

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

FRIDAY, THE 05TH DAY OF JULY 2019

THE HON'BLE MR. JUSTICE S.VAIDYANATHAN

O.A. Nos.33 and 34 of 2019

and

A. Nos.2230, 2231 & 2920 of 2019

in

C.S. No.33 of 2019

Hatsun Agro Product Ltd.,
Having registered office at,
No.1/20-A, Rajiv Gandhi Salai (OMR),
Karapakkam, Chennai - 600 097,
And also carrying on its business at,
Old No.AD-83/New No.AD13,
Anna Nagar, Opp.IOB Towers Branch,
Chennai - 600 040.
represented by its
Authorised Signatory.

... Applicant/Plaintiff

(in O.A. Nos.33 and 34 of 2019)

-Versus-

1. M/s.Patanjali Biscuits Pvt.Ltd.
Continental Chambers, 5th Floor,
15A, Hemantha Basu Sarani,
Kolkata - 700 001.

2. Patanjali Ayurved Limited,
Plot No-209, Bhalswa Village,
Opposite Jaiangir Puri,
G.T.Karnal Road,
Delhi - 33.

... Respondents/Defendants

(in O.A. Nos.33 and 34 of 2019)

O.A. No.33 of 2019:-

Original Application praying that this Hon'ble Court be pleased to grant an order of interim injunction restraining the Respondents/Defendants by themselves, their agents, servants or any one claiming through them from in any manner infringing the Applicant/Plaintiff's Trade Mark "AROKYA" or any other mark or marks which are in any way

identical or deceptively similar to the Applicant/Plaintiff's registered trademark "AROKYA" as described in the schedule to the Plaint pending disposal of the instant suit.

O.A. No.34 of 2019:-

Original Application praying that this Hon'ble Court be pleased to grant an order of interim injunction restraining the Respondents/Defendants by itself, its servants or agents or anyone claiming through it from in any manner passing off its products as that of the Applicant/Plaintiff by using the offending trademark AROGYA which are similar, deceptively similar and identical to the Applicant/Plaintiff's trademark AROKYA or by using any other trademark which is similar, deceptively similar or identical to that of the Applicant/Plaintiff's trademark AROKYA by manufacturing or selling or offering for sale or in any manner advertising the same.

A. Nos.2230, 2231 & 2920 of 2019:-

1. M/s.Patanjali Biscuits Pvt.Ltd.
Continental Chambers, 5th Floor,
15A, Hemantha Basu Sarani,
Kolkata - 700 001.
2. Patanjali Ayurved Limited,
Plot No-209, Bhalswa Village,
Opposite Jaiangir Puri,
G.T.Karnal Road,
Delhi - 33. ... Applicants/Respondents/Defendants

-Versus-

Hatsun Agro Product Ltd.,
Having registered office at,
No.1/20-A, Rajiv Gandhi Salai (OMR),
Karapakkam, Chennai - 600 097,
And also carrying on its business at,
Old No.AD-83/New No.AD13,
Anna Nagar, Opp.IOB Towers Branch,
Chennai - 600 040.
represented by its
Authorised Signatory. ... Respondent/Applicant/Plaintiff

A. No.2230 of 2019:-

Application praying that this Hon'ble Court be pleased to vacate the order of interim injunction dated 28.02.2019 in O.A.No.34 of 2019 in C.S.No.33 of 2019.

A. No.2231 of 2019:-

Application praying that this Hon'ble Court be pleased to vacate the order of interim injunction dated 28.02.2019 in O.A.No.33 of 2019 in C.S.No.33 of 2019.

A. No.2920 of 2019:-

Application praying that this Hon'ble Court be pleased to pass a Summary judgment under Order XIII A of the Code of Civil Procedure (as amended) to dismiss the suit against the defendants.

These Applications, coming on this day before this Court for hearing, the Court made the following order;-

The Applicants, who are the Defendants in the suit have come forward with these Applications, seeking to vacate the order of interim injunction dated 28.02.2019 passed in O.A.Nos.33 and 34 of 2019 in C.S.No.33 of 2019.

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2. On 28.02.2019, this Court had granted an order of interim injunction against the Defendants, pursuant to non-appearance of the Defendants in spite of issuance of private notice on them. Subsequently, the Applicants took out these Applications for vacating the interim order dated 28.02.2019 and upon consideration of the submissions made on either side, this Court, by an interim order dated

directed the order dated 28.02.2019 to be kept in abeyance for a period of two weeks.

3. The main argument advanced by the learned counsel appearing for the Applicants/Defendants is that though the word 'Aarogya' is deceptively similar, the Defendants have been using the said Trademark "Patanjali Aarogya" for quite a number of years, as the same was registered as early as in 2016 itself. It was his further argument that there is no likelihood of damaging the goodwill and reputation of the Plaintiff, as the Mark "Patanjali Aarogya" is named for selling a multi grain biscuit, whereas the Respondent/Plaintiff has been using the mark AROKYA for manufacturing milk and Dairy based products and therefore, it cannot be said that the Applicants/Defendants are the competitors of the products of the Respondent/Plaintiff. In support of his submission, the learned counsel appearing for the Applicants/Defendants drew the attention of this Court to the Application No.2036717 submitted by them, in which the details of goods and service described under Class:30 are Coffee, Tea, Cocoa, Sugar, Rice, etc., whereas in the Application No.3375847 submitted by the Respondent/Plaintiff, the details of goods and service indicated under Class:29 are preserved, dried, frozen and cooked fruits, eggs, milk and milk products, etc., and therefore, there is no connectivity in sale of both products and such sale will not definitely affect the market of each other's product.

4. It was submitted by the learned counsel for the Applicants / Defendants that the word 'PATANJALI' is a device mark and as per the settled proposition, the mark has to be taken as a whole and together and cannot be seen in a divided form and in an isolated manner. Even a bare look at both the Trademarks will prove the fact that there is a difference in spelling and pronunciation. It was further submitted that the Applicants / Defendants have been dealing with the products under the very same Trademark for more than eight years and the Respondent/Plaintiff was aware of such factum in the year 2016. Despite that, the Respondent/Plaintiff has belatedly approached this Court only in the year 2019 with the delay of nearly three years from such awareness. The Applicants/Defendants, in order to substantiate his submission, has relied upon a judgment of the Hon'ble Supreme Court in the case of Wander Ltd., and another vs. Antox India P.Ltd., reported in 1990 (Supp) SCC 727, wherein it has been held as under:

"5. 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 uncertain 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.

5. It was the submission of the learned counsel for the Applicants / Defendants that the application of dilution theory against competing litigants is nothing, but misuse of its real objective and it was vividly expressed and discussed by J.Thomas McCarthy in The Trademark Reporter [Vol.94 TMR 1176], stating as follows:

"If "dilution" is viewed as overlapping with the doctrines of confusion over source and confusion over sponsorship, affiliation or connection, then "dilution" will, in many cases, surely devour the traditional confusion-based grounds for defining the scope of trademark rights. To apply "dilution" in the case of competing litigants is, in my view, a dangerous result in harm to the balance of free and fair competition. I believe that "dilution" (of

whatever dimensions) must be defined as a separate and distinct kind of protection for a few (a very few) widely known trademarks.

Dilution by blurring and infringement by a likelihood of confusion are not stops along the same railway line: they are different lines altogether. They are separate lines because they are separate kinds of consumer perception. In the United States, some courts and commentators see blurring and confusion merely as different points along a single line continuum of consumer perception. In my opinion, this is seriously erroneous view and misses the key difference between the two doctrines. The mark that confuses does not necessarily dilute. It does not because dilution is and should be a separate legal theory positing a different kind of damage to a mark caused by a different form of consumer perception. Any attempt to weld the two doctrines together is bound to result in error and bafflement..."

6. It was the further submission of the learned counsel for the Applicants / Defendants that in the absence of possession of registration under Class 30, the Plaintiff cannot claim right over the Trademark "Arokya", especially when the two marks, namely, "Patanjali Aarogya" and "Arokya" are phonetically dissimilar and are used for entirely different products. Since the Respondent/Plaintiff has suppressed several facts, the suit itself is not maintainable in terms of Sections 28 and 134 of the Trademarks Act, 1999 and Sections 28 and 134 of the Act read as under:

"28. Rights conferred by registration.-

(1) Subject to the other provisions of this Act, the registration of a trade mark shall, if valid, give to the registered proprietor of the trade mark the exclusive right to the use of the trade mark in relation to the goods or services in respect of which the trade mark is registered

and to obtain relief in respect of infringement of the trade mark in the manner provided by this Act.

(2) The exclusive right to the use of a trade mark given under sub-section (1) shall be subject to any conditions and limitations to which the registration is subject.

(3) Where two or more persons are registered proprietors of trade marks, which are identical with or nearly resemble each other, the exclusive right to the use of any of those trade marks shall not (except so far as their respective rights are subject to any conditions or limitations entered on the register) be deemed to have been acquired by any one of those persons as against any other of those persons merely by registration of the trade marks but each of those persons has otherwise the same rights as against other persons (not being registered users using by way of permitted use) as he would have if he were the sole registered proprietor."

134. Suit for infringement, etc., to be instituted before District Court.—

(1) No suit—

(a) for the infringement of a registered trade mark; or

(b) relating to any right in a registered trade mark; or

(c) for passing off arising out of the use by the defendant of any trade mark which is identical with or deceptively similar to the plaintiff's trade mark, whether registered or unregistered, shall be instituted in any court inferior to a District Court having jurisdiction to try the suit.

(2) For the purpose of clauses (a) and (b) of sub-section (1), a "District Court having jurisdiction" shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or any other law for the time being in force, include a District Court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or proceeding, or, where there are more than one such persons any of them, actually and voluntarily resides or carries on business or personally works for gain.

Explanation.—For the purposes of sub-section (2),

"person" includes the registered proprietor and the registered user."

At last, it was pleaded by the learned counsel for the Applicants/Defendants that on account of the interim order, the Applicants/Defendants incurred huge loss, as the products being manufactured by them are perishable one and therefore, the interim injunction granted in favour of the Respondent/Plaintiff needs to be vacated, as there is no *prima facie* case or balance of convenience made out by the Respondent/Plaintiff.

7. On the contrary, it was contended by the learned counsel for the Respondent / Plaintiff that the Applicants/Defendants are trying to hoodwink the public by using the device mark "Patanjali" along with "Aarogya", which exclusively belongs to the Respondent/Plaintiff. Even though there is no dispute over the registration of the Applicants/Defendants' device mark "Patanjali", the Trademark of the Respondent/Plaintiff, "Arogya" was registered as early as in 1995 and the same cannot be allowed to be used along the device mark. It was further contended that when the Applicants/Defendants sought for registration of the Trademark "Patanjali Aarogya", the Plaintiff had made several objections to it. He has also pointed out that by deceptively adopting the Trademark of the Respondent/Plaintiff, a wrong impression is sown in the minds of the public at large that the products of the

Respondent/Plaintiff have been taken over by the Applicants / Defendants, even though they are two different entities as on date.

8. It was further contended by the learned counsel for the Respondent/Plaintiff that while comparing two Trademarks, it is incumbent upon the Court to ensure that it does not create any confusion to the buyers and the Trademarks should not be made in such a way that consumers are forced to believe that both the products are from the same company. A judgment of this Court in the case of **Wockhardt Limited vs. Aristo Pharmaceuticals Limited,** reported in **MANU/TN/0746/1999** was relied upon to substantiate the above contention, by which it was observed as follows:

"18....It is now well settled that the court while considering likelihood of deception or confusion, must make allowance for imperfect recollection and the effect of careless pronunciation and speech on the part not only of the person seeking to buy under the trade description, but also of the shop assistant ministering to that person's wants. It is not permissible to make a meticulous comparison of the words, letter by letter and syllable by syllable and the two marks must be taken as a whole to ascertain whether there is a likelihood of deception or confusion. The principle that the marks must be compared as a whole, is well settled and it is incumbent upon the court to consider whether the totality of the proposed trade mark is such that it is likely to cause deception or confusion or mistake in the mind of the person accustomed to the existing trade mark.

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59. In view of the discussion and reasonings

aforestated, we summarise our conclusion as follows. (1) the registered proprietor of a trade mark has exclusive right to the use of the trade mark in relation to the goods in respect of which the trade mark is registered and to obtain relief in respect of infringement of the trade mark in the manner provided by the Act. (2) When once it is registered after a lapse of 7 years, it acquires the validity and it becomes a distinctive mark. (3) Whether it is descriptive or has become publici juris is a question of fact to be established. (4) When a number of marks all have a common element, may it be prefix, suffix or root, i.e., essential part or the core of the mark, they come to be associated in the public mind as an indication of the same source, which misleads or causes deception or confusion. (5) It is the common element that has to be identified in the impugned mark and the registered trade mark and if such common element is highly distinctive and is not just a description or a commonly used word, the likelihood, of deception or confusion would be very much there, despite the fact that it may differ in similarity in certain letters. (6) The question has to be approached from the point of view of an unwary purchaser and not from the point of doctor's prescription or the advice of chemists, druggists or pharmacists, as they may do it in a craze to clear the commodity because it treats the same ailment. In such a situation, there may be likelihood of deception or confusion coupled with anxiety of the dealer to cause confusion on the consumer. (7) The nature of the commodity, the class of purchasers, the mode of purchase and other surrounding circumstances must also be taken into consideration. (8) Marks must be looked at from the first impression of a person of average intelligence and imperfect recollection. (9) Marks must be compared as a whole microscopic examination being impermissible. (10) The broad and salient features must be considered, for which the marks must not be placed side by side to find out the differences in design. (11) Overall similarity is the touchstones. (12) It is not the colour of the container or the difference in the product, but it is the statutory right to the word what has to weigh. (13) The plaintiff need not in general show strong prima facie case and the prima facie case is required to be shown must, be something more than a case that will avoid the action being struck out as frivolous or vexatious and even if

the chance of success at the trial are only 20 per cent, the statutory protection is absolutely necessary by way of an injunction in order to prevent confusion or deception arising from similarity of marks."

9. It was the contention of the learned counsel for the Respondent/Plaintiff that the mark has to be examined as a whole, as the registration of a composite mark confers right upon the registered proprietor, otherwise, the very object of the provision of Section 17(1) of the Act will be totally frustrated and to support his contention, he cited a judgment of Bombay High Court in the case of **Pidilite Industries Limited vs. Jubilant Agri & Consumer Products Limited**, reported in **MANU/MH/0019/2014**, wherein it was held as under:

"15.2 It is true that the registration of a composite mark confers upon the registered proprietor a monopoly over the trademark taken as a whole. It is not the Plaintiff's contention that the registration of a composite mark confers upon the registered proprietor exclusivity over each and every constituent part thereof (no matter how minuscule or insignificant it may be in relation to the mark considered as a whole). The Court therefore has to examine the mark as a whole. As a part of this evaluation process, the Court is required to determine what is/are the prominent and/or essential features of the mark taken as a whole. The protection and/or exclusivity will be conferred on these features and not on insignificant trivia. This Court has therefore at the outset after considering the relevant factors prima facie come to the conclusion that the word 'MARINE' forms a prominent and/or essential feature of the registered trademark (considered as a whole). If the Defendant's arguments are accepted, the consequences will be startling. Composite marks will become useless. The same will be infringed with impunity by the simple expedient of using a trademark which has, as its essential or prominent feature(s), the essential and

prominent feature of the registered mark with the addition of other matter. The mandate of Section 17(1) will be totally frustrated.

21. As held hereinabove, the Defendant has adopted an essential feature of a registered trademark of the Plaintiff. This by itself is actionable. Actual confusion need not be proved for infringement. It is required for passing off. Secondly, even for passing off, there is a clear case of deception and/or confusion. The contention of the Defendant is not tenable since the Defendant itself states that 'Jivanjor' is the house mark of the Defendant. It is evident that the product identification mark used by the Defendant is 'Marine PLUS' and that the same is being used as a trademark. The consumers can never identify the product only by the house mark and it is inevitable that the products are referred to and called out only by their product identification marks. It is the settled position that the use of a mark as a sub-brand also amounts to infringement and an injunction ought to follow. As pointed out by the Plaintiff, the products bearing the house mark 'Fevicol' have achieved a turnover close to around Rs. 1000 crores, out of which the turnover of the products bearing the mark 'MARINE' (which is only one of the products of the many products bearing the house mark 'FEVICOL') has exceeded Rs. 100 crores. The mark 'MARINE' by itself has gained tremendous reputation and goodwill and further distinctiveness and secondary meaning which is associated by the consumers, trade and public at large with the Plaintiff alone. The invoices produced by the Defendant themselves show that the products of the Defendant are also referred to as 'Marine Plus Cop', 'JJ Marine Plus', 'JJ Marine PLUS CLP', 'J Marine Plus Cop', i.e. 'Marine Plus' being the leading and essential feature and not 'Jivanjor'. Furthermore, the fact that the Defendant refers to its 'mark' as 'Jivanjor Marine PLUS' itself is an admission on the part of the Defendant that 'Marine PLUS' is being used as a trademark/part of its trademark. Whether the rival marks are similar or not will have to be approached from the point of view of average intelligence and imperfect recollection of consumers who would normally be carpenters or such persons who are not highly literate persons and are bound to get confused."

10. It was the further contention of the learned counsel for the Respondent / Plaintiff that the delay in approaching the Court by the Plaintiff is not a ground to justify the action of infringement by the Applicants / Defendants and to that effect, the Hon'ble Apex Court in the case of Ramdev Food Products Pvt. Ltd., vs. Arvikndbhai Rambhai Patel and Others, reported in MANU/SC/3725/2006, has been pleased to hold as under:

"60. Kerr in his "Treatise on the Law and Practice of Injunction", Sixth Edition at pages 360-361 states as under:

Mere delay after knowledge of the infringement to take proceedings, not sufficient to call the Statute of Limitations into operation, or where the infringement continues, is not, it seems, a bar to the right of an injunction at the trial. Lapse of time unaccompanied by anything else is, it seems, no more a bar to a suit for an injunction in aid of the legal right than it is to an action deceit.

But delay may cause the Court to refuse an interlocutory injunction, especially if the defendant has built up a trade in which he has notoriously used the mark....

Specific knowledge on the part of the plaintiff and prejudice suffered by the defendant is also a relevant factor. [See *Spry on Equitable Remedies*, Fourth Edition, page 433]

61. Applying the aforementioned principles in the instant case, it is evident that the time gap between the issuance of the notice and filing of an application for grant of injunction was not a voluntary act on the part of the appellant herein.

It had to wait for the outcome of various proceedings pending before different courts. The respondents having themselves taking recourse to judicial proceedings, as noticed hereinbefore, cannot now be permitted to set up the defence of desecience on the part of the appellant. Indisputably, in a case of infringement of trade mark, injunction would ordinarily follow where it

is established that the defendant had infringed the trade mark and had not been able to discharge its burden as regard the defence taken by it."

11. The learned counsel for the Respondent / Plaintiff also referred to the judgment of the Hon'ble Delhi High Court in **The Indian Hotels Company Ltd vs. Ashwajeet Garg and Others**, reported in **MANU/DE/1058/2014** to contend that the Hon'ble Delhi Court has enumerated certain legal principles in the case infringement, holding that simply because the plaintiff has not chosen to taken any action against such other parties cannot disentitle the plaintiff from taking action. For the sake of convenience, the relevant portion of the said judgment is extracted hereunder:

"44.... The Delhi High Court in the case of Prakash Roadline Ltd. Vs. Prakash Parcel Service (P) Ltd. MANU/DE/0526/1992 : 48 (1992) DLT 390: 1992(22) DRJ 489 rejected the contention of the Defendant therein that there were others in the market with similar name whom the Plaintiff had chosen not to sue by holding that the other parties may not be affecting the business of the Plaintiff They may be small time operators who really do not matter to the Plaintiff Therefore, the Plaintiff may not choose to take any action against them. **The Court further held that the mere fact that the Plaintiff has not chosen to take any action against such other parties cannot disentitle the Plaintiff from taking the present action.**

45. The legal principles that thus emerge are the following:

i. Action for infringement is a statutory remedy conferred on the registered proprietor of a registered trade mark.

ii. Registration of trade mark gives the proprietor the exclusive right to the use of the

trade mark in connection with the goods in respect of which it is registered.

iii. If the essential features of the trade mark of the Plaintiff have been adopted by the Defendant, the fact that the get-up, packing and other writing or marks on the goods or on the packets shows marked differences, or indicate clearly a trade origin different from that of the registered proprietor of the mark would be immaterial.

iv. Mere delay in filing of a suit for infringement is not fatal.

v. Phonetic similarity constitutes an important index of whether a mark bears a deceptive or misleading similarity to another.

vi. The Court must consider the usage of words in India, the manner in which a word would be written in Indian languages and the similarity of pronunciation if the rival marks are used.

vii. Resemblance between the two marks must be considered with reference to the ear as well as the eye.

viii. The rival marks have to be compared as a whole. The two competing marks must be judged both by their look and by their sound. All the surrounding circumstances must be considered.

ix. Where the similarity between the Plaintiffs and the Defendant's mark is so close either visually, phonetically or otherwise and the court reaches the conclusion that there is an imitation, no further evidence is required to establish that the Plaintiffs rights are violated.

x. Competing marks have to be compared keeping in mind an unwary purchaser of average intelligence and imperfect recollection.

xi. Broad and essential features of the two are to be considered. They should not be placed side by side to find out if there are any marked differences in the design and get up.

xii. A single actual use with intent to continue such use eo instanti confers a right to such mark as a trade mark.

xiii. The applicant has to establish user of the said mark prior in point of time than the impugned user by the non-applicant.

xiv. A suit for infringement is maintainable

by a registered proprietor against another registered proprietor.

xv. While staying the further proceedings pending decision of the registrar on rectification, an interim order including of injunction restraining the use of the registered trademark by the Defendant can be made by the court.

xvi. A trademark shall not be registered if it is identical or similar to an earlier trademark in respect of goods or services covered by the trade mark and is likely to cause confusion amongst the public.

xvii. Registration of an identical or a similar trade mark shall also be refused for goods and services not covered by the earlier trade mark if it is shown that the earlier trade mark is a well known trademark.

xviii. The mere fact that the Plaintiff has not chosen to take any action against other parties cannot disentitle the Plaintiff from taking the present action."

Finally, it was stated that since this Court, being satisfied with the argument and finding balance of convenience in favour of the Plaintiff at the threshold, had granted interim orders, no question of vacating the same arises at this stage.

12. Heard the learned counsel on either side and perused the material documents available on record, including the judgments relied upon by the respective parties.

13. The Respondent/Plaintiff has stated that there is an infringement of the Trademark "Arokya" and the

Applicants/Defendants have been using the very same Trademark of the Plaintiff by simply adding a letter 'A', which is deceptively similar and identical to that of the Plaintiff's Trademark. First of all, let us analyze what is infringement? An infringement is a minor offense that involves breaking a rule or a law and it can also result in imposition of legal penalties for breaking a law, as in the case of a copyright infringement or a patent infringement. Though the mark 'Aarogya' used by the Applicants/Defendants is deceptively similar and one and the same, the Applicants/Defendants have been using the Trademark as 'Patanjali Aarogya', which was registered in the year 2016.

14. Admittedly, the Respondent/Plaintiff had the knowledge of the Applicants/Defendants infringing its Trademark with the similar pronunciation (though spelling is different), when they applied for registration of their trademark itself. It is not known as to why the Plaintiff had not immediately come down to question such infringement in a Court of Law in the year 2016 and the act of the Plaintiff can merely be termed as "Fence Sitting" for their lack of decisiveness, neutrality or hesitance to choose between two sides in a competition, etc. Since there has been a considerable delay on the part of the Respondent/Plaintiff in instituting the suit, the

<https://hcservices.ecourts.gov.in/hcservices/> respondent/plaintiff is not entitled to any interim relief as sought by them and even if granted exparte, that has got

to be revoked during passage of time.

15. Even assuming for the sake of argument that there is substance in the contention of the Plaintiff to claim damages, it is only a tort liability, for which, the suit has to be instituted in the jurisdictional Court, where the Defendants reside. Moreover, the Plaintiff ought to have obtained leave under Clause XII of the Letters Patent as held by the Hon'ble Bombay High Court in **Navin Makhija vs. Tulsibhimjiyani**, reported in **2013 (1) Mh.L.J 173** and there is no iota of evidence to show that such leave has been duly obtained in this case. Insofar as passing off is considered, the cause of action arises where deceit is practised and the convenience of the plaintiff to sue the defendant is immaterial and it has nothing to do with the location of the Registrar's office also. This Court, while dealing with the similar situation in **Premier Distilleries Pvt. Ltd., vs. Sush Distillers, Bangalore**, reported in **2001 (3) CTC 652**, had categorically observed as follows:

"7. The essence of the action of passing off is deceit on the part of the defendant in trying to pass off his goods as that of the plaintiff. That is a pure question of fact to be established by proper evidence. The cause of action can arise where deceit is practised. It cannot arise at a location where the plaintiff who claims the relief, chooses to lodge an application for registering his mark, without any deceit having been practiced within that jurisdiction.

9. The cause of action in a suit for passing off, on the other hand and as already observed, has nothing at all to do with the location of the

Registrar's Office or the factum of applying or not applying for registration. It is wholly unnecessary for the plaintiff to prove that he had applied for registration. The fact that the plaintiff had not applied for registration will not improve the case of the defendant either. Filing of an application for registration of a trade mark, therefore, does not constitute a part of cause of action where the suit is one for passing off.

10. The argument advanced that registration if granted would date back to the date of application and that the plaintiff would have the right to seek amendment of the plaint to seek relief on the ground of infringement as well, is wholly irrelevant so far as the cause of action for bringing a suit for passing off is concerned. While it may be convenient to the plaintiff to institute a suit in a court where he may later on be able to bring a suit for infringement of the trade mark, that convenience of the plaintiff is in no way relevant for deciding as to whether a cause of action for filing a suit for passing off can be said to have arisen in a place where, the deceit alleged to have been practised by the defendant had in fact, not been practised within the jurisdiction of the court in which the suit is brought.

11. The cause of action is not to be confused with convenience. Many things may be convenient to a plaintiff, but they do not become part of bundle of facts requiring to be established for obtaining the decree in the suit. The argument advanced for the plaintiff is also far fetched. It seeks to presume that the plaintiff in a suit for passing off who has applied for registration of the mark will pursue the effort to have the trade mark registered; that such effort will be successful; that such an event will occur when the suit is still pending; that the suit will continue to pend till the registration is effected; that plaintiff would be seeking an amendment to add a prayer with regard to infringement and that the plaintiff would be ultimately in a position to establish infringement. The cause of action is something which has occurred and which gives a right to take action. The cause must precede the action and not follow it. The events contemplated by the plaintiff as being capable of occurring at a point of time in the future, merely on account of those possibilities, will not constitute a cause of

action for relief for securing which, those events are not materially relevant."

16. Legal obligation of one party to a victim as a results of a civil wrong or injury requires some form of remedy from a court system. A tort liability arises because of a combination of directly violating a person's rights and the transgression of a public obligation causing damage or a private wrongdoing. Evidence must be evaluated in a court hearing to identify who the tort feason / liable party is in the case.

17. It is relevant to point out that there is no interconnectivity between the products sold by the Plaintiff and the Defendants and the classes of registration are also different, as the Plaintiff's trademark was registered under Class 29, whereas the products of the Applicants/Defendants was under Class 30. The Plaintiff's Trademark "Arokya" was familiar amongst general public in connection with milk and milk products only, whereas the Applicants/Defendants involve in preparation of biscuit related items. In this regard, I find much force in the contention raised by the learned counsel for the Applicants/Defendants that the mark has to be viewed as a whole and together and cannot be looked into in a divided form and in an isolated manner.

18. It is seen that the Applicants/Defendants are carrying on its business under the Trademark "Patanjali Aarogya" for nearly three years and the Plaintiff, having kept quiet all these years, cannot attempt to stall the business of the Applicants/Defendants on one fine morning, unless there is a specific finding in the suit after full-fledged trial. Hence, this Court finds that there is no need for an interim order to be in operation and therefore, the interim injunction granted by this Court on 28.02.2019, which was later on ordered to be kept in abeyance for shorter period, is liable to be vacated.

19. Accordingly, **Application Nos.2230 and 2231 of 2019 are ordered** and the interim injunction granted by this Court in O.A.Nos.33 and 34 of 2019 on 28.02.2019 is hereby vacated.

20. When this Court posed a question on 20.03.2019 regarding the possibility of changing the wrapper of "Patanjali Aarogya" by portraying the word 'Patanjali' in a larger font and showing the word 'Aarogya' with lesser visibility, by the Applicants/Defendants, the learned Senior Counsel for the Applicants/Defendants has stated that such exercise will take months together. In view of the order passed now vacating the interim injunction, it is

suggested that the Applicants/Defendants shall change the

wrappers by portraying the word 'Aarogya' very smaller in size (like "smoking is injurious to health" printed in the cigarette pocket) so as to ensure that the consumers are able to identify the products easily even at first sight.

21. **A.No.2920 of 2019 filed to pass a summary judgment is dismissed**, in view of the fact that the interim order granted by this Court is vacated and the entire issues, such as damages, jurisdiction, passing off, etc need to be decided after full-fledged trial by letting the respective parties to adduce both oral and documentary evidence.

22. It is made clear that the observations made hereinabove are only for the purpose of disposal of these Applications and it will have no bearing on the main suit to be decided.

Sd./-S.V.N.J
05.07.2019

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//Certified to be true copy//
Dated at Madras this the day of 2019.

JJ 29/08/2019

COURT OFFICER(O.S.)

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