

Dharampal and others

...Appellants

Versus

Devraj

...Respondent

CORAM: HON'BLE MR. JUSTICE VIKAS BAHL

Present: Mr. Sudhanshu Makkar, Advocate and
Ms. Himani Makkad, Advocate, for the appellants.

Mr. Alok Mittal, Advocate and
Mr. Harsh Vasu Gupta, Advocate, for the respondent.

VIKAS BAHL, J. (ORAL)

This judgment has been divided into the following sections:-

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CHALLENGE IN THE PRESENT APPEAL:-

1. Challenge in the present Regular First Appeal is to the judgment dated 17.10.2022 vide which the suit filed by the respondent/plaintiff for permanent injunction under the Trade Marks Act, 1999, was allowed and the



defendants/present appellants were restrained from continuing the business of sale of sarees under the name and style of 'M/s. Vimal Saree Palace' or 'Vimal Wadhwa Saree Palace', as the said trade name/sign board deceived the public at large, since the respondent/plaintiff was running his business of sale of sarees under the name and style of 'Bimal Saree Centre' in close vicinity, much prior to the defendants, since the year 1980 and earned goodwill and reputation and the present appellants/defendants were able to pass off their goods as the goods of the plaintiff causing substantial loss to the plaintiff.

ARGUMENTS ON BEHALF OF THE APPELLANTS:

2. Learned counsel for the appellants has submitted that in the present case, vide order dated 12.03.2022, the application filed by the respondent-plaintiff under Order 39 Rule 1 and 2 was allowed and against the said order, defendant No.3/appellant No.3 had filed FAO No.1533 of 2022, which was decided on 08.04.2022 and a reading of the said order would show that since the present appellant had undertaken that he would change his trade name from 'Vimal Saree Palace' to 'Vimal Wadhwa Saree Palace' and had undertaken that he would not prominently display 'Vimal' as compared to other words and that the display board would have a different colour, design and appearance from the display board of the plaintiff and the order granting injunction was accordingly modified and subsequent to the passing of the said order, the present appellant has changed his trade name to 'Vimal Wadhwa Saree Palace', thus the original suit filed by the plaintiff was required to be disposed of as having become infructuous. It is submitted that after the passing of the said order, no



amendment in the plaint was sought and no specific relief qua restraining the present appellant from continuing the business in the name and style of 'M/s. Vimal Wadhwa Saree Palace' was sought. It is submitted that the relief granted by the trial Court to the plaintiff was beyond the prayer made in the plaint.

3. Learned counsel for the appellants has next contended that a perusal of Exhibit P-27 and Exhibit P-28 would show that the colour of the display board of the shop of the respondent has changed, inasmuch as, in Exhibit P-27, the colour is navy blue, whereas in Exhibit P-28, the colour is light blue. It is submitted that PW-1, while appearing in the witness box had admitted that the colour of the boards kept changing everyday and thus, once it was the own case of the respondent-plaintiff that the colour of the Board changes it cannot be said that there is any visual deception. Learned counsel for the appellant has further made reference to Exhibit R-2 to show that at present, the board of the shop of the appellant has the trade name of 'Vimal Wadhwa Saree Palace' and all the bills/invoices etc. are also on the said name, thus, there is no possibility of any confusion or deception. It is submitted that at any rate, on account of the change of the trade name by the appellants, the suit of the plaintiff should have been dismissed.

4. The next argument of learned counsel for the appellants is to the effect that plaintiff-Devraj has himself not appeared in the witness box and the said Devraj had executed a power of attorney dated 26.09.2022, which has been exhibited as Exhibit P-1 and it is only his son, who has appeared in the witness box on 27.09.2022 and for the non-appearance of the plaintiff, adverse inference should be drawn against him. It is submitted that once the



plaintiff could have got his power of attorney executed on 26.09.2022, then nothing stopped him from appearing in the witness box on 27.09.2022 and thereafter for the purpose of cross-examination. It is submitted that the said aspect has not been considered by the trial Court in accordance with law.

5. Learned counsel for the appellant has also referred to Exhibit R-43 to show that there are other shops selling sarees in the area where the shop of the plaintiff and the present appellant is situated. It is submitted that Exhibit R-43 is with respect to the shop by the name of 'Shri Ram Sarees' and that no injunction against the said saree shop has been sought, whereas an injunction is being sought against the present appellant. It is submitted that in the said area, several shops are there and thus the plaintiff cannot seek injunction against the present appellant for selling sarees in the area. It is further submitted that in the present case, no independent witness has been examined inasmuch as PW-1 is the son of the plaintiff and even PW-2, in his cross-examination has stated that he is having business relations with the plaintiff. It is submitted that without there being any independent corroboration of the necessary ingredients to prove deception and loss, no injunction should have been granted in favour of the respondent-plaintiff. It is further argued that in every case, totality of the facts and circumstances is required to be seen and the entire case cannot be based upon the mentioning of only one word i.e. 'Vimal/Bimal'. It is argued that the said word 'Vimal/Bimal' is suffixed by the word 'Wadhwa' and even the colour of the board which is presently there is different from the colour of the board which is there in the shop of the plaintiff and that the sole word 'Vimal/Bimal' is not to be seen in isolation for grant of injunction. It is



submitted that the plaintiff is having a huge shop, whereas the present appellant is having a much smaller shop than that of the plaintiff and thus it cannot be said that the customers of the plaintiff would be deceived only by using the word “Vimal”. Learned counsel for the appellant has also submitted that since sarees are primarily sold to women, thus it cannot be said that two persons having separate names and separate shops would cause confusion in the mind of the said ladies to be deceived.

6. Learned counsel has further argued that in the present case, reliance placed upon Exhibit P-38 and P-39 by the trial Court to state that there was loss to the plaintiff is misconceived. It is submitted that the said Exhibits P-38 and P-39 were produced on the date the case was finally argued and was produced in rebuttal evidence and the same cannot be taken into consideration. It is submitted that in case the said documents are not taken into consideration, then there is no proof of actual loss and, therefore, on the said point also, the judgment of the trial Court is liable to be set aside. It is argued that in the present case, the suit has been filed under Section 27(2) of the Trade Marks Act, 1999, which only recognizes the right of injunction and in the suit, no reference has been made to Section 135, which actually provides for the remedy and thus the suit deserves to be dismissed on the said ground also. It is submitted that the reliance which has been placed upon the report of the Local Commissioner by the trial Court is also misconceived, inasmuch as, it was only on one occasion that the Local Commissioner had found that the sign board being used in the shop of the present appellant was ‘Vimal Saree Wadhwa Palace’. It is submitted that the said sign board was a side sign board and at any rate, the said sign board has



been removed. It is argued that the word ‘Vimal/Bimal’ is a generic word and thus no injunction for the use of the said word can be granted in favour of any person and every person is entitled to use the said word in their tradename. In support of his arguments, learned counsel for the appellant has referred to the observations made by the trial Court in paragraph 34 of the said judgment. It is argued that the judgment of the trial Court is illegal, perverse and deserves to be set aside and the suit filed by the plaintiff deserves to be dismissed.

ARGUMENTS ON BEHALF OF THE RESPONDENT:

7. Learned counsel for the respondent, on the other hand, has opposed the present appeal and has submitted that the judgment of the trial Court is well-reasoned and detailed and is in accordance with law and deserves to be upheld. It is submitted that in the present case, the *mala fides* on the part of the present appellants is apparent from the fact that their father was carrying on the business in the shop in question in the name of ‘*Dharampal Di Hatti*’ for the last 40/45 years and even started selling sarees in the same, as had been admitted by DW-1 in his cross-examination. It is submitted that once the saree business did not earn good money, then the present appellant and his family members coined a transfer deed in the year 2021 and changed the name of their shop from ‘*Dharampal Di Hatti*’ to that of ‘Vimal Saree Palace’. It is submitted that the word ‘Vimal’ in Hindi is visually and phonetically similar to the word ‘Bimal’ which is the trade name of the plaintiff. It is submitted that there was no reason for the defendants to have kept the said name except to deceive the customers of the plaintiff to make them believe that the shop of the appellant is the same shop



as that of the plaintiff so that they could sell their goods to the customers of the plaintiff. It is submitted that the shop of the appellant is situated just six shops prior to the shop of the plaintiff in the same market and both the parties are in the same business. It is argued that on account of the deception played by the appellant, much loss has been caused to the plaintiff, which fact is apparent from Ex. P-38 and P-39 as well as from the evidence on record.

8. It is submitted that Ex. P-38 and P-39 were duly exhibited on record in the presence of the counsel for the present appellants/defendants and no objection was raised by the present appellants-defendants at the time of their exhibition either with respect to the mode of proof or with respect to the admissibility/authenticity. It is submitted that Ex. P-38 and P-39 are monthly GST returns, which are uploaded on the GST Portal and are a part of the Government record. It is submitted that once the username and password is entered, then the said return can be seen from the portal and since the appellants were aware of the said aspect and never doubted the authenticity etc. of the said GST returns, they never objected to the exhibition of the said documents before the trial Court. It is submitted that it is a matter of settled law that once the exhibition of the document is not objected to, then subsequently in appeal, the said objection cannot be raised. It is further submitted, that moreover, there is other evidence also to show that on account of the phonetic expression and visual display of 'Vimal' and 'Bimal' being very similar, the appellants/defendants have been able to deceive the general public by causing confusion and has taken benefit of the goodwill of the plaintiff.



9. It is argued that a perusal of the plaint would show that the primary grievance of the plaintiff was with respect to the use of the word 'Vimal', which was phonetically similar to the word 'Bimal' and in case the appellants/defendants do not use the word 'Vimal', then the plaintiff has no objection to the appellants carrying on their business even under the title of 'Wadhwa Saree Palace'. It is submitted that the arguments raised on behalf of the appellants to the effect that relief granted is beyond the prayer made is completely misconceived in view of the above facts and also in view of the fact that after amendment in the written statement by the present appellants, the issues were recast and a specific issue with respect to the fact as to whether the present appellants should be restrained from continuing the business under the name and style of 'Vimal Wadhwa Saree Palace' or 'M/s Vimal Saree Palace' was framed and the plaintiff as well as the defendants were given due opportunity to lead evidence on the said issue and thus, the present appellants cannot state that they were taken by surprise on the said aspect or were not given due opportunity to defend the said aspect. It is submitted that PW-1 and PW-2 have proved all the necessary ingredients for the grant of injunction with respect to the defendants carrying on the business under the name and style of 'Vimal Wadhwa Saree Palace' as well as 'M/s Vimal Saree Palace' and due opportunity has been given to the defendants to cross-examine the said witnesses and that the trial Court, after considering the entire evidence, has granted injunction with respect to both the expressions, which were an issue in trial after the recasting of the issues. It is argued that at any rate, it is a matter of settled law that any act done by the defendants during the pendency of the suit would not come in the way of



the Court in doing substantial justice and in granting and moulding the relief, which was not specifically prayed for. It is submitted that it is further settled law that the Court has the power to grant relief emerging from the facts and circumstances of the case, more so, when any act is done by the defendants during the pendency of the suit.

10. It is argued that even after having given an undertaking before this Court, the present appellants had violated the said undertaking, which fact is apparent from the report of the Local Commissioner, who was appointed by the Court and also from the photographs, which have been clicked on the direction of the Local Commissioner, as even in the board displayed subsequent to the said undertaking, the present appellants had conspicuously shown the word 'Vimal' and had mentioned the same as 'Vimal Saree' in the first line and in the next line, had mentioned the subsequent words 'Wadhwa Palace', thus, making every endeavour to still confuse the customers. It is submitted that in fact, the present appellants are liable to be proceeded against for having violated the said undertaking given before this Court and the argument on behalf of the appellants that subsequently the said board has been removed does not absolve the present appellants of having violated the said undertaking.

11. Learned counsel for the respondent has further submitted that even a perusal of the power of attorney Ex.P1 would show that the respondent-plaintiff was 80 years of age and in the said power of attorney, it has been specifically mentioned that the son of the plaintiff had been helping him in his business and thus the evidence led by the son of the plaintiff as PW-1 was worthy of credence. It has been submitted that a perusal of the



evidence of PW-1 would show that the son of the plaintiff was able to give all the details with respect to the business and the dispute and was able to withstand the cross-examination and had personal knowledge about each and every aspect of the business, whereas the plaintiff himself had become hard of hearing and in said circumstances, as per settled law, the evidence of PW-1 could not be disregarded. It is submitted that the cross-examination of DW-1 as well as DW-2 has completely demolished the stand of the defendants and fully supports the pleas raised by the plaintiff and even the evidence of PW-1 and PW-2 fully supports the case of the plaintiff. It is argued that the reliance sought to be placed upon Ex. R-43 is completely misconceived, inasmuch as, Ex. R-43 relates to the shop by the name of 'Shri Ram Sarees'. The said name being completely different from the name of the shop of the plaintiff would have no relevance. It is submitted that moreover, a perusal of the photographs would show that no address of the said shop had been mentioned and thus the said document is completely irrelevant for the purpose of adjudication of the present case. It is argued that the names 'Vimal' and 'Bimal', more so, when written in Hindi, are deceptively similar and are apparently being used by the appellants to divert the customers of the plaintiff for their own benefit and also to use the goodwill of the plaintiff, who has been carrying on the work of sale of sarees etc. for the last more than 40 years, whereas business started by the present appellants was in the year 2021. It is submitted that it has been repeatedly held in various judgments that in such like situations, the defendants are required to be enjoined. In support of his arguments, learned counsel for the respondent has relied upon the judgment of a coordinate Bench of this Court



in *RFA 1571 of 2017* titled as *D.P. Jagan and sons Versus M/s DP Jagan and Company and another* and also the judgment of Hon'ble Supreme Court in the case of *Ruston & Hornsby Ltd. Versus Zamindara Engineering Co. reported as 1969 (2) SCC 727*. It is prayed that the judgment of the trial Court is well reasoned and detailed and is in accordance with law and deserves to be upheld and the present appeal is meritless and deserves to be dismissed.

ANALYSIS AND FINDINGS:

12. This Court has heard learned counsel for the appellants as well as learned counsel for the respondent and has perused the paper book as well as the original record of the trial Court, which has been summoned by this Court and is of the opinion that the judgment of the trial Court is in accordance with law and deserves to be upheld and the appeal filed by the present appellants is meritless and deserves to be dismissed for the reasons which have been detailed hereinafter.

13. It was the case of the plaintiff/respondent in the plaint that he was doing his business under the trade name 'M/s Bimal Saree Centre' at Mahabir Ghati, Bhiwani, Tehsil and District Bhiwani, in the shop owned by his wife for the last more than 40 years and by virtue of the long user of the said trade name, the plaintiff had gathered publicity and had become popular amongst the public at large. The said suit was filed in the year 2021. It was further pleaded that the defendants/present appellants were earlier doing handloom/hosiery business in the name and style of 'Dharampal Di Hatti' in the shop bearing Municipal Unit No.F-96B situated at Mahabir Ghati, Bhiwani, which shop was, as per the cross-examination of DW-1, six shops



away from the shop of the plaintiff. DW-1 Bharat Bhushan in his cross-examination had further admitted that the present appellants had started business of saree in the shop under the name of 'Dharampal Di Hatti'. It was the case of the present appellants/defendants that a release deed dated 24.11.2021 (Ex.R1) was executed in favour of defendant No.3 by his father Dharampal (defendant No.1), who thereafter became the owner of the said shop. Admittedly, the signboard/tradename of the said shop initially was 'Vimal Saree Palace'. Surprisingly, the defendants who were running the shop in question for the last 40 years under the name of 'M/s. Dharampal Di Hatti' and were doing hosiery work and thereafter even had started the business of saree in the said shop, as admitted by DW-1 in his cross-examination, instead of relying upon their own tradename, chose to change the name of the shop to 'Vimal Saree Palace'. The same, as is apparent from the facts and circumstances as well as evidence on record, was done only to create confusion in the mind of the general public and the customers of the plaintiff, who was already in the business of selling of sarees for the last 40 years and were doing business under the trade name of 'Bimal Saree Centre' and had build substantial goodwill. From the documents and the evidence on record, which would be discussed hereinafter, it would be apparent that the words 'Vimal/Bimal' more so when written in Hindi (विमल/बिमल), have the same phonetic expression and visual display and are deceptively similar and would cause confusion in the mind of the customers and general public and would further help the appellants in selling their goods as that of the plaintiff, thus causing loss to the plaintiff.

14. A close perusal of the plaint, more so paragraphs 2, 3, 4 and 8



would show that the primary concern of the plaintiff was that the appellants were using the word 'Vimal' on their signboard/trade name and it is on account of the said word being used that the suit for injunction had been instituted. It was the specific case of the plaintiff that the words 'Vimal Saree' and 'Bimal Saree' are phonetically and structurally similar and on account of the said trade name having been adopted by the appellants, the plaintiff suffered irreparable loss. It was also pleaded that an old employee of the plaintiff had been employed by the defendants/appellants by offering double of the salary to make the customers of the plaintiff believe that the business of the defendants was that of the plaintiff.

15. PW1-Rajesh Kumar in his examination-in-chief had specifically mentioned that the said old employee was named Gopal Soni. Nothing has been highlighted from the cross-examination of the said PW1 to show that the said statement of the witness in the examination-in-chief in para 7 was false or incorrect. In fact, DW1 (Bharat Bhushan, defendant No.3) in his cross-examination, (reproduced hereinafter) has admitted that Gopal Soni is his salesman and he was paying him Rs.18,000/- per month and that the said Gopal Soni was working in the shop of the appellants since 26.11.2021. To a specific question put to the said DW1-Bharat Bhushan, as to where the said Gopal Soni was working prior to 26.11.2021, the said DW1 had stated that he did not know as to where he was working nor had he asked Gopal Soni as to where he was working even after filing of the case. Thus, evasive replies were given. Additionally, it would be relevant to mention that the averments with respect to the old employee of the plaintiff having been employed by the defendants had been specifically made in para 7 of the plaint and neither



in the original written statement nor in the amended written statement, the said averments had been specifically denied and only general denial of the averments made in para 7 of the plaint had been made. Thus, the observations of the trial Court to the effect that even the old employee of the plaintiff was hired by the present appellants cannot be stated to be perverse or illegal. The averments to the effect that the plaintiff was running the business under the trade name 'Bimal Saree Centre' much prior to the defendants who had started the business in the year 2021 made in para 6 of the plaint had also not been specifically denied. The fact that the shops of the plaintiff and the defendants are at a very close proximity has been admitted by DW1 in his cross-examination. It is not disputed that the business run by both the plaintiff and defendants is with respect to sale of Sarees. A reading of the plaint and the replication and the evidence on record would show that it was further the case of the plaintiff that many customers used to make enquiries from the shop of the defendants regarding the location of Bimal Saree Centre because the shop of the defendants was situated prior to that of the plaintiff and the appellants used to deceive them and that the customers used to get confused treating the business of the appellants to be the same as that of the plaintiff. It was further the case of the plaintiff that the defendants used to purchase their own material from Delhi, under the name of Bhushan Saree as they feared that if the goods were booked in the name of Vimal Saree, then, the goods may be delivered at the shop of Bimal Saree, belonging to the plaintiff. Copy of one builtly (bill) was also attached with the replication.

16. Importantly, in the plaint, it was specifically pleaded by the



plaintiff in para 8 that at the time of meeting held in the market, the defendants had proclaimed that Vimal was a son and thus, the trade name 'Vimal' had been adopted in his name. Para 8 of the plaint is reproduced hereinbelow:-

*“8. That the defendants requested not to use the said sign board of Vimal Saree Palace and furniture like that of the plaintiff but they refused. A **meeting of the market was also held, where, they have proclaimed that Vimal is one the son and trade name has been adopted in his name, which is not a genuine cause.** By refusing to the advice, the plaintiff has got cause of action to file the present suit against the defendants and is accruing day to day since 01.12.2021.”*

17. In the original written statement, no plea was taken in the entire written statement as to for what reason the defendants were wanting to change the name from 'Dharampal Di Hatti' to 'Vimal Saree Palace'. Reply filed to para 8 of the plaint in the original written statement is reproduced hereinbelow:-

“8. That para No.8 of the plaint is wrong, denied not admitted to be correct. The plaintiff never approached and requested to the answering defendants as alleged in this para. A cooked up story has been alleged by the plaintiff.”

18. In the entire original written statement, no plea was taken that the nickname of wife of defendant No.3 was "Vimal". However, subsequently, apparently as an afterthought in the amended written statement, the present appellants had taken the plea that the popular name of wife of defendant No.3 was "Vimal". It is not in dispute that the name of wife of defendant No.3 is "Neeraj". The said fact is apparent from the cross-



examination of DW1-Bharat Bhushan (reproduced hereinafter). The said Bharat Bhushan had specifically stated in his cross-examination that his wife was doing job in BPS School for the last twenty years and had been receiving salary in her account and the name of his wife in the entire record was entered as “Neeraj”. It is not in dispute that the present appellants had not been able to produce even a single document to even remotely show that his wife’s nickname was “Vimal”. Even DW2-Neeraj Ahuja, wife of Bharat Bhushan, had admitted in her cross-examination that her alleged nickname Vimal was not entered or registered in any ID etc. and had further submitted that there was no property in her name. It was further specific evidence of PW1 that there was none in the name of Vimal or Bimal in the family of the defendants and they had adopted the said name only to pass off the goods in the name of shop Bimal Saree Centre. From the abovesaid facts and circumstances and evidence, it is apparent that the said defence, which is not even remotely substantiated, has been taken up only as an afterthought in the amended written statement. It is inconceivable that once specific plea had been taken in the plaint to the effect that the defendants had proclaimed that Vimal was one of their son, the defendants (present appellants) would not rebut the said plea in the first instance in the original written statement by stating that the shop had been named after the alleged nickname of the wife of defendant No.3. At any rate, there is nothing on record to even remotely show that wife of defendant No.3 was known as “Vimal” and thus, the finding of the trial Court on the said aspect can neither be stated to be perverse nor illegal.

19. In addition to the above, the oral evidence led by the plaintiff



fully supports the case of the plaintiff for grant of injunction. PW1-Rajesh Kumar, son of Dev Raj, while appearing in the witness-box had specifically proved on record that site plan Ex.P2 which would show that the shop of the plaintiff and defendants is in close proximity and that the said witness had also been running the shop and even in the bank account of the firm, he was an authorized signatory. The said PW1 had further stated that the business under the name and style of M/s Bimal Saree Centre was being run for the last more than 40 years and the bank statements and purchase bills as well as ITRs had been duly produced and proved on record as Ex.P3 to Ex.P30. The said PW1 further supported the pleadings of the plaintiff by leading evidence to the effect that the defendants were doing hosiery business under the name and style of 'Dharampal Di Hatti' and had thereafter changed the name to 'M/s Vimal Saree Palace' having the same phonetic expression and were passing off their goods as goods of the plaintiff. PW1 had also specifically stated that the trade name Vimal Saree Palace or Vimal Wadhwa Saree Palace was colourable adoption of the plaintiff's trade name which was causing confusion in the mind of the customers of the plaintiff and public at large and that on account of using the same name, the sale of the goods of the shop of the plaintiff had been affected and the same had been decreasing day by day.

20. The said PW1 had also given evidence with respect to the fact that as per the undertaking given by the defendants before the Hon'ble High Court, the defendants were not to prominently display "Vimal" as compared to other words and were to use the words "Vimal Wadhwa Saree Palace" and to have a different design and appearance on the display board as that of the



plaintiff but changing the name from Vimal Saree Palace to Vimal Wadhwa Saree Palace was meaningless as it was the word 'Vimal' which would misguide the general public. In his evidence, PW1 had further referred to the fact that even after having given the said undertaking, the present appellants were mentioning 'Vimal Saree' in the first line of the signboard and 'Wadhwa Palace' in the second line and not "Vimal Wadhwa Saree Palace" together, and had thus violated the undertaking given before the High Court and for the said purpose, had referred to the report of the Local Commissioner which had been duly exhibited as Ex.P31 and the photographs Ex.P32 to Ex.P37 which had been taken on the directions of the Local Commissioner. It was specifically averred that the bone of contention between the parties was, the usage of the word 'Vimal'/'Bimal' and unless the word 'Vimal' was not removed, there would always be confusion and would remain a cause for litigation. The detail evidence of PW1 fully supports the case of the plaintiff. Nothing substantial has been pointed out in the cross-examination of PW1 on behalf of the appellants to dislodge the abovesaid detailed evidence given by the said PW1.

21. Further in support of their case, the plaintiff had also examined PW2 Hitesh Gupta, who, apart from reiterating the case of the plaintiff, had further submitted that the defendants had intentionally adopted the name of their trade business similar to that of the plaintiff. PW2 further stated that on queries made by the new customers, the defendants asserted that their shop was old shop of Bimal Saree and that the word Vimal has similar phonetic expression as that of Bimal. Relevant portion of the examination-in-chief of the said witness is reproduced hereinbelow:-



“Examination in chief by way of affidavit of PW-2 Hitesh Gupta.

Xxx xxx

- 1. That I know the parties to the suit. The shops of both the parties are situated in Mahabir Ghati, Bhiwani. The shop of defendant is four shops ahead than that of the plaintiff. The plaintiff is doing business in the name and style M/s Bimal Saree Centre for the last more than 40 years but I am watching the shop since I have attained the age of majority.*
- 2. That the defendant earlier used to do the business under the name and style Dharampal Di Hatti. Later on, in the year 2021, they have changed their business from Dharampal Di Hatti to Saree business and intentionally they have adopted a name of their trade business similar to that of plaintiff.*
- 3. That when a new customer enters the market to find out the shop of Bimal Saree Centre then they used to enquire from the defendant, when he was doing the work of hosiery etc., because the shop of the defendant is near the turn of the road.*
- 4. That feeling jealous and to earn more by passing off the goods in the name of the shop of plaintiff, the defendant has started the saree business by using the word Vimal, which has a similar phonetic expression to that of Bimal.*
- 5. That after the gap of four months, the defendants have changed the name of business from Vimal Saree Palace to Vimal Saree Wadhwa Palace and on enquiry by the new customers, the defendants asserted that this is the old shop of Bimal Saree. If the defendants remove the word Vimal then dispute between the parties comes to an end but the defendant is not ready to remove the word Vimal from this trade business.*
- 6. That the deponent and his family residing outside Bhiwani and used to send customers for the purchase of saree*



*from the plaintiff's shop but they happened to enquire the location of the plaintiff but the defendant asserted that his shop is the same old shop. **The incident of telling lies by the defendant occurred many times with my relatives, who have told me after visiting the market.***

22. Importantly, in the cross-examination, no specific question/suggestion had been put to the said PW2 with respect to the plaintiff running the business in the name and style of Bimal Saree Centre for the last 40 years or even on the aspect of the defendants intentionally adopting the name of their trade business similar to that of the plaintiff or that word Vimal had similar phonetic expression as that of Bimal. It is a matter of settled law that the statement made in the examination-in-chief, unless specifically suggested to be incorrect, would be considered as undisputed and can be treated as an admission to the facts stated in the examination-in-chief. Reference in this regard can be made to the judgment of the Hon'ble Supreme Court in the case of **Muddasani Venkata Narsaiah (dead) through Legal Representatives Vs. Muddasani Sarojana** reported as **2016 (12) SCC 288**, the relevant portion of which is reproduced hereinbelow:-

*“15. Moreover, there was no effective cross-examination made on the plaintiff's witnesses with respect to factum of execution of sale deed, PW 1 and PW 2 have not been cross examined as to factum of execution of sale deed. The cross-examination is a matter of substance not of procedure one is required to put one's own version in cross-examination of opponent. **The effect of non cross-examination is that the statement of witness has not been disputed.** The effect of not cross-examining the witnesses has been considered by this Court in Bhoju Mandal v.*



*Debnath Bhagat. This Court repelled a submission on the ground that same was not put either to the witnesses or suggested before the courts below. Party is required to put his version to the witness. **If no such questions are put the court would presume that the witness account has been accepted as held in Chuni Lal Dwarka Nath v. Hartford Fire Insurance Co. Ltd.***

16. In Maroti Bansi Teli v. Radhabai, it has been laid down that the matters sworn to by one party in the pleadings not challenged either in pleadings or cross-examination by other party must be accepted as fully established. The High Court of Calcutta in A.E.G. Carapiet v. A.Y. Derderian has laid down that the party is obliged to put his case in cross-examination of witnesses of opposite party. The rule of putting one's version in cross-examination is one of essential justice and not merely technical one. A Division Bench of Nagpur High Court in Kuwarlal Amritlal v. Rekhlal Koduram has laid down that when attestation is not specifically challenged and witness is not cross-examined regarding details of attestation, it is sufficient for him to say that the document was attested. If the other side wants to challenge that statement, it is their duty, quite apart from raising it in the pleadings, to cross-examine the witness along those lines. A Division Bench of Patna High Court in Karnidan Sarda v. Sailaja Kanta Mitra has laid down that it cannot be too strongly emphasised that the system of administration of justice allows of cross-examination of opposite party's witnesses for the purpose of testing their evidence, and it must be assumed that when the witnesses were not tested in that way, their evidence is to be ordinarily accepted. In the aforesaid circumstances, the High Court has gravely erred in law in reversing the findings of the first Appellate Court as to the factum of execution of the sale deed in favour of the plaintiff."



23. In addition to the pleadings and oral evidence, the plaintiff's case stands fully substantiated with the documents produced on record. In Ex.P1, which is special power of attorney executed by the plaintiff in favour of his son, it was specifically stated that the plaintiff along with his sons, including Rajesh Kumar (PW1), was doing business in the shop in question and that the said Rajesh Kumar (PW1) had good knowledge of his business and was also aware of all the illegal activities committed by the defendants and that since, the said Dev Raj (plaintiff) was an old person and was hard of hearing thus, he could not visit the Court on each hearing. The said aspects stand fully substantiated from the evidence of PW1 (which has been discussed in detail hereinabove) who has withstood the cross-examination conducted by the defendants and has given the details with respect to each and every aspect of the case. Several documents such as Income Tax Returns, Bills etc. have been duly exhibited by the plaintiff on record to further prove their case. Ex.P15 is a bill dated 30.12.2004, in which the name Bimal Saree Center has been mentioned. Ex.P16 is a bill dated 21.01.2010 with respect to the shop of the plaintiff and the name of Bimal Saree Centre has been specifically mentioned in the same. Ex.P17 is a registration certificate issued in the name of Bimal Saree Centre by the Government of India for the purposes of GST which shows that after the implementation of the GST Act, the firm of the plaintiff got itself registered under the GST Act. Ex.P19 is a Bank account opened under the name of M/s Bimal Saree Center in the Punjab National Bank on 03.07.2010. Ex.P23 and Ex.P24 are the advertisements given by Bimal Saree Centre in the newspapers showing that the plaintiff had made substantial efforts to



advertise their goods. The said documents also lead credence to the averments made in the plaint that the plaintiff was doing the said business much prior to the business started by the defendants under the trade name of Vimal Saree Palace in the year 2021. The documents Ex.P25 and Ex.P27 show the sign boards of the defendants with the name “Vimal Saree Palace” and that of the plaintiff with the name “Bimal Saree Centre” respectively. Both the said names have been mentioned in Hindi. A comparison between the two would show that the visual display and the phonetic expression is similar and confusing.

24. Much reliance has been placed, by the learned counsel for the appellants, on the order dated 08.04.2022 passed in FAO-1533-2022, which was an appeal filed by the appellants against the order allowing the application under Order 39 Rules 1 and 2 CPC filed by the plaintiff. In the said proceedings, the present appellants had given an undertaking that they would change their trade name from “Vimal Saree Palace” to “Vimal Wadhwa Saree Palace” and would not prominently display “Vimal” as compared to other words and that the display board would have a different colour, design and appearance from the display board of the plaintiff. It was the case of the appellant that he had complied with the said undertaking. In this regard, apart from other aspects which have been detailed in the subsequent part of the present judgment, it would be relevant to note that subsequent to the passing of the said order dated 08.04.2022, a Local Commissioner was appointed by the trial Court vide order dated 17.08.2022 to submit a report regarding the state of affairs regarding the Sign-board, Logo etc. used by the defendants and to take photographs of the shop of the



defendants. In compliance to the said order, the Local Commissioner had submitted a report dated 18.08.2022 which had been duly exhibited as Ex.P31. A perusal of the said report would show that it had been stated by the Local Commissioner that he had visited the spot on 17.08.2022 at 05:16 PM and that at the time of spot inspection, he had seen that on the two sign boards which were towards the eastern side, the name of the shop was written as “**Vimal Saree** Wadhwa Palace” instead of “Vimal Wadhwa Saree Palace” as undertaken and a big banner/hoarding was also hanging just above the shop in question in the main street on which the words were written as “**Vimal Saree** Wadhwa Palace” and the said Local Commissioner had directed the photographer to take 6 photos of the spot. The said photographs have been exhibited as Ex.P32 to Ex.37. A perusal of the said photographs would show that in the shop of the appellants, on the sign board, on the eastern side, the words “Vimal Saree” had been mentioned in the first line, whereas, the words “Wadhwa Palace” had been mentioned in the next line. The photographs also show that the banner, as stated by the Local Commissioner, was also there and even in the said banner the words “Vimal Saree” was in the first line, whereas, the words “Wadhwa Palace” was in the next line. It is thus apparent that in spite of having given a specific undertaking that the sign boards would mention the words “Vimal Wadhwa Saree Palace” the same has not been done and it is the words “Vimal Saree” which had been highlighted in the first line. Even the other part of the undertaking which required the appellants to not prominently display “Vimal” as compared to other words does not stand duly complied with.



25. Apart from other acts, the said act also clearly shows that the intent of the appellants/defendants was consistently to deceive the customers of the plaintiff and the general public so as to pass off the goods of the appellants as the goods of the plaintiff in order to cause loss to the plaintiff by using the goodwill of the plaintiff. Even the undertaking given before this Court was violated. Mere plea of the learned counsel for the appellants that subsequently the banners had been removed would not absolve the appellants of having violated the undertaking. Moreover, it is not possible for the plaintiff to get the Local Commissioner appointed at every subsequent stage to further prove the violation of the said undertaking, more so, when the trial had been completed. Although the above act of the appellants calls for taking action against the appellants/defendants, however since this Court is finally adjudicating the main Regular First Appeal, thus, this Court does not wish to initiate any action against the present appellants.

26. In addition to the said report of the Local Commissioner and the photographs, even the evidence of DW-1 and DW-2 demolishes the defence set up by the present appellants and fully supports the case of the plaintiff. The true translation of relevant portion of evidence of DW-1 is reproduced herein below:-

“DW1

Statement of Bharat Bhushan aged about 48 years s/o Dharampal Wadhwa r/o Jain Chowk, Bhiwani, Tehsil and District Bhiwani (All Documents objected to) on SA.

(Recalled for cross examination)

XXXXXXXXXX Sh. Mukesh Kharkia counsel for plaintiff.

My wife does job in BPS school from last 20 years. She received



salary in her account. I don't know as to in which bank she has her account. **The name of my wife in the entire record is entered as Neeraj. I had filed reply of case prior to amended reply of the present case. The reply of case which I had submitted earlier was read over to me by my advocate. Thereafter, I had affixed my signatures. It is correct that I had told all the facts of previous reply case to my advocate. Thereafter, the reply case was prepared.I pay him an amount of Rs18,000/- per month. Gopal Soni works at my shop from 26-11-2021. I don't know, as to where Gopal Soni was working before 26-11-2021. Even after filing of this case, I didn't ask Gopal Soni as to where he was working. I don't know that Rajesh had submitted statement in present case that Gopal Soni was working at our shop earlier.When we go towards Bichla Bazar, then my shop comes first. The shop of the petitioner comes in street after leaving six shops ahead of my shop. My father is sitting in the photographs in Ex P36. My father is also sitting in Ex P37, the person sitting with him is not me. I am able to see blurred. Ex P36, Ex P37 is photo of my shop. These are the same photographs. Ex P32 is photograph of my shop. I know about Bimal Saree Centre for the last 8/10 years. I don't know about the same prior to this. We run a shop under the name of "Dharampal di Hatti" for the last 40/45 years. We started business of sarees in the shop under the name of "Dharampal di Hatti". Earlier, there affixed a board in the name of "Dharampal di Hatti".No other employee works in the shop with me except Gopal Soni."**

A perusal of the above evidence would show that apart from other aspects, DW1-Bharat Bhushan had also admitted that his father was sitting in the photographs (Ex.P36 & Ex.P37), which had been clicked by



the photographer at the instructions of the Local Commissioner in which the sign boards violating the said undertaking were displayed. Further the said DW-1 had further admitted that the said Bimal Saree Centre was there for the last 8/10 years and the said evidence had been given on 07.10.2022, thus, it had been admitted by the said DW-1 that Bimal Saree Centre had been there prior to the year 2021, when the appellants started using the trade name “Vimal Saree Palace”. The fact that business of *sarees* was started in the shop of the appellants under the name of “*Dharampal Di Hatti*” had also been admitted. In the said circumstances, the arguments raised on behalf of the respondent/plaintiff to the effect that once the business of *sarees* in the shop of the appellants-defendants under the trade name of “*Dharampal Di Hatti*” did not work, the present appellants/defendants purposely changed the name which was phonetically and visually similar and deceptive to the trade name of the plaintiff in order to use the goodwill of the plaintiff for passing off their own goods as the goods of the plaintiff, carries weight.

27. DW-2 Neeraj Ahuja, wife of Bharat Bhushan, had also admitted that her father-in-law was sitting in photograph (Ex.P32) but had further stated that the shop did not seemingly belong to them whereas DW1 (Bharat Bhushan) had admitted that Ex.P32 was a photograph of his shop. The true translation of relevant portion of her evidence is reproduced herein below:

“DW-2 Statement of Neeraj Ahuja w/o Sh. Bharat Bhushan r/o Bhiwani Bhiwani

.....My father-in-law is seated in Ex.P-32, but this shop does not seem/belong to us. The P-36 is also same photo, which does belong to us. The Ex.P-37 is seemed blurry. I cannot tell as to whether this photo belongs to our shop or not.



It is incorrect that the photos from Ex.P-32 to Ex.P-37 belong to our shop and I am denying deliberately. The board in photo Ex.P-36 is in the name of Vimal Saree Wadhwa Palace. I have two brothers whose names are Praveen and Rinku. My name Vimal is not entered/registered in my any ID. Voluntarily said, "Vimal is my childhood nickname..... There is no property in my name".

28. Ex.R73 and Ex.R69 are the documents which have been produced by the present appellants and have been relied upon by them before the trial Court to show the various bills issued in favour of the present appellants. A closer perusal of the said documents would show that while addressing the present appellants, even the dealers dealing with the present appellants had mentioned the word “Bimal” instead of “Vimal” prior to the words “Wadhwa Saree Palace Bhiwani”. Learned counsel for the respondent has thus highlighted the fact that even the dealers of the present appellant, while dealing with the present appellants have used the term “Bimal” instead of term “Vimal” which clearly shows that there was confusion created even in their mind.

29. Thus, from the above said facts and circumstances and the evidence on record, it is apparent that the plaintiff-Dev Raj was running a saree shop in the name and style of M/s Bimal Saree Centre at Mahabir Ghati, Bhiwani for the last 40 years and that the defendants were also running the shop of hosiery clothes in the same market under the name and style “*Dharampal Di Hatti*” and as per the cross-examination of DW1, the defendants had even started the sales of sarees in the said shop, however thereafter, for no valid reason, had changed the name and style of the said



shop to “Vimal Saree Palace” which name was visually and phonetically similar to the name of the shop of the plaintiff. It is apparent that the same was done in order to misrepresent and deceive the general public so as to use the goodwill of the plaintiff and to pass off the goods of the defendants as goods of the plaintiff and the same had caused monetary loss and damage to the goodwill of the plaintiff. No valid reason has come as to why the defendants wanted to name their shop having a prefix of “Vimal” and even the plea raised in the amended written statement to the effect that it was the nick name of the wife of defendant No.3 was apparently an afterthought, as apart from the fact that no such plea was taken in the original written statement, there was no evidence, much less documentary evidence, to support the said plea which was taken in the amended written statement. It is not in dispute that both the shops are located in the same vicinity and market and both the plaintiff and defendants are doing the business of selling *sarees* and the business of the plaintiff is well established since several years. After having given an undertaking before the High Court in proceedings under Order 39 Rules 1 and 2 CPC, it was the case of the defendants that they had changed the name of their shop to “Vimal Wadhwa Saree Palace”. The undertaking as given before the High Court has been violated by the defendants, as is apparent from the report of the Local Commissioner (Ex.P31) as well as photographs (Ex.P32 to Ex.P37), the details of which have been mentioned herein above. Moreover, the primary issue in the present case is with respect to the use of the word “Vimal” which the present appellants are even now using. The using of subsequent words “Saree Palace” or “Wadhwa Saree Palace”, as has been rightly held by the trial



Court, would not make much difference as both “Vimal Saree Palace” or “Vimal Wadhwa Saree Palace” are deceptively similar to the trade name of the plaintiff and will lead to misrepresentation in the minds of potential customers. Learned counsel for the respondent has fairly submitted that they would have no grievance left in case the word “Vimal” is removed from the trade name/sign board of the appellants.

30. The trial Court had rightly observed that Wadhwa Saree Palace is sufficient to identify a shop and thus, the insistence of the defendants to use the word “Vimal” shows that the appellants wish to use the goodwill of the plaintiff. Ex.P38 and Ex.P39 are the GST returns showing that the sale of the plaintiff has been reduced for the period from 01.12.2021 to 30.09.2022 as compared to the sales made by him for the period from 01.02.2021 to 30.11.2021, inasmuch as, in the period between 01.02.2021 to 30.11.2021 the plaintiff had sold *sarees* worth Rs.7,47,65,088.66/- in 10 months, whereas, the sales for the period from 01.12.2021 to 30.09.2022, which is also for a period of 10 months after the appellants changed their trade name and used the word ‘Vimal’, was worth Rs.4,91,77,936.46/-, which is a substantial decrease. Ex.P38 and Ex.P39 were exhibited in the presence of the counsel for the defendants and no objection, much less the objection with respect to mode of proof was raised at the time of the exhibition of the said documents. The zimni order dated 17.10.2022 is reproduced as under:

*“Argued by: Sh. R.P. Jain and Sh. Mukesh Kharkia, Advocates
for the plaintiff.*

Sh. S.K. Makkar, Advocate for the defendants.

Ld. Counsel for the plaintiff has closed the rebuttal



*evidence after tendering **documents Ex. P-38 and Ex. P-39** vide his statement recorded separately.*

Arguments heard.

As per my separate detailed judgment of even date, the suit of the plaintiff is decreed with costs. Decree sheet be prepared accordingly and file be consigned to records after due compliance.

Pronounced in open Court.

17.10.2022

Ashwani Kumar

Addl. District Judge,

Bhiwani UID No. HR0106”

31. It is a matter of settled law that once no objection has been raised to the exhibition of the documents, which are the GST returns and are also uploaded on the government portal, at the time of tendering the same before the trial Court, then, the present appellants cannot be permitted to raise objections regarding the same for the first time before the Appellate Court. In case the appellants had any objection with respect to the mode of proof, then it was incumbent upon the appellants to have raised the objections at the time of tendering of the said documents so that the plaintiff, if required, could have taken further steps. Reference in this regard can be made to the judgment of the Division Bench of this Court in the case of **Bhagwan Dass and another Versus Khem Chand and others** reported as **1973 AIR Punjab and Haryana 477** the relevant portion of which is reproduced hereinbelow:-

“3. The observations of the Privy Council in Gopal Das’s case AIR 1943 Privy Council 83 (supra) which were relied upon by the learned Single Judge, were to the following effect:-

"Where the objection to be taken is not that the document is



in itself inadmissible but that the mode of proof put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a Court of appeal and then complain for the first time of the mode of proof."

4. *In Harnam Singh's case (1963) 65 Pun LR 1133 (supra) this Court came to the conclusion that in order to prove document "C" it was necessary to call an attesting witness alive and available in proof of the execution of the document in question but no objection was raised when it was produced and exhibited by the Trial Court." In that case, the counsel for the plaintiffs made a statement that he produced the copies of the sale deeds marked 'A' and 'B'. This was objected to, but when he said "I also produce "C" copy of the sale deed" no objection was taken. Grover J., as he then was, while delivering the judgment observed as follows:--*

"In these circumstances the defendants cannot now be heard to say that the document was not properly proved....."

32. At any rate, the appellants have not been able to show that the said documents have been wrongly exhibited. Thus, in the present case, the observations of the trial Court to the effect that there is a substantial decline in the sale of the goods of plaintiff cannot be stated to be perverse or against the record. Further, the trial Court has rightly relied upon a judgment of the Hon'ble Supreme Court in the case of "*Man Kaur (Dead) by Lrs. Vs. Hartar Singh Sangha*" reported as 2010 (10) SCC 512 while considering the evidence of PW-1 Rajesh, who was a power of attorney and son of Dev Raj, as the said PW-1 Rajesh was aware of all the facts of the case and was



also managing the affairs of the business, as has been detailed hereinbefore.

33. The Co-ordinate Bench of this Court in the case titled as “***D.P. Jagan and sons Vs. M/s DP Jagan & Company and another***”, ***passed in RFA-1571-2017, decided on 12.05.2020***, where the issue in question was as to whether it is permissible to adopt deceptively similar business name so as to pass off the goods as that of someone else, the Co-ordinate Bench had observed that where in a case the plaintiff is proved to be prior user of business name and the defendants have started using the deceptively similar business name, then, in such a situation, the plaintiff has an over-riding right to restrain the defendants. The relevant portion of the said judgment is reproduced herein below: -

“xxx xxx xxx

*Now let us discuss various precedents cited by learned counsel for the parties. Learned counsel for the appellant has relied upon a judgment passed by the Hon'ble Supreme Court in **Laxmi Kant V Patel vs. Chetan Bhai Shah and another'** (2002) 3 SCC 65. In the aforesaid case, the Hon'ble Supreme Court was examining correctness of the order passed by learned Trial Court and the High Court of Gujarat refusing to grant ad interim injunction. It was prima facie established on the file that the plaintiff had started the business of colour lab and studio in the year 1982 under the name and style of Muktajiwan Colour Lab & Studio. In the year 1997, **the passing-off action was initiated** by the plaintiff seeking issuance of permanent preventive injunction against the defendants restraining them from passing off their business, services and goods as of and for the business, services and goods of the plaintiff. The defendants in the aforesaid judgment had in fact started using the word Muktajiwan in their trade name. **Hon'ble Supreme Court while discussing various aspects laid down as under:-***



***“8. It is common in trade and business for a trader or a businessman to adopt a name and/or mark under which he would carry on his trade or business. According to Kerly (Law of Trade Marks and Trade Names, 12th Edn., para 16.49), the name under which a business trades will almost always be a trade mark (or if the business provides services, a service mark, or both). Independently of questions of trade or service mark, however, the name of a business (a trading business or any other) will normally have attached to it a goodwill that the courts will protect. An action for passing-off will then lie wherever the defendant company's name, or its intended name, is calculated to deceive, and so to divert business from the plaintiff, or to occasion a confusion between the two businesses. If this is not made out there is no case. The ground is not to be limited to the date of the proceedings; the court will have regard to the way in which the business may be carried on in the future, and to its not being carried on precisely as carried on at the date of the proceedings. Where there is probability of confusion in business, an injunction will be granted even though the defendants adopted the name innocently.*”**

Xxxx

***15. The observation of the trial court that the business name sought to be adopted by the defendants was “somewhat similar” to that of the plaintiffs was immaterial and irrelevant. This observation, the trial court was probably persuaded to make, in the background that the business name sometimes adopted by the plaintiff used “QSS” as prefixed to “Muktajivan Colour Lab” or as part of the full name and that made the difference. The learned counsel for the plaintiff-appellant has pointed out that “QSS” is an abbreviation, the elongated or full form whereof is “Quick Service Station” and that was merely an adjective*”**



prefixed to the name. We find merit in the submission. It is the word “Muktajivan”, the employment of which makes distinctive the business name of the plaintiff and it is the continued use of “Muktajivan” in the business name of the plaintiff which has created a property therein linked with the plaintiff. We are, therefore, unhesitatingly of the opinion that a clear case for the grant of ad interim injunction prayed for by the plaintiff was made out and the trial court and the High Court — both fell in an error in not granting the same.

xxx xxx xxx

Now let us analyse the reasons given by the learned Trial Court in the judgment under appeal. First reason is that the D.P.Jagan is a generic name. It may be noted here that generic has been defined as “characteristic of or relating to a class or group of things; not specific”. D.P.Jagan cannot be a generic name. Hence, the first reason given by the learned Trial Court is not correct. Second reason that the plaintiff has no over-riding right to use the word ' D.P.Jagan' is also not correct. Trial Court has not examined the dispute in proper prospective. The plaintiff is proved to be prior user of business name “D.P.Jagan & Sons”. The defendants have started using the word deceptively similar business name i.e “D.P.Jagan & Company” in 2012 only while starting to trade/deal in the similar articles/goods. The defendants have opened their business premises in the adjoining premises to that of the plaintiff. In such circumstances, the plaintiff do have a over-riding right to restrain the defendants. The learned trial Court has also erred while observing that since D.P.Jagan is not registered trade mark of the plaintiff and hence has no right to seek injunction. The plaintiff never came to the Court for protecting his registered trade mark. He has filed a suit under common law claiming that he has earned a reputation while using a particular business name which cannot be permitted to be used by the defendants by adopting deceptively similar



trade/business name. It is not necessary that before filing such a suit, the plaintiff must get the trade mark registered. Hon'ble Supreme Court in S.Syed Mohidin's case (supra) have already held that a prior user of a business name is entitled to maintain a suit and protect its business interest even against holder of a registered trade mark. It has been held that registered trade mark is only acknowledging a prior right but does not create any new right.

Next reason assigned by the Trial Court that the plaintiff has failed to prove loss of business or goodwill, is also erroneous because it is not mandatory that before a plaintiff maintains a suit, it is necessary to prove the loss of business or goodwill. It may be noted here that learned Trial Court itself has discussed that the turnover of the plaintiff firm in the financial year 2011-13 was Rs.8.23 crores which increased to Rs.8.62 crores in the year 2013-14 and further grew to Rs.9.71 crores in 2014-15, whereas the defendants was having turnover of Rs.50 lacs in the last financial year. Thus, it is apparent that the plaintiff earned a goodwill since 1985 which apparently appears to be the reason for huge difference in turnover of both the firms. In such cases, question is whether the one party which has adopted a deceptively similar business name or mark can be permitted to continue to deceive the plaintiff and customers in the street. In the present case, this Court is of the considered view that the defendants have started using deceptively similar name and are thereby making an attempt to pass off their goods as that of the plaintiff.

Failure to examine a deceived customer in evidence, cannot itself result in dismissal of the suit, particularly, when other overwhelming evidence is available to prove the case of the plaintiff.

Last reason assigned by the learned Trial Court is also not correct. Represented pictorial extracted above clearly proves that deceptively similar name has been used by the defendants and the learned trial Court erred in drawing conclusion to the contrary.

xxx xxx xxx



Keeping in view the aforesaid facts, this Court has come to conclusion that since the plaintiff and the defendants are in the same trade, attempt of the defendants to use almost identical name for running the similar business in the adjoining premises must be thwarted. There is sufficient material available on record to come to a conclusion that such deceptively similar name is likely to cause deception. Hence, the judgment passed by the learned Trial Court is set aside. There shall be perpetual injunction against the defendants from using business name “D.P.Jagan & Company”. Appeal allowed.”

34. The facts of the present case are on a higher footing than the facts of the above-said case, inasmuch as, in the above-said case, the plaintiff was not able to prove the loss of business and goodwill and the trial Court had refused to grant injunction although subsequently the High Court, on challenge, had granted injunction, whereas in the present case, the trial Court had granted injunction in favour of the plaintiff and the business loss to the plaintiff had also been established. The Co-ordinate Bench of this Court in the above-said case had also considered the definition of “generic” and had observed that the same is defined as “characteristic of or relating to a class or group of things; not specific” and had further observed that “D.P. Jagan” could not be stated to be a generic name. The Hon’ble Supreme Court in the case of *Ruston & Hornsby Ltd. (supra)* after noticing that the High Court had found that there was a deceptive resemblance between the word “RUSTON” and the word “RUSTAM” and thus, the use of the bare word “RUSTAM” constituted infringement of the plaintiff’s trade mark “RUSTON”, had observed that since the trade mark of the respondents therein was deceptively similar to the trade mark of the appellant therein, the



fact that the word “INDIA” was added to the trademark of respondents therein was of no consequence and accordingly, the permanent injunction was granted. Although, the said case was a case of infringement as there was a registered mark and not a case of passing off, but the observations made by the Hon’ble Supreme Court in para 8 would further the case of the plaintiff herein, inasmuch as, once the word “Vimal” and “Bimal”, more so, when written in Hindi are deceptively similar, then, the mere fact that the defendants had subsequently added the word “Wadhwa” would not call for dismissing the suit of the plaintiff for injunction. No contrary judgment has been cited on behalf of the appellants.

35. The arguments raised on behalf of the appellants to the effect that the relief granted in the present case is beyond the prayer as there was no prayer with respect to the grant of injunction with respect to “Vimal Wadhwa Saree Palace” and also the fact that the suit had been rendered infructuous in view of the order dated 08.04.2022 passed by the Co-ordinate Bench of this Court in FAO-1533-2022, deserves to be rejected.

36. As has been detailed herein above, a perusal of the pleadings and the evidence would show that the primary concern of the plaintiff was with the use of word “Vimal” as the same was deceptively similar to the word “Bimal”. After the amended written statement was filed, issue no.1 was recast and the recasted issue no.1 is reproduced herein below: -

*“(1) Whether the plaintiff is entitled to a decree for permanent injunction restraining the defendants from starting or continuing the business **under the name and style of M/s.Vimal Saree Palace or Vimal Wadhwa Saree Palace which is likely to deceive the public as the plaintiff is also running his***



business in the name and style of M/s. Bimal Saree Centre since 1980 as prayed for?OPP”

A perusal of the evidence of PW-1 which has been discussed in detail hereinabove, would show that positive evidence had been led by the plaintiff to show that the defendants deserved to be enjoined even from using the word “Vimal Wadhwa Saree Palace” as the word “Vimal” was deceptively similar to the word “Bimal”. The said witness was duly cross-examined. Due opportunities were given to both the parties to lead their evidence in support of the said issue and thus, full trial had taken place on the said issue. The trial court, after considering the entire oral evidence and the documents on record, including the report of the Local Commissioner and the photographs produced by the Local Commissioner, had decided issue No.1 in favour of the plaintiff. This Court also, after having reconsidered the entire evidence and documents on record, is of the view that the finding on the recasted issue no.1 deserves to be upheld. In view of the above and without there being any challenge to the order recasting of the issue, at the appropriate stage, it is not now open to the appellants to say that grant of injunction qua Vimal Wadhwa Saree Palace was not in issue during trial or could not be granted. Moreover, it has been held by the Co-ordinate Bench of this Court in a ***judgment dated 30.10.2015 passed in Regular Second Appeal No.3938 of 2009***, titled as “***Amrit Lal and another Vs. Sadhu Ram and another***”, the SLP against which has been dismissed on 15.02.2016 (SLP No.2624/2016), that if anything had been done by a party after the filing of the suit, then, the relief granted to the plaintiff could be modified and even in case a suit for permanent injunction has been filed, if



any act takes place during the pendency of the suit, then, the Court could even grant mandatory injunction although no amendment had been made in the plaint to claim mandatory injunction. The relevant portion of the said judgment is reproduced herein below:-

“xxx xxx xxx

13. Learned counsel for respondent-defendant No.1 has argued that the suit filed by the appellants-plaintiffs was not maintainable. The construction was raised before filing of the suit and despite this fact, the appellants-plaintiffs have not amended the plaint to seek the relief of mandatory injunction. The report of local commissioner is clear that there existed construction at the spot. Defendant No.1 had raised construction of the shop at the same place, where it existed earlier. He had not encroached upon any part of the chowk. The dimension of the shop tally with the dimensions mentioned in the sale deed vide which the property was purchased. No substantial question of law or fact arises in this appeal requiring determination or to interfere with the concurrent findings of the Courts below.

xxx xxx xxx xxx

23. The next question which weighed heavily before the Courts below is as to whether the relief of injunction could be modified. Counsel for the defendant has not disputed the settled proposition of law that in case, it is found that the construction had been raised after filing of the suit, the relief sought by the plaintiff could be modified and relief of mandatory injunction could be allowed. Reference in this regard can also be made to *Balbir Singh Vs. Jagir Singh* 1993(3) PLR 419 and *Sadhu Singh and others Vs. Thakardawara Bhagwan Narainji* 2007(1) PLR 704.”

37. In Sadhu Singh and others Vs. Thakardawara Bhagwan



Narainji reported as 2007(1) PLR 704, it has been held as under:-

“6. The submission of the learned counsel for the appellants is that only relief for permanent injunction was prayed by the respondent but the learned trial Court has granted the relief of mandatory injunction also which was not prayed. However, the Court where the matter is pending is competent to grant any relief, which is considered by it to be necessary to do justice to the parties. Since the trial Court had reached the conclusion that the respondent was dispossessed during the pendency of the suit and some construction has been raised over the suit land, therefore, the trial Court is justified in granting the decree for mandatory injunction.”

38. At any rate, the finding of the trial Court to the effect that main grouse of the plaintiff was to the use of the word ‘Vimal’ by the defendants, as it created confusion and that defendants should be restrained from using the name ‘Vimal’ in any form, either by using ‘Vimal Saree Palace’ or by inserting the name ‘Wadhwa’, is in accordance with law and deserves to be upheld as has been discussed hereinabove. With respect to the argument that the suit had been rendered infructuous in view of the order dated 08.04.2022 passed by the Co-ordinate Bench of this Court in FAO-1533-2022, it would be relevant to note that the said appeal was filed by defendant no.3 against the order vide which temporary injunction was granted in favour of the plaintiff. Thus, the said order was passed in a proceeding emanating from an application filed under Order 39 Rules 1 and 2 CPC. It is a matter of settled law that the observations made in the orders passed in the said proceedings are neither binding nor operate as res judicata and the suit has to be finally adjudicated after taking into consideration the evidence and the documents



on record, independently. Moreover, a perusal of the order dated 08.04.2022 would show that it was specifically stated in the said order that the suit is still pending and the trial Court was requested to decide the suit within a period of six months from the date of the order. In case, on the basis of the said undertaking, the suit was required to be disposed of as infructuous, then, the question of the Court making the said observations and giving the said direction would not arise. Rather, the Co-ordinate Bench of this Court had further observed that it was open for the plaintiff to file a fresh application i.e., an application for interim order etc., if any other grievance was there, which expression clearly showed that the other grievance could be, any other grievance than the one already being agitated by the plaintiffs. Merely because an interim order passed by the trial Court has been modified and that too on an undertaking given by the present appellants, which has also been subsequently violated, would not call for dismissing the suit as infructuous.

39. Even the argument that the suit had not been filed under Section 135 of the Trade Marks Act, 1999 also does not call for dismissing the suit or for setting aside the judgment of the trial Court. It is not in dispute that as per Section 27(2), it has been specifically provided that nothing in the Act shall be deemed to affect rights of action against any person for passing off goods or services as the goods of another person or as services provided by another person or the remedies in respect thereof. Section 135 of the Trade Marks Act, 1999 further specifically provides for reliefs which can be granted in a suit for passing off, which includes the grant of injunction. It could not be disputed before this Court that the suit for permanent injunction



with respect to passing off was maintainable in view of provision of Section 27(2) and Section 135 of the Act and merely because it has not been specifically mentioned in the plaint that the suit had been filed under Section 135, would not call for dismissal of the suit or for setting aside of the judgment of the trial Court. No law has been cited on behalf of the appellants that in such a situation, the suit of the plaintiff is to be dismissed only on the said account. Further, document Ex.R43 relied upon by the present appellants does not in any way further the case of the present appellants. The said document is a photograph depicting that there is a shop by the name of “Sri Ram Saree”. The said trade name is completely different from the name of the plaintiff shop and thus, the said photograph is of no relevance. Moreover, a perusal of the said photograph shows that no address of the said shop has been mentioned and thus, it cannot be said with full affirmation as to where the said shop was located. At any rate, the said document does not call for interference in the judgment of the trial Court which is well reasoned.

CONCLUSION:-

40. Keeping in view the abovesaid facts and circumstances, the impugned judgment is in accordance with law and deserves to be upheld and is accordingly, upheld and the present appeal being meritless, deserves to be dismissed and is accordingly, dismissed.

October 29, 2025

puneet/naresh.k/pawan

**(VIKAS BAHL)
JUDGE**

Whether speaking/reasoned:-

Yes/No

Whether reportable:-

Yes/No