



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Judgment Reserved on: 25th May, 2023***
Judgment Delivered on: 20th September, 2023

+ **CS(COMM) 298/2018, CRL.M.A. 736/2007 (u/s 340 CrPC) and
CCP(O) 47/2010**

MARIE STOPES INT., Plaintiff
 Through: **Mr.Hemant Singh, Ms.Mamta Rani
Jha, Ms.Soumya Khandelwal and
Ms.Pragya Jain, Advocates.**
 versus

PARIVAR SEVA SANSTHA Defendant
 Through: **Mr.Mayank Kumar, Mr.Neel Mason,
Mr.Ankit Rastogi, Mr.Ashish Mohan,
Ms.Chamanpreet Kaur and
Ms.Sagrika Tanwar, Advocates.**

CS(COMM) 479/2018 and I.A. 11070/2022 (seeking adjournment)

PARIVAR SEVA Plaintiff
 Through: **Mr.Mayank Kumar, Mr.Neel Mason,
Mr.Ankit Rastogi, Mr.Ashish Mohan,
Ms.Chamanpreet Kaur and
Ms.Sagrika Tanwar, Advocates.**
 versus

VIVEK MALHOTRA & ORS. Defendants
 Through: **Mr.Puneet Taneja, Mr.Manmohan
Singh Narula and Mr.Amit Yadav
Mr.Hemant Singh, Ms.Mamta Rani
Jha, Ms.Soumya Khandelwal and
Ms.Pragya Jain, Advocates for D-9/
Marie Stopes International.**

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**CORAM:
HON'BLE MR. JUSTICE AMIT BANSAL**

JUDGMENT

1. By way of this common judgment, I shall decide both the two suits captioned above.
2. CS(COMM) 479/2018 was originally filed on 11th September, 2003 as CS(OS) 1691/2003 on behalf of Parivar Seva Sanstha (hereinafter referred to as 'PSS') seeking permanent injunction restraining passing off along with other reliefs. CS(COMM) 298/2018 was originally filed on 4th July, 2005 as CS(OS) 898/2005 on behalf of Marie Stopes International (hereinafter referred to as 'MSI') seeking permanent injunction restraining infringement of registered trademark, passing off, along with other ancillary reliefs.

CASE SET UP BY PSS IN CS(COMM) 479/2018

3. It has been pleaded on behalf of PSS in CS(COMM) 479/2018 that:
 - 3.1 PSS is an Indian Non-Governmental Organisation (NGO), originally registered under the Societies Registration Act, 1860 in the name 'Marie Stopes Society' (hereinafter referred to as 'MSS') in the year 1978.
 - 3.2 The main activities of the plaintiff are running clinics/centers, contraceptive social marketing, reproductive health education and training and offering high-quality reproductive health and family planning services at affordable prices. The main objective of the centers is to offer family planning services and abortion in a safe, confidential, and reliable manner.
 - 3.3 On 24th November, 1982, MSS's name was changed to 'PSS'. The grants received by PSS were routed through MSI but were received from other organizations/donors. PSS is an independent entity and has been using the

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brand name 'Marie Stopes' by virtue of being a registered proprietor of the said trademark.

3.4 The defendant no.9, MSI was originally registered as 'Population Services International' and later, changed its name to 'Population Services, Europe' and thereafter to 'Marie Stopes International' in 1989.

3.5 It is the case of PSS that its clinics used the trademark 'Marie Stopes Clinic'. There were about 25 Marie Stopes Clinic in existence in India by the end of 1990s with reputation of providing high quality, affordable abortion, and family planning services. PSS is thus synonymous in India with the 'Marie Stopes' name and has nurtured and extensively promoted the trademark 'Marie Stopes' along with offering services and goods bearing the trademark 'Marie Stopes'. Additionally, PSS has also protected the trademark 'Marie Stopes Clinic' in suits wherein the ex-doctors were using the name. The plaintiff enjoys goodwill in the trademark 'Marie Stopes' and spends huge amounts of money on publicity and advertisements. On account of the aforesaid, PSS has received huge donations from other countries.

3.6 PSS applied and got registered on 28th December, 1987 the trade mark 'Marie Stopes' comprising device of a door (hereinafter referred to as 'the



door device') i.e., in class 10 and 16 and



in Class 9 (hereinafter referred collectively as 'Marie Stopes trademarks').

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3.7 MSI going against its own policy of collaborating with one agency in one country, set up a competitive organization in India viz. 'Population Health Services' (hereinafter referred to as 'PHS'), the defendant no.2. The shares of PHS are held by 'Marie Stopes India', the defendant no.3.

3.8 It is the case of PSS that problems with MSI became clear, when MSI communicated its desire for a changed role and agenda in January, 1995 at the Asia workshop. Due to criticism of the international donor community on the role of a middleman, MSI evolved a 'Partnership Manual, which sought to seize control over the working of independent national partners of MSI. The said 'Partnership Manual' was not signed by PSS.

3.9 PSS was engaged in the following projects in collaboration with MSI:

- i. Orrisa Urban Reproductive Health Project.
- ii. Children by Choice and not by Chance Project-Rajasthan.
- iii. European Commission aided Howrah project.
- iv. European Commission aided IEC 8 clinics project.

MSI caused disruptions in the funding of the aforesaid projects and caused the donors to terminate the funding for the projects. PSS had to continue the said projects from its own funds, thereby causing losses to PSS both in terms of money as well as in terms of reputation in donor circles.

3.10 MSI terminated the alleged 1978 Agreement vide letter dated 13th March, 2003. Again, a letter dated 2nd April, 2003 was sent to PSS by MSI seeking confirmation of the terms of MSI's letter dated 13th March, 2003. On 10th April, 2003, PSS requested for a copy of the 1978 Agreement from MSI, which MSI did not provide. Thereafter, MSI published a caution notice on

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17th July, 2003. PSS sent reminder notices dated 21st July, 2003 and 30th July, 2003, which were also not responded to by MSI.

3.11 Accordingly, the present suit was filed seeking the following reliefs:

“(a) A decree of permanent injunction restraining the Defendants their directors, members, officers, agents, etc from using in any manner, the trademark/ tradename/service mark Marie Stopes, the Door Logo device as also advertising the said marks and from doing any thing amounting to passing off the goods and services of the Plaintiff as its own;

(b) a declaration in favour of the plaintiff to the effect that the Rajasthan Project and contract dated 29.9.2000 were illegally/wrongfully terminated by defendant No.9;

(c) A mandatory injunction to the effect that the defendant No.9 continue to fund the existing Rajasthan project of the Plaintiff, as well as pay/remmit to the Plaintiff additional funds in relation to any escalation in project expenses;

(d) an order for recovery of the amount of Rs. 40.42 lakhs from the Defendant No.9 in lieu of the completion of the of the Howrah project;

(e) An order cancelling the illegal registration of the defendants No.2;

(f) an order of damages to the tune of Rs. 178 lakhs to the damages suffered by the Plaintiff in the Orissa Project;

(g) An order for damages in favour of the Plaintiff to the tune of Rs.4,00,00,000/- in lieu of the Rajasthan Project;”

CASE SET UP IN THE WRITTEN STATEMENT OF MSI

4. MSI, the defendant no. 9, contested CS(COMM) 479/2018 by filing a written statement in which it has been pleaded that:

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4.1 PSS has no *locus standi* to pray for an injunction against the defendants from using Marie Stopes trademarks as PSS itself is a licensed user of the said marks. PSS is not the originator or owner of the said marks. PSS was permitted the use of the Marie Stopes trademarks in terms of the 1978 Agreement. PSS has no legal rights over the said mark after termination of the said Agreement vide letter dated 13th March, 2003.

4.2 MSI is the prior user of the 'Marie Stopes International' and 'the door device' trademarks in the United Kingdom and in India and has also registered the same under various classes.

4.3 Registration of the Marie Stopes trademarks in the name of PSS and 'Marie Stopes', by PSS under classes 16, 10 and 9 have been obtained by misrepresentation and suppression of material facts regarding the license issued to PSS as per the 1978 Agreement. Further, no authorisation was sought from MSI, who was the sole and exclusive proprietor of the aforesaid trademarks.

4.4 The instant suit is not maintainable on the ground of passing off since no deception/confusion is possible amongst the public as all lawful use of 'Marie Stopes' trademarks in India has been done either by MSI or through its agents/licensees with proper control being exercised by MSI over such use. PSS, who was earlier a licensee and authorized to use the said marks, has since been disentitled to use them in consonance with the termination letter dated 13th March, 2003 as all the use was done as a licensee under the 1978 Agreement.

4.5 As per the 1978 Agreement, the promoters of PSS had approached MSI and requested permission for the use of the word 'Marie Stopes' in the name of the society to be formed subsequent to the 1978 Agreement. Further as per

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clause 3 of the said Agreement, the exclusive right in the name 'Marie Stopes', including Marie Stopes trademarks vests with MSI.

4.6 The original name of the plaintiff society 'Marie Stops Society' was registered only pursuant to the trademark license granted by MSI. The name of the plaintiff society was changed to 'PSS' on 24th November 1982.

4.7 MSI, through its contact with international donors, merely acted as a conduit for funds to PSS from these donors and would monitor and oversee the execution of projects so funded by these donors. Hence, MSI was under no obligation to provide these funds mandatorily but would oversee that PSS adhered to the terms and references set out in the project as demanded by the donors.

4.8 PSS failed to permit the audit of the Rajasthan project funded by Buffet Foundation in terms of the requirements of the donor agencies, which ultimately led to the termination of the funding and premature closure of the project by the donor. It was solely the acts of omission/commission by PSS, which led the donors to terminate the projects and no liability/responsibility on MSI can arise with regard to the projects mentioned in the plaint.

5. The defendant no.2, Population Health Services and its Director, Mr. Vivek Malhotra, the defendant no.1 contested CS(COMM) 479/2018 by filing a common written statement. Similarly, Marie Stopes India, the defendant no.3, its trustees, Mr. Vivek Malhotra, the defendant no.6 and Mr. Nandan Das Gupta, the defendant no.7 have a filed a common written statement. In their written statements, the defendants no.1, 2, 3, 6 and 7 have supported the stand taken by the defendant no.9.

6. In its replications, PSS has re-affirmed its assertions made in the plaint.

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CASE SET UP BY MSI IN CS(COMM) 298/2018

7. It has been pleaded on behalf of MSI in CS(COMM) 298/2018 that:

7.1 MSI was a company registered under the laws of United Kingdom, in the name 'Population Services Family Planning Programmes Limited' (hereinafter referred to as 'PSFPPL') and constitutes a part of legacy of Ms. Marie Stopes, who was a doctor and a pioneer in the field of population control and reproductive health related services in the UK. PSI changed its name to 'Marie Stopes International Limited' with effect from 12th August, 1991 and further changed its name to MSI.

7.2 MSI is a voluntary organisation working in the area of reproductive health care and services and operates a range of programmes in nearly 40 countries including India.

7.3 MSI has been using the trademark 'MARIE STOPES' along with 'the door device' since 1973.

7.4 MSI is the registered proprietor of the trademark,



('Marie Stopes International'),



('the door device') and ('MARIE STOPES INTERNATIONAL' along with 'the door device') under Classes 10 and 16 since 27th December, 2002 in India.

7.5 MSI (then known as PSFPPL), under the assumed name of 'Population Services International', entered into the 1978 Agreement with the promoters of PSS to extend its charitable activities. Pursuant to the said Agreement, PSS

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was registered under the name of 'Marie Stopes Society'. In furtherance of the Agreement, MSI granted licenses and permission to the promoters of PSS to use the Marie Stopes trademarks.

7.6 PSS had irregularities in its functioning which severely jeopardised the projects and interests of the donors, from whom, funds were procured in furtherance of its objectives.

7.7 PSS amended the MOA and Dr.Dhall, the founder member and the President appointed by MSI, resigned from the governing body in June, 2002. Dr. Tim Black, Chief Executive of MSI was voted out from the PSS's governing body in August, 2002, which was contrary to Clause 7.1 of the 1978 Agreement.

7.8 MSI terminated the 1978 Agreement vide a letter dated 13th March, 2003, which was followed by a reminder letter dated 2nd April, 2003.

7.9 Accordingly, the present suit was filed seeking the following reliefs:

“a) a decree for permanent injunction restraining the defendant, its office bearers, assigns in business, franchisees, licensees, agents, etc. from using the impugned trade marks "MARIE STOPES" and the logo comprising "door device" or any other trademark or logo as may be identical to or deceptively similar with the trademark "MARIE STOPES" and the logo comprising the "door device" of the plaintiff, in relation to medical, reproductive healthcare and birth control services as may be likely to lead to confusion or deception amounting to passing off of the defendant's business or services for those of or associated with the Plaintiff;

b) a decree for permanent injunction restraining the defendant, its office bearers, assigns in business, franchisees, licensees, agents, etc. from using the impugned trade marks "MARIE STOPES" and the logo comprising "door device" or any other trademark or logo as may be identical to or deceptively similar

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with the trademark "MARIE STOPES" and the logo comprising the "door device" of the plaintiff, in relation to contraceptives, advertisements and reproductive healthcare services as may amount to infringement of trade mark registration numbers 01161971, 01161972 and 01161973 of the plaintiff.

c) a decree for delivery up of all the infringing articles, publicity materials, hoardings, banners, blocks, dies and all such articles employed by Defendant in applying the impugned trademark to the offending goods, to an authorized representative of the plaintiff for destruction;

d) an order for rendition of accounts of profit illegally earned by the defendant and a decree for an amount so found due or in the alternative, a decree for Rs.20 lakhs towards damages or such further damages as may be ascertained by the Hon'ble Court may be passed in favour of the plaintiff and against the defendant;

e) an order for costs of the proceedings;”

CASE SET UP IN THE WRITTEN STATEMENT OF PSS

8. In its written statement, PSS has pleaded that:

8.1 The 1978 Agreement was entered into between the promoters of the PSS and MSI. The society itself was not privy to this contract, nor had ratified the said contract and hence, the same is not binding on it. The promoters of the PSS being proper parties have not been made a party to the instant suit. The 1978 Agreement required that PSS upon incorporation would enter into a subsequent Agreement with MSI. However, no such Agreement was executed and hence, PSS cannot be referred to as a licensee.

8.2 PSS was a national partner in India of MSI and did not function as a subsidiary but both parties engaged on a principal-to-principal basis.

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8.3 The suit is barred by reasons of acquiescence, delay and laches. MSI has acquiesced to the use of Marie Stopes trademarks by PSS by being aware of use and registration of said trademarks.

8.4 PSS's health clinics have used the trade name/trademark/ service mark 'Marie Stopes Clinic' since its inception in 1978 and by the end of the 1990s, about 35 'Marie Stopes Clinics' were in existence in India. PSS has performed all roles of a proprietor of a trademark including granting of franchises, protection of trademark/name 'Marie Stopes Clinic' in various legal suits, spending money on advertisements etc.

8.5 PSS is the prior user of the trademark 'Marie Stopes' in India.

8.6 The trademark registrations applied by PSS during the years 1981 and 1982 were in the knowledge of the deputed members of MSI serving on the governing body of PSS and hence, MSI has acquiesced to the usage of marks by the PSS and is now estopped from restraining its use.

8.7 PSS has created its reputation and goodwill in India independent of MSI, though both of them have collaborated in the past with respect to certain projects, albeit as separate entities. MSI has never used the 'Marie Stopes' mark in India and PSS has exclusively popularised the same.

9. In its replication, MSI has reaffirmed its assertions made in the plaint.

PROCEEDINGS IN THE SUITS

10. Summons in CS(OS) 1691/2003 were issued on 12th September, 2003 and summons in CS(OS) 898/2005 were issued on 6th July, 2005.

11. Vide judgment dated 22nd February, 2010, this Court granted interim injunction against PSS restraining it from using the trademark 'MARIE STOPES' including the door device.

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12. The two suits were consolidated for a joint trial on 25th October, 2010. On the said date, issues were also framed and a Local Commissioner was appointed for recording of the evidence. Thereafter, on 31st January, 2011, the issues were recasted and the parties were referred to mediation before the Delhi High Court Mediation and Conciliation Centre, which failed eventually.

13. Following are the final issues framed in the present suits:

“(1) Whether the agreement dated 2nd March, 1978 was executed with promoters of Parivar Seva Sanstha and binds the Parivar Sewa Sanstha (PSS)? OPD- CS(OS) No. 1691/2003

(2) if the findings on the above issue are in the affirmative, what is the effect and meaning of the said agreement? OPD

(3) Is any plaintiff in either suit entitled to a decree for permanent injunction against the opposite party to restrain use of the mark 'Marie Stopes and/or the door device in relation to the goods products and services offered by such plaintiff?

(4) Does the plaintiff in CS(OS) No. 898/2005 prove that the defendant has infringed the trademark, registrations which have been disclosed in the suit? OPD-CS(OS) No. 898/2005.

(5) Does the plaintiff in CS(OS) No. 1691/2003 prove that the defendant is guilty of passing off its business activities as those of the said plaintiff? OPP

(6) Does the Marie Stopes International prove that it is the legitimate user by prior adoption of the mark Marie Stopes and/or door device as alleged by it? OPD

(7) Does the Parivar Seva Sansthan prove that it is entitled to a money decree for Rs.40.2 lakhs from the 9th defendant in the suit, as alleged? OPP

(8) Are the plaintiffs in either of the suits entitled to a decree for damages as claimed? If so, to what extent? Onus on parties

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(9) Relief.”

14. Mr. Dinesh Dayal, Additional District Judge (Retd.) was appointed as a Local Commissioner to record the evidence. Evidence was recorded by the Local Commissioner in CS(OS) 1691/2003 and CS(OS) 898/2005.

15. Subsequently, CS(OS) 898/2005 was converted to a commercial suit on 2nd February, 2018 and CS(OS) 1691/2003 was converted to a commercial suit on 8th February, 2018 and the same were re-numbered as CS(COMM) 298/2018 and CS(COMM) 479/2018 respectively.

16. Following witnesses appeared on behalf of MSI:

- i. Mr. Tim Black (DW-1), Chief Executive and Secretary of MSI.
- ii. Ms. Zoe Alison Norden (DW-2), Legal Department- The Guardian Newspaper.
- iii. Ms. Nutan Wozencroft (DW-3), Financial Controller-Overseas Division of MSI.
- iv. Mr. V.K. Govil (DW-4), (Member of the governing body of MSI).

17. Following witnesses appeared on behalf of PSS:

- i. Ms. Sudha Tewari (PW-1), President of PSS
- ii. Mr. Trilok Nath Suri (PW-2), Manager Finance, PSS
- iii. Mr. Syed Mahtab Ali (PW-3), Manager Finance, PSS.

18. I have heard the submissions on behalf of the parties and gone through the record of the suits.

19. My issue wise findings are as under:

ISSUE NO.1 : WHETHER THE AGREEMENT DATED 2ND MARCH, 1978 WAS EXECUTED WITH PROMOTERS OF PARIVAR SEVA SANSTHA AND BINDS THE PARIVAR SEWA SANSTHA (PSS)? OPD- CS(OS) No. 1691/2003

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AND

ISSUE NO.2 : IF THE FINDINGS ON THE ABOVE ISSUE ARE IN THE AFFIRMATIVE, WHAT IS THE EFFECT AND MEANING OF THE SAID AGREEMENT? OPD

20. The main bone of contention between the parties relates to the existence of the 1978 Agreement between MSI and the promoters of PSS. MSI contends that the collaboration between MSI and PSS commenced in the year 1978 on the basis of the aforesaid Agreement, whereas PSS disputes the existence of the said Agreement.

21. To begin with, a reference may be made to the respective pleadings of the parties on this aspect. In paragraphs 10 to 12 of the plaint in CS(COMM) 298/2018, MSI has pleaded that MSI (under the assumed name of 'Population Services International') entered into an Agreement dated 2nd March, 1978 with the promoters of PSS to extend its charitable activities in India. It is further pleaded that pursuant to the 1978 Agreement, PSS was set up and registered as a society in the name of 'Marie Stopes Society' for providing family planning services in India. The 1978 Agreement also gave a right to MSI to terminate the said Agreement and upon such termination, the new society could not use the Marie Stopes trademarks. Paragraphs 10 and 12 of the plaint in CS(COMM) 298/2018 are reproduced below:

“10. The defendant, Parivar Seva Sansthan, is a society registered under The Societies Registration Act No: XXI of 1860, having its registered office at C-374, Defence Colony, New Delhi. The defendant is engaged in the business of rendering reproductive health care services involving medical termination of pregnancy, birth control advisory and dispensation of contraceptives including condoms. In 1978, the plaintiff (then

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known as Population Services International) entered into an agreement with the promoters of the defendant society to extend its charitable activities to Indian population. Pursuant to the execution of the agreement dated 2nd March 1978, a copy whereof is annexed herewith and marked as ANNEXURE-B, the defendant society was constituted, set up and registered under the name of "Marie Stopes Society" for providing family planning services in India. The plaintiff granted licenses and permission to the promoters of the defendant society to use the trade mark and trade name MARIE STOPES and "the door device".

11. *It was specifically set out in Clause 34 of agreement dated 2nd March 1978 (hereinafter referred to as "the trade mark user agreement") that the promoters of the defendant had approached the plaintiff and requested for permission to use the trade mark MARIE STOPES in the name of the society to be formed by the defendant.*

Clause 3 of the said trademark user agreement unambiguously specifies that the plaintiff is the owner of the name MARIE STOPES and has exclusive right to use thereof including emblems, specimen whereof were specifically provided in the schedule to the said Trade Mark User Agreement, which inter alia, included the "door device".

12. *Under the said Trade Mark User Agreement, the defendant was permitted to use the trade mark MARIE STOPES in relation to the clinics to be established by the defendant. The terms of the agreement further specified that if the defendant does any acts/deeds or things and/or omitted to do anything which in the sole opinion of the plaintiff might injure or imperil or be against the interest of the plaintiff and/or trade mark MARIE STOPES, then- the plaintiff had the liberty to terminate the said Trade Mark User Agreement forthwith and upon such termination, the defendant was to absolutely stop using the mark MARIE STOPES. With effect from 24th November 1982, the name of the defendant society was changed*

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from MARIE STOPES SOCIETY to "Parivar Seva Sanstha", its present name."

22. The response of PSS to the aforesaid pleadings is contained in paragraphs 26 to 28 of its written statement, which have been reproduced below:

"26. The contents of paragraph 10 are denied to the extent that the plaintiff granted any license. It is vehemently denied that there exists a license agreement entered into between the Plaintiff and the Defendant and the Plaintiff is put to strict proof thereof. It is submitted that a photocopy of an alleged agreement with promoters which itself required the execution of a subsequent contract with the Defendant (and never was) will not suffice and the Plaintiff is required by law to produce a written license or ratification by the defendant society of the alleged trademark license agreement with the Defendant entity. It is further submitted that there has never been any agreement of trademark license between the Plaintiff and the Defendant for any of the projects undertaken by the two. In fact the Defendant is an independent entity that works in collaboration with the Plaintiff but is not in any manner subordinate to or controlled by the Plaintiff. Such averments of the Plaintiff are denied as being completely false.

27. The contents of paragraph 11 are denied in entirety. It is submitted that where no agreement existed between the parties to the instant suit there arises no question of relying on any clause of the same. The Plaintiff is put to strict proof of the averments in the paragraph under reply.

28. The contents of paragraph 12 are denied. It is submitted that there was no subsequent license agreement between the Plaintiff and the Defendant entity as was required and therefore there arises no question of termination of the same. The Plaintiff has since acquiesced to the defendant's use of the said trademark and cannot now claim any rights in India of the

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trademark MARIE STOPES. The Plaintiff is put to strict proof of the averments in the paragraph under reply. It is however a matter of record that the Defendant's name was changed with effect from November 24, 1982 from Marie Stopes Society to Parivar Seva Sanstha, its present name.”

23. PSS, in its written statement has denied the existence of the 1978 Agreement between MSI and PSS. However, there is no outright denial of the existence of the 1978 Agreement. It is not the case of MSI that the said Agreement was between PSS/MSS and MSI. The Agreement was between MSI and the promoters of PSS, as PSS/MSS was yet to be registered at that point of time.

24. It is also pertinent to mention here that in its response dated 10th April, 2003 [CS(COMM) 479/2018, plaintiff's documents vol.1, Pg no.300] to the termination notice dated 13th March, 2003 [Ex.DW-1/14], PSS did not dispute the existence of the 1978 Agreement. It only stated that it did not have a copy of the 1978 Agreement.

25. On behalf of MSI, Dr. Tim Black (DW-1), who was the Chief Executive and Secretary of MSI has deposed that the 1978 Agreement was executed and the same was signed by him on behalf of MSI (then known as PSI) and by Dr. Dhall, Mr. Govil and Mr. Arora as the promoters of the new society proposed to be set up in India. He has identified his signatures on each page of the 1978 Agreement. The relevant extract from his affidavit of evidence is as under:

*“6. I say that “Marie Stopes House” is the nerve Centre of MSI's U.K. Centre network which is the largest private sector providing family planning services in Britain. In order to spread its population and birth control services overseas, MSI looked for local partners in other countries. **It was during this phase in***

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1978 that I met Dr. (Ms.) Sudesh Bhal Dhal, a qualified Gynecologist, Mr. V. K. Govil and Mr. G.K. Arora of New Delhi, India. They expressed their desire to set up Indian local partner and affiliate of MSI in India. Accordingly, an agreement dated 02nd March 1978 was executed in the name of Population Services International {the assumed name under which Population Services (Family Planning Programme) Ltd.} carried its population and birth control activities as mentioned above. The agreement was signed by me personally on behalf of Population Services International and it was signed by Dr. Dhal, Mr. Govil and Mr. Arora as the promoters of the new society proposed to be set-up in India by MSI. I have a copy of the agreement with me and I am advised that a copy thereof has also been placed on record of the suit. I identify my signature on each page of the said agreement. The original agreement was retained by the promoters in India for registering the society in the name of Marie Stopes Society and should be available with PSS. I say that PSS is deliberately withholding the original agreement and disputing it falsely. A copy of the agreement as placed on suit record which bears my signature may be exhibited as EXHIBIT DW1/10. I also identify the signature of Dr. Dhal, Mr. V. K. Govil and Mr. G. K. Arora as they had signed on each page of the said agreement in my presence. The said agreement was necessitated to record grant of permission by MSI to PSS to enable PSS to use the trade mark/trade name "Marie Stopes" and to enable it to register as a society under the said name to reflect its affiliation with MSI. All ownership in the trade mark Marie Stopes and Marie Stopes logos as depicted in the agreement itself, always belonged to MSI. PSS therefore had no right to use the licensed trade marks/trade name once the permission was withdrawn and affiliation with MSI was broken. Any further use after discontinuation of affiliation would constitute misrepresentation to world at large and lead to deception."

26. Dr. Tim Black, who was unwell at the time of cross-examination, was cross-examined through video conferencing at the High Commission of India

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in London. He was cross-examined by the counsel on behalf of PSS for three days from 19th to 21st August, 2014. He could not be cross-examined any further as he expired on 11th December, 2014.

27. It is contended on behalf of MSI that since further cross-examination of Dr. Tim Black could not be continued on account of his death, his testimony can be looked into by the Court. Reliance in this regard is placed on the following judgments:

- i. ***Krishan Dayal v. Chandu Ram***, 1969 SCC OnLine Del 134.
- ii. ***Dever Park Builders Pvt. Ltd. v. Madhuri Jalan***, 2002 SCC OnLine Cal 535.

28. On behalf of PSS it was contended that since the cross examination could not be completed, it should not be given any weight. Reliance in this regard is placed on the judgment of the Andhra Pradesh High Court in ***Somagutta Sivasankara Reddy v. Palapandia Chinna Gangappa***, MANU/AP/1284/2001.

29. In ***Krishan Dayal*** (supra), a Single Bench of this Court has held that statement of a witness in examination-in-chief cannot become inadmissible by reason of the subsequent death of the witness before his cross-examination. The Court would have to decide as to what weight can be attached to the examination-in-chief in view of the facts and circumstances of the case. The Court may also take into account whether the testimony of such a witness has been corroborated or supported by surrounding circumstances.

30. Similar view has also been taken by the Calcutta High Court in ***Dever Park Builders*** (supra). The relevant observations of the Court are set out below:

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*“19. Therefore, from the aforesaid catena of decisions which are rendered in Civil cases and from the discussion reached by me hereinabove **I hold that the testimony of the deceased defendant is admissible and the Court is bound to consider its weight to be attached for deciding this matter.** Each and every proof in examination in chief does not require being cross-examined. There are cases where no cross-examination is really required. I find here a portion of the examination-in-chief has been cross-examined and such portion in my view should be absolutely admissible in evidence and be considered without any hesitation by the learned Judge at the time of hearing and deciding of the suit. **Cross-examination is essentially needed to bring out the truth of the oral testimony, but in case of documentary evidence where there is no suggestion or pleading as to fraud and forgery the cross-examination hardly matters.**”*

31. In *Somagutta* (supra), relied upon by PSS, the Andhra Pradesh High Court has made similar observations that the evidence of a person who could not be cross-examined on account of his death may be admissible. However, the weight of probative value thereof, would vary from case to case.

32. In light of the aforesaid decisions, it is clear that the evidence of a person who died before completion of cross examination can be considered by the Court. The only issue which has to be considered by the Court is the weight that is to be attached to such testimony in the facts and circumstances of the case. Further, in cases of documentary evidence, where there is no suggestion with regard to fraud or forgery, it would not matter whether cross-examination of the witness has been carried out and the testimony of a witness, who expired before the completion of cross-examination, can be considered by the Court.

33. In the present case, as noted above, Dr. Tim Black has deposed clearly on the execution of the 1978 Agreement and identified his signatures as well

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as the signatures of Dr. Dhall, Mr. Govil and Mr. Arora on the same, who signed in his presence. It is borne out from the record that Dr. Tim Black was cross-examined over three days on behalf of PSS and 148 questions were put to him in the cross-examination. In the cross-examination on record, not a single question was put to the said witness about the execution of the 1978 Agreement or its existence.

34. The evidence of Dr. Tim Black is corroborated by the evidence of Mr. V.K. Govil (DW-4), who was duly cross-examined on behalf of PSS. Mr. V.K. Govil was a practicing Advocate and was involved in the drafting of the 1978 Agreement. In his testimony, Mr. Govil has deposed that he drafted the 1978 Agreement, which was signed by Dr. Tim Black, Dr. Sudesh Dhall, Mr. G.K. Arora and by Mr. Govil himself. He has identified his signatures on all the pages of the 1978 Agreement. He has further deposed that the original 1978 Agreement was retained by him for the purposes of registration of the proposed society. Once the society was registered under the name of 'Marie Stopes Society', the original 1978 Agreement was given by him to Dr. Sudesh Dhall, who placed it in the office files of PSS.

35. In the cross-examination of Mr. Govil conducted on behalf of PSS, he has reiterated that he signed the 1978 Agreement in his individual capacity and physically handed over the original 1978 Agreement to Dr. Sudesh Dhall. He has denied the suggestion put to him on behalf of PSS that there was no such Agreement or that nothing was handed over to Dr. Sudesh Dhall.

36. Dr. Sudesh Dhall also filed an affidavit dated 3rd March, 2006 at the stage of hearing of interim application (I.A. No.4907/2005 in CS(COMM) 298/2018) wherein she deposed in favour of the execution and existence of

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the 1978 Agreement. The relevant portions from her affidavit of evidence are as under:

*“2. I requested MSI to establish an entity in India which would conform to MSI's protocols and Licensee Agreement which was given shape in an Agreement in 1978 where I was one of the promoters. **An Agreement dated 2nd March 1978 was signed by me.***

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*4. I say that all activities including governance, administration and compliances of PSS were to be approved by MSI, London, before acted upon by PSS in India throughout the tenure of my relationship and Chairmanship of PSS up till 2002. **All the terms of the Agreement dated 2nd March 1978 were followed strictly in the letter and spirit by the Governing Body of the Executive Committee Members as well as other members of the Society at all points of time. All the members of the Governing Body were elected in accordance with the terms of the 1978 Agreement. The Memorandum & Articles of Association of PSS were duly approved by MSI, UK.”***

37. However, Dr. Dhall could not appear as a witness in the case. In this regard, Mr. V.K. Govil in his evidence has deposed that he contacted the husband of Dr. Dhall with regard to her appearing as a witness in the case and was informed by her husband that Dr. Dhall was suffering from dementia and Parkinson's and therefore, was not in a mental condition to depose as a witness. The relevant medical certificate in this regard has been exhibited as Ex.DW-4/4.

38. In view of the above, in my opinion, the evidence of Dr. Tim Black has been sufficiently corroborated by the evidence of Mr.V.K. Govil. As noted above, Dr. Tim Black was cross-examined over three days and subjected to 148 questions, with none of the questions dealing with the existence of the

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1978 Agreement. Further, there are no allegations of forgery or fraud of the documentary evidence. Therefore, in my considered view, maximum weight would have to be given to the evidence of Dr. Tim Black in the facts and circumstances of the present case.

39. The combined evidence of Dr. Tim Black and Mr. V. K. Govil, the pleadings in the suit as well as the response dated 10th April, 2003 to the legal notice 13th March, 2003 leaves no doubt in my mind that the 1978 Agreement was duly executed between MSI and the then promoters of PSS.

40. Next, it is contended on behalf of PSS that the 1978 Agreement was executed by 'Population Services International' on its letter head, which is an American entity and not a UK entity. Therefore, even if it is assumed that the 1978 Agreement was executed, it was not with the UK entity, PSFPPL, the predecessor of MSI.

41. In paragraph 6 of the plaint in CS(COMM) 479/2018 as well as in paragraph 7 of the affidavit of evidence of PW-1, it has been admitted by PSS that MSI was originally registered as 'Population Services International'. The paragraph 6 of the plaint has been produced hereinbelow-

"6. The defendant No.9 was originally registered as Populations Services International. In the year 1979-80 the Defendants name was changed to Population Services, Europe. Subsequently, the name of the defendant was changed to Marie Stopes International sometime around 1989, even though the defendant was registered as a charity in name of Population Services Family Planning Programme Ltd. ..."

42. The aforesaid averments have been supported in paragraph 7 of the affidavit of evidence filed by Ms. Sudha Tewari, PW-1, which is as under:

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“7. I say that the defendant No.9 was originally registered as Populations Services International. In the year 1979-80 the Defendants name was changed to Population Services, Europe. Subsequently, the name of the defendant was changed to Marie Stopes International sometime around 1989, even though the defendant was registered as a charity in name of Population Services Family Planning Programme Ltd.....”

43. With respect to the aforesaid deposition, Ms. Sudha Tewari, PW-1, in her cross examination, has stated that it is a ‘cut paste’ error.

44. This aspect has been explained by Dr. Tim Black, DW-1 in his testimony. DW-1 has stated that ‘Population Services international’ and ‘Population Services Europe’ were the assumed names under which PSFPPL carried out its population and birth control activities. Dr. Tim Black was extensively cross-examined on this aspect. The relevant extracts from the cross-examination of Dr.Tim Black are set out below: -

“ ...

Q52. Is there any charity or company registered as Population Service Europe in UK?

A. No. But it was the trading name we adopted for Population Services Family Planning Programme Limited in UK.

Q53. Do you have any documents from Charity or Company’s department or any other government organization which refers to your trading name Population Services Europe.

A. No. (Vol: We were not required to have any registration.)

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Q.83. If the name of the American Company was changed to Population Services International in 1972 why is it referred to as

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Population Services International & Co. Inc. in Article 4 (b) and 7?

A. Because it was incorporated in US in 1971 as Population Services Inc. and it adopted the trading name Population Services International when we embarked on our first overseas project.

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Q.140. You have referred to Population Services International as the assumed name of the UK Company in paragraph 2 of your affidavit. Do you refer to the American Company?

A. Yes. Phill Harvey and I formed both the American Company and the UK Company and we worked the two companies as associate companies.

Q.141. If the Population Service International was neither registered in UK nor it had established its business in UK, under what authority or provision of law you were using the name in UK?

A. We were using it as a trading name with the authority of the Board of the US Company which at that time consisted of myself, Phill Harvey and another."

45. From the aforesaid, it is clear that 'Population Service International' was the assumed name under which the UK entity, PSFPPL carried out its activities and therefore, there was nothing unusual if the 1978 Agreement had been executed on the letterhead of 'Population Service International'. Resultantly, I do not find any merit in the submission of PSS that the 1978 Agreement had nothing to do with the U.K. entity.

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46. Next, it has been contended on behalf of PSS that since the original of the 1978 Agreement has not been produced, the same cannot be proved on the basis of the photocopy placed on record. Reliance has been placed on the judgments in *Jagmail Singh v. Karamjit Singh and Ors*, (2020) 5 SCC 178 and *Ram Mehar v. Ali Mohd and ors*, 2021 SCC Online Del 3388.

47. In this regard, reference may be made to relevant provisions of the Indian Evidence Act, 1872:-

“63. Secondary evidence —

(1) ...

(2)....

(3) copies made from or compared with the original;

65. Cases in which secondary evidence relating to documents may be given.—

(a) when the original is shown or appears to be in the possession or power —

of the person against whom the document is sought to be proved, or

of any person out of reach of, or not subject to, the process of the Court, or

of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;

and when, after the notice mentioned in section 66, such person does not produce it;

(b) ...

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(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

66. Rules as to notice to produce.—

Secondary evidence of the contents of the documents referred to in section 65, clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his attorney or pleader, such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it: —

(1) ...

(2) when, from the nature of the case, the adverse party must know that he will be required to produce it;

67. Proof of signature and handwriting of person alleged to have signed or written document produced. — *If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting."*

48. In **Jagmail Singh** (supra), relied upon by PSS, the Supreme Court has held that for the secondary evidence to be admitted, foundational evidence has to be given proving as to why the original evidence could not be furnished.

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49. In the present case, both Mr. V.K. Govil and Dr. Tim Black have testified that the original Agreement was in possession of PSS and they have deliberately withheld it, which lays the foundational evidence as to why the original Agreement could not be produced by MSI. Hence, the requirement to send a notice as per Section 66 of the Indian Evidence Act stands dispensed with as the instant case falls within proviso 2 to Section 66 of the Indian Evidence Act.

50. In *Ram Mehar* (supra), the appellant claimed that he had lost the original documents in a house fire and hence, pleaded that his case fell under Section 65(c) of the Indian Evidence Act. However, no evidence was led for proving the statement with respect to the aforementioned fire. It was held that in the absence of foundational evidence for leading secondary evidence, secondary evidence is inadmissible.

51. In the present case, even if it is assumed that the original 1978 Agreement is not with PSS, then as per the evidence on record, it has to be taken to be lost. Even in this scenario, the photocopy of the said Agreement would be admissible as secondary evidence in terms of Section 65(c) of the Indian Evidence Act and no notice under Section 66 is required.

52. In light of the discussion above, in my opinion, the photocopy of the 1978 Agreement would be admissible as secondary evidence. Further, in view of the fact that the signatures of Dr. Tim Black and Mr. V.K. Govil, the two signatories of the 1978 Agreement have been proved in evidence, the aforesaid 1978 Agreement stands proved in terms of Section 67 of the Indian Evidence Act, 1872.

53. At this stage, reference may be made to the relevant portions of the Agreement dated 2nd March, 1978 entered into between Population Services

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International (now known as MSI) and Dr. Sudesh Dhall, Mr. V.K. Govil and Mr. G.K. Arora as promoters of the society to be incorporated. The 1978 Agreement is reproduced below:

“This AGEEMENT is made on the Second day of March. One thousand nine hundred and seventy eight BETWEEN Population Services International of 108, Whitfield Street, London W.1., United Kingdom, (here is after referred to as PSI) of the One Part and

1. *Dr. (Mrs) Sudesh Bahl Dhall of L1/18 Haus Khas Enclave, New Delhi.*
2. *Mr. V.K. Govil of 4, Marina Hotel, Connaught Place, New Delhi.*
3. *Mr.G.K. Arora of 4, Marine Hotel, Connaught Place, New Delhi.*

(hereinafter referred to collectively as ‘the Promoters of the Other Part)

Whereas:

1. *PSI was established in the United Kingdom with the object of providing family welfare services in any part of the world as are specifically defined in the objects Clause of the Memorandum and Articles of Association of PSI (herein after referred to a “the said objects and purposes”)*
2. *The Promoters are desirous of executing the said objects and purposes in India and for this purpose are desirous of forming a registered Society in the Union Territory of Delhi.*
3. *PSI is the owner and has the exclusive rights in the name ‘Marie Stopes’ and its Emblems specimen whereof is given in the Schedule hereunder (hereinafter collectively referred to as “the said Marks”).*
4. *The promoters have approached and requested PSI to permit and grant a licence for use of the said Marks by the*

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proposed Society to be formed by the Promoters and also for using and/c including the word “Marie Stopes” in the name of the clinics and/or new proposed Society and also to use the word to be registered with the name “Marie Stopes” under the provisions of the Societies Registration Act, 1860 Act No.21 of 1860 in the Union Territory of Delhi in India (hereinafter referred to as “the said New Society”) to which request PSI has agreed on the terms and conditions hereinafter set forth.

NOW THESE PRESENTS WITNESSETH AND IT IS MUTUALLY AGREED BY AND BETWEEN THE PARTIES HERETO AS FOLLOWS:

*1. Pursuant to the said Agreement and in consideration of the Promoters forming the said New Society in the Union Territory of Delhi in India for carrying out and executing said objects and purposes subject to the provisions of Clause 2 below, **PSI hereby grant permission and licence for the use of the said Marks as are specified in the Schedule given hereunder by the said New society in the name of the New Society and/or in relation to the clinics run and maintained by the said New Society.***

2. The Promoters hereby undertake that this Agreement shall be adopted and cause to be adopted by the said New Society immediately after the registration of the Said New Society and thereafter the said New Society shall carry out the terms of this Agreement to the full extent.

3. The Promoters and/or the said New Society subject to the provisions of Clause 2 above shall not pay any money for the licence hereby granted by PSI during the continuance of this Agreement and thereafter the following terms shall be applicable.

a) If the said New society shall do or cause to be done directly or indirectly whether as principal or agent any acts deeds or things and/or to omit to do anything which may injure or imperil or be against the interest of PSI and/or the said Marks, of which

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*events PSI shall be sole judge and the decision of PSI in this behalf to be final and binding on the liberty to terminate and cancel this Agreement forthwith by writing a letter to the said New Society. **On termination of this Agreement the said New Society shall absolutely stop using the said Marks and also take immediately effective steps to change its name and to remove the name 'Marie Stopes' from the name of the said New Society.***

b) If the said New Society shall fail and/or neglect to carry out the directions in sub Clause (a) above, PSI shall be at liberty to specifically enforce its rights under this Agreement through court of law.

(c) Notwithstanding anything herein before contained it shall be lawful for PSI to terminate this Agreement without assigning any reason therefore by giving 3 months notice in writing and immediately on receipt of the notice the said New Society shall take effective steps for deletion of the word 'Marie Stopes' from the name of the said New Society. After the expiry of the notice period the said New Society shall not use in any manner whatsoever the word 'Marie Stopes' and/or the said Marks and shall not represent or indicate in any way connection with PSI.

4. The Promoters hereby undertake that immediately after the registration of the said New Society, they shall cause the said New Society to enter into an Agreement with PSI on the lines of a draft annexed hereto and marked 'A'."

SCHEDULE referred to above :



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IN WITNESS WHEREOF THIS AGREEMENT has been executed on the day and the year first above written.”

54. It was contended on behalf of PSS that the 1978 Agreement, even if it is assumed that it existed, was not between MSI and PSS. The said Agreement was between MSI and the then promoters of PSS. The said Agreement was required to be ratified by PSS upon its incorporation, which was never done. Therefore, the aforesaid Agreement is not binding on PSS. No fresh Agreement was entered into between MSI and PSS upon its incorporation.

55. *Per contra*, on behalf of MSI, it has been contended that even if the said 1978 Agreement was not formally approved/ratified by PSS, the said Agreement was duly acted upon. In this regard, reliance is placed on behalf of MSI on the following documents:

- i. Certificate of Registration of PSS dated 11th July, 1978 (in the name of MSS) [Ex.PW-1/34].
- ii. Memorandum of Association (MOA) and Articles of Association (AOA) of PSS dated 22nd August, 1978 [Ex.PW-1/2].

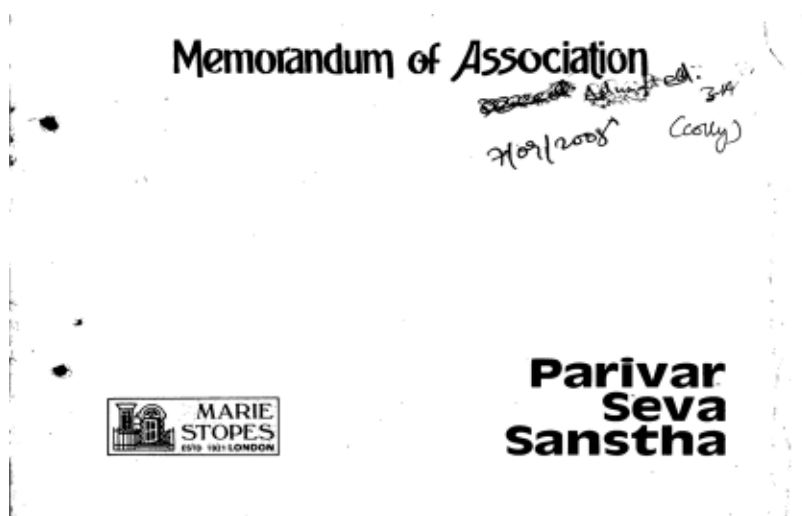
56. A perusal of recital 4 of the 1978 Agreement would show that PSS was permitted to be registered in the name of ‘Marie Stopes Society’ only on the basis of the 1978 Agreement. In the absence of the 1978 Agreement, there was no basis for PSS being registered under the name of ‘Marie Stopes Society’. Further, in terms of clause 1 of the Agreement, MSI granted a license for the use of its trademarks by the new society to be incorporated and the clinics to be run and maintained by the said society. The fact that immediately after signing of the 1978 Agreement, a society in the name of

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'Marie Stopes Society' was registered on 11th September, 1978 itself shows that the 1978 Agreement was duly acted upon.

57. Now, a reference may be made to the Memorandum of Association of PSS [Ex.PW1/2] as well as relevant clauses of the rules and regulations of PSS :



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RULES AND REGULATIONS OF THE PARIVAR SEVA SANSTHA

1. ...

2. Interpretation:

2.3 ...

(f) 'Population Service Europe' means Population Services Europe, a company Incorporated in England under the Companies Act 1948 and 1967 and also registered as charity No. 265443 with the Charity 'Commission in London, England.

6. President

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6.1 The President or the Society shall be a nominee of Population Services Europe with the right to Population Services Europe to withdraw and re-appoint another.

8. Alterations to Members of the Governing Body:

8.1 If any member or the Governing Body shall be likely to remain outside the Union Territory of Delhi for a period not less than three months an alternate for such member of the Governing Body may be appointed:

(a) in the case of the President by Population Services Europe and

(b) in the case of a member being an elected member by the Governing Body.

8.2 An alternate so appointed shall not hold office as such for a period longer than that permissible to the original member in whose place he has been so appointed and shall vacate office if and when the original member returns to the Union Territory of Delhi.”

58. A perusal of MOA of PSS shows that the ‘Marie Stopes door device’ logo has been used therein, which could not have been used in the absence of the aforesaid 1978 Agreement. In terms of Clause 6 of the rules and regulations of PSS reproduced above, the President of PSS was the nominee of Population Services Europe, the then assumed name of MSI. This shows the collaboration with MSI and control of MSI over the new society, PSS.

59. In this regard, reference may be made to the judgment of the Supreme Court in *Kollipara Sriramulu v. T. Aswatha Narayana*, AIR (1968) SC 1028, the relevant paragraph of which is set out below:

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“3. ... It is well established that a mere reference to a future formal contract will not prevent a binding bargain between the parties. The fact that the parties refer to the preparation of an agreement by which the terms agreed upon are to be put in a more formal shape does not prevent the existence of a binding contract. There are, however, cases where the reference to a future contract is made in such terms as to show that the parties did not intend to be bound until a formal contract is signed. The question depends upon the intention of the parties and the special circumstances of each particular case. As observed by the Lord Chancellor (Lord Cranworth) in Ridgway v. Wharton [6 HLC 238, 63], the fact of a subsequent agreement being prepared may be evidence that the previous negotiations did not amount to a concluded agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement. In Von Hatzfeldt-Wildenburg v. Alexander [(1912) 1 CH 284, 288] it was stated by Parker, J. as follows:

“It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored.”

60. There is nothing in the 1978 Agreement to suggest that ratification of the Agreement by the proposed society was a *sine qua non* for the said Agreement to be a binding contract. As noted above, the 1978 Agreement was duly given effect to by the parties and therefore, it cannot be said that ratification of the Agreement by the new society to be incorporated, was a

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pre-condition to be fulfilled, failing which the Agreement could not be acted upon. In my reading of the 1978 Agreement, ratification was only in the nature of a desire of the parties and merely because it was not ratified, would not affect the binding nature of the Agreement. It is relevant to note here that not only was the Agreement acted upon to register PSS as a society, but it was also continuously acted upon till the disputes arose between the parties in the year 2002. Till 2002, the President of PSS was the nominee of MSI. Further, other members of the governing body were also nominees of MSI.

61. On behalf of PSS reliance is placed on section 19(e) of the Specific relief Act to submit that a 'pre-incorporation agreement' is binding on parties only if the same is ratified by the entity post its incorporation. I do not find merit in the aforesaid submission as in the present suit MSI is not seeking specific performance of the Contract. Further, the language of Section 19 (e) itself suggests that the same is applicable only in the case of companies that are to be incorporated. Admittedly, PSS was registered as a society and not as a company.

62. Therefore, I do not find merit in the submission of the PSS that just because a further agreement between MSI and PSS, as contemplated under 1978 Agreement was not executed or the 1978 Agreement was not ratified, the 1978 Agreement would not be binding on PSS.

63. In view of the discussion above, I have no hesitation in holding that the Agreement dated 2nd March, 1978 was duly executed between MSI and the promoters of PSS, the same was acted upon and was binding on PSS.

64. Accordingly, Issues no.1 and 2 are decided in favour of MSI.

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ISSUE NO.4: DOES THE PLAINTIFF IN CS(OS) No. 898/2005 PROVE THAT THE DEFENDANT HAS INFRINGED THE TRADEMARK REGISTRATIONS WHICH HAVE BEEN DISCLOSED IN THE SUIT? OPD-CS(OS) No. 898/2005.

65. MSI has filed CS(COMM) 298/2018 claiming infringement of its trademarks bearing no.1161971, 1161972 and 1161973, exhibited as Ex. DW-1/11, Ex.DW-1/12 and Ex.DW-1/13 respectively, as well as passing off.

66. It is submitted on behalf of PSS that PSS is the prior registered proprietor and user of the Marie Stopes trademarks, bearing no.483376B, 483375 and 483378, exhibited as Ex.PW-1/18, Ex.PW-1/19 and Ex.PW-1/20 respectively in India.

67. In view of Section 28(3) of the Trade Marks Act, 1999, no infringement action can lie against the defendant unless its registration is declared to be invalid. For ease of reference, Section 28(3) is extracted below:

“28. Rights conferred by registration.—

...

(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.”

68. It is an admitted position that both PSS and MSI are the registered proprietors of the identical Marie Stopes trademarks in the same classes. Since both the PSS and MSI are registered proprietor of almost identical trademarks,

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in my view, in terms of section 28(3) of the Trade Marks Act, 1999, no infringement action can lie against PSS.

69. Accordingly, issue no.4 is decided in favour of PSS.

ISSUE NO.6: DOES THE MARIE STOPES INTERNATIONAL PROVE THAT IT IS THE LEGITIMATE USER BY PRIOR ADOPTION OF THE MARK MARIE STOPES AND/OR DOOR DEVICE AS ALLEGED BY IT? OPD :

ISSUE NO.5: DOES THE PLAINTIFF IN CS(OS) No. 1691/2003 PROVE THAT THE DEFENDANT IS GUILTY OF PASSING OFF ITS BUSINESS ACTIVITIES AS THOSE OF THE SAID PLAINTIFF? OPP;

AND

ISSUE NO.3: IS ANY PLAINTIFF IN EITHER SUIT ENTITLED TO A DECREE FOR PERMANENT INJUNCTION AGAINST THE OPPOSITE PARTY TO RESTRAIN USE OF THE MARK 'MARIE STOPES AND/OR THE DOOR DEVICE IN RELATION TO THE GOODS PRODUCTS AND SERVICES OFFERED BY SUCH PLAINTIFF?

70. I have already decided above that a case for infringement cannot be made out since PSS and MSI both are the registered proprietors of almost identical trademarks in the same classes. However, Section 27(2) of the Trade Marks Act provides that *de hors* the provisions of the Act, an action of passing off would be maintainable. Therefore, since the parties have filed the present suits for infringement as well as passing off, the case of the parties can be considered in the context of passing off. A reference in this regard may be made to the judgment of *S. Syed Mohideen v. P. Sulochana Bai*, 2016 (2) SCC 683, wherein the Supreme Court held that an action for passing off shall remain unaffected by any registration provided under the Trade Marks Act.

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71. It is the case of PSS that its clinics have been using the trademark 'Marie Stopes Clinic' since 1976. There were about 25 Marie Stopes Clinics in existence in India by the end of 1990s with a reputation of providing high quality, affordable abortion and family planning services. PSS is thus synonymous in India with the 'Marie Stopes' name and has nurtured and extensively promoted the trademark 'Marie Stopes' along with offering services and goods bearing the trademark 'Marie Stopes'. Additionally, PSS has also protected the trademark 'Marie Stopes Clinic' in suits wherein the ex-doctors were using the name. PSS enjoys goodwill in the trademark 'Marie Stopes' and spends huge amounts of money on publicity and advertisements. Ms. Sudha Tewari, PW-1 has deposed in her affidavit of evidence regarding the aforesaid facts.

72. MSI claims proprietary rights in the Marie Stopes trademarks comprising the door device logo on account of being the prior user of the said marks in UK since 1976. The relevant extracts from the affidavit filed by Dr. Tim Black, DW-1 are given below:

"3. I say that Dr. Marie Stopes, a British Citizen was a pioneer in publicly propagating need for birth control and safe abortion in United Kingdom. She had set-up a birth control clinic to facilitate safe abortion in London in March 1921 by the name of "Mother's Clinic". Dr. Stopes expired in 1958 but her work continued at the said premises by the "Society for Constructive Birth Control Clinic" (SCBCC). As the said clinic went into liquidation, it was taken over by Population Services (Family Planning Programme) Ltd. in 1976 alongwith the lease of the clinic premises which was located at 106-108 Whitefiled, London. A copy of the lease order dated 26.04.1976 recording the transfer of lease is placed on record and may be exhibited as EXHIBIT DW1/3.

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4. *I say that pursuant to said takeover of Mother's Clinic and in order to commemorate the initiative taken by Dr. Marie Stopes, decided to name the said clinic after Marie Stopes's name. Accordingly, the name of the clinic was changed by me from "Mothers Clinic" to "Marie Stopes House" and ever since 1976, the said clinic has been known as "Marie Stopes House". Mr. Harry Stopes son of Ms. Marie Stopes, at our request has acknowledged right of Population Services (Family Planning Programme) Ltd's right to use of name of his mother, Marie Stopes for the clinics. A letter dated 28.02.2003 signed by Mr. Harry Stopes has been placed on record and may be exhibited as EXHIBIT DW1/4.*

5. *I say that we spent large amount to give publicity and create awareness about "Marie Stopes" House in London by inserting large number of advertisements in local newspapers. Some specimen copies of such advertisements published in the newspaper titled "Guardian" dated 29th November 1976, 17th January 1977, 02nd December 1977, 11th January 1978 and 19th January 1978 have been placed on record, duly certified by the Historic Newspapers, Scotland and may be exhibited as EXHIBIT DW1/5 to EXHIBIT DW 1/9 respectively."*

73. DW-1, Dr. Tim Black has stated in his evidence that after taking over the lease of the clinic run by Dr. Marie Stopes in 1976, the name of the clinic was changed to 'Mothers clinic' to 'Marie Stopes House'. Mr. Harry Stopes son of Marie Stopes also acknowledged the aforesaid in his communication dated 20th February, 2023 [Ex.DW-1/4]. MSI also gave huge publicity to this fact in newspaper advertisements. No cross examination of Dr. Tim Black, DW-1 was conducted on the aforesaid aspects.

74. The aforesaid facts have also been confirmed by Ms. Sudha Tewari, PW-1 in her cross-examination conducted on 28th May, 2012. The relevant extracts from her cross-examination are set out below:

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“Q13. Are you aware what happened to Dr. Marie Stopes clinic in U.K after he death?”

Ans. Dr. Marie Stopes clinic which was called ‘Mother’s clinic’ could not be sustained and went into voluntary receivership.

Q14. When was that?

Ans. I understand this was sometime in 1975.

Q15. Do you know what happened to “Mother’s clinic” of Dr. Marie Stopes clinic after 1975?

Ans. I understand that Population Services Family planning Programme Ltd., which was established in 1973, took over this premises on lease basis in 1976.”

75. Regarding the advertisements in The Guardian Newspaper, Ms. Zoe Alison, DW-2 from Legal Department of the Guardian Newspaper, U.K deposed as a witness and proved the photocopies of the said advertisements filed by MSI. She was duly cross-examined by the counsel for PSS. The relevant extracts from her deposition are set out below:

“On SA

Q.1 Are you from the Guardian Newspaper UK?

A. Yes

“Q.2 Are you carrying your records of the Guardian Newspaper published on 29th November, 1976, 17th January, 1977, 2nd December, 1977, 11th January, 1978 and 19th January, 1978?

A. Yes.

Q.3 Can you look into the copies of these newspapers which are part of the suit record and confirm that they are true copies of newspaper publications by your company?

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A. Yes. They are the same copies that I have. Same text. I have checked each page. The newspapers are already part of Ex.DW1/5 to DW1/9.

XXXX by Mr. Anil Airi, Advocate for the Plaintiff.

....

“Q.3 Have you brought the original newspaper with you or the copies of the newspapers?”

A. I have printed copies of the newspaper from our archive case.

Q.4 What you have brought with you is not the newspaper as it was printed and published on those dates. Is that correct?

A. It is a print out of the scanned copy of the published newspaper as they are stored in our archives.

Q.5 Are you responsible for maintaining the computer and archive department of Guardian?

A. No. It is a historic archive which is not maintained. Things are not added to it but I can have access to it only.

Q.6 Can you tell when these papers were scanned and archived?

A. I do not know.

Q.7 Does it bear any certificate from the person who scanned and archived the newspapers?

A. No. (Vol.- but you must have a password and user ID to access the archives).

Q.8 Are the password and IDs to access the archives given to other employees of Guardian also?

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A. Yes. But you can only access and not modify any contents.

Q.9 Is there a separate department within Guardian for scanning and archiving?

A. I do not know if it is maintained within the Guardian. I do not know who does it.

Q.10 Do you have the advertisement which is on page 14 of Ex.DW1/5 with the heading “Sex should be fun” in the copy of the newspaper brought by you?

A. Yes.”

76. On behalf of PSS, it has been contended that all the aforesaid advertisements are incomplete as the entire newspapers were not produced. It is further stated that DW-2, who was examined to prove the advertisements, only brought print outs of the scanned copies from the archives. Therefore, in the absence of an affidavit under Section 65B of the Indian Evidence Act, 1872, the print outs of the scanned documents cannot be taken into evidence. Further, from the advertisements, it appears that the advertisements were issued by PSI, an American organisation and not by MSI. In any event, the aforesaid newspaper advertisements by themselves do not constitute trademark user and hence, it cannot be said that MSI was the prior user of the Marie Stopes trademarks.

77. In my opinion, Section 65B of the Indian Evidence Act, is not attracted in the present case as the documents proved by DW-2 were not electronic records. They were photocopies of newspapers and in the nature of secondary evidence in terms of Section 63 of the Evidence Act read with section 65 (c) of the Evidence Act. Since the documents were already on record, the role of

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DW-2 was only limited to confirm whether the said documents were photocopies of the original. DW-2 has testified that Ex. DW-1/5 to Ex. DW-1/9 are true copies of the original newspapers. In order to prove the said photocopies, DW-2 produced printouts of the scanned copies of the original published newspapers stored in the archives. As per my understanding, there is no bar under Section 65B of the Evidence Act, for a document on record of the suit to be proved by producing electronic records.

78. A perusal of the advertisement showed that it was issued by “**T. Black, PSI, Marie Stopes House, 108, Whitfield Street, London, W.1.**”. I have already held above that PSI was the assumed name under which PSFPPL carried out its activities.

79. On the other hand, no evidence has been produced on behalf of PSS with regard to use of Marie Stopes trademarks by PSS in the year 1978. Evidence in this regard given by Ms. Sudha Tewari, PW-1 is hearsay as admittedly she joined PSS only in the year 1981 and therefore, had no personal knowledge of the events of 1978. The relevant portion of the cross-examination of PW-1 is set out below:-

“Q33. I put it to you that you were not in the organization in 1978 and hence you have no knowledge as to why it was name Marie Stopes Society?”

Ans. Yes, that is correct.”

80. Therefore, in my opinion, MSI has placed sufficient material on record to establish its prior use and goodwill and reputation of the Marie Stopes trade marks in UK.

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81. Next, it is contended on behalf of the PSS, that the conduct of the parties show that the use of Marie Stopes Trademarks by PSS in India was independent. In this regard, reliance is placed on the following:

- i. Registration of trademarks in favour of PSS as a proprietor and not as a licensee. [Ex. PW-1/18 to PW-1/20]
- ii. Various copyright registrations in favour of PSS. [Ex. PW-1/21 to PW-1/32]
- iii. Various franchises agreements entered into by PSS. [Ex. DW 4/X-18]
- iv. Legal proceedings initiated by PSS for persons infringing the Marie Stopes Trademarks in India. [Ex.DW 4/X-14, to DW 4/X-16]

82. PSS has also claimed acquiescence by MSI in respect of its long and continuous user of the Marie Stopes trademarks. It has further been contended by PSS that it was PSS that developed, used and promoted the Marie Stopes trademarks since its incorporation in 1978. PSS has attained goodwill in the aforesaid trademarks in India on account of uninterrupted use for the last thirty years and since, MSI has failed to establish any goodwill or reputation in respect of the aforesaid marks in India no case for passing off is made out. Reliance has been placed on the following judgments:

- i. ***Intex Technologies and Anr. v. AZ Tech and Anr.***, 2017 SCC OnLine Del 7392.
- ii. ***Toyota Jidosha Kabushiki Kaisha v. Prius Auto Industries Limited and Ors.***, (2018) 2 SCC 1.
- iii. ***Roland v. Sandeep Jain and Ors.***, 2021 SCC OnLine Del 3482.
- iv. ***Toyota Jidosha Kabushiki Kaisha v. Tech Square Engineering Pvt. Ltd. and Anr.***, 2023 SCC OnLine Del 583.

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83. *Per contra*, on behalf of MSI it has been contended that the entire use of the Marie Stopes trademarks by PSS in India is on the basis of the 1978 Agreement, as a licensee of MSI. In this regard, counsel for the plaintiff has placed reliance on the judgment of this Court in ***Baker Hughes Limited v. Hiroo Khushalan***, 1998 PTC (18).

84. In my considered view, all the aforesaid factors relied upon by PSS would not change the fundamental premise that all the registrations obtained by PSS of the Marie Stopes trademarks and copyrights as well as all the aforesaid actions were on account of PSS being a licensee of MSI in terms of the 1978 Agreement. PSS and MSI never dealt with each other on a principal-to-principal basis. Therefore, the entire usage, goodwill and reputation arising out of the said use of the Marie Stopes trademarks by PSS in India would enure to the proprietor of the marks, i.e., MSI and not PSS.

85. In view of the above, reliance placed on behalf of PSS on the judgments in ***Intex Technologies*** (supra), ***Prius Auto Industries*** (supra), ***Roland*** (supra) and ***Tech Square Engineering*** (supra), would not come to the assistance of PSS as in all the aforesaid cases, unlike the present case, there was no collaboration between the parties or permitted user by the defendants.

86. The fact of collaboration between PSS and MSI since its inception has been specifically admitted by PSS in paragraph 6 of its plaint. The relevant portion of paragraph 6 of the plaint in CS(COMM) 479/2018 is set out below:

“6. The Plaintiff has been collaborating with the Defendant No.9 since its inception. In fact members of the Defendant No.9 were members of the governing body of the Plaintiff till recently. The Plaintiff is however a independent entity and as such has been interacting with the Defendant No. 9 as a national 'partner'. The brand name "Marie Stopes" is used

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in India by the Plaintiff as a registered trademark in various classes as also registered copyrights or appertant artwork/logos with all rights in India vesting with the Plaintiff.”

87. The aforesaid fact has been reiterated in paragraph 7 of the affidavit of evidence of Ms. Sudha Tewari, PW-1. Therefore, from its very inception, the use of the Marie Stopes trademarks by PSS was on account of collaboration between MSI and PSS.

88. At this stage, reference may also be made to the Technical Assistance Agreement [Ex.PW-1/50] executed between PSS and MSI in 1997 in respect of the ‘Orissa project’, wherein PSS has specifically acknowledged the ownership of MSI in respect of the Marie Stopes trademarks. The relevant extract from the Technical Assistance Agreement is set out below:

“In addition, particular attention will be paid to the quality of service provision, given that MSI’s brand name ‘Marie Stopes’ is to be used within the project. MSI will consequently expect that existing protocols procedures 'and working methods as currently adapted by PSS in other programmes shall also apply here conforming to MSI standards.”

89. It is also relevant to note that the aforesaid Agreement was signed by Ms. Sudha Tewari, PW-1 on behalf of PSS.

90. Till 2002, as per the rules and regulations of PSS (Ex. PW-1/2), the President of PSS had to be a nominee of MSI. In August, 2002 the rules were amended to remove this requirement. It is not disputed that the nominees of MSI continued to be on the governing body of PSS from 1978 to 2002. Therefore, the governing body and management of PSS continued to be under the control of MSI till 2002. It is apparent from the above that till the time disputes arose between the parties in the year 2002, PSS recognised MSI as

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being the proprietor of the Marie Stopes trademarks and therefore, MSI did not object to the use of Marie Stopes trademarks by PSS till then.

91. MSI never objected to the aforesaid registrations obtained by PSS as well as the aforesaid actions as it was under a *bonafide* belief that the said registrations were on the basis of the permitted use under the 1978 Agreement. There was never any assertion by PSS of its independent rights in respect of the aforesaid trademarks. Therefore, I do not find any merit in the submission of PSS with respect to acquiescence of PSS's use of Marie Stopes trademarks by MSI. However, once the 1978 Agreement was terminated, PSS was not entitled to use the same.

92. At this stage, reference may be made to the decision in ***Baker Hughes*** (supra). In the aforesaid case, a joint venture agreement was entered into between the plaintiff (a company incorporated in United Kingdom) and the defendant (a company incorporated in India), which contemplated incorporation of a joint venture company in India. The company to be incorporated in India had, as a part of its name, 'Baker', which was a part of the name of the plaintiff's company. The Agreement provided that the Indian company would not be entitled to use the name 'Baker' in the event the shareholding of the plaintiff company in the Indian company fell below 40%. Disputes arose between the parties and the plaintiff company sought to restrain the Indian company from using the name 'Baker'. A single Bench of this Court held that the use of the name 'Baker' by the Indian company was permissive in nature and once the relationship between the plaintiff and the defendant ended, the defendant company could not use the name 'Baker' and continued use by the defendant would amount to passing off. The defendant therein made an argument that the said Agreement was not binding on the

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Indian company as it was not adopted by the Indian company, which is similar to the submission being made on behalf of the PSS in the present case. However, the said argument was rejected by the Court. Even otherwise, *de hors* the Agreement, it was held that the use by the defendant would amount to passing off. Relevant observations from the judgment in ***Baker Hughes*** (supra) are set out below:

“From the conduct of the second defendant, it appears to me that the 'Basic Agreement' was adopted and acted upon by the second defendant. The second defendant having taken the benefit of the 'Basic Agreement' cannot be heard to say that the same was not adopted by it. If the same was not adopted by the second defendant, the question that arises is as to how it was using the trade name Baker as part of its corporate name. Prima facie it appears to me that the trade name Baker belongs to the plaintiffs which fact would be evident from the further analysis of the matter detailed in the latter part of the judgment. Obviously the permission to the second defendant to use the trade name Baker as part of its corporate name flowed from the “basic agreement”. The allotment of shares of second defendant to the first plaintiff is also as per the basic the ‘basic agreement’.

XXX

XXX

XXX

The use of the name Baker as part of its corporate name by the second defendant was permissive in nature and once the plaintiffs disassociated themselves from the second defendant the use of the word Baker in the corporate name of the second defendant becomes highly improper, and it impinges upon the right of the plaintiffs to use the same exclusively, Learned counsel, for the plaintiffs submitted that assuming without admitting that the 'Basic Agreement' was not binding on the second defendant even then the plaintiffs will be entitled to interim injunction as the second defendant is passing off its goods and business as that of the plaintiffs by using the word Baker in its corporate name despite the fact that the plaintiffs

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*have proprietary right over the name Baker and the goodwill attached thereto. It was pointed out that the word Baker is being used by the plaintiffs and its associate companies all over the world for a long time. **The second defendant was not entitled to use the word Baker in its corporate name after the first plaintiff had sold its share in the second defendant. Once the first plaintiff snapped its ties with the second defendant the continued use of the word Baker in the corporate name of the second defendant cannot be permitted.***”

93. The aforesaid judgment was upheld by the Supreme Court in ***Baker Hughes Limited & Anr v. Hiroo Khushalan & Anr.***, 2004 (29) PTC 153 (SC).

94. The facts of the aforesaid case are very similar to the case at hand. There was a collaboration between the parties. PSS was registered as a society in the name of ‘Marie Stopes Society’ on the basis of the 1978 Agreement. PSS was permitted and continued to use the Marie Stopes trademarks in terms of the 1978 Agreement between the parties. Once the permissive user was terminated by MSI *vide* termination notice dated 13th March, 2003 [Ex.DW-1/14], PSS had no right to use the Marie Stopes trademarks and any such user would amount to passing off.

95. In ***Cadila Health Care Ltd v. Cadila Pharmaceuticals Ltd.***, 2001 (5) SCC 73, the essential elements for constituting passing off have been elucidated by the Supreme Court in the following terms:

“10. Under Section 28 of the Trade and Merchandise Marks Act on the registration of a trade mark in Part A or B of the register, a registered proprietor gets an exclusive right to use 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. In the case of an

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*unregistered trade mark, Section 27(1) provides that no person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark. Sub-section (2) of Section 27 provides that the Act shall not be deemed to affect rights of action against any person for passing off goods as the goods of another person or the remedies in respect thereof. In passing-off action is maintainable. The passing-off action depends upon the principle that nobody has a right to represent his goods as the goods of somebody. **In other words a man is not to sell his goods or services under the pretence that they are those of another person. As per Lord Diplock in Erven Warnink BV v. J. Townend & Sons [(1979) 2 All ER 927] the modern tort of passing off has five elements i.e. (1) a misrepresentation, (2) made by a trader in the course of trade, (3) to prospective customers of his or ultimate consumers of goods or services supplied by him, (4) which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence), and (5) which causes actual damage to a business or goodwill of the trader by whom the action is brought or (in a quia timet action) will probably do so.***

96. It is to be noted that both MSI and PSS both are using the word mark 'Marie Stopes'. PSS uses the mark 'Marie Stopes', whereas MSI uses the mark 'Marie Stopes International'. Both, MSI and PSS are also using 'the door device'. An added factor for confusion would be the inherent nature of the services. Both MSI and PSS are NGOs, which are engaged in the activities relating to reproductive health services. The continuing use of Marie Stopes trademarks by PSS after the termination of the 1978 Agreement would amount to misrepresentation about the continuing association/collaboration between PSS and MSI with an intent to ride on the goodwill and reputation of the marks of MSI, which would amount to passing off. It would also be detrimental to public interest as the public at large is likely to associate PSS's

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activities with those of MSI. Applying the principles of passing off as set out in the aforesaid precedent to the facts of the present case coupled with the observations made above, MSI has established a case of passing off as the user by the PSS after termination of the 1978 Agreement amounts to passing off and therefore, MSI is entitled to a decree of permanent injunction against PSS.

97. In view of the discussion above, Issues no. 3, 5 and 6 are decided in favour of MSI.

ISSUE NO.7: DOES THE PARIVAR SEVA SANSTHAN PROVE THAT IT IS ENTITLED TO A MONEY DECREE FOR RS.40.2 LAKHS FROM THE 9TH DEFENDANT IN THE SUIT, AS ALLEGED? OPP

AND

ISSUE NO.8: ARE THE PLAINTIFFS IN EITHER OF THE SUITS ENTITLED TO A DECREE FOR DAMAGES AS CLAIMED? IF SO, TO WHAT EXTENT? ONUS ON PARTIES

98. PSS claims recovery in relation to the various ongoing projects at the time when disputes arose between PSS and MSI. At that time, there were following 4 projects in respect of which recoveries have been sought by PSS:

- I. Orrisa Urban Reproductive Health Project. (hereinafter referred to as 'the Orissa project')
- II. Children by Choice and not by Chance Project-Rajasthan. (hereinafter referred to as 'the Rajasthan project')
- III. European Commission aided Howrah project. (hereinafter referred to as 'the Howrah project')
- IV. European Commission aided IEC 8 clinics project. (hereinafter referred to as 'the 8 clinics project')

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99. In respect of all the aforesaid projects PSS seeks damages from MSI on the ground that funding in respect of the aforesaid projects as promised was not made and hence, PSS had to spend its own funds for completion of these projects resulting in losses.

100. On the other hand, MSI submits that role of MSI under the aforesaid projects was only that of a conduit of funds between the donor and PSS. MSI was not obliged to arrange for any funds for the said projects and its role was only to oversee that the funds provided by the donors are spent in a proper manner.

THE ORISSA PROJECT

101. The Orissa Project was a bilateral project between the British Government and the Indian Government and funded through Department for International Development (DFID), which is an arm of the British Government. A Technical Assistance Agreement [Ex. PW-1/50] was signed between the MSI and PSS for the aforesaid project. MSI was the monitoring agency under the said Agreement whereas PSS was the implementing agency. The programme was terminated by DFID *vide* letter dated 19th February, 1999 [Ex. DW-3/1].

THE RAJASTHAN PROJECT

102. The Rajasthan Project was funded by the 'Buffett Foundation'. As per the Memorandum of Understanding with Buffett Foundation [Ex. PW-1/5], role of MSI was to act as a funding conduit for making available project funds to PSS and monitoring the progress of the project. The aforesaid project was

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terminated by the donor i.e., the Buffet Foundation *vide* letter dated 26th March, 2003 [Ex. PW- 1/56].

THE HOWRAH PROJECT

103. As per the contract dated 16th April, 1996 [Ex. DW- 3/19], the aforesaid project was to be funded by the European Commission and the role of MSI was only to act as facilitator of the funds. Further, MSI held a fiduciary responsible for the execution of the project.

THE 8 CLINICS PROJECT

104. European Commission (EC) entered into a contract dated 18th January, 2000 with MSI, who held a fiduciary responsible for the execution of the project. As per the letter dated 20th August, 2003 [Ex. DW-3/24], PSS had directly written to EC terminating the project as of 31st August, 2003 and seeking reimbursement of funds. This is a clear acknowledgment that the funds for the project were to come directly from EC.

105. A perusal of the contracts executed in relation to the aforesaid projects would show that the role of MSI was only to act as a facilitator of the funds. In her cross examination, Ms. Sudha Tewari, PW-1 has specifically admitted that MSI was only a facilitator. Relevant part of cross examination is set out below:

“Q37. Is it correct that as per technical assistance agreement, PSS was obliged to submit financial reports and cash flows of the funds for Odisha, project to DFID?”

Ans. Yes, through MSI as it was the conduit for funds from DFID.

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Q11. So are you saying that MSI acted as a conduit of funds?

Ans. Yes, in addition to their other scope of work.”

106. For the 8 Clinics Project, PSS itself sought reimbursement of funds from the donor, EC, *vide* letter dated 20th August, 2003 [Ex. DW-3/24], which is a clear acknowledgment that the funds for the project were to come directly from EC. Therefore, evidence on record, clearly shows that MSI was only a conduit of funds between the donors and PSS and it held a fiduciary responsibility for execution of the aforesaid projects.

107. As per the evidence on record, all the aforesaid projects were ultimately terminated by the donors except for the IEC 8 clinic project, which was terminated by PSS itself. One of the reasons given by the donors was that PSS did not permit the audit of the aforesaid projects by the auditor nominated by the donors showing lack of transparency on behalf of the PSS. In the affidavit of Ms. Nutan Wozencroft, DW-3, it has been specifically stated that PSS did not permit any audit or monitoring of the disbursement made for the Howrah Project and therefore, EC decided to hold the funds [Ex. DW-3/20]. In respect of the Rajasthan Project, PSS in its communication dated 24th March, 2003 [Ex. PW-1/55] refused to agree for appointment of an external consultant for monitoring the project. Hence, the aforesaid project was terminated by the donor i.e., the Buffet Foundation *vide* letter dated 26th March, 2003 [Ex. PW-1/56].

108. Even if it is assumed that the funding for the projects was improperly stopped by the donors or that the projects were wrongfully terminated by the donors, surely, PSS cannot put the blame on MSI. If there was any grievance

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of PSS with regard to the above, the remedy was to initiate appropriate legal action against the donors.

109. In some cases, PSS continued with the projects even after termination by the donor, either of its own funds or funding from other donors. Therefore, it cannot be said that PSS suffered any losses on account of the funding being withdrawn by the donors. If PSS continued the projects despite the termination by the donors, no liability can be fastened upon MSI.

110. In view of thereof, PSS is not entitled to damages or a money decree as claimed.

111. MSI also claims rendition of accounts and in the alternative, damages. In terms of paragraph 43 of the affidavit of Ms.Nutan Wozencroft, DW-3, as on 31st October, 2003, PSS was holding an amount of Rs.5,85,83,073/- belonging to the Buffet Foundation, which has not been accounted for by PSS.

112. However, it is not the case of MSI that MSI had to refund the amount to Buffet Foundation. Further, nothing has been shown that the aforesaid amount belonged to MSI. In view thereof, I am not inclined to grant the relief of rendition of accounts in favour of MSI.

113. No evidence has been led on behalf of MSI that it suffered any losses so as to claim damages from PSS.

114. In view thereof, neither PSS nor MSI is entitled to damages/money decree/rendition of accounts.

115. Issues no.7 and 8 are decided accordingly.

RELIEF

116. In view of the discussion above, MSI is entitled to a decree of permanent injunction on the basis of passing off.

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117. Accordingly, CS(COMM) 298/2018 is decreed against the defendant, PSS in terms of prayer (a) of the suit.
118. CS(COMM) 479/2018 is dismissed in its entirety.
119. Parties to bear their own costs.
120. Decree sheet be drawn up.
121. All pending applications, if any, stand disposed of.

AMIT BANSAL, J.

SEPTEMBER 20, 2023

rt/at/sr

Signature Not Verified
Digitally Signed By: DINESH
KUMAR
Signing Date: 20.09.2023
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