

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

APPEAL FROM ORDER NO. 53 OF 2021

Cutis Biotech
Sole Proprietorship concern
Through its sole proprietor Archana Ashish
Kabra, Age- 40, Occupation-Business,
Address- Shop No.1, Plot No.1
City Survey No.10123, 1st floor,
Opp. Datta Mandir, Dayanand Nagar,
New Mondha Corner, Nanded,
Maharashtra- 411 602

... Appellant/
Original Plaintiff.

Versus

Serum Institute of India Pvt. Ltd.
Registered Address -212 /2 off Soli,
Poonawalla Road, Hadapsar, Pune,
Maharashtra -411 028.
Also at Sarosh Bhavan, 16- B/1
Dr. Ambedkar Road, Pune
Maharashtra 411 001
Through its Director
Adar Cyrus Poonawalla
Age- Adult, Occupation: Business
Address-21/2 off Soli Poonawalla Road,
Hadapsar.

... Respondent/
Original Defendant.

Mr.Abhinav Chandrachud and Mr.Aditya Soni with Chetan Alai, Shriniwas Bade and Mr.Swaraj Jadhav i/b. White & Brief Advocates & Solicitors for the Appellant.

Dr.Birendra Saraf, Senior Advocate with Mr.Rohan Savant, Mr.Hitesh Jain, Ms.Pooja Tidke, Ms.Monisha Mane Bhangale and Ms.Warisha Parkar i/b. Parinam Law Associates for the Respondent.

CORAM : **NITIN JAMDAR AND
C. V. BHADANG, JJ.**

DATE : **20 April 2021.**

JUDGMENT : (Per Nitin Jamdar, J.)

The subject matter of this Appeal is the trademark 'Covishield'. Both, the Appellant- Cutis Biotech and the Respondent- Serum Institute of India Pvt. Ltd. have applied for registering this trademark, and their applications are pending. Cutis Biotech filed a suit against Serum Institute in the Commercial Court at Pune. In this suit, Cutis Biotech sought an interim injunction to restrain Serum Institute from using the trademark 'Covishield' and maintain the accounts regarding the sale. The learned District Judge/ Commercial Court rejected the interim application. Hence Cutis Biotech is before us with this Appeal under section 13 of the Commercial Courts Act, 2015.

2. We have heard Mr. Abhinav Chandrachud and Mr. Aditya

Soni, learned Advocates for the Appellant- Cutis Biotech and Dr. Birendra Saraf, learned Senior Advocate for the Respondent- Serum Institute.

3. Neither Cutis Biotech nor Serum Institute have a registration for the trademark- 'Covishield'. Sub Section (1) of Section 27 of the Trade Marks Act, 1999 mandates that no person shall be entitled to institute any proceeding to prevent or recover damages for the infringement of an unregistered trademark. However, sub-section (2) thereof saves the right to take action against any person for passing off his goods or services as the goods and services of the applicant and preserves the remedies to prevent passing off actions. Since Cutis Biotech does not have a registered trademark, it has based its case on the action of passing off.

4. The learned counsel have placed reliance on various precedents as regards the principles to be employed for the grant of an injunction to prevent Passing off. These are: *Toyota Jidosha Kabushiki Kaisha v. Prius Auto Industries Limited and Ors.*¹, *Neon Laboratories Limited v. Medical Technologies Limited and Ors.*², *Dhariwal Industries Ltd. and Anr. v. M.S.S. Food Products*³, *Laxmikant V. Patel v. Chetanbhai Shah and Anr.*⁴, *Corn Products Refining Co. v. Shangrila Food Products Ltd.*⁵, *Biochem*

1 (2018) 2 SCC1

2 (2016) 2 SCC 672

3 (2005) 3 SCC 63

4 (2002) 3 SCC 65

5 AIR 1960 SC 142; (1960) 1 SCR 968

*Pharmaceutical Industries and Ors. v. Biochem Synergy Limited*⁶, *Aktiebolaget Volvo of Sweden v. Volvo Steels Ltd. of Gujrat (India)*⁷, *Kaviraj Pandit Durga Dutt Sharma v. Navaratna Pharmaceutical Laboratories*⁸, *Indian Bank v. Maharashtra State Cooperative Marketing Federation Ltd.*⁹

5. Basic principles from the above decision are as follows. Passing off is a tort in Common law to enforce rights regarding unregistered trademark. It is an action in equity. It is based on the principle that no one should use dishonest means to destroy his competitor's business. The law of passing off is developed to prevent unscrupulous persons from benefiting from the reputation and goodwill earned by an honest business. Based on this principle rooted in equity, the Courts initiate measures to prevent passing off. In such cases, the order of injunction ensures that no one should present his goods and services to the customers as of another party with goodwill in respect of the same and seek benefit therefrom. To establish passing off by the respondent, the applicant must first establish goodwill and reputation attached to his goods and services. Second, the applicant must show that the respondent's acts are likely to lead the public to believe that the goods and services offered by the respondent are goods and services of the applicant, and third, the applicant is likely to suffer or has suffered damage. Under our jurisprudence of passing off action, these three principles are referred

6 1997 [99(2)] BomLR 538; 1998 (18) PTC 267 (Bom)

7 1997 SCC OnLine Bom 578; 1998 Supp Arb LR 627

8 (1965) 1 SCR 737; AIR 1965 SC 980

9 (1998) 5 SCC 69

to as the Classical Trinity. Further nuances of these three tests are developed. To determine confusion, the test is of a person of average intelligence and imperfect recollection. Whether these ingredients are established is to be determined in the facts of each case. The courts employ a higher standard of scrutiny regarding medicinal products because any confusion regarding these products may cause harm greater than the ordinary products. While examining the judicial precedents, the distinction between an act of infringement of a registered trademark and passing off has to be remembered. With this prefix on the position of law, we now turn to the facts and discussion.

6. Cutis Biotech is the sole proprietorship of Archana Ashish Kabra. Cutis Biotech commenced its business of selling pharmaceutical products in the year 2013 at Nanded, Maharashtra. Serum Institute is a company incorporated under the Companies Act, 1956 at Pune. It started its business in the year 1966 as a registered partnership firm. Serum Institute manufacturers of Vaccines & immuno-biologicals and has won various awards in this field. It supplies vaccines to various international organizations for the immunization programme worldwide.

7. Cutis Biotech, on 29 April 2020, filed an Application No.4493681 for registration of trademark 'COVISHIELD' ('Covishield') under Class-5. The mark as proposed was for veterinary, Ayurvedic, allopathic, medicinal and pharmaceutical

preparations and vitamins and dietary food supplements for humans and animals. This application is pending registration in the Trademark Office. On 6 June 2020, Serum Institute applied for registration of trademark 'Covishield' under Application No.4522244 for vaccine under Class-5. It had also applied for other variants.

8. On 24 July 2020, Serum Institute applied to Drugs Controller General in Form CT-04 to conduct Phase-II/III clinical trial in India about a vaccine to be called 'Covishield'. On 31 July 2020, Serum Institute applied to DCGI in Form CT-10 to manufacture the 'Covishield' vaccine for clinical trial purposes. On 2 August 2020, the Directorate General of Health Services, Biological Division granted permission to Serum Institute to manufacture test batches of *ChAd0x1 nCoV-19* Coronavirus vaccine (Recombinant) for clinical trials. The Food and Drugs Authority, on 8 August 2020, granted a license to Serum Institute for conducting the clinical trials. Food and Drugs Authority issued further communication on 20 August 2020 granting provisional permission to the Serum Institute to manufacture additional products for the Coronavirus vaccine subject to conditions. The Ministry of Health and Family Welfare, Government of India, on 10 December 2020, published the COVID-19 vaccine procedure, which referred to the trademark of Serum Institute of 'Covishield' in collaboration with an agency named AstraZeneca for Phase-II/III

stage.

9. On 11 December 2020, Cutis Biotech filed Trademark Suit No.1/2020 in the District Court, Nanded seeking to restrain Serum Institute from using the mark 'Covishield' invoking the law of passing off. On the next date, on 12 December 2020, Cutis Biotech filed another application in the Trademark Registry for registration of trademark 'Covishield' in Class-5 for a vaccine for human use and others under the class.

10. Serum Institute filed its appearance in the suit filed at Nanded. It moved an application under Order 7 Rule 11(d) of the Code of Civil Procedure, 1908 seeking rejection of the plaint on the ground that the suit was not maintainable under section 134(2) of the Trademark Act, 1999, and the suit ought to have been filed under the Commercial Courts Act, 2015. The application was heard, but no orders were passed by the Court

11. On 4 January 2021, Cutis Biotech filed the present Commercial Suit No.1/2021 in the District Court (Commercial Court) at Pune along with an application for a temporary injunction. On 20 January 2021, Cutis Biotech applied for withdrawal of the suit filed at Nanded. Serum Institute filed its reply to the application and contested the same.

12. The District Judge, Pune, heard the injunction application.

The District Judge noted that both Cutis Biotech and Serum Institute do not have registration for the trademark 'Covishield'. Thus, the grievance of Cutis Biotech would be termed as an allegation of passing off by Serum Institute. The District Court considered the law on the subject and the tests required for grant of injunction in case of passing off. The District Court held that Cutis Biotech had earned no goodwill in a short time. There was no dishonest deception by Serum Institute for passing off or to divert the business of Cutis Biotech. The products of Cutis Biotech and Serum Institute were different. The trade channels were different. There was no evidence of any confusion caused in the mind of the consumers. The products of Cutis Biotech and Serum Institute were used for different purposes, and visual appearance of the products was different. The District Court also considered the implications of the grant of such injunction. The Court noted the situation brought about by the pandemic and the importance of the vaccine for the general public. The District Court, by the impugned order dated 30 January 2021, rejected the Interim Application. Being aggrieved, Cutis Biotech has filed this appeal under section 13 of the Act of 2015.

13. To grant an injunction in cases of passing off, both ingredient of injunction, i.e. *prima facie* case and balance of convenience, should exist in favour of the applicant. The court has to be satisfied that there are serious questions to be tried at the suit,

irreparable damage will be caused to the applicant, and the hardship would be more to the applicant, and therefore an interim injunction is necessary. The applicant has to make out a strong case that the Respondent's action would materially injure its business, and the danger is imminent. In certain cases, that grant of or refusal of the injunction will adversely affect the general public interest, also a relevant factor.

14. For consideration of *prima facie* case and determining the balance of convenience, the relevant factors will have to be considered cumulatively. Cutis Biotech has sought to criticize the order passed by the District Court by dealing with one ground separately as if it is a standalone ground. But as rightly pointed out by Serum Institute, all the factors will have to be taken cumulatively.

15. The foundation of passing off action is the existence of goodwill. Further as to who conceived and adopted the mark earlier is also relevant. Cutis Biotech has pleaded its case of goodwill and prior use in the plaint and the interim application. As pleaded, the case of Cutis Biotech on its goodwill and prior use is as follows. Cutis Biotech is selling pharmaceutical products, and it commenced its business in the year 2013. On 25 April 2020, Cutis Biotech coined the word 'Covishield' and decided to use it in respect of pharmaceutical and other related products. Having found no such registered trademark, Cutis Biotech applied for registration of this trademark on 29 April 2020 regarding veterinary, ayurvedic,

allopathic, medicinal and pharmaceutical preparation and vitamins and dietary food supplements for humans and animals in Class-5. From 30 May 2020, Cutis Biotech received products like antiseptic and disinfectant liquid, sanitizes, bearing brand 'Covishield', from its manufacturers. Cutis Biotech sold products in various states in India. The trading community and average consumers purchase its products, and they are popularized through advertising. The trademark 'Covishield' has become a distinct product and business of Cutis Biotech. From 30 May 2020 to 31 December 2020 for seven months, the turnover of Cutis Biotech was Rs.1600152/- and it spent Rs.122500/- towards advertising the products.

16. We have considered the pleadings of Cutis Biotech regarding the prior user. The averment in the plaint that from 30 May 2020 Cutis Biotech received the products bearing the brand 'Covishield' from its manufacturers is not substantiated. No particulars are enumerated. Details are necessary since it is a foundation of the case of Cutis Biotech that it is a prior user and has acquired goodwill. Some invoices under Goods and Service Tax as of 30 May 2020 are placed on record. One bears reference to M/s. Samrvir Biotech Private Limited in Himachal Pradesh. This invoice refers to six products. Out of that, five are Forest Herbs hand sanitisers, and there is one entry of 'Covishield', but it has no particulars. Some GST invoices post-September 2020 are on record. These invoices are prepared by Cutis Biotech itself with the only

reference to the names such as Shri Varu Pharmaceuticals, Gaurav Medicals. Some invoices have no names. One document placed on record is a certificate of provisional registration. There is a document regarding the change of premises and a tax audit report by a Chartered Accountant. This is the evidence that Cutis Biotech has produced on record to demonstrate that it has used the trademark 'Covishield' before the application of Serum Institute on 6 June 2020. We do not find adequate details to establish a *prima facie* case.

17. On the other hand, a detailed reply is filed by Serum Institute, placing on record the prior user and adoption of the mark by the Serum Institute and how the claim of Cutis Biotech that it is the prior user is erroneous. It is the case of Serum Institute that it coined the mark 'Covishield' in March 2020 itself. For that purpose, an inter-office communication between the Purchase Department to obtain packaging material for the 'Covishield' vaccine is on record. Samples of packaging material regarding 'Covishield' being delivered to one Anup Printers on 25 May 2020. Further inter-office communication of 26 March 2020 to the Purchase Department of the Serum Institute to procure packaging material under trademark 'Covishield' is on record, where there is an endorsement of one Anup Printers dated 27 March 2020. Serum Institute had issued a statement in March 2020 they are investing around USD 100 million on the COVID-19 vaccine. Another statement was issued in

April 2020 that Serum Institute plans to produce a Coronavirus vaccine in collaboration with Astra Zeneca. The trial of the Oxford Coronavirus vaccine commenced around 23 April 2020. The Union Health Minister further made a statement on 25 April 2020 in respect trial of Serum Institute. On 3 May 2020, Serum Institute received virus seed, and cell bank from Oxford University and permission was granted by DCGI. Therefore, on 6 June 2020, when Serum Institute applied for registration of 'Covishield', it was widely known in the media. The response of Cutis Biotech to these documents of Serum Institute is that they are fabricated. It is not possible to accept such a simplistic contention as further narration would show that none of the documents are in isolation.

18. Not only there is adequate evidence to show prior adoption and user, but Serum Institute has also continued its user without a break. It is placed on record that Serum Institute has produced 60 million doses of the 'Covishield' vaccine per month and has supplied 48 million doses to the Government of India. Serum Institute has obtained various permissions and licenses required to manufacture the vaccine under the trademark 'Covishield'. The details of the permissions obtained and procedure followed are given in the say filed by Serum Institute. These are as follows: The compliance with the procedure required to manufacture the vaccine with the trademark 'Covishield' includes observance of Drugs & Cosmetics Act 1940, Rules, 1945 and New Drugs and Clinical Trial Rules, 2019. The approval of layout plans of manufacturing; the

joint inspection of premises by teams of Experts & Drugs Inspector. The establishment of premises complying with GMP/GLP requirements laid down in Schedule M & Schedule L-I of Drugs and Cosmetics Rules. Engaging a qualified technical staff for the manufacture and quality control of the vaccines. The preparation of master formula. The framing of the Standard Operation Procedures. The manufacture of batches as per detailed Batch Manufacturing Protocol under the supervision of competent technical staff. The submission of samples of each batch of the vaccine produced along with the standards to be submitted to the National Control Laboratory for testing and certification of each batch and distributing batch either directly in the market or through Government Health authorities to end-users. It is stated that various mandatory clinical stages for the development of 'Covishield' have been undertaken to develop the 'Covishield' vaccine, which includes pre-clinical (Animal testing) studies, the compilation of pre-clinical data and application for Phase-I Clinical Trial on human subjects. Further Clinical Trial Phase-I on 20-hundred healthy volunteers to check the safety of vaccine complying with several regulatory steps/procedures is carried out. The Clinical Trial Phase-II is carried out on almost five hundred healthy volunteers to check expanded safety and efficacy of vaccine complying with several regulatory steps/procedures. The Clinical Trial Phase-III on more than one thousand volunteers is done to confirm safety and efficacy of vaccine and submission of the huge data so generated/ compiled and its review by SEC/DCGI and

approval. These events form a chain of seamless activity for the development of the vaccine using the mark. It is, thus, clear therefore right from March 2020, Serum Institute has been taking steps in furtherance of the mark 'Covishield'. Apart from the inter-departmental correspondence, the factum of Serum Institute developing a vaccine being in the media is not being denied. After evaluating the evidence on record, we find that Serum Institute had coined the word 'Covishield' and took substantial steps towards its development and manufacture. Thus, there is adequate and convincing material on record to demonstrate the prior adoption of the mark by Serum Institute. There is no perversity in the finding that Cutis Biotech cannot claim to be a prior user of 'Covishield'.

19. To establish goodwill, Cutis Biotech has claimed that from 30 May 2020 to 31 December 2020, its turnover was of Rs.16 lakh and it spent Rs.1.2 lakh towards advertisements. If spread over for seven months, this amount would come around less than rupees two 2 lakh a month. To lay the foundation for the acquisition of goodwill, the turnover need not be enormous. If the applicant is a small businessman, it cannot be said that he has not earned goodwill because there is no substantial turnover. But as rightly contended by Serum Institute that, considering Cutis Biotech sold hand sanitisers and disinfectants, which products had high demand during the pandemic, the turnover of Rs.16 lakh for seven months is not significant. In the case at hand, if the aspect of turnover is taken cumulatively with other factors, it becomes relevant. This small

amount of turnover has to be seen with the claim of Cutis Biotech of being a prior user. As held earlier, the evidence placed on record shows no prior user and the adoption of the mark. According to us, there is no sufficient material on record to hold that Cutis Biotech has established sufficient goodwill regarding trademark 'Covishield'. From this evidence produced on record, the failure of Cutis Biotech to substantiate its assertion that it was a prior user of the mark and had acquired goodwill is more than clear. There is no perversity in the finding of the District Court that Cutis Biotech has not established this test for granting an injunction.

20. The next aspect is the likelihood of deception and whether the products of Cutis Biotech and Serum Institute are in the common field. This is relevant in the context of misrepresentation and confusion in the mind of the customers. If there is no probability of any deception, it would be a factor to decline injunction. Confusion should arise in the minds of the customers of average intelligence and imperfect recollection. Actual confusion is not required to be established, and a likelihood of confusion is enough to establish the ingredients of passing off. To decide whether the respondent's action is likely to deceive or cause confusion leading to passing off would have to depend on the particular facts of the case. A common-sense approach will have to be adopted to find out whether Serum Institute's conduct is calculated to pass off its goods as that of the Cutis Biotech's or at least create confusion in the mind

of the customers leading to the Serum Institute benefiting at the expense of the Cutis Biotech.

21. The District Court has held that the consumers of Cutis Biotech and Serum Institute are different, and the trade channels are also different. According to Cutis Biotech, this finding is incorrect as the trade connection between the products, medicinal products of the parties is sufficient for confusion to arise, and even if trade channels are different, so long as the marks are deceptively similar, case of passing off is made out. It is contended that actual confusion does not have to be proved when at the interim stage injunction is sought. First, it has to be remembered that the ingredients required to establish an action of passing off are to be taken cumulatively and in the totality of the circumstances. Second, the issue of confusion in the mind of the average consumers will have to be considered in the light of finding that Cutis Biotech has not established that it is a prior user or had acquired goodwill.

22. We do not agree with the contention of Cutis Biotech that there is a likelihood of confusion between the products of Cutis Biotech and Serum Institute. The vaccine 'Covishield' produced by Serum Institute is not available across the counter. The vaccine will be administered through Government agencies. The buyer of the product 'Covishield' of Serum Institute is the Government of India. The administration of the vaccine is through an injection. The sale of disinfectant or hand sanitiser, though it may relate to the

same field, that is, health care products, cannot be said to cause confusion in the mind of average consumers. The administration of vaccine through an injection is well known. It will be too farfetched to hold that there will be confusion in the average consumers' minds between the use of a trademark in a Government administered vaccine at designated places and over the counter sanitiser products. Visually also the products are different. The District Court was correct in holding that there will be no deception or likelihood of confusion in the products of Cutis Biotech and that of Serum Institute.

23. In fact, the argument of Cutis Biotech before us is converse, that the people may buy its products of thinking they are protected against corona virus because of the use of mark 'Covishield'. This would mean, according to Cutis Biotech, confusion would result in people to buy its products. This argument is the opposite of the concept passing off. If such purchases do take place, it will be because of the goodwill generated by Serum Institute regarding its mark 'Covishield'. To substantiate passing off by Serum Institute, Cutis Biotech has to show that Serum Institute is passing off its goods as that of Cutis Biotech based on the goodwill of Cutis Biotech. The argument advanced by Cutis Biotech is therefore self-destructive.

24. Cutis Biotech then sought to contend that because Serum Institute is using the mark 'Covishield' for its vaccine, the suppliers

of Cutis Biotech have stopped supplying goods to Cutis Biotech which is not only causing damage to the business of Cutis Biotech but would also impair its growth. Reliance is placed on the decision of the learned Single Judge of Delhi High Court in the case of *Ellora Industries v. Banarasi Das Goela and others*¹⁰. To uphold such a ground, a factual foundation must exist for this assertion. For that, we turn to the pleadings in the interim application and the plaint. This case of future damage and loss of growth is founded on one assertion that on 7 December 2020, one of the trade partners of Cutis Biotech refused to supply the order dated 15 August 2020 of manufacturing multivitamin injection, citing the confusion that may arise. This email refers to an email sent on 15 August 2020 by one Geeta Jain, and the reply is given on 7 December 2020 saying that it is not possible to supply the goods because people might feel that the injection is a duplicate. The mails have been exchanged with a gap of almost six months. The authenticity of this single exchange of mails is doubtful.

25. Firstly, the case of Cutis Biotech of future damage is not substantiated in fact. Second, since the Serum Institute is the prior user of the mark and has acquired goodwill and because of that consumers are not consciously purchasing the goods of Cutis Biotech, it cannot be considered as a case of passing off by Serum Institute. The decision in the case of *Ellora Industries*, on which reliance is placed, arose from different facts and circumstances. In

¹⁰ ILR (1979) II Delhi 481

the said decision, the learned Single Judge of Delhi High Court emphasized the need to establish goodwill as a foundation for basing the claim of passing off. Without goodwill and the prior user shown in the first place, the loss of future sale or potential injury cannot be a standalone factor in this case, assuming it is a factor available in law.

26. Cutis Biotech applied for registration on 29 April 2020 regarding Class-5, and the products were sanitiser, liquid antiseptic, disinfectant etc. After the Ministry of Health published the COVID-19 procedure on 10 December 2020 referring 'Covishield' vaccine of Serum Institute, another trademark application was filed by Cutis Biotech on 12 December 2020 for registration of trademark 'Covishield' in Class-5 for vaccines. Thus, realizing that a suit filed on 11 December 2020 for passing off with no application for vaccine registration, Cutis Biotech applied for registration. According to us, the conduct of Cutis Biotech does not appear to be *bonafide*. This factor also will have to be considered while considering its claim for an injunction.

27. As regards the other ancillary arguments of Cutis Biotech that Serum Institute was aware of the application of Cutis Biotech and had applied that for different variants of the mark and have stated to the contrary are concerned, they are not of much significance as the foundation of passing off action, i.e. prior use and acquisition of goodwill have not been established by Cutis Biotech.

On the other hand, Serum Institute has claimed these ingredients, yet Serum Institute has not moved any cause for restraining Cutis Biotech for passing off action.

28. Since there is no prima facie case in favour of Cutis Biotech, its prayer to direct the Serum Institute to maintain accounts cannot be granted. A direction to maintain accounts is not a routine order and cannot be issued when there is no prima facie case made out by Cutis Biotech.

29. Serum Institute, through its written submission, has placed certain facts, which are not disputed. After the present suit was filed on 4 January 2021, the vaccine 'Covishield' of Serum Institute has started being administered from 16 January 2021. The Government of India has rolled out an extensive vaccine administration programme. The Government of India identified almost 300 million people for the vaccine in the first round, and the first order for 11 million doses for the 'Covishield' vaccine has been placed. The second dose would be administered after the stipulated weeks. On 1 March 2021, a vaccination drive for those above the age of sixty and the age of forty-five years with comorbidities has been launched. 'Covishield' vaccine of Serum Institute has been supplied through the States and Union Territories. As of 16 March 2021, sixty-six million doses of 'Covishield' have been supplied to the Government of India. Also, around fifty-nine million doses have been supplied to over seventy-two different countries. The

Government of India has placed a further purchase order for ten crore doses of 'Covishield' of Serum Institute. Serum Institute has, to date, made a sale amounting to Rs.37507 lakhs through the sale of the 'Covishield' vaccine. The Serum Institute has also placed on record that it has spent Rs.28 crore on the development, research and is expected to spend a further Rs.20 crore. With these facts, the balance of convenience is not in favour of Cutis Biotech. Grant of injunction against Serum Institute would have a serious impact on its business.

30. There is one more facet to be considered to determine the balance of convenience. That 'Covishield' is a vaccine to counter Coronavirus is now widely known. A temporary injunction directing Serum Institute to discontinue the use of mark 'Covishield' for its vaccine will cause confusion and disruption in the Vaccine administration programme of the State. In this case, thus, the grant of an injunction would have large scale ramifications traversing beyond the parties to the suit.

31. The scope of an appeal against the discretionary order is now well established. The appellate court will not interfere with the exercise of discretion of the trial court and substitute it unless the discretion of the trial court is arbitrary or perverse or where the trial court has passed an order contrary to the settled principles of law governing injunctions. The appellate court will not generally interfere if the conclusion arrived at by the trial court is reasonably

possible. Merely because if it considered the matter at the trial stage; it would have come to a contrary conclusion is not a ground for the appellate court to interfere¹¹. A total deference to the discretion by the trial court is not expected from the appellate court if the order is arbitrary or perverse. But, as our above discussion would show that the discretion used by the learned District Judge in refusing to grant an injunction is not arbitrary or perverse. Even if the evidence was to be looked at in the first instance, no case is made out for grant of any relief.

32. The Appeal is dismissed.

(C.V. BHADANG, J.)

(NITIN JAMDAR, J.)

11 1990 (Supp) SCC 727