



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 2096 OF 2025

Anita Rajesh Upadhyay, Aged about 60 years,
Occupation-Business, R/o House No.HD-22,
Abhiruchi Parisar, Old Subhash Nagar, Govindpura,
Bhopal – 462 023.

PETITIONER

VERSUS

Automark Industries (India) Pvt.Ltd. A Company duly
incorporated under the provisions of Companies Act,
1956 C.I.N. U29290MH1988PTC046196 having its
Registered Office at 'Gurukripa', Datta Square, Yavatmal
445 001 'Saraf Court', Opposite Yashwant Stadium,
Dhantoli, Nagpur – 440 012, Through its Authorized
Signature Mayur Khara (DIN : 00171615) of the Company
R/o Flat No.401, Plot No.104, 105/2, Farmland,
Happy Heights, Ramdaspath, Nagpur – 440 010.

RESPONDENT

Shri F.T. Mirza, Senior Advocate with Shri S.K. Bhoyar, Counsel for the petitioner.
Shri H.V. Thakur, Advocate with Shri Parth Ranade, Counsel for the respondent.

CORAM : PRAFULLA S. KHUBALKAR, J.

DATE : SEPTEMBER 30, 2025

ORAL JUDGMENT

RULE. Rule made returnable forthwith. Heard finally by consent of the learned counsels for parties.

2. The petitioner takes an exception to the order passed by the District Judge-5, Nagpur on an application filed under Order XXVI Rule 9 of the Code of Civil Procedure, 1908 (for short, 'the Code') alongwith under Order XL Rule 1 of the Code for appointment of a Court Commissioner and Court Receiver.

3. The respondent has filed a Trade Mark Suit No.6 of 2019 under Section 134 of the Trade Marks Act, 1999 alleging infringement and passing off. The plaintiff has prayed for declaration and injunction to restrain the defendant from using word 'Automark' and any mark containing word

'Auto', 'Automark' and from committing any act of passing off. The plaintiff had also filed an application under Order XXXIX Rule 1 and 2 of the Code praying for injunction, which was granted by order dated 20.03.2020 and the defendant was restrained from using the trademark 'Automark'. Thereafter on 02.03.2021, the plaintiff filed a conjoint application below Exhibit 18 under Order XXVI Rule 9 of the Code for appointment of Court Commissioner and under Order XL Rule 1 of the Code for appointment of the Court Receiver. The defendant opposed the application by submitting her reply and by order dated 04.03.2025, the application came to be partly allowed thereby appointing Advocate Saurabh Singh as Court Commissioner with directions to him to search the premises of the defendant and the places shown by the plaintiff to ascertain production of any goods infringing the trademark of the plaintiff. The defendant has raised challenge to this order by way of instant writ petition.

4. Shri F.T. Mirza, learned Senior Advocate for the petitioner vehemently submitted that the application filed by the plaintiff had no foundation for seeking any appointment of Court Commissioner or Court Receiver as the application does not state any act of infringement of the trademark. By inviting attention to paragraph no.5 of the application, he pointed out that the application is filed only on the basis of some apprehension perceived by the plaintiff and he submitted that there is no basis for submitting the application for appointment of Court Commissioner. It is also submitted that the application is filed after about a year after the injunction order was passed and pursued after about four years. As such, the plaintiff had not made out any case for claiming any search of the premises of the defendant. It is also submitted that the

application at Exhibit 18 deserved to be rejected since it was not supported by any affidavit. Lastly, it is submitted that by the impugned order, the trial Court has appointed an advocate of the choice of the plaintiff as a Court Commissioner, who is directed to take search of the premises of the defendant which is absolutely arbitrary.

5. Shri H.V. Thakur, learned counsel appearing for the respondent strongly opposed the writ petition and submitted that despite grant of temporary injunction in favour of the plaintiff, various acts of infringement of trademark were noticed which necessitated the plaintiff to file the application. He primarily submitted that the writ petition is an abuse of process of Court since the defendant had already filed a separate application dated 02.04.2025 in the suit for recalling the name of the Court Commissioner and praying for appointment of the Court Commissioner by consensus of the parties. In view of this application, he submitted that the challenge raised by the petitioner is misconceived since the petitioner's only grievance is with respect to name of the advocate, who is appointed as a Court Commissioner.

6. Rival submissions thus fall for my consideration.

7. While considering rival contentions, it has to be seen that the impugned order is passed on an application filed by the plaintiff which is not supported by any affidavit. A perusal of the application at Exhibit 18 clearly shows that the plaintiff has only expressed apprehension about an attempt from the defendant to destroy evidence of infringement activities. It is also crucial to note that the defendant has filed a separate application dated 02.04.2025 at Exhibit 50-D in the suit for recalling the name of the advocate appointed as Court Commissioner and with a specific prayer for

appointment of a Court Commissioner by consensus of parties. A perusal of the impugned order shows that the Court has entertained the application filed after one year from the injunction order and order is passed after four years. There is nothing on record to show the reasons for appointment of the particular advocate as Court Commissioner. Further, the impugned order directs the Court Commissioner to take search of the premises of the petitioner at all the places shown by the plaintiff which makes it clear that it authorizes the plaintiff to go on searching the defendant's premises only at the instance and whims of the plaintiff. The objection raised by the defendant with respect to appointment of the advocate of plaintiff's choice and the objection about general directions to search the premises, appears to have substance.

8. At the same time, it has to be noted that although the petitioner has filed the instant writ petition challenging the appointment of the Court Commissioner, however she has also filed an application at Exhibit 50-D raising grievance only with respect to the name of the Court Commissioner.

9. The trial Court ought to have given due consideration to the aspect of foundation and need for appointment of the Court Commissioner after lapse of five years from the date of injunction order. In case, the need was demonstrated, due consideration should have been given to the name of the Court Commissioner after seeking consensus of the parties. The impugned order, therefore, does not stand to the scrutiny of law.

10. However, in the backdrop of abovementioned aspects of the matter and considering the application filed by the petitioner-defendant for recalling the name of the Court Commissioner, it is desirable that the application filed by the plaintiff at Exhibit 18 be considered afresh.

11. In view of abovementioned factual and legal aspects, the following order is passed:-

- I. The writ petition is partly allowed.
- II. The order dated 04.03.2025 passed by District Judge-5, Nagpur below Exhibit 18 in Trade Mark Suit No.6 of 2019 is quashed and set aside.
- III. The Court of District Judge-5, Nagpur is directed to consider and decide the application at Exhibit 18 afresh, after giving due consideration to the application at Exhibit 50-D filed by the defendant, after affording opportunity of hearing to the parties concerned.

12. Rule is made absolute in above terms. The writ petition stands disposed of. No costs.

(PRAFULLA S. KHUBALKAR, J.)