DLT 458 and *Warner Bros. Entertainment Inc. & Anr. Vs. Harinder Kohli & Others*; ILR (2009) 1 Delhi 722.

43. In *Mandali's* case the issue pertaining to grant of ad interim injunction was involved before the Supreme Court in a property dispute. In this case, the Karnataka High Court had permitted the private respondents to make construction on the suit land subject to the final decision. It was in this context that the Apex Court had observed as under:-

“21. While considering an application for grant of injunction, the court will not only take into consideration the basic elements in relation thereto viz. existence of a prima facie case, balance of convenience and irreparable injury, it must also take into consideration the conduct of the parties.

22. Grant of injunction is an equitable relief. A person who had kept quiet for a long time and allowed another to deal with the properties exclusively, ordinarily would not be entitled to an order of injunction. The court will not interfere only because the property is a very valuable one. We are not, however, oblivious of the fact that grant or refusal of injunction has serious consequence depending upon the nature thereof. The courts dealing with such matters must make all endeavours to protect the interest of the parties. For the said purpose, application of mind on the part of the courts is imperative. Contentions raised by the parties must be determined objectively.”

44. Similarly in, *Biswaroop Roy Choudhary's* case (*supra*), the learned Single Judge of this Court had also dealt with the issue of delay and laches in applying for grant of an ad interim injunction. That was a case

where production of a film was involved and the Court had denied the grant of ad interim injunction purely on the ground of delay and laches as it was observed that because of the aforesaid reason of delay in approaching the Court for seeking an ad interim injunction the other party had spent considerable amount of money in making the film and thus the balance of convenience was shifted in favour of the party who had made the film and the plaintiff in that case could not be permitted now to use, blackmailing or taking coercive steps by filing the suit and trying to obtain injunction.

45. The third case is of *Warner Bros. Entertainment Inc. & Anr.(supra)*, where also the point which has been raised is that the plaintiff in a given circumstance must come to this court with clean hands in case it wants an ad interim injunction.

46. The aforesaid principles are no doubt very bedrock to the grant of ad interim relief in favour of a party. But it is pertinent to note that the very grant of ad interim relief is a discretionary relief which is to be exercised on very well settled principles of law and keeping in mind the unique factual matrix of each case.

47. In the present case, the suit itself was filed originally in 1991 when the present defendant had intended to start the shop in Karol Bagh area using the name of Haldiram Bhujawala. So there was no delay in approaching the court. Therefore, the aforesaid judgements where an ad interim injunction had been granted keeping in view the factum of inordinate delay is certainly not helpful to the defendant.

48. There is no dispute about the fact that a party who is claiming ad interim injunction along with the main suit must, apart from establishing three basic facts, namely, *prima facie* case, balance of convenience and irreparable loss. It must also show bonafide conduct. But it is also true and correct that every averment/ allegation made by a party must be substantiated with material and cogent facts and evidence.

49. However, the defendant has failed to convince the court giving any specific instances which would show that the plaintiffs have been guilty of concealment of material fact with a view to score an unfair advantage over the defendants. Therefore, the court is not persuaded to accept the plea of the defendant that the plaintiffs are responsible for concealment of fact or that their conduct has been such which disentitles them to grant of

any ad interim injunction. Accordingly, this contention of the defendant also does not carry any weight.

No interim order when the prior user by the plaintiff itself becomes subject-matter of adjudication.

50. The fourth argument which has been made by the learned counsel for the defendant is that no interim order be passed against the defendant when he has been claiming user much prior to the plaintiff's claim and it becomes a matter of adjudication. Reliance in this regard is placed by the learned counsel for the defendant on both the judgments of the single judge as well as the Division Bench judgment passed in *ALKEM Laboratories Limited vs. Mega International (Private) Limited* reported in (2007) 34 PTC 557 (Del) and (2009) 41 PTC 302 (Del) (DB).

51. The contention of the learned counsel for the defendant essentially has been that the case of the plaintiff as setup in the plaint originally was that he was using the trade name Haldiram Bhujawala with effect from 1965 although the registration for the word Haldiram Bhujawala with 'V' logo (trade mark no.285062) was in the year 1981. The defendant in its written statement had categorically stated that Rameshwar Lal, s/o Ganga Bishan was the inventor, originator and the proprietor of the trade

name Haldiram Bhujawala with effect from 1958 although the registration was done vide TM No.330375 in the year 1980. It has been contended, after the defendant took the plea that it was using the trade mark with effect from 1958, which was much prior to the use of the said trade name by the plaintiff from the year 1965. The plaintiff changed its stand in the plaint by amending the plaint and took the plea that the plaintiff is using the same since 1941.

52. It was further stated by the defendant that no documentary evidence has been placed on record by the plaintiff to show that it was using the trade name from 1941. Therefore, in the absence of any documentary evidence, no injunction could have been granted in favour of the plaintiff because the very prior user of the Trade Mark between the plaintiff and the defendant was the bone of contention and had to be adjudicated.

53. Alternatively, it was contended that the defendant being the prior user of the trade name Haldiram Bhujawala, to which the plaintiff was claiming proprietary right, both the defendant and the plaintiff being the

concurrent users, ought to have been permitted to use the said trade name and the defendant could not be injuncted from using the said trade name.

54. I have considered this submission of the leaned counsel. The plea of concurrent user is an argument of desperation because it was not the case of the defendant. Moreover, this plea of concurrent user is completely demolishing the claim of the defendant that Rameshwar Lal, father of the defendant, was the inventor and originator of the trade name Haldiram Bhujawala and it was got registered by him vide registration No.330375. The fact of the matter is that this registration of the trademark no. 3300375 also stands since revoked on the objections of the plaintiff, thus, there is no basis to use the mark. Further Rameshwar Lal has given a certificate and an affidavit to the effect that his father was the inventor and originator which also goes against them. Both these documents are in the nature of an admission. A person does not make an admission against his own interest unless and until it is true and correct. This is the rationale of making it relevant under Section 21 of the Evidence Act. So far as the dissolution deed signed by the mother is concerned, that only gives them a permission to use the trade name in West Bengal. Therefore, this submission is also without any merit.

Irreversible Damage

55. The sixth arguments of the learned counsel for the defendant is that wherein an interim order, if granted, will lead to irreversible situation, that is, the party's reputation, credibility, goodwill, etc., would suffer. No interim order should be passed. Correspondingly, it was urged where the plaintiff's losses, if any, are capable of being remedied by award of damages then the plaintiff is not entitled to any ad interim orders.

56. There is no dispute about the fact that apart from *prima facie* case and the balance of convenience before an ad interim injunction is granted in favour of a party, what must be shown is an irreparable loss. An irreparable loss is a loss (in case the injunction is not granted), if it is of such a nature that it cannot be compensated in terms of money.

57. The contention of Mr. Mukund, the learned counsel for the defendant is that during the pendency of the appeal itself, the operation of the ad interim order ought to have been stayed as it has serious civil consequences on their business. In order to further support his

submission with regard to severity of impact of the grant of ad interim restraint order against the defendant, it was contended that the defendants were carrying on the business activities in the name of Haldiram/Haldiram's/ Haldiram Bhujawala and Haldiram Bhujawala with 'V' logo between February, 1992 to 12.5.1999 when the ad interim restraint order was passed against them for the first time by Hon'ble Mr. Justice J.B. Goel in the suit while deciding I.A. No.1675/2012.

58. It has been stated that the defendant had to stop the use of different names between 1999 to 3.6.2010 when the business activity was being carried out under a name other than Haldiram. It has been stated that after 11 years of use of the aforesaid trade name Haldiram etc., the Division Bench of this court vacated the ad interim order granted by the learned Single Judge Mr. Goel and remanded the matter back. It has been stated that no amount of compensation can restore the losses and the goodwill which the defendant lost for these 11 years while as the plaintiff has been the beneficiary of the order.

59. It has been further contended that the interim order was again granted by the learned ADJ on 27.9.2012, the operation of which has

been stayed by this court and the same continues till date. Therefore, at this point of time when the substantial portion of time has passed while the litigation between the plaintiff and the defendant is pending, passing of an ad interim injunction restraining them from user of the trade name Haldiram is likely to cause irreparable loss to them which no amount of money can compensate.

60. Correspondingly, it has been argued that so far as the plaintiff is concerned, in case the injunction is refused to them then certainly they can be compensated for the non-grant of injunction by the court and ultimately in case they succeed in the suit. Therefore, this should be the basis of grant or denial of injunction to the parties and accordingly, the appeal of the defendant against the plaintiff deserves to be allowed.

61. No doubt the principles of law which have been urged by the learned counsel Mr. Mukund before this court for the grant of ad interim injunction cannot be faulted with but the fact of the matter remains as to whether the injunction deserves to be granted to the plaintiff or not or whether ad interim injunction deserves to be refused to the plaintiff has to be tested in the light of the three tests which have been enunciated by the

courts repeatedly and which have been reproduced hereinabove, namely, the existence of a *prima facie* case, the irreparable loss caused to the plaintiff and the balance of convenience, whether it exists in favour of the plaintiff or not.

62. So far the existence of *prima facie* case is concerned, there is no dispute about the fact that the trade mark Haldiram Bhujawala was the trade name invented by Ganga Bishan, father of Mool Chand and Rameshwar Lal, whose progenies are fighting for the use of the trade mark.

63. It is also not disputed that Rameshwar Lal has setup a case that he is the originator and the original adopter of the name Haldiram Bhujawala but that plea which has been taken by the defendant is false on account of the fact that the plaintiff have brought to the notice of the court an affidavit and certificate purported to have been filed by Rameshwar Lal himself in a litigation initiated with their other family members, who happen to be their cousins etc. in Calcutta wherein he has admitted that the mark Haldiram Bhujawala was the name invented, adopted and originated by his father, Ganga Bishan.

“EVIDENCE OF DISTINCTIVENESS

I, Rameshwar Lal Aggarwal, son of Shri Ganga Bishan alias Haldi Ram, aged 47 years, Indian by nationality resident of 3-A, Brajodulal Street, Calcutta, do hereby solemnly affirm and declare as under :-

2.1

3.2

4.3 *That trade mark of my firm if “Haldiram Bhujawala” with letters HRB prominently placed” in the centre and the said mark being used by my firm since 1958 and by virtue of said user during the past 20 years the said trade mark has acquired much wide reputation that the word “HALDIRAM” forming the essential, leading and distinctive part thereof has become exclusively associated with business activities of my firm along for Bhujia, Namkin and Sweet Meat etc. “HALDIRAM” forming the essential part of the trade mark of my firm is the nick name of my father who was trading under the name “HALDIRAM BHUJIAWALA” since his young age.*

(Emphasis supplied)”

.....

“Dated 16.11.1974

TO WHOM SO EVER IT MAY CONCERN

This is to confirm that the name Haldi Ram Bhujawala (HRB) which was originally adopted and used by my father since 1941 shall remain the sole property to

my brother Mool Chand and his representative for whole of India except the State of West Bengal. I or any of my representatives shall not claim any further right on this and I shall trade under the name Haldi Ram Bhujawala in West Bengal only.

*Sd/-
(RAMESHWAR LAL AGGARWAL)”*

64. Section 58 of the Evidence Act lays down that a fact which is admitted and need not be proved and this admission by Rameshwar Lal (since deceased), father of the defendants obviously points out it was Ganga Bishan who had invented, originated and adopted the trade name Haldiram Bhujawala.

64A. The aforesaid facts clearly and unequivocally help the plaintiff to establish a *prima facie* case of their grandfather being the inventor and originator of the trade name to which they have acquired their right to the trade mark in whole of India except the State of West Bengal.

Change of user qua Regd. TM No.285062 from 1965 to 1941 or before, after Defendants’ categorical assertion in their written statement qua prior user of 1958 – No interim order, when prior user claimed by plaintiff itself, becomes a matter of adjudication.

65. The next argument which has been urged by Mr. Mukund, the learned counsel for the defendant is that in the original plaint filed on

10.12.1991, the plaintiff had stated that he has been using the trade mark Haldiram Bhujawala since 1965 and also that the firm M/s. Chand Mal Ganga Bishan in which mother of appellant No.2/defendant No.2 was partner was owning the trade mark certificate of 285062 dated 27.1.1981 and its supporting document stated that the user of the aforesaid trade mark was started from 1965 which continued till date.

66. The defendants filed their written statement and stated that they have been using the mark Haldiram Bhujawala since 1958 and had also placed on record the evidence to that effect. It was alleged by Mr. Mukund, once the defendants took the stand that they had been using the trade mark since 1958, the plaintiff filed his application for amendment of the plaint and shifted his date of user from 1941 so as to defeat the claim of prior user of the appellant.

67. It was contended by Mr. Mukund that in a case of this nature where the user of the trade name from 1965 or from 1941 by the plaintiff or by the defendant from 1958 itself was the subject-matter of adjudication by the court, no ad interim injunction ought to have been granted in favour

of the plaintiff as neither of the parties could claim exclusive right to such name Haldiram Bhujawala.

68. I have carefully considered this submission. Though in the first instance, the argument advanced by Mr. Mukund may seem to be very convincing one but on deeper examination, I find this argument to be without any merit. It is stated that the court while considering an application under Order 39 Rule 1 & 2 CPC especially in a case where parties amend their pleadings, court does not see the stand of the parties on the basis of unamended pleadings of the parties. More so, when the parties have been fighting over the ad interim order itself for more than two decades, there is bound to be change in circumstances. Further, once the amendment is allowed then the amendment relates back to the date of inception of the plaint or the written statement as the case may be and whether a party is entitled to an ad interim relief or not has to be considered by the court on the basis of the last pleading. Moreover, in the instant case, it is not only the plaintiff, who had amended the plaint, the defendant has also amended his written statement from time to time and has been shifting his stand though in a different context. Therefore, in my considered opinion, this amendment which has been sought by the

plaintiff with regard to the change of date has to be considered on its merits.

69. It may also be pertinent here to mention no doubt in the original plaint, the plaintiff has stated that they have been using the trade name Haldiram Bhujawala from 1965 but that was essentially on account of the fact that though that date was given in the trade mark application submitted by them for the purpose of registration of 'V' logo which was stated to have been granted in their favour vide trade mark certificate No.285062 on 27.1.1981 and it related back to the date which was given by them from 1965.

70. Mr. Amarjit Singh, the learned counsel for the plaintiff had pointed out that 1965 was taken as a date because in that year, logo Haldiram Bhujawala logo in word 'V' was adopted. Further, the fact of the matter remains that it is the admitted case of the parties that Ganga Bishan @ Haldiram had been using this trade name Haldiram Bhujawala from his young days even though young days have not been defined and he originally started his business in Bikaner and that is how the year was changed from 1965 to 1941 when Ganga Bishan used to carry out the

business of selling *namkeens* and other saltish articles/eatables at Bikaner under the said trade name. Under these circumstances, it could not be said that because of the subsequent developments which had taken place between the parties, namely, the starting of the business under the trade name Haldiram Bhujawala by Rameshwar Lal, father of the defendants in West Bengal in 1958 coupled with the fact that in 1974, there was dissolution of the partnership consisting of three partners in which mother of the defendants was a party and a signatory to the dissolution by virtue of which the user of trade name Haldiram Bhujawala was allocated to Moolchand in respect of whole of India except West Bengal while as Kamla Devi (w/o Rameshwar Lal) was given the exclusive use of the same in West Bengal. It became crystal clear that the user of the trade name Haldiram Bhujawala under the trade mark No.285062 was not under adjudication as is sought to be urged by the learned counsel for the defendants and therefore, nothing much turns on this submission.

71. I have considered the rival contention on this score. *Prima facie* it is established that the trade name Haldiram Bhujawala was invented/originated by Ganga Bishan and passed on to the partnership Chand Mal Ganga Bishan. Once the partnership was dissolved, it was

allocated to Moolchand in respect of whole of the country except State of West Bengal which was given to Kamla Devi (w/o Rameshwar Lal), who had started business in West Bengal in 1953. Essentially, what was given to them was a license to use the trade name in West Bengal only. Therefore, the opening of shop by they progeny of Rameshwar Lal, that is, defendants were absolutely wrong on their part.

Declaration dated 16.11.1974, allegedly signed by late Sh. Rameshwar Lal Agarwal (father of the appellant), denied by appellant/defendant as a forged and fabricated document, prima facie being a disputed document, held in order dated 3.6.2010 by this Hon'ble Court as well as trial court in the impugned judgment

72. The next argument which has been advanced by Mr. Mukund, the learned counsel for the appellant/defendant is that the declaration dated 16.11.1974 allegedly signed by Late Rameshwar Lal Aggarwal, father of the appellant as well as the dissolution deed dated 16.11.1974 signed by Kamla Devi is forged.

73. There is no dispute about the fact that stand of the defendant with regard to the dissolution deed has been ambivalent. The defendant in the written statement with regard to the signature of Kamla Devi on the

dissolution deed have, in the first instance, been simply denied and it has been stated that Kamla Devi was an illiterate person and it was sheer out of respect of her being the daughter-in-law to Ganga Bishan, his father-in-law, who was the another partner of Chand Mal Ganga Bishan apart from Moolchand and Shivkaran that she had signed the document. Later on it was stated by the defendant that the said dissolution deed was signed by Kamla Devi under undue influence and finally it was contended that the said dissolution deed is a forged one and it does not bear the signatures of Kamla Devi at all.

74. It may also be pertinent here to mention that at the stage when the defendant took the plea that the dissolution deed was signed by Kamla Devi out of respect and courtesy to elder in the family, namely, Ganga Bishan @ Haldiram, the case of the appellant/defendant was that they are not claiming their right to the inheritance of trade mark through their mother but they are claiming the right to use the trade mark through their father Rameshwar Lal. Sometimes, they have been claiming their right directly from their grandfather, Gang Bishan. All these shifting stands have been taken by the defendant by amending their written statement from time to time also.

75. Mr. Amarjit Singh, the learned counsel for the plaintiff has taken the plea that this stand of the defendant is totally a convenient stand which has kept on changing from time to time. It has been stated that this plea has absolutely no merit as would be evident from the fact that all these pleas are contradicting one another. Sometimes, the defendant says that they are inheritors of the trade name through their father and when it becomes inconvenient to them, they bank upon the right to use the trade mark through their mother and assail the dissolution deed. He has also drawn the attention of the court to the declaration of Rameshwar Lal signed on 16.11.1974 in which Rameshwar Lal has categorically admitted that the trade name Haldiram Bhujawala was invented, originated and attributed to his father Ganga Bishan at Bikaner which clearly contradicts the stand of the appellant/defendant that their father Rameshwar Lal was the originator and inventor of the trade name. It has also been stated by him that the signatures of Rameshwar Lal are stated to be forged on account of the fact that there is another similar affidavit signed by Rameshwar Lal on the same lines which has been disbelieved by the court but without realizing the fact that Rameshwar Lal has given two affidavits dated 9.6.1976 and 9.6.1978, contents of which is not doubted

by the defendants. In the said affidavits a definite stand is taken supporting the invention and origination of the trade name attributable to his father in a litigation started by their cousins against them in Calcutta itself which tantamount to an admission in the pleadings which also goes against the appellant/defendant. All these facts clearly show that this is a false stand taken by the defendants.

76. I have carefully considered this rival contention and gone thorough the voluminous record. Suffice it would be first to say that so far as Kamla Devi is concerned, the defendants were not claiming right to use through Kamla Devi. She has chosen to remain silent for almost eight years without seeking impleadment in this suit. It is only in the year 1999 that she has filed a suit for dissolution of partnership and rendition of accounts. Further, where you take the stand that documents is signed out of respect or under misrepresentation, undue influence, fraud or even is alleged to be forged then one is *prima facie* admitting the existence of documents and onus of fraud, coercion, undue influence, forgery to be proved is on him which can be only done during the trial. All these facts clearly show that *prima facie* at this stage the existence of correctness of

the document of dissolution is to be assumed. Therefore, this fact also goes against the defendant.

77. Ganga Bishan had consciously permitted Rameshwar Lal to use the trade name Haldiram Bhujawala only in West Bengal and for the rest of the country, the rights were given to Moolchand, his other son. Therefore, Ashok Kumar, the son of Rameshwar Lal, after the death of later could not have encroached upon the territory which was meant exclusively to be used by Moolchand and his successors by opening a shop in Karol Bagh, Delhi which compelled them to file a suit for injunction.

78. Further the conduct of the defendants does not contemporaneously matched with the pleadings or the stand taken by them before the court. In the first instance, the appellants are taking the plea that the mother of the appellant/defendant had signed the dissolution deed out of respect to her grandfather, namely, Ganga Bishan which later on changed to undue influence and forgery.

79. Curiously enough at no point of time till 1999, the appellant/defendants have chosen to make their mother Kamla Devi as a

party despite the fact that she is not only necessary but also a proper party to the suit. Kamla Devi would have been the best person to take a stand before the court as to whether she signed the dissolution deed out of respect, undue influence or because it was a forged document. It may be borne here in mind that the suit itself was filed in 1991 and for a period of eight years, neither Kamla Devi nor any of the appellant/defendant made any effort to make her as a party and it is only in the year 1999 for the first time that a suit for declaration was filed by Kamla Devi seeking a declaration that the dissolution deed which is purported to be signed by her is a forged document and claiming other consequential relief. Obviously, Kamla Devi would not have done so unless and until she had consulted the defendant and the defendants had realized that this was one of the main weaknesses in their case as the stand taken by them was not fitting in with the factual matrix of the case.

80. In addition to this, *prima facie* once a document is placed on record then there is a presumption of the correctness of the document and a person who takes up a plea that the document is signed under undue influence or is a forged document or that it is signed by fraud the onus of proving that the signatures on the document were obtained by undue

influence, force or fraud, is on such a party because this is a fact which is especially within the knowledge of such a party and by virtue of Section 106 of the Evidence Act, that party has to discharge that onus which can be done only during the course of appeal and at the *prima facie* stage the document is taken to be the one which is a correct and genuine document and it will obviously go in favour of the respondent/plaintiff.

81. The same would be the reasoning which would be applicable to the declaration dated 16.11.1974 purported to have been signed by Rameshwar Lal Aggarwal, the father of the defendant. Therefore, this contention of Mr. Mukund, the learned counsel for the defendant is without any merit.

Documents post 27.9.2012 not to be relied

82. The another argument which has been urged by Mr. Mukund, the learned counsel for the appellant/defendant is that the order of the Division Bench dated 3.6.2010 has not been complied with both in letter and spirit. In this regard it was contended by the learned counsel that the Division Bench had specifically stated that the documents which was filed by the respondent/plaintiff post 12.5.1999, that is, the date when the

order of restraint was passed by the learned single judge of this court against the present appellant will not be considered by the learned ADJ while deciding the application under Order 39 Rule 1 & 2 CPC afresh. It has been stated that the very fact that the learned ADJ has placed reliance on the affidavit dated 9.6.1976 in order to pass a fresh restraint order in itself shows that it has not followed the orders of the Division Bench in letter and spirit and thus, the order of restraint which has been passed pursuant to deciding the application under Order 39 Rule 1 & 2 CPC is not sustainable in the eyes of law.

83. I have considered this submission made by the learned counsel for the appellant; however, I do not agree with this submission of the learned counsel. The learned ADJ has considered both the situations, that is, the situation both where the documents were on record pre 12.5.1999 as well as post 12.5.1999 and in both the situations he has found the *prima facie* case in favour of the respondent/plaintiff so as to pass an injunction order against the present appellant.

84. It may also be pertinent here to mention that although the Division Bench has specifically referred to in its order dated 3.6.2010 that

documents post 12.5.1999 may not be taken into consideration by the learned ADJ while deciding the application under Order 39 Rule 1 & 2 CPC. The impugned order dated 27.9.2012 not refers to documents dated 09.07.1976 filed after 12.5.1999. The document to which reference is made is not such a document that if it is ignored or overlooked or taken off, the record as if the balance will be titled in favour of the defendant as it contained facts which were already covered in the affidavit dated 09.06.1978 which was on record prior to 12.05.1999. It was never visualized that it will take so long to decide the interim application but in the last one year or so, there have been so many major developments in the litigation between the parties in different forums that those facts which go to the root of the matter will have to be necessarily considered by this court as otherwise non-consideration of the said facts and the documents by this court will only result in passing an inchoate order which will not be sustainable in the eyes of law.

85. The illustration of this would be reflective from the fact that the trade mark registration No.330375 was obtained in the name of Rameshwar Lal and Prabhushankar Aggarwal in the year 1980. This registration was obtained by Rameshwar Lal and Prabhushankar

Aggarwal on the ground that Rameshwar Lal is the inventor, originator and propagator of the trade mark while as the respondent/plaintiff herein had raised various objections including the one that the same has been allegedly obtained in collusion with the attorney who was looking after the matters of both the warring group, namely, Rameshwar Lal and Moolchand. It may be pertinent here to mention the registration of trade mark 330375 which was got done by Rameshwar Lal was cancelled on the objections having been raised by Moolchand and its progeny, who are the respondent/plaintiffs herein. After the cancellation of the trade mark certificate by the Intellectual Property Appellate Board the defendant had chosen to file a writ petition in Calcutta and in this writ petition also they were unsuccessful in obtaining any stay order against the operation of the judgment passed by the Tribunal. Meaning thereby that the registration of the trade mark was *prima facie* got done by Rameshwar Lal and Prabhushankar Aggarwal surreptitiously and was not sustainable in the eyes of law.

86. One of the arguments of the learned counsel for the defendant has been that the defendant may be permitted to use the mark Haldiram Bhujiawala notwithstanding the fact that its trademark registration

330375 has been cancelled on account of the fact that the appellant has been using the aforesaid trade mark since 1958 while as the plaintiff had stated that it had started user of the mark only in 1965 and the trade mark No.285062 has been registered in 1981. It is only later on the written statement having been filed by the present defendant that the plaintiff took the plea that it is using the trade mark since 1941. It is, therefore, urged that no case for passing off is made out against the present defendant on account of the fact that the trade mark happens to be registered in favour of the plaintiff.

87. Mr. Mukund, the learned counsel for the defendant has contended that the plaintiff had not setup a case of passing off in the plaint. Therefore, there is no point in considering a plea which has neither been pleaded nor is any *prima facie* evidence produced about the same.

88. I have carefully considered the submission of the defendant in this regard. The plea of concurrent user which is taken by the present appellant is self destructive of the plea that Rameshwar Lal was the inventor or a prior adopter. The plea of concurrent user pre-supposes the pre-existing and pre-established right of another in the mark. It may be

pertinent here to refer to the fact that one of the submissions which the defendant had made originally was that their father Rameshwar Lal was the inventor and originator of the trade mark Haldiram Bhujawala which was totally contrary to the affidavit dated 09.06.1978 and the **certificate** dated 16.11.1974 which was placed on record showing that Rameshwar Lal himself had admitted that his father Ganga Bishan @ Haldiram was originator and inventor of the trade name Haldiram for which he was doing business originally in Bikaner till 1958 when Rameshwar Lal opened the shop in Calcutta. Thus, from the aforesaid discussion, the only irresistible conclusion which can be drawn at the moment is that the plaintiff has been able to establish before the trial court that it has got a *prima facie* good case on account of the fact that it has been established that Ganga Bishan was the originator and inventor of the trade name Haldiram Bhujawala, and was the partner of the partnership firm which was started by him under the name and style of Chand Mal Ganga Bishan by virtue of which the trade name came to be used exclusively by the partnership firm. On account of dissolution of the partnership in 1974, the trade name Haldiram Bhujawala had been exclusively assigned in favor of Moolchand and his successors for use throughout India except

the State of West Bengal because so far as the said State of West Bengal is concerned, Rameshwar Lal had started a shop under the name of Haldiram Bhujawala at Calcutta and thus, to that extent, he was permitted to use the trade name/trademark, so far as West Bengal is concerned. The balance of convenience is in favour of the plaintiff because not only it was doing business pursuant to the allocation of the trade name in favour of Moolchand in Delhi by running more than one shop since 1983, firstly, in Chandni Chowk and then at various other places but as a matter of fact, it was also legally authorized to use the said trade name at all places other than West Bengal.

89. The contention that the plaintiff would suffer an irreparable loss is also satisfied inasmuch as the defendants by opening the shop in Delhi, which was not within their domain, had tried to encroach upon the domain of the plaintiff and by usurping the said trade name of Haldiram Bhujawala in a domain where they were not supposed to function, they were causing irreparable loss to the plaintiff but were also adding to the confusion of the public at large. This confusion emanates from the fact that both the respondent and the petitioner were using the word Haldiram with 'V' logo or Haldiram Bhujawala or Haldiram in different

letters/font with a perceptible difference and thus, creating a doubt in the minds of the public at large as to which one is the genuine one.

90. In addition to this, the other conditions which are essential for the grant of an ad interim injunction, namely, that a party must come to the court with clean hands and that there should be no delay in approaching the court for grant of an ad interim relief, has also been satisfied by the plaintiff and not proved by the defendant to be the deficiencies in the case of the plaintiff which may disentitle them the relief claim. Accordingly, for the above mentioned reasons, I feel that so far as the appeal of the defendant is concerned, it is without any merit and the same is liable to be dismissed.

91. Further, it may be pertinent here to mention that the Hon'ble Division Bench while disposing of the appeal filed against the ad interim order dated 12.05.1999 had specifically observed that the entire trial may be completed within a period of six months. It seems that many six months have elapsed in between, however, the trial court has not been able to decide the suit till date. I have been given to understand that the evidence of the respondent/plaintiff has been substantially completed and

some evidence still remains to be recorded. It is very strange that despite a specific direction, the judicial officer conducting the trial has not deemed it proper to seek enlargement of time from the court when more than six years have elapsed from the direction of the order having been passed by the Division Bench. I, therefore, direct that the learned Registrar General shall prepare a list of officers, who have remained in that particular court for more than six months and have dealt with the aforesaid case and seek their explanation as to why the aforesaid direction passed by the Division Bench was not complied with by them. The explanation furnished by such of the officers, who remained posted in the said court for more than six months and yet were not able to complete the trial, shall be placed before this court after a lapse of three months.

92. The learned trial judge had permitted the defendant to use the trade name Haldiram Bhujawala for a limited period as per the exception carved out in clause 43 (1)(a) and (b) of the impugned order, till the time the said order is modified or vacated or till the time rectification order is passed by the Tribunal, as those two connected appeals and the CM (M) have also already been disposed of and the contingency which permitted the defendant to use the trade name has also cease to exist. The

defendant had used the aforesaid trade name for a considerable length of time, causing irreparable loss to the plaintiff and they ought to stop forthwith the use of the trade name; however, I am cognizant of the fact that as the business has been done by them under the name of Haldiram, they must have got printed certain menu cards, pamphlets, boxes, etc., which will go waste and they need to be compensation for the same. I, accordingly, fix a period of two weeks within which the defendant must destroy the same. So far as the plaintiffs are concerned, they shall deposit a sum of Rs.5 lacs with the Registrar General of this court within a period of one week from today so that in the event of the boxes, pamphlets, boards, etc., which are got printed by the defendant under the banner of Haldiram are to be removed forthwith, that the defendant is duly compensated by disbursing the said amount to the defendant, from the aforesaid amount. So far as the disbursal of the amount of Rs.5 lacs in order to compensate the defendant is concerned, this shall be done by the Trial Court on production of documents which will show the amount of money spent by them in getting their boxes, pamphlets, etc. printed in the last three months.

93. In view of the above, the appeal against the impugned order dated 27.9.2012 passed by the learned ADJ stands dismissed and the restraint order against the defendants, their representatives, agents, assignees etc. from using the trade name/mark Haldiram Bhujawala HRB with 'V' logo in any form whatsoever, wholly or in parts forthwith, till the final disposal of the suit, as ordered by the trial court, stands affirmed except that para 43 (1) (a) and (b), which permitted the defendant to use the trade name on certain contingency, stands deleted. Further, clause 43 (1) (c) stands modified to the extent that now instead of the defendant, the plaintiff shall maintain an account of sales made by them using the aforesaid trade name/mark or logo, duly audited in accordance with law, till final disposal of the suit and shall file the same before the court as and when called upon to do so.

V.K. SHALI, J.

OCTOBER 19, 2015

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