

MANU/GJ/1287/2013

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IN THE HIGH COURT OF GUJARAT

Appeal From Order No. 154 of 2013

Decided On: 10.10.2013

Dandi Salt Pvt. Ltd. **Vs.** Indo Brine Industries Ltd.

Hon'ble Judges/Coram:

S.H. Vora, J.

Counsels:

For Appellant/Petitioner/Plaintiff: S.K. Bansal and Harshadray A. Dave, Advocates

For Respondents/Defendant: S.N. Soparkar and Pratik Y. Jasani, Advocates

Case Note:

Intellectual Property Rights - Use of trademarks - Injunction thereof - Present appeal filed for challenging order whereby Appellant was restricted from using trademark which was similar with Respondent's trademark - Whether injunction from using trademark was justified - Held, cleared from fact that Respondent did not make mention of filing of second suit and obtaining ex-parte injunction order from trial Court - Respondent also concealed fact of cancellation proceedings against its impugned registered trademark before Intellectual Property Appellate Board (IPAB) - Respondent gave undertaking before IPAB not to initiate any proceedings for infringement of trademarks against Appellant - Thus, this conduct could not save Respondent from consequences of concealment of material facts and making misrepresentation in Court - Trial Court failed to consider these material suppressions made in case - Respondent made wrong and false statement before trial Court pertaining to factum of two registered trademarks - Same were incorporated in ex-parte order of injunction despite fact that trademark registrations were not in force in view of Respondent's own undertaking before IPAB - Therefore, order of grant of injunction was not justified and same quashed - Appeal allowed. [paras 26 and 27]

JUDGMENT

S.H. Vora, J.

1. Challenge in this Appeal from Order preferred under Order 43 Rule 1(r) of the Code of Civil Procedure (for short, the 'Code') is the order dated 31.01.2013 passed by the learned 5th Additional District Judge, Gandhidham, Kutch in Regular Civil Suit No. 3 of 2011 (for short, the 'impugned order') whereby, the learned trial Judge confirmed the ex-parte order dated 20.12.2011 wherein, reliefs in terms of para 21 A, B and C of the injunction application were granted against the defendants. The appellants namely M/s. Chirai Salt (India) Pvt. Ltd. and M/s. Dandi Salt Pvt. Ltd. are the original defendant Nos. 1 and 2 and appellant Nos. 2 and 3 are the Directors of defendant No. 2 - Company in the subject matter of Regular Civil Suit No. 3 of 2011 which was filed by the respondent - plaintiff - M/s. Indo Brine Industries Ltd. The parties to the present proceedings would be referred to as per their status in the plaint for convenience.

2. Before the submissions made by the learned advocates for the respective parties to the present proceedings are taken on hand, it is required to bear in mind that the subject matter of suit is plaintiff's claim of prior user of the trademark and infringement of copyright 'DANDI' in relation to salt. But, at the time of hearing of injunction application, the plaintiff deleted relief for injunction of copyright 'DANDI' as per purshish Exh.82 and restricted claim of prior user of trademark 'DANDI'.

3. The brief facts leading to filing of the suit as well as injunction application Exh.5 by the plaintiff can be stated thus:-

3.1. The plaintiff is a company incorporated under the Companies Act, 1956 having its registered office at Gandhidham and salt factory at village Chopadva, Kutch. The plaintiff is engaged in the business of manufacturing, selling and exporting 'iodized free flow salt for human consumption' under the trademark and label of 'KOHINOOR' as well as under the trademark and label containing and consisting of the name 'DANDI NAMAK' in Hindi as also 'DANDI SALT' in English since the month of June, 1998. According to the plaintiff's case, the plaintiff being prior user, lawful owner and proprietor of the trademark 'DANDI NAMAK', is entitled to use the same exclusively and also entitled to restrain others from imitating and/or violating the vested property rights in the said trademark by others in any manner and by passing off their goods under such imitated mark or label as those of the goods of the plaintiff.

3.2. It is specific case of the plaintiff that as per the information made available to it from the markets, the defendant No. 1 namely, Chirai Salt (India) Pvt. Ltd. is a company incorporated under the Companies Act having its factory and office at Gandhidham, Kutch, engaged in the business of manufacturing 'Salt for human consumption' under the identical and/or deceptively similar mark 'DANDI NAMAK' in Hindi and 'DANDI SALT' in English and selling the same through defendant No. 2. The defendant No. 2 namely, Dandi Salt Private Limited, is also company incorporated under the provisions of Companies Act, 1956 by one Mr. Suresh Chand Agarwal and his wife Mrs. Anju S. Agarwal as the promoters and Directors. As per the plaintiff's case, said Mr. Suresh Chand Agarwal and his wife Mrs. Anju S. Agarwal, as being the partners of M/s. Kunwar Ajay Group of Industries and also as being the Directors of M/s. Kunwar Ajay Foods Pvt. Ltd., were marketing and selling iodized free flow salt under the trademark DANDI NAMAK/DANDI SALT of the plaintiff till the month of August, 2004. It is the case of the plaintiff that from the records and proceedings including balance sheets and Director's reports filed by the defendant No. 2-Company with the Registrar of Companies, Ahmedabad, it appears that the defendant No. 2-Company has not at all commenced any business activity since the date of its incorporation and except above two promoters, no other person has been inducted either as the Director or the member of the said company. However, the defendant No. 3, who has been doing business of sarees under the name of H.R. Enterprise at Surat was supplying sarees to M/s. Kunwar Ajay Designers Sarees Pvt. Ltd. and M/s. Poonam Industries Ltd. of said Mr. Suresh Chand Agarwal, falsely claimed himself to be the Director of defendant No. 2-Company. In the said manner, the defendant No. 4, who is a family member of defendant No. 3, also claimed himself to be the Director of defendant No. 2-Company. While as per the record of the companies, the defendant Nos. 3 and 4 are not the Directors of the defendant No. 2-Company. It is the case of the plaintiff that however, defendant Nos. 3 and 4 are indulged into illegal acts of violation of the vested property rights of the plaintiff's prior used trademark 'DANDI NAMAK' in the name of defendant No. 2-Company. While, in fact, the defendant No. 2-Company is only on paper and never commenced any business activity. In plaint para 3, the plaintiff asserted the details of the brief facts leading to the adoption, use and registration of the trademark and then

submitted that the plaintiff is a prior user since 1998 and also the plaintiff being originator and owner of the same, claims exclusive copyrights as per the provisions of Copyright Act, 1957.

It is the case of the plaintiff that in order to distinguish its aforesaid goods and services from the goods/services of others, it has honestly and bonafidely conceived and adopted various trademark labels including trademark and label containing and consisting of the name DANDI NAMAK/DANDI SALT in the peculiar lettering style, lay out, get-up, mode, fashion and style, all in artistic works printed on polythene bags for 'iodized free flow salt for human consumption' since the month June, 1998. It is the case of the plaintiff that the plaintiff is having two units having capacity of 57,200 Mts. and 1,66,000 Mts. respectively with total investment of more than Rs. 25 crores which it has spent and it is having a work force of more than 400 employees. Since the plaintiff is very well known in the markets for its quality products and in addition to manufacture and sale of iodized free flow salt under its own brands, namely, Kohinoor, DANDI NAMAK/DANDI SALT, INDO, INDOBRINE etc., the plaintiff has been approached large business enterprises of India, namely, Hindustan Lever and Tata Salt to get manufactured iodized salt and accordingly, the said companies are getting their iodized salt manufactured under their respective trademarks 'Annapurna' and also 'I-Shakti' through the plaintiff upon Written Manufacturing Agreements with such companies. In plaint para 3.12, the plaintiff gave details of sales of iodized salt under the trade name DANDI NAMAK/DANDI SALT effected to the said M/s. Kunwar Ajay Group commencing from the year 2001 to 2004. It is the case of the plaintiff that the arrangement as to the marketing of iodized salt through the said M/s. Kunwar Ajay Group continued only upto the month of August 2004 and certain dispute took place about payment of dues and, therefore, the plaintiff compelled to stop and discontinue selling and/or supplying goods to said M/s. Kunwar Ajay Group from the month of August, 2004. It is the case of the plaintiff that thereafter, the plaintiff decided to market its products through M/s. New Hari Om Industries and the plaintiff modified the existing label and artistic work on the polythene bag as well as the slogan by alteration of the spelling of the name 'DANDI SALT' to be read as 'DAANDEE SALT' in place of 'DANDI SALT' while the Hindi version thereof kept as it was with slightly altering trade slogan to be read as 'Dandi Namak Buddhi Aur Shakti Ke Liye' in place of 'Dandi Namak Amrut Hai Buddhi Aur Shakti Ke Liye'. It is the case of the plaintiff that it sold the goods to the said M/s. New Hari Om Industries for the years commencing from 2005 to 2007 to the tune of Rs. 9 lacs approximately. In plaint para 3.16, the plaintiff provided sales figures commencing from the year 2006 to 2010. The plaintiff spent huge expenses, labour and skill in advertising and popularising its iodized free flow salt under the trademark DANDI NAMAK/DANDI SALT since the month of June, 1998 and as such, the said trademark identifies and distinguishes the goods of the plaintiff from those of others and accordingly, the said trademark is exclusively associated and connected with the goods, business and operations of the plaintiff only and none else.

3.3. It is the case of the plaintiff that in order to protect the vested property rights in its trademark DANDI NAMAK/DANDI SALT, it took appropriate registration proceedings with the Registrar of the Trade Marks including two applications which are detailed in plaint para 6 in Clause-30 on 16.01.2008 for registration of its trademark (logo) 'DANDI NAMAK' with the devise of Dandies under the provisions of Section 18 of the Trade Marks Act, 1999. The aforesaid registration applications as detailed in plaint para 6, came to be advertised in the Trade Marks Journal to invite objections and pursuant to the said advertisement, the defendant No. 3, by claiming himself to be the Director of the defendant No. 2-Company, filed false notice of opposition with a view to delay the registration of prior used and most distinctive trademark 'DANDI NAMAK' of the plaintiff.

It is the case of the plaintiff that the defendant No. 3, while opposing the winding up petition against the group companies of the said M/s. Kunwar Ajay Group, filed affidavit dated 28.04.2008 in Company Petition No. 210 of 2002 before this Court categorically submitting on oath that Mr. Suresh Agarwal sold two trademarks namely, 'DANDI NAMAK' and 'FRIENDLY WASH DETERGENT' through agreement for assignment date 10.01.2005 for a whopping consideration to one M/s. Pinky Advertising Company Pvt. Ltd., Mumbai. In light of such affidavit dated 28.04.2008 of the defendant No. 3 before this Court, it is not lawful for the defendant No. 3 to claim himself to be the successor of or part of M/s. Kunwar Ajay Group or claim any right in the mark 'DANDI NAMAK'. However, the defendant No. 3 lodged false notice of opposition based on the contention that the defendant No. 3 as also the defendant No. 2-Company are the part of M/s. Kunwar Ajay Group and/or successor-in-interest of the group companies of Mr. Suresh Chand Agarwal. It is specific case of the plaintiff that said Mr. Suresh Chand Agarwal was marketing iodized salt under the trademark DANDI NAMAK/DANDI SALT of the plaintiff till the month of August, 2004 as aforesaid and, therefore, he was not entitled under the law to adopt or use the mark namely DANDI NAMAK/DANDI SALT nor was he entitled to claim any right in the trademark DANDI NAMAK/DANDI SALT nor was he entitled to assign or transfer the rights in the said mark to M/s. Pinky Advertising Company Pvt. Ltd.

3.4. It is further case of the plaintiff that the defendants are neither honest nor bonafide in using and/or imitating the prior used trademark 'DANDI NAMAK' of the plaintiff. It is submitted that the defendant Nos. 3 and 4 by claiming themselves to be the Directors of the defendant No. 2-Company, filed a suit being Civil Suit No. 2 of 2006 in the District Court, Surat against the present plaintiff and others. Since no prima facie evidence as to the claim of user/ownership of the mark 'DANDI' since the year 2000 were filed, the District Court, Surat did not grant interim injunction. It is also submitted that since the defendants failed to obtain any injunction against the present plaintiff for the alleged passing off in the Civil Suit No. 2 of 2006, the defendant Nos. 3 and 4 filed copyright registration applications and obtained copyright registration in respect of label of DANDI NAMAK/DANDI SALT and on the basis of such fraudulent copyright registration, the defendant No. 3 filed several complaints for the alleged infringement of copyright in the different parts of country against the dealers/traders selling the goods of the plaintiff. Therefore, the plaintiff was constrained to file rectification petition before the learned Copyright Board for cancellation of copyright registration so obtained by the defendant Nos. 3 and 4 and upon consideration of the evidence tendered in such rectification petition, the learned Copyright Board vide order dated 20.05.2010, cancelled the copyright registration so obtained by the defendant Nos. 3 and 4. Though the defendants filed appeal before the Hon'ble Delhi High Court as also before this Court against the order of cancellation of copyright registration passed by the learned Copyright Board, the same have been dismissed in limine. It is the case of the plaintiff that upon inspection of records pertaining to the defendant No. 2-Company, it was learnt that said Mr. Suresh Chand and his wife are the only Directors and shareholders of the defendant No. 2-Company and as per the proceedings and declarations including the balance sheets and Director's reports filed by the said Directors, the defendant No. 2-Company has not commenced any business activity nor they retired from the Company nor inducted the defendant Nos. 3 and 4 as the Directors or otherwise in the defendant No. 2 - Company. Upon receipt of such certified copies of the records and proceedings on 12.02.2009, the Regional Director, Ministry of Corporate Affairs, Mumbai made a detailed investigation of the records at the instance of plaintiff's complaints/representation and upon detailed investigation pertaining to the defendant No. 2-Company and after due investigation, it was opined for necessary prosecution to be filed against the defendant Nos. 3 and 4 for the offences punishable

under Section 628 of the Companies Act, 1956.

3.5. It is the case of the plaintiff that though two oppositions of defendant No. 3 abandoned and necessary certificates of registration came to be issued granting registration of the trademark 'DANDI NAMAK' to the plaintiff and the learned Copyright Board cancelled the fraudulent copyright registration so obtained by the defendant Nos. 3 and 4, however, defendant No. 3 by suppressing the aforesaid facts and by making false statement on oath, filed a suit against the present plaintiff in the District Court, Delhi (South) having no territorial jurisdiction and obtained ex-parte ad-interim injunction which ultimately came to be vacated on the basis of the plaintiff's application filed under Order 39 Rule 4 of the Code. Against the said order, the defendant No. 3 filed writ petition before the Hon'ble Delhi High Court and challenged action of learned Registrar of Trade Marks granting registration to the plaintiff. However, the said litigation ended with no success. It is the case of the plaintiff that thereafter, defendant No. 3 filed rectification petition before the learned IPAB, Chennai against the registration of the said trademark in the name of plaintiff and the same is pending.

3.6. It is the case of the plaintiff that the Hon'ble Supreme Court vide order dated 26.07.2010, dismissed the Special Leave Petition challenging the order dated 19.06.2009 of the Hon'ble Andhra Pradesh High Court whereby, the Hon'ble Andhra Pradesh High Court permitted the learned Registrar of Trade Marks to proceed further with the registration proceedings to register the trademark 'DANDI NAMAK' to the plaintiff. It is stated by the plaintiff that the defendant No. 3 also preferred Review Petition and Curative Petition before the Hon'ble Supreme Court to review order dated 26.07.2010 but both failed.

3.7. It is the case of the plaintiff that after raising battle in different proceedings and since the defendants were fully aware that the plaintiff is the lawful owner, proprietor and prior user of the trademark DANDI NAMAK/DANDI SALT and also holding registration thereof, the defendants, in collusion with others, were found indulged into illegal acts of infringement of trademark, infringement of copyright and passing off by unauthorisedly using and imitating the prior used trademark 'DANDI NAMAK' of the plaintiff in Jaipur City and elsewhere in the other parts of the country. Therefore, the plaintiff was constrained to file a suit for perpetual injunction and damages in the District Court at Jaipur (Rajasthan) against the defendant Nos. 2 to 4 and other defendants of Jaipur. As per the say of the plaintiff, the District Court, Jaipur was pleased to grant ex-parte injunction on 21.08.2010 against the defendants and the said injunction was confirmed till disposal of the suit vide order dated 28.10.2010. The defendants, though challenged the said order before the Rajasthan High Court, they were failed. It is the case of the plaintiff that the defendant Nos. 2 to 4 thereafter, filed an application under Order 7 Rule 11 of the Code in the said suit before the District Court, Jaipur and disputed territorial jurisdiction. Though the plaintiff challenged rejection of the order of the plaint before the Hon'ble Rajasthan High Court, however, the plaintiff did not succeed. Though the defendants were restrained from using the trademark DANDI NAMAK/DANDI SALT by the District Court, Jaipur till dismissal of the First Appeal preferred by the plaintiff before the Hon'ble Rajasthan High Court, the defendant Nos. 2 to 4 in active participation and by joining hands with the defendant No. 1 herein, once again resumed illegal acts of violation of vested property rights including the copyrights and the rights of registration of trademark of the plaintiff and the plaintiff was constrained to file a suit for injunction and damages/rendition of accounts being Regular Civil Suit No. 1 of 2011 in the District Court, Gandhidham on 18.10.2011 and got ad-interim injunction against the defendants.

3.8. It is the case of the plaintiff that defendant Nos. 2 to 4 in their Rectification Petition before I.P.A.B., also filed application for stay of operation of registration of trademark (logo) 'DANDI NAMAK' under the registration number as detailed in plaint para 6. As per the direction of the learned Appellate Board issued on 17.11.2011, the plaintiff filed an undertaking to the effect that the plaintiff will not take action before any civil or criminal Court on the basis of the registration of the trademark under the application numbers as detailed in plaint para 6 until and unless the order passed by the Hon'ble Andhra Pradesh High Court in Contempt Case No. 433 of 2009 against the Registrar of Trade Marks is suitably modified or set aside. It is the case of the plaintiff that the defendant Nos. 2 to 4 in active connivance with the defendant No. 1 at Gandhidham, started illegal acts of imitation and passing off their fake goods under the identical and/or deceptively similar mark DANDI NAMAK/DANDI SALT under the presumption that since IPAB by way of interim order, stayed the registration and/or directed the plaintiff to file an undertaking as aforesaid, the defendants are permitted by the learned IPAB to imitate the prior used and distinctive trademark DANDI NAMAK/DANDI SALT of the plaintiff and/or to pass off their goods under the imitated marks and labels and thus, they are free to defraud the purchasers under such imitated marks. It is the case of the plaintiff that on account of the defendants' illegal and unlawful acts of passing off as well as violation of the vested property rights of the trademark of the plaintiff, the plaintiff has suffered much more harm, prejudice and damage to its well established trade as also to the reputation and goodwill generated during all these years since 1998 and, therefore, unless the defendants are restrained immediately from committing such illegal acts, the defendants would cause further damage to the business as well as to the reputation and vested property rights of the plaintiff.

3.9. Upon these bundle of facts, it is the case of the plaintiff that cause of action of the present suit firstly arose in the month of March, 2009 when the defendants found indulged into offences of falsification of trademark against which, the plaintiff lodged complaint against the defendants and during the course of investigation by the concerned Investigating Officer, the defendants again committed illegal acts of violation of vested property rights of the plaintiff and were found selling their salt under the identical and deceptively similar mark DANDINAMAK/DANDI SALT in Jaipur City and other parts of the country in the month of August, 2010 for which, the plaintiff filed suit against the defendants in the District Court, Jaipur and accordingly, the defendants were restrained and remained restrained till 12.10.2011 when the Hon'ble Rajasthan High Court pronounced judgment in S.B. First Appeal No. 483 of 2011. It is the case of the plaintiff that cause of action thereafter, once again arose when the defendants resumed illegal acts of violation of the vested property rights in active collusion with the defendant No. 1 and some other salt manufacturers of Gandhidham in clandestine manner and also circulated visiting cards and business papers bearing identical name 'DANDI' and 'DANDI SALT PVT. LTD.' etc. It is the say of the plaintiff that though the District Court, Gandhidham restrained defendant Nos. 2 to 4 by way of interim injunction order passed in Regular Civil Suit No. 1 of 2011 because IPAB directed the plaintiff to submit undertaking as aforesaid, the defendant Nos. 2 to 4 resumed illegal acts of passing off and violation of the vested property rights of the plaintiff in active collusion with defendant No. 1 at Gandhidham and as such, cause of action against the defendants for passing off and violation of the vested property rights of the plaintiff is continued to arise 'de die in dem' in Gandhidham.

Thus, since the cause of action in respect of violation of the plaintiff's vested property rights and passing off by the defendants is continuous and recurring one at Gandhidham and elsewhere in India, the plaintiff filed the present suit as provided under Section

134(2) of the Trade Marks Act, 1999 read with Sections 55 and 62(2) of the Copyright Act, 1957. In the said suit, the plaintiff filed application Exh.5 for obtaining temporary injunction against the defendants inter alia praying for the following reliefs:-

(A) The defendants by themselves, their servants, agents, dealers, distributors and all other persons connected with them or claiming under them in any manner, may please be restrained by a perpetual order and injunction of this Hon'ble Court from in any manner marketing, selling, advertising and/or using in relation to their 'Salt' and/or any other like goods, any mark or label containing and consisting of the name DANDI NAMAK or DANDI SALT and/or any other mark/label which may be identical and/or deceptively similar to the plaintiff's prior used trade mark and label of DANDI NAMAK/DANDI SALT/INDOBRINE DANDI NAMAK and also from doing the business of 'salt' or any other like goods under the trade name of DANDI SALT PRIVATE LIMITED or any other name containing and consisting of the name DANDI NAMAK or DANDI SALT so as to violate the vested property rights and to pass off their such goods and business and/or enable others to pass off their such goods as and for the true goods of the plaintiff;

(B) The defendants by themselves, their servants, agents, dealers, distributors and all other persons connected with them or claiming under them in any manner, may please be restrained by a perpetual order and injunction of this Hon'ble Court from in any manner imitating and/or reproducing the plaintiff's artistic work titled DANDI NAMAK and/or DANDI SALT in their impugned label on pouch packings of 'Salt' in any manner and/or any other art work which may be identical and/or deceptively similar or substantial reproduction of the artistic work titled DANDI NAMAK or DANDI SALT of the plaintiff so as to infringe upon the plaintiff's copyright under the provisions of the Copyrights Act, 1957;

(C) The defendants may please be ordered and decreed to render the true and accurate account of profits earned by them from the manufacture and sale of their 'Salt' and any other like goods under the identical and/or deceptively similar mark and the artistic work containing and consisting of the name DANDI NAMAK or DANDI SALT or DANDI SALT PRIVATE LIMITED and/or any imitated art work on the pouch packings of their 'Salt' and to grant the decree of the amount so ascertained in favour of the plaintiff of all such profits as damages for the illegal acts of violation of the vested property rights including the copyrights of the plaintiff and for the illegal acts of passing off committed by them as complained off.

(D) to (G).....

4. In response to the averments made in the plaint, the defendant Nos. 2 to 4 filed their written statement before the learned trial Court. It is contended by the answering defendants that defendant No. 2 - M/s. Dandi Salt Pvt. Ltd. is a part of M/s. Kunwar Ajay Group and different sister concerned companies of the M/s. Kunwar Ajay Group are displaying the name of M/s. Kunwar Ajay Group on their respective products in order to reflect that they are part thereof. It is specifically contended by the answering defendants that different sister concerned companies of M/s. Kunwar Ajay Group are forming single economic unit for the purpose of present proceedings. It is contended that Shri Suresh Chand Agarwal and Mrs. Anju Agarwal were initially the Directors of the defendant No. 2-Company and in the year 2005, defendant Nos. 3 and 4 become the Directors of defendant No. 2-Company after completion of formalities before the learned

Registrar of Companies. It is contended by the answering defendants that since the year 2000, through its predecessor, they have been engaged in the business of manufacturing, marketing and exporting of all kinds of salt. The word 'DANDI' is also formed essential part of trading style of the defendant No. 2-Company i.e. 'Dandi Salt Pvt. Ltd and since the year 2000, defendant No. 2-Company has been using the said trademark in an artistic way comprising of the word 'Dandi' as also the placement of colour, artistic features etc. involved therein and thus, the defendant No. 2-Company is the owner of the Art Work involved in the said Trademark/Art Work. The subject matter of art work under No. A-75928/2006 was created and published in the year 2000 on behalf of the defendant No. 2-Company and since then, the defendant No. 2-Company has been using the said trademark/trade name/art work in relation to its goods along with the sister concern of the said M/s. Kunwar Ajay Group. It is contended by the answering defendants that the defendant No. 2-Company is getting the goods manufactured by the various other parties on job work basis and few of job workers of the defendant No. 2-Company are named in para 9 of the written statement.

According to the answering defendants, the plaintiff is one of the job workers of the defendant No. 2-Company and thus, the fact is apparent from one of the criminal proceedings filed under Section 138 of the Negotiable Instruments Act wherein, the plaintiff has stated that it is a job worker of the answering defendants. It is contended by the answering defendants that the defendant No. 2-Company has widely advertised the said trademark/label through different medias such as different T.V. Channels namely, Zee News, Channel-7 and Sahara Samay etc., advertisement in leading newspapers, trade magazines on which, disputed trademarks of the defendant No. 2-Company are being advertised/displayed. According to the answering defendants, the defendant No. 2-Company has spent substantial sum of money on publicity of the trademark/trade name/art work and thus, incurred crores of rupees. On account of aggressive advertisement campaign, the said trademark/trade name came into light and became one of the important household articles. It is contended by the answering defendants that the defendant No. 2-Company is the proprietor of the said trademark/trade name both under statutory as also under the common law. Therefore, the plaintiff cannot be permitted to use or deal with the trademark/trade name/label identical with and/or deceptively similar thereto in relation to the same goods/cognate goods as that of defendant No. 2-Company without leave and license of the defendant No. 2-Company. It is contended by the answering defendants that on account of ban imposed for some period on the use of device of Gandhiji or the word 'DANDI' for commercial purposes, subsequently, after much effort and litigation, ban has been lifted and in doing so, the defendant No. 2-Company faced/initiated various proceedings as detailed in para 17 of the written statement. In paras 18 and 19 of the written statement, the answering defendants gave details of few other litigations between the defendant No. 2-Company and other parties including the plaintiff on the subject matter of trademark/label. It is contended by the answering defendants that after vacation of the ex-parte injunction order dated 13.10.2011 passed in Regular Civil Suit No. 1 of 2011 with the consent of the parties to the proceedings, as per order passed by this Court dated 21.12.2011 passed in Appeal From Order No. 467 of 2011, the plaintiff filed instant Civil Suit No. 3 of 2011 and obtained ex-parte injunction on 20.12.2011 malafidely and fraudulently. While attacking the conduct of the plaintiff, it is contended by the answering defendants that the instant suit filed by the plaintiff is neither maintainable on law nor on facts as it is nothing but an abuse of process of law as the plaintiff is neither owner nor proprietor of the impugned trademark in relation to the impugned goods. But in fact, the plaintiff has been a job worker of the predecessor of the defendant No. 2-Company. It is specifically contended by the answering defendants that the instant suit filed by the plaintiff is hit by principles of res sub-judice as in Civil

Suit Nos. 1 of 2011 and 3 of 2011, the issues and parties are the same.

In Civil Suit No. 1 of 2011, the plaintiff sought relief of infringement and passing off. While in the instant Civil Suit No. 3 of 2011, the plaintiff sought relief of passing off which has already been sought in the earlier Civil Suit No. 1 of 2011. It is specifically contended by the answering defendants that the instant Suit No. 3 of 2011 has wrongly and malafidely filed by the plaintiff. On 21.12.2011, ex-parte injunction order dated 18.10.2011 passed in Civil Suit No. 1 of 2011 was set aside with the consent of the plaintiff in a proceedings of Appeal from Order No. 467 of 2011 before this Court. However, on 20.12.2011, the plaintiff has fraudulently obtained ex-parte injunction order in the instant suit and, therefore, the conduct of the plaintiff has been tainted as the plaintiff has suppressed the fact of obtaining ex-parte injunction order in Civil Suit No. 3 of 2011 while inviting consent order before this Court in Appeal from Order No. 467 of 2011. Not only that, at the time of obtaining the impugned ex-parte injunction order, the plaintiff suppressed the fact that while passing the ex-parte injunction order dated 24.05.2010 in Delhi Suit No. 760 of 2010, the learned Additional District Judge, Delhi recorded the finding that the defendant No. 2-Company herein, plaintiff therein is the prior user of trademark 'DANDI'. It is contended by the defendant No. 2-Company that the plaintiff has malafidely suppressed this material fact from the District Court, Gandhidham while obtaining ex-parte injunction order. It is contended by the answering defendants that the plaintiff has asserted many other false facts and twisted the facts in such a manner which dis-entitles it to have any discretionary relief in its favour and for that purpose, the defendants have raised various contentions in paras 9 to 18 so as to demonstrate that the conduct of the plaintiff is such that it is not entitled to have any relief, more particularly, discretionary relief in its favour. In nutshell, the answering defendants have denied all the contents of the plaint and contended that the contents of the entire plaint are wrong and, therefore, denied.

4.1. According to the answering defendants, it has adopted and continued use of mark 'DANDI' from the year 2000 and such fact stands established when the defendant's trademark application of the year 2000 filed in the Trade Mark Office and the defendant extensively gave publicity and use of mark in various newspapers in the form of articles. It is the case of the answering defendants that it has initiated various legal proceedings against the plaintiff in different forum of trademark office, copyright office, IPAB, Andhra Pradesh High Court as well as District Court, Surat. All the said proceedings initiated by the defendant establish that the plaintiff has knowledge that the defendant has interest in the mark 'DANDI' and the plaintiff has such knowledge right from the year 2000.

4.2. According to the case of the answering defendants, the trademark 'DANDI' always belonging to the defendant and the plaintiff is the manufacturer and processor of salt and used to manufacture salt under the trademark 'DANDI' on the job work basis as per the instructions of the defendants and Kunwar Ajay Group. It is the say of the answering defendants that it has placed various orders to the plaintiff for supply of salt under trademark 'DANDI' and the plaintiff was supplying salt to the defendant under the trademark 'DANDI'. The plaintiff was also doing job work in various other trademarks like I-SHAKTI, TATA and ANNAPURNA. The plaintiff has admitted that it is doing job work for and on behalf of Kunwar Ajay Group and such fact is admitted by the defendant in the proceedings initiated under Section 138 of the Negotiable Instruments Act.

4.3. It is the case of the answering defendants that the plaintiff has made material suppression of facts in an injunction application before the trial Court. The plaintiff has

suppressed/concealed from the trial Court the factum of cancellation of its copyright registration at the instance of the defendant, orders passed by the Copyright Board and dismissal of the appeal of the plaintiff both by the Gujarat High Court and subsequently by the Hon'ble Supreme Court. The plaintiff has suppressed the factum of refusal of trademark applications for the trademark 'DANDI' under Nos. 1408876 and 1408875 both dated 26.12.2005. It is also the say of the defendant that the plaintiff has suppressed order of Andhra Pradesh High Court dated 08.02.2010 whereby, direction was issued by the Andhra Pradesh High Court to the Central Government to decide with regard to issue of use of trademark 'DANDI'.

4.4. It is the specific case of the answering defendants that the plaintiff has furnished wrong cause of action in plaint para 17 inasmuch as the plaintiff has stated that cause of action arose for filing the present suit in March, 2009 when the defendants were allegedly found indulged in the offences of falsification of trademark. As such, the plaintiff has made such false statement to its own knowledge and it has deliberately made such false statement with a view to obtain ex-parte order of injunction by misrepresentation though the plaintiff was fully aware about the activities of the defendant right from the year 2000 through various legal proceedings and otherwise.

4.5. According to the answering defendants, the plaintiff is also not entitled to the injunction on account of delay, laches and acquiescence because the defendant adopted the trademark 'DANDI' in relation to the salt in the year 2000 and in light of evidence placed on record, it stands established that use of trademark 'DANDI' was very much to the knowledge of the plaintiff since the year 2000. The suit, as framed by the plaintiff does not furnish any explanation about delay, laches and acquiescence on the part of the plaintiff and further, the impugned order is also silent on this aspect of the matter.

4.6. It is the further case of the answering defendants that during the course of hearing before the trial Court at Gandhidham, the defendant deleted its claim for infringement of copyright. According to the answering defendants' submission, Civil Suit No. 1 of 2011 filed by the plaintiff pertains to trademark and copyright both and ex-parte order of injunction dated 20.12.2011 also pertains to the relief of trademark and copyright though at the relevant time, copyright registration in favour of the plaintiff was cancelled. However, the plaintiff obtained ex-parte order of injunction by suppressing material fact about cancellation of registered trademark at the behest of the defendant. In fact, the learned trial Judge ought to have taken a serious view of the matter against the plaintiff for making suppression of material facts and should have denied the discretionary relief of injunction.

Submissions made by learned Senior Counsel Mr. S.K. Bansal appearing for learned advocate Mr. H.A. Dave for the appellants.

5. At the outset, it is submitted by learned Senior Counsel Mr. Bansal that it is true that the instant appeal under Order 43 Rule 1(r) of the Code is preferred to challenge discretionary order passed by the learned trial Court under the provisions of Order 39 Rules 1 and 2 of the Code passed in the instant Civil Suit No. 3 of 2011 and it is equally true that in such appeal, the appellate Court would not interfere unless the appellate Court comes to the conclusion that the impugned order passed by the learned trial Court is arbitrary, capricious, perverse and contrary to the settled principles of law. It is submitted that on perusal of the impugned order and looking to the conduct of the plaintiff in instituting the instant Civil Suit No. 3 of 2011 and, more particularly, the way and manner in which the ex-parte injunction order obtained by the plaintiff by suppressing material fact i.e. while inviting the consent order dated 21.12.2011 invited

by the parties to the present appeal in Appeal from Order No. 467 of 2011 whereby, injunction order dated 18.10.2011 passed in Civil Suit No. 1 of 2011 was set aside by this Court by giving directions to the learned Additional District Judge, Gandhidham to dispose of the injunction application Exh.5. It is an admitted fact that though the plaintiff was fully aware of the vacation of the ex-parte injunction order dated 18.10.2011 vide order dated 21.12.2011, the plaintiff filed instant Civil Suit No. 3 of 2011 by suppressing fact of filing instant Civil Suit No. 3 of 2011 before this Court while inviting consent order on 20.12.2011. Not only that, the plaintiff by furnishing false cause of action and by making material suppressions about factum of cancellation of plaintiff's copyright registration at the behest of the defendants and further dismissal of the appeal of the plaintiff by this Court and subsequent, dismissal by the Hon'ble Supreme Court.

It is vehemently submitted that the plaintiff was fully aware of the defendant's activities about extensive use of trademark 'DANDI' right from the year 2000. However, such various actions/activities suppressed by the plaintiff from the learned trial Court and obtained ex-parte injunction order and, therefore, the impugned order becomes arbitrary, capricious, perverse and contrary to the settled principles of law. It is submitted by learned Senior Counsel Mr. Bansal that in para 17 of the plaint, the plaintiff has disclosed that cause of action arose for filing instant suit in March, 2009 when the defendants were found indulged in the offences of falsification of trademark. Though, the plaintiff was fully aware about the actions/activities of the defendants in respect of the trademark right from the year 2000 and thus, contends wrong cause of action in the plaint which dis-entitles the plaintiff to the discretionary relief of injunction. It is submitted that though Civil Suit No. 1 of 2011 filed by the plaintiff contains ingredients of prior use as well as passing off, the plaintiff by abusing the process of law and concealing the material facts from the learned trial Court, filed the instant suit on the ground that composite suit for infringement of trademark and passing off is not maintainable. But in fact, the plaintiff by hook and crook intended to continue ex-parte injunction against the defendants, preferred second civil suit on the same cause of action which was furnished in the earlier Civil Suit No. 1 of 2011 because the ex-parte injunction which the plaintiff obtained in earlier Civil Suit No. 1 of 2011 came to be vacated by this Court in Appeal from Order No. 467 of 2011 on 21.12.2011 and before one day i.e. 20.12.2011, the plaintiff succeeded in obtaining ex-parte injunction in the instant Civil Suit No. 3 of 2011. According to the submissions of learned Senior Counsel Mr. Bansal, the learned trial Judge granted ex-parte injunction against the defendants on 20.12.2011 which cannot sustain in the eye of law because vide order dated 21.12.2011, this Court in Appeal from Order No. 467 of 2011, vacated ex-parte injunction order by consent of the parties to the suit and, therefore, the order which will remain in force would be the order dated 21.12.2011 and not the order dated 20.12.2011 passed by the learned trial Judge in the instant Civil Suit No. 3 of 2011. It is submitted by learned Senior Counsel Mr. Bansal that the plaintiff has malafidely and with oblique motive filed the instant suit on the same cause of action before the same Court on the basis of the alleged prior user right and passing off for the mark 'DANDI' since 1998 and obtained ex-parte injunction order dated 20.12.2011.

In the impugned ex-parte injunction order dated 20.12.2011, the learned trial Judge noticed that the plaintiff has registered the trademark despite the undertaking given by the plaintiff before the IPAB that it will not take any action on the basis of the registration of the mark before any civil or criminal Court unless and until the order passed by the Hon'ble Andhra Pradesh High Court in Contempt Case No. 433 of 2009 against the Registrar of Trade Marks is suitably modified or set aside.

5.1. It is submitted by learned Senior Counsel Mr. Bansal that the plaintiff claims to be the proprietor of the impugned trademark 'DANDI' in relation to salt on account of its alleged prior adoption in the year 1998 and alleged continuous use thereafter. But if the plaint and evidence placed on record is examined as a whole, the plaintiff has furnished year-wise sales of salt under the impugned trademark 'DANDI' for the period from year 2001 to 2004 only. In support thereof, the plaintiff relied upon two affidavits, namely, affidavit of one Mr. Shivkumar Krishnakumar Vaid and affidavit of one Smt. Indra Dindayal Agarwal filed in the suit of Thane Court filed by the plaintiff against Smt. V.M. Raizada and others. The above referred deponents did not directly file these affidavits in the instant suit. According to the said affidavits, the deponents therein stated that they purchased salt manufactured by the plaintiff under the trademark DANDINAMAK/DANDI SALT since the year 1998 and also produced invoices in that regard. According to learned Senior Counsel Mr. Bansal, those affidavits were filed in the month of November, 2010 by the deponents in the said suit of Thane Court. Thus, these two affidavits cannot be accepted on its face value for the simple reason that in any earlier litigation initiated at the instance of the plaintiff or defendants, no such affidavits and invoices were produced. So, it can be said that the said affidavits are fabricated and got up. Furthermore, the plaintiff in para 3.14 of the plaint of the subject matter of the instant suit, has stated that in the year 2004, the plaintiff changed the mark from 'DANDI' to 'DAANDEE'. Under the circumstances, the genuineness or otherwise of the invoices annexed with the affidavits in the suit of Thane Court is under serious dispute and without full-fledge evidence pertaining to the invoices, at this stage, the learned trial Judge committed serious error in mechanically relying upon these invoices to come to the conclusion that the plaintiff uses the disputed trademark since June, 1998.

5.2. It is vehemently submitted by learned Senior Counsel Mr. Bansal that the earlier suit being Civil Suit No. 1 of 2011 filed by the plaintiff pertains to trademark and copyright both but to justify filing of the instant suit No. 3 of 2011, the plaintiff tried to demonstrate before this Court that nature and scope of both the suits is different and distinct inasmuch as the first suit was a composite suit for infringement of two registered trademark as well as for infringement of common law copyright in the artistic works on packaging of salt while the second suit is only for passing off action being common law remedy saved by Section 27(2) read with Section 134(1)(c) and Section 135(1)(3) of the Trade Marks Act, 1999 is nothing but an attempt to eye wash or divert the plaintiff's own conduct approaching the Court by suppressing the factum of vacation of ex-parte injunction by consent order dated 21.12.2011 passed by this Court in Appeal from Order No. 467 of 2011. The plaintiff's attempt to justify the maintainability of the second suit on the ground that the first suit being composite suit for infringement of trademark and passing off action is not maintainable is misleading submission as the action of infringement of trademark and passing off under the trade mark can be clubbed together and both these actions are different from the copyright action.

5.3. It is submitted by learned Senior Counsel Mr. Bansal that though the impugned order passed by the learned trial Court runs into 64 pages, but not a single important document produced by the defendants has been referred and/or discussed keeping in mind the controversy involved in the lis between the parties. It is submitted that the learned trial Judge failed to consider that the plaintiff is a job worker of the defendants under the trademark 'DANDI' and the trademark 'DANDI' always belong to the defendants and the plaintiff was manufacturer and processor of the salt and used to manufacture salt under the trademark 'DANDI' on the job work basis upon instructions of the defendant-M/s. Kunwar Ajay Group. In order to establish this fact, the defendants placed before the learned trial Court record of criminal complaints filed by the plaintiff regarding the offence punishable under Section 138 of the Negotiable Instruments Act

against M/s. Kunwar Ajay Foods Pvt. Ltd and others. Before filing of such criminal complaints, the plaintiff issued statutory notice to M/s. Kunwar Ajay Foods Pvt. Ltd. and in the said notice, in the criminal complaint as well as in the verification recorded by the Magisterial Court of the authorised person of the plaintiff, the plaintiff made clear admission to the effect that the plaintiff was only job worker and was supplying salt and used to process salt under the brand name of 'DANDI' and packed the same in various packings on behalf of M/s. Kunwar Ajay Group. According to learned Senior Counsel Mr. Bansal, the learned trial Court cursorily noted the fact but discarded the submissions without assigning any cogent and legal reasons. If the record of the criminal complaints initiated at the instance of the present plaintiff is carefully examined, the clear admission made by the plaintiff prima facie disproves the case of the plaintiff being proprietor of the impugned trademark.

5.4. Learned Senior Counsel Mr. Bansal submitted that the learned trial Court erred in not considering the above stated submissions and material documents and thus, the impugned order passed by the learned trial Court can be said to be outright illegal, arbitrary, perverse and contrary to the settled principles of law. On the contrary, the defendants successfully established that the disputed trademark was of the ownership of M/s. Kunwar Ajay Foods Pvt. Ltd. and the defendant No. 1-Dandi Salt Pvt. Ltd. being a part of M/s. Kunwar Ajay Group of Companies, is one of the sister companies of the said group and, therefore, it construed single economic unit for the purpose of the present proceedings. Such contentions raised by the defendants in the written statement remained unanswered in the impugned order. Lastly, it is submitted by learned Senior Counsel Mr. Bansal that the plaintiff in earlier suit Civil Suit No. 1 of 2011 and the instant Civil Suit No. 3 of 2011 claimed relief under the Trade Marks Act as well as under the Copyright Act and according to the plaintiff, such composite suit is not maintainable in light of the decision of this Court rendered in Letters Patent Appeal No. 877 of 2010 on 07.03.2012 and, therefore, the plaintiff filed instant Civil Suit No. 3 of 2011 only for passing off the trademark. In fact, this argument to sustain maintainability of the instant Civil Suit No. 3 of 2011 is misleading and to cover up misconduct of the plaintiff exhibited in approaching the same Court on the same cause of action by way of instant Civil Suit No. 3 of 2011. Had it been so, the plaintiff would have respected the order of this Court passed in Appeal From Order No. 467 of 2011 and by deleting the claim for infringement of copyright in the first Civil Suit No. 1 of 2011, the plaintiff would have proceeded for hearing of the injunction for passing off trademark.

Not only that, if it was the plaintiff's bonafide belief that the initial suit being Civil Suit No. 1 of 2011 was composite suit for reliefs under the Trademark Act as well as under the Copyright Act being not maintainable, then there was no reason or grounds for the plaintiff again to claim relief for infringement of copyright in the instant Civil Suit No. 3 of 2011 and then to delete such relief conveniently during the course of final arguments before the learned trial Court. Therefore, it is urged that the impugned order is absolutely silent on this aspect of the plaintiff's conduct and further, suppression of material particulars, as submitted hereinabove, the impugned order passed by the learned trial Court is required to be interfered with.

5.5. During the course of arguments, learned Senior Counsel Mr. Bansal took me through almost all the relevant papers produced in this appeal in the form of paper book containing almost more than 1000 pages and also relied upon certain decisions which shall be referred to in this judgment at relevant place as and when the contentions/issues involved in the appeal are dealt with. Submissions made by learned Senior Counsel Mr. S.N. Soparkar appearing for learned advocate Mr. Pratik Jasani for

the respondent/original plaintiff.

6. While opposing the appeal, at the outset, it is submitted by learned Senior Counsel Mr. S.N. Soparkar appearing for learned advocate Mr. Jasani for the plaintiff that the appeal is not maintainable filed by defendant No. 1 through the defendant Nos. 2 and 3 in view of the subsequent events, more particularly, brought on record by way of additional documents vide Civil Application No. 7659 of 2013. After referring certain specific order/directions issued by this Court in other separate proceedings initiated either at the instance of the Income Tax Department or at the instance of the plaintiff, the appellant Nos. 2 and 3 remained neither shareholders nor the Directors of the appellant No. 1-Dandi Salt Private Limited and, therefore, the appellant cannot file the instant appeal either individually or jointly to represent the company within the provisions of Order 29 Rule 1 of the Code.

6.1. While vehemently opposing the appeal, it is submitted by learned Senior Counsel Mr. Soparkar that considering the limited powers of the appellate Court in Appeal from Order, no ground is made out by the defendants to interfere with the discretionary order passed by the learned trial Court. According to his submissions, the appellate Court would not reassess the material with a view to reach to a different conclusion because the Appeal from Order against the order passed by the learned trial Judge while exercising powers under Order 39 Rules 1 and 2 of the Code is discretionary order and, therefore, the appeal against such discretionary order is appeal on principle. It is submitted that the appellants are estopped from taking grounds to challenge the impugned order as to maintainability of the instant suit for passing off because in the Appeal from Order No. 7 of 2012 before this Court, the appellants challenged ad-interim injunction order dated 20.12.2011 and took the contention that the plaintiff is not entitled to file the second suit and to have an ad-interim injunction during the pendency of the first suit as also the ad-interim injunction order in first suit being vacated by consent. According to the submissions made by learned Senior Counsel Mr. Soparkar, the said contention did not find favour by this Court in the said Appeal from Order No. 7 of 2012 and ad-interim injunction granted by the Court below in the instant Civil Suit No. 3 of 2011 came to be continued. Not only that, the appellants challenged the final order dated 15.05.2012 passed below Exh.5 before the Court below and also took the very same contention in Appeal from Order No. 242 of 2012 but, this Court while setting aside the final order below Exh.5, continued ad-interim injunction vide order dated 09.10.2012 and directed to decide the injunction application at Exh.5 afresh. This very contention was carried further before the Hon'ble Supreme Court by way of Special Leave Petition but the Hon'ble Supreme Court was not pleased to vacate the ad-interim injunction order dated 20.12.2011 and the learned trial Judge was directed to hear and decide the injunction application Exh.5 and also application under Order 39 Rule 4 of the Code filed by the appellant within a period of 60 days.

In light of this submission, it is argued by learned Senior Counsel Mr. Soparkar that the appellants are now not entitled under the law to re-agitate the very same issue once again in the instant appeal. After referring the proposition of law as laid down in the decisions rendered in the cases between M/s. Dodha House v. S.K. Maingi reported in MANU/SC/2524/2005 : AIR 2006 SC 730, Ratan Food Products v. Jasvindersing Harcharansing rendered in Letters Patent Appeal No. 877 of 2010 in Special Civil Application No. 3871 of 2010, Jagannath Chemfood Pvt. Ltd. v. Ankur Chemfood rendered in Special Civil Application No. 856 of 2012 and the decision in the case of Mohan Lal, Prop, of Mourya Industries v. Sona Paint & Hardwares and Micolube India Ltd. v. Rakesh Kumar reported in MANU/DE/1251/2013 : 2013(55) PTC-61 (Delhi Full Bench) as to non-maintainability of composite suit i.e. first suit seeking relief for

infringement of two registered trademarks as well as infringement of common law copyright in the artistic works on packaging of salt, the plaintiff thought it fit to withdraw the first suit. So, how in any case, as on today, the first suit is withdrawn on 30.07.2013. Therefore, according to him, even otherwise, considering the nature and scope of both the suits being Civil Suit Nos. 1 of 2011 and 3 of 2011 are different inasmuch as the first suit was a composite suit for infringement of two registered trademarks as well as for infringement of common law copyright in the artistic works on packaging of salt while the second suit is only for passing off being the common law remedy saved by the various provisions contained in Trade Marks Act. It is also argued by learned Senior Counsel Mr. Soparkar that in order to put controversy to an end, the plaintiff withdrawn the earlier Civil Suit No. 1 of 2011 from the Court of Additional District Court, Gandhidham on 30.07.2013 and, therefore, the second suit, though it is successive, is maintainable under the law.

6.2. It is argued by learned Senior Counsel Mr. Soparkar that though in the impugned order, the learned trial Court took into consideration the factum of registration of trademark in favour of the plaintiff by the Registrar of Companies and subsequent stay order issued by IPAB but at the end, the learned trial Court observed that the instant suit was basically filed to challenge the passing off action and, therefore, the learned trial Court rightly prima facie examined the averments of both complaints and after examining the evidence placed before the learned trial Court regarding prior user, the learned trial Court rightly confirmed the ex-parte injunction order in favour of the plaintiff.

6.3. It is submitted by learned Senior Counsel Mr. Soparkar that the invoices produced before the learned trial Court would show that the plaintiff used the trademark and marketed the goods and also sold goods using disputed trademark since June, 1998. It is submitted that in the said invoices, there are endorsements to the effect that the amount of goods shown in the individual invoices, came to be realized by cheque and even the cheque numbers are quoted/written in the invoices. For this purpose, learned Senior Counsel Mr. Soparkar relied upon two affidavits of Mr. Shivkumar Krishnakumar Vaid and affidavit of one Smt. Indra Dindayal Agarwal which were placed on record and also proceedings of one Civil Suit filed at Thane Court and submitted that there is nothing on record to indicate that the said affidavits along with the invoices placed in the instant case are false and filed only with a view to support the false case of the plaintiff. As against this, voluminous evidence showing prior user of trademark by the plaintiff, the defendants did not produce a single invoice, bill, supply order or purchase order or any document showing actual sale of salt under the name of 'DANDI SALT'. It is submitted that if at all the defendants are serious in contesting the invoices produced by the plaintiff, they should have produced at least a single invoice showing to the learned trial Court that the defendants sold the goods under the name of 'DANDI SALT' to any purchaser. It is, therefore, submitted by learned Senior Counsel Mr. Soparkar that in absence of any cogent evidence tendered by the defendants, the learned trial Court was justified at this stage to rely upon the invoices produced by the plaintiff.

6.4. Learned Senior Counsel Mr. Soparkar contended that the defendants placed much reliance on one agreement of assignment of trademark executed by M/s. Kunwar Ajay Foods Pvt. Ltd. on 10.01.2005. Without entering into the legal form of the said assignment deed whether sufficiently stamped or not and whether it is registered or not which pertains to the consideration of amount of Rs. 11 crores, the said deed suggests/proves that on 10.01.2005 when the deed of assignment was executed, M/s. Kunwar Ajay Foods Pvt. Ltd. was not at all using the disputed trademark. Not only that one letter addressed by Mrs. Anju Agarwal on 01.09.2001 to one Mr. Suresh Chand

Agarwal, partner of M/s. Kunwar Ajay Group of Industries, states that said Mrs. Anju Agarwal had applied for registration of brand name of DANDI NAMAK/DANDI SALT but said Mrs. Anju Agarwal had never used this brand name under her proprietorship concern. By virtue of said letter dated 01.09.2001, said Mrs. Anju Agarwal transferred all the powers and rights to use the above-mentioned brand names unconditionally in favour of the M/s. Kunwar Ajay Group of Industries. Both these deed of agreement and letter, in terms, indicate that neither the said firm nor Mrs. Anju Agarwal used the brand name DANDI NAMAK/DANDI SALT. Under the circumstances, assignor has not used the trademark which is alleged to have been assigned by M/s. Kunwar Ajay Group on one hand and on the other hand, the letter of said Mrs. Anju Agarwal could not create proprietary right in trademark by mere declaration without its use.

6.5. It is submitted by learned Senior Counsel Mr. Soparkar that it is true that the District Court, Jaipur allowed the application of defendants under Order 7 Rule 11 of the Code and rejected the suit of the plaintiff for want of territorial jurisdiction but considering the said order, there is nothing that the District Court examined the merits of the matter and dismissed the suit of the plaintiff on merits. Similarly, it is also submitted that considering the record of criminal complaints filed under Section 138 of the Negotiable Instruments Act, nothing transpires that the plaintiff ever admitted that the M/s. Kunwar Ajay Foods Pvt. Ltd. was the owner of the trademark and, therefore, there is nothing admitted by the plaintiff to show that the plaintiff projected himself as job worker of the defendants in the said proceedings. It is, therefore, submitted by learned Senior Counsel Mr. Soparkar that considering the settled provisions of law, it is the manufacturer, who can be presumed to be a proprietor of the trademark and not the marketer. Therefore, the learned trial Judge rightly refused the contention raised by the defendants about alleged admission made by the plaintiff.

6.6. Learned Senior Counsel Mr. Soparkar relied upon certain decisions cited in support of his contentions which shall be referred to in this judgment at an appropriate time as and when his contentions are examined on facts and law at appropriate stage. In light of his submission both on facts and law, it is submitted by learned Senior Counsel Mr. Soparkar that this appeal is merit less and, therefore, deserves fate of dismissal.

6.7. For and on behalf of the plaintiff and defendants, this Appeal from Order came to be argued at great length on various dates. Learned counsel for both the sides tendered paper-book containing around 1000 pages. In addition to that they have cited various case laws at bar and in light of the case laws cited at bar, both the learned Senior Counsel referred most of the documents in support of their respective contentions and, therefore, I have also minutely examined the averments made in both the plaints including the plaint of earlier Civil Suit No. I of 2011 and also relevant documents relied upon by learned counsel for both the sides.

Findings of the Court

7. It is required to be kept in mind that the present Appeal from Order is filed under the provisions of Order 43 Rule 1(r) of the Code and challenge in this appeal is a discretionary order passed by the learned trial Judge under the provisions of Order 39 Rules 1 and 2 of the Code. In case of Matrix Telecom Pvt. Ltd. v. Matrix Cellular Services Pvt. Ltd. reported in MANU/GJ/1081/2011 : 2011 (3) GLR 1951, this Court, in paras 6 and 6.1, observed as under:-

6. Before proceeding further it is required to be noted that the present appeal is against the rejection of interim relief and the main suit is still pending. If this

court elaborately deals with the matter on merits it is likely that the same would prejudice the case of either side. Therefore, it is well settled law that this Court is not required to go into the merits of the entire matter at this stage and what is required to be seen is whether the appellant-plaintiff has made out a prima facie case or not for grant of interim injunction.

6.1. It is required to be noted that it is well settled law that the Appellate Court may not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. The Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by the court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion.

8. Similarly, in the case of Wonder Ltd. and another v. Antox India Pvt. Ltd. reported in MANU/SC/0595/1990 : 1990 (Supp.) SCC 727, the Hon'ble Supreme Court in para 9 of the said decision, after considering the scope of Order 43 Rule 1(r) of the Code in an appeal wherein, the discretionary order passed by the learned trial Court is under challenge, observed as under-

9. Usually, the prayer for grant of an interlocutory injunction is at a stage when the existence of the legal right asserted by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. The court, at this stage, acts on certain well settled principles of administration of this form of interlocutory remedy which is both temporary and discretionary. The object of the interlocutory injunction, it is stated

...is to protect the plaintiff against injury by violation of his rights for which he could not adequately be compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the "balance of convenience lies.

The interlocutory remedy is intended to preserve in status quo, the rights of parties which may appear on a prima facie. The court also, in restraining a defendant from exercising what he considers his legal right but what the plaintiff would like to be prevented, puts into the scales, as a relevant consideration whether the defendant has yet to commence his enterprise or whether he has already been doing so in which latter case considerations somewhat different from those that apply to a case where the defendant is yet to commence his enterprise, are attracted.

9. So, in light of the limited powers of this Court, the Appellate Court can interfere with

the discretionary order passed by the trial Court only in exceptional circumstances and the Appellate Court cannot interfere with the exercise of discretion of the Court of first instance and substitute its own discretion except, where the discretion has been shown to have been exercised arbitrarily, capriciously or perversely or where the Court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. In nutshell, an appeal against exercise of discretion is said to be an appeal on principle. To put it differently, the Appellate Court cannot reassess the entire evidence so as to come to its own conclusion contrary to the conclusion arrived at by the trial Court, if two views are possible.

10. Before proceeding further, learned Senior Counsel Mr. Soparkar raised serious contention to the effect that neither the defendant No. 3 nor defendant No. 4 are the Directors of the defendant No. 2-Company and in order to substantiate the said contention, learned Senior Counsel Mr. Soparkar placed on record documentary evidence consisting of the memo of petition of Special Civil Application No. 16189 of 2012, copy of the order/communication dated 16.07.2012, 11.09.2012 and 12.09.2012 addressed to the Registrar, Registrar of Company, Ahmedabad by Commissioner of Income Tax-I, Surat, copy of the order dated 14.06.2005 addressed to one Shri Ramnivas Hukumchand Gupta by the Tax Recovery Officer, Central Range, Surat, copy of certificate of sale of shares dated 14.06.2005 as well as copy of letter dated 20.06.2005 addressed to the Registrar of Companies by Tax Recovery Officer, Central Range, Surat and copy of letter dated 17.10.2012 addressed to M/s. Dandi Salt Pvt. Ltd. by Deputy Registrar of Companies, Gujarat with the permission of the Court vide order dated 24.07.2013 passed in Civil Application No. 7659 of 2013. After referring to the various additional documentary evidence placed on record, it is contended that the said share certificates so issued in favour of the defendant Nos. 2 and 3 are under suspension/abeyance. It is contended that once the transfer of shares of Mr. Suresh Chand Agarwal and Mrs. Anju Agarwal in favour of the defendant Nos. 3 and 4 are withdrawn as per orders/communication dated 16.07.2012 and 12.09.2012 as also as per detailed affidavit dated 24.01.2012 of Mr. Aditya Vikram, Commissioner of Income-Tax-I, Surat, defendant Nos. 3 and 4 cannot be said to be the Directors of defendant No. 2 - Company and consequently, they are not entitled to maintain the instant appeal for and on behalf of defendant No. 2 - Company. In support of his submission, learned Senior Counsel Mr. Soparkar has relied upon the decision rendered in the case of State Bank of Travancore v. M/s. Kingston Computers (1) P. Ltd. reported in MANU/SC/0280/2011 : 2011 (11) SCC 524.

11. I have minutely examined the additional documentary evidence placed on record. There is nothing on record to infer that the shares transferred in favour of the defendant Nos. 3 and 4 are cancelled but it appears that the said transfer is under scanner of concerned Income Tax Department and as on this date, the said issue has not been finalized either in favour of or against defendant Nos. 3 and 4 and, therefore, this order is not required to be overburdened any further so as to examine as to whether the transfer is legal or illegal, as it is not the subject matter of this appeal. But the fact remains that as on this date, the shares which are transferred in favour of the defendant Nos. 3 and 4, are not cancelled and, therefore, it cannot be said that the present appeal is incompetent at the instance of defendant Nos. 3 and 4. So, in the case relied upon by learned Senior Counsel Mr. Soparkar, namely, State Bank of Travancore (supra) wherein, maintainability of the suit at the instance of one of the Directors who was not authorised to sign and verify the suit for recovery was dismissed under the provisions of Order 29 Rule 1 of the Code and the said judgment of the trial Court dismissing the suit was upheld by the Hon'ble Supreme Court. Had it been the case that if the transfer of the shares in favour of the defendant Nos. 3 and 4 is cancelled by the competent

authority then, the plaintiff is right and justified to raise such contention with the help of the principles laid down in the case of State Bank of Travancore (supra). Therefore, the preliminary contention raised by learned Senior Counsel Mr. Soparkar as to non-maintainability of appeal at the instance of defendant Nos. 3 and 4 is devoid of merits and, therefore, there is no substance in the contention so raised in order to non-maintainability of appeal in light of various additional documentary evidence placed on record with the permission of the Court as per order dated 24.07.2013 passed by this Court in Civil Application No. 7659 of 2013.

12. The plaintiff, before filing Regular Civil Suit No. 3 of 2011, filed subject matter Suit No. 1 to 2011 before the same trial Court against the defendants on the basis of proprietary rights in the mark 'DANDI' on account of prior adoption and use of the mark since 1998 and also on the basis of registration of Trade Marks under Nos. 1641653 and 1641655 both in Class 30. In the said suit, the learned trial Judge vide ex-parte order dated 18.10.2011, restrained the defendant from using the Trade Mark/Trade Name and infringement of Copyright 'DANDI'. The defendant initiated cancellation proceedings against the plaintiff's impugned registered Trade Marks under Nos. 1641653 and 1641655 both in Class 30 before the Intellectual Property Appellate Board (IPAB). Vide order dated 17.11.2011 passed in the cancellation proceedings, the plaintiff filed an undertaking before IPAB that they would not take action before any civil or criminal Court on the basis of registration of the Trade Mark under the Application Nos. 1641653 and 1641655 both in Class 30 until and unless the order passed by the Andhra Pradesh High Court in the Contempt Cases suitably modified/set aside. Civil Suit No. 1 of 2011 and Civil Suit No. 3 of 2011 hereinafter referred to as the first suit and second suit respectively for convenience.

13. Thereafter, the defendant filed Appeal from Order No. 467 of 2011 to quash and set aside the ex-parte interim order dated 18.10.2011 passed in the first suit below application Exh.5. In the said Appeal from Order, this Court by order dated 21.12.2011 quashed and set aside the ex-parte order dated 18.10.2011. In the said suit, the plaintiff has filed interim injunction application Exh.5 inter alia praying reliefs in terms of paras 21A, 21B and 21C which read as under:-

21A. The defendants by themselves, their servants, agents, dealers, distributors and all other persons connected with them or claiming under them in any manner, may please be restrained by interim injunction of this Hon'ble Court during the pendency of the present suit from in any manner manufacturing, marketing, selling and/or using in relation to their 'Salt' and/or any other like goods, the impugned mark/label containing and consisting of the name DANDI NAMAK or DANDI SALT and/or any other mark/label which may be identical and/or deceptively similar to the plaintiff's prior used and registered trade mark DANDI NAMAK/DANDI SALT and also from doing the business of 'salt' or any other like goods under the trade name of DANDI SALT PRIVATE LIMITED or any other name containing and consisting of the name DANDI NAMAK or DANDI SALT so as to infringe upon the vested property rights in the Registered Trade Mark DANDI NAMAK of the plaintiff;

21B. The ad-interim injunction order in terms of prayer (A) above against the defendants may please be issued ex-parte, as provided under Sec. 135(2) of the Trade Marks Act, 1999;

21C. As provided under Sec. 135(2) of the Trade Marks Act, 1999, pending the hearing and final disposal of the suit, the Hon'ble Court may be pleased to

restrain the defendants from disposing off or dealing with their assets in a manner which may adversely affect the plaintiff's ability to recover damages/accounts of profits etc. that may be finally awarded to the plaintiff by the Hon'ble Court.

14. Though the aforesaid reliefs were granted by the learned trial Judge in the first suit, the same were quashed and set aside by this Court by order dated 21.12.2011 passed in Appeal from Order No. 467 of 2011. The plaintiff filed the second suit on the same cause of action on the basis of prior user right for the mark 'DANDI' since 1998 and infringement of copyright and obtained ex-parte injunction order dated 20.12.2011 in terms of paras 21A to 21C as aforesaid by concealing the ex-parte order dated 20.12.2011 before this Court while inviting consent order in Appeal from Order No. 467 of 2011.

15. Vide the writ petition before the Hon'ble Andhra Pradesh High Court, advocate Mr. Ravikanth Shinde, in Public Interest Litigation, sought direction against Kunwar Ajay Group of Industries not to use trademark 'DANDI' and device of Mahatma Gandhi as such, the said trademark is violative under the provisions of Emblems and Names (Prevention of Improper Use) Act, 1950. Vide order dated 24.04.2003, the Andhra Pradesh High Court imposed ban upon Kunwar Ajay Group of Industries. The Trade Mark 'DANDI' of said Kunwar Ajay Group of Industries, of which, the defendant M/s. Dandi Salt Pvt. Ltd. is also the part and extensively used trademark 'DANDI' since its adoption in the year 2000, moved the Hon'ble Supreme Court seeking review of order dated 24.04.2003 passed by the Andhra Pradesh High Court imposing ban from manufacturing, stocking and marketing the product 'kitchen salt' under the brand 'DANDI'. The Hon'ble Supreme Court granted permission to the defendants to file review petition before the Andhra Pradesh High Court, but both the plaintiff and defendant filed a review petition. Vide order dated 08.02.2010, Andhra Pradesh High Court allowed the Review WPMP No. 31333 of 2008 and the judgment dated 24.04.2003 passed in Writ Petition No. 14562 of 2002 under review was set aside to the limited extent it prohibited use of word 'DANDI'. Consequently, the review petition preferred by the plaintiff bearing Review WPMP No. 15669 of 2009 was permitted to be withdrawn.

16. Though ban imposed by the Andhra Pradesh High Court was in operation, the Registrar of Trade Marks proceeded with the registration of trademark 'DANDI' under Nos. 1641653 and 1641655 in favour of the plaintiff. So, the defendant moved a contempt petition before the Andhra Pradesh High Court. Vide order dated 10.09.2009, the Andhra Pradesh High Court directed the Registrar of Trade Marks not to grant final registration of the Mark 'DANDI' to the plaintiff. However, the Registrar of Trade Marks, in violation of the said order of Andhra Pradesh High Court, granted trademark registration to the plaintiff under the said application Nos. 1641653 and 1641655 both in Class 30. Therefore, the defendant was constrained to file cancellation petition against the impugned registered trademarks of the plaintiff under Nos. 1641653 and 1641655 before IPAB. In the said proceedings, the plaintiff gave an undertaking on 17.11.2011 that they would not enforce the said registration in any infringement proceedings. The plaintiff moved Andhra Pradesh High Court for recalling contempt notice but vide order dated 01.02.2012 in Contempt Case No. 433 of 2009, Andhra Pradesh High Court reinforced the said undertaking of the plaintiff filed before IPAB and further directed IPAB to decide the controversy between the parties.

17. It is an admitted fact that the plaintiff's copyright registration of 'DANDI' Label under Nos. 1641653 and 1641655 was challenged by the defendant before the Copyright Board. Vide order dated 25.03.2011, the Copyright Board allowed the petition

of the defendant and cancelled the copyright registration of said label and the said order came to be confirmed upto the Hon'ble Supreme Court.

18. The defendant No. 2 - M/s. Dandi Salt Pvt. Ltd., which is a part of Kunwar Ajay Group of Industries, filed a suit for injunction against the plaintiff in the District Court, Surat in the year 2006 and sought injunction against misuse of the trademark 'DANDI SALT' in English and in Hindi 'DANDI NAMAK' by the plaintiff as the plaintiff being joint worker of defendant and M/s. Kunwar Ajay Group. The plaintiff moved an application under Order 7 Rule 11 of the Code of Civil Procedure seeking rejection of the plaint which was dismissed and, therefore, the plaintiff filed application being Special Civil Application No. 13045 of 2009 and by order of the Gujarat High Court, the proceedings before the District Court, Surat came to be stayed.

19. Admittedly, the plaintiff filed first suit before the District Court, Gandhidham, Kutch against the defendants on the basis of the alleged violation of vested property rights in the mark 'DANDI' on account of alleged prior use and adoption of the mark since 1998 and also on the basis of registration of trademarks registered both in Clause-30. As noticed from the plaint and injunction application, more particularly, in terms of relief Clause-21A to 21C, it is quite evident that the first suit was filed for infringement of registered trademarks as well as for the infringement of common law copyright in the artistic works on the packaging of salt and also restraining the defendants from, in any manner, marketing, selling, advertising and/or using in relation to their salt and/or other like goods which may be identical and/or deceptively similar to the plaintiff's prior used trademark so as to violate vested property rights and to pass off plaintiff's goods and business and/or enable others to pass off their such goods as and for the true goods of the plaintiff.

20. It is equally relevant and important to compare the averments/relief claimed in both the suits so as to prima facie decide whether the first suit which was filed, excludes relief for passing off or not? The title of both the suits is 'Suit for perpetual injunction and for damages and/or rendition of accounts under Section 135 of the Trade Marks Act, 1999 and Section 55 of the Copyright Act, 1957. In plaint para 20 of both the suits, the plaintiff has made verbatim prayer. In para 20A of the first suit, the words 'registered trademark' and 'to infringe upon the vested property rights in the registered trademark' were employed/used whereas, in the second suit, the word 'passing off' is employed/used, in para 20(C), the expression 'for the illegal Acts of infringement of statutory rights of registration' were employed/used whereas, in the second suit, the words 'illegal acts of passing off' came to be employed/used. So far as reliefs claimed in paras 20D to 20G, the plaintiff has made no change or alteration in the prayer clause of both the suits. Vide application Exh.82, the plaintiff deleted relief claimed in para 20(B) claiming relief for copyright action as per order dated 21.01.2013 passed by the learned trial Court in the second suit which was there in the first suit. Still however, the below comparison chart showing specific averments made in both the suits, prima facie, establishes and proves that the plaintiff has prayed for the relief of passing off as available at common law in the first suit also.

SUIT NO. 1 of 2011	SUIT NO. 3 of 2011
In heading of Suit No. 1 of 2011 the plaintiff inter-alia invoked the provisions of Section 135 of Trade Marks Act, 1999. Section 135 of Trade Marks Act, 1999 relates to the remedy pertaining to infringement and passing off both. Hence the Suit No. 1 relates to both the remedy, i.e. pertaining to infringement and passing off.	In heading of Suit No. 3 of 2011, the plaintiff inter-alia invoked the provisions of Section 135 of Trade Marks Act, 1999. Section 135 of Trade Marks Act, 1999 relates to the remedy pertaining to infringement and passing off both. Hence, the suit No. 1 relates to both the remedy i.e. pertaining to infringement and passing off.
In para No. 2 of the plaint, the plaintiff has alleged that the defendant No. 2 and 3 are indulged into illegal acts of violation of the vested property right in the plaintiff's prior used and the registered trademark. The allegation of infringement and passing off both are there in para No. 2 of the plaint.	In para No. 2 of the plaint, the plaintiff has alleged that the defendant No. 3 and 4 are indulged into illegal acts of violation of the vested property right in the plaintiffs prior used and the registered trademark. The allegations of infringement and passing off both are there in para No. 2 of the plaint.

In the beginning of para No. 3 of the plaint, the plaintiff has given the details of brief facts leading to adoption, use and registration of trade mark. The plaintiff is alleging its user and registration both in the beginning of para No. 3 of the plaint.	In the beginning of para No. 3 of the plaint, the plaintiff has given the details of brief facts leading to adoption, use and registration of trade mark. The plaintiff is alleging its user and registration both in the beginning of para 3 of the plaint.
In para No. 3.5 of the plaint, the plaintiff alleged long, continuous, extensive and voluminous prior user of the trade mark label.	In para No. 3.5 of the plaint, the plaintiff alleged long, continuous extensive and voluminous prior user of the trade mark and label.
In para 6 of the plaint, the plaintiff alleged that in order to protect the vested property right in its trademark DANDI NAMA/DANDI SALT, which came to be associated by virtue of long, extensive and voluminous user.	In para No. 6 of the plaint, the plaintiff alleged that in order to protect the vested property right in its trademark DANDI NAMA/DANDI SALT, which came to be associated by virtue of long, extensive and voluminous user.
In para No. 6 of the plaint, the plaintiff alleged its user and common law right.	In para No. 6 of the plaint, the plaintiff alleged its user and common law right.
In para 9 of the plaint, the plaintiff alleged itself to be prior user and prior registered proprietor of the trademark DANDI NAMA. The plaintiff further alleged in the same para regarding its entitlement to protect the statutory and vested property right.	In para No. 8 of the plaint, the plaintiff alleged itself to be prior user and lawful owner of the trademark DANDI NAMA. The plaintiff further alleged in the same para regarding its entitlement to protect the statutory, common law property right & vested property right.
The plaintiff has pleaded the necessary ingredient of infringement and passing off both in para No. 9 of the plaint.	The plaintiff has pleaded the necessary ingredient of infringement and passing off both in para No. 8 of the plaint.
In para No. 10 of the plaint, the plaintiff alleged that the defendants are not honest in imitating the prior used, most distinctive, popular and registered trade mark DANDI NAMA of the plaintiff.	In para No. 9 of the plaint, the plaintiff alleged itself to be prior user and prior registered proprietor of the trademark DANDI NAMA. The plaintiff further alleged in the same para regarding its entitlement to protect the statutory and vested property.

In para No. 11 of the plaint, the plaintiff alleged that the defendants are found doing passing off and falsification of prior used trademark DANDI NAMAK.	In para 10 of the plaint, the plaintiff alleged that the defendants are found doing passing off and falsification of prior used trademark DANDI NAMAK.
In para 14 of the plaint, the plaintiff alleged the prior user and vested proprietary right in the trademark DANDI.	In Para 14 of the plaint, the plaintiff alleged the prior user and vested proprietary right in the trademark DANDI.
In para No. 15 of the plaint, the plaintiff alleged its trademark to be prior used and registered trademark.	
In para No. 16 of the plaint, the plaintiff alleged the violation of vested legal right. The plaintiff further invoked the provisions of Section 134 and 135 of the Trade Marks Act, 1999, which relates to infringement and passing remedy both.	In para No. 16 of the plaint, the plaintiff alleged the violation of vested legal right. The plaintiff further invoked the provisions of Section 134 and 135 of the Trade Marks Act 1999, which relate to Infringement and passing remedy both.
In para No. 17 of the plaint, the plaintiff has based the cause of action on the basis of violation of vested property right.	In para No. 17 of the plaint, the plaintiff has based the cause of action on the basis of violation of vested property right.
In para No. 18 of the plaint, the plaintiff has based the jurisdiction on the basis of violation of vested property right. The plaintiff further invoked Section 134(2) of the Trade Marks Act 1999.	In para No. 18 of the plaint, the plaintiff has based the jurisdiction on the basis of violation of vested property right & passing off. The plaintiff further invoked Section 134(2) of the Trade Mark Act 1999.
The plaintiff has based the jurisdiction para on the basis of infringement and passing off both.	The plaintiff has based the jurisdiction para on the basis of infringement and passing off both.
In para No. 19(a) of the plaint, the plaintiff sought relief against the violation of vested property right and also against the violation of prior used and registered trademark. In the plaint, the plaintiff sought the relief of infringement and passing off both.	In para No. 19(a) of the plaint, the plaintiff sought relief against the violation of vested property right and also against the violation of prior used and trademark. In the plaint, the plaintiff sought the relief of passing off both.

21. It is a matter of fact that Civil Suit No. 1 of 2011 has been withdrawn during the hearing of the present Appeal from Order on 30.07.2013 when this Court insisted to examine the nature and scope of both the suits. To justify the action, it is contended by learned Senior Counsel Mr. Soparkar to the effect that the scope and nature of both the suits are different inasmuch as the first suit was a composite suit for infringement of its two registered trademarks as well as for the infringement of common law copyright in the artistic works on the packaging of salt while the second suit is only for passing off being the common law remedy saved by Section 27(2) read with Section 134(1)(c) and Section 135(1)(3) of the Trade Marks Act. But, such contention cannot sustain for a moment on bare perusal of the averments/reliefs claimed in both the suits. Needless to say that if any party claims violation of vested property rights in the trademark, registered or unregistered, it means, the party is bringing action for passing off action within the meaning of Section 27(2) of the Trade Marks Act, 1999. So, in the considered

opinion of the Court, the first suit includes the relief for passing off action and if at all, the first suit is not maintainable being composite suit, then the plaintiff could have deleted relief for infringement of its registered trademark as well as for infringement of common law copyright in the artistic works on the packaging of salt. Surprisingly, the plaintiff again claimed both the reliefs i.e. infringement of vested property rights in the registered trademark 'DANDI NAMAK' and also in respect of passing off action. So, attempt made by learned Senior Counsel Mr. Soparkar to justify maintainability of the second suit cannot be accepted on the ground that the nature and scope of both the suits are different and furthermore, the first suit was composite suit for both the reliefs for infringement of registered trademark as well as for the infringement of common law copyright in artistic works on the packaging of the salt, in light of prayers made in paras 20A to 20C and 21A to 21C in both the suits respectively.

22. It is an admitted fact that ex-parte injunction order obtained by the plaintiff in the first suit on 18.10.2011 was the subject matter of Appeal from Order No. 467 of 2011. Vide consent order dated 21.12.2011, this Court vacated the ex-parte order of injunction dated 18.10.2011 operating against the defendants and relegated the parties to approach the learned trial Court for hearing of the injunction application. Instead of proceeding with the hearing of injunction application as per order passed by this Court in Appeal from Order No. 467 of 2011, the plaintiff filed second suit on 20.12.2011 and again obtained ex-parte injunction order by suppressing two important facts namely, filing of second suit while inviting the consent order in the said Appeal from Order No. 467 of 2011 dated 21.12.2011 and secondly, plaintiff made false statement before the learned trial Court in the second suit pertaining to the factum of two registered trademarks though the said trademark registrations were not in force in view of the plaintiff's own undertaking given before IPAB. Vide consent order dated 21.12.2011 passed in the said Appeal from Order No. 467 of 2011, this Court in para 7 of the said order made following observation:-

7. Under the circumstances, with the consent of the learned advocates appearing on behalf of the respective parties and in view of the interim order passed by the Intellectual Property Appellate Board dated 23/11/2011 in M.P. Nos. 8 & 9/2011 in OA/1/2011/TM/AMD and M.P. Nos. 10 & 11/2011 in OA/3/2011/TM/AMD suspending the registered trade mark "dandi" in favor of the respondent-original plaintiff and the undertaking filed by the respondent-original plaintiff that they shall not initiate any proceedings for infringement of the said trade mark "dandi", without further entering into the controversy whether the learned trial Court was justified in granting such an ad-interim injunction without notice to the appellants-original defendants and whether the said ex-parte ad-interim order is contrary to the decision of this Court in the case of I Infotech Consumer Services Ltd. (Supra), the present Appeal from Order is allowed and the ex-parte ad-interim relief granted by the learned Additional District Judge, Gandhidham, Kutch dated 18/10/2011 passed in Regular Civil Suit No. 1/2011 below Exh. 5 is hereby quashed and set aside and the learned trial Court to decide and dispose of the said application, Exh. 5 in accordance with law and on its own merits.

23. At this stage, it is relevant to consider the submission made by learned Senior Counsel Mr. Soparkar to the effect that the defendants cannot be permitted to challenge the impugned order on the ground of non-maintainability of the second suit for passing off because in Appeal from Order No. 7 of 2012, the defendants have challenged ex-parte injunction order dated 20.12.2011 wherein, the defendants took contention that the plaintiff is not entitled to file second suit and to have ad-interim injunction during

the pendency of the first suit as the ad-interim injunction order in the first suit being vacated by consent order dated 21.12.2011 in Appeal from Order No. 467 of 2011. It is also submitted that the said contention did not find favour by this Court in the said Appeal from Order No. 7 of 2012 and ad-interim injunction granted by the Court below in the second suit came to be continued. Not only that, the defendants also challenged the final order dated 15.05.2012 passed below Exh.5 in the second suit before this Court by way of Appeal from Order No. 242 of 2012 but this Court, while setting aside the final order below Exh.5 passed in the second suit, continued ad-interim injunction vide order dated 09.10.2012 and directed the learned trial Judge to decide injunction application Exh.5 afresh. Thereafter, this very contention was carried further before the Hon'ble Supreme Court by way of Special Leave Petition. The Hon'ble Supreme Court was not pleased to vacate the ad-interim injunction order dated 20.12.2011 passed in the second suit and the learned trial Judge was directed to hear and dispose of the injunction application Exh.5 and also application under Order 39 Rule 4 of the Code filed by the defendants within a period of 60 days. In light of these series of litigations, learned Senior Counsel Mr. Soparkar urged that the defendants are now not entitled under the law to re-agitate the very same issue once again in the instant appeal. I have given thoughtful consideration to the submissions made by learned Senior Counsel Mr. Soparkar and for that purpose, I have minutely examined all the orders operating and passed in favour of the plaintiff at various stages of the litigation but nowhere or at no place, any Court dealt with the issue whether the first suit was for passing off action within the meaning of Section 27(2) of the Trade Marks Act or not? On the contrary, this Court while disposing Appeal from Order No. 242 of 2012 vide order dated 09.10.2012, made following observations in paras 15 to 17:-

15. As far as Regular Civil Suit No. 1 of 2011 is concerned, prayer was made for infringement of trade mark while prayer in Regular Civil Suit No. 3 of 2011 was made for passing off. It is to be noted that cause of passing off and cause of breach of infringement of trademark are two different causes of action. However, while deciding the prayer for passing off, the aspect qua breach of infringement of trademark will also emerge as one of the important aspects.

16. It is further noted that this Court vide order dated 21-12-2011 in Appeal From Order No. 467 of 2011 passed a reasoned order considering the order passed by the Andhra Pradesh High Court in Contempt Case No. 433 of 2009 as well as the undertaking given by the plaintiff to the effect that it will not take action on the basis of registrations before the Hon'ble Intellectual Property Appellate Board. Said issue is at large before the said Board.

17. All the aforesaid aspects have not been considered by the trial court and, therefore, a grave error has been committed by the trial court in passing the impugned order. Since aforesaid action of the learned Addl. District Judge does not appear to be in proper perspective, this Court, without deciding this matter on merits, thinks it imperative in the interest of justice that the matter be remanded to the trial court for a decision afresh after giving opportunity of hearing to both the parties.

24. Similarly, it is also relevant to refer to the following observation made by this Court in Appeal from Order No. 7 of 2012 vide order dated 15.02.2012:-

At the outset, it is necessary to specify that various contentious issues raised by both the sides with regard to maintainability of the suit on the ground of passing off action as also during the pendency of earlier Civil Suit grant of

interim relief in favour of the respondents -they are not being touched at all. Except for deciding the basic issue as to whether this case falls under rarest of rare cases whereby instead of relegating the parties to the trial Court, this Court needs to entertain the appeal and set-aside the ex parte injunction and since the answer is in negative that the Court has restrained itself from opining on any of the issues raised by both the sides so as not to prejudice the case pending before the trial Court.

25. There is no doubt in the mind of this Court that when this Court by order dated 21.12.2011 passed in Appeal from Order No. 467 of 2011, quashed and set aside ex-parte injunction order granted in the first suit against the present defendants, vacated the relief claimed as to plaintiff's prior used trademark and also for violation of vested property rights and for passing off goods and business of the plaintiff and for the true goods of the plaintiff against the defendants. So, now, the question is that once this Court vide order dated 21.12.2011, vacated ex-parte order dated 18.10.2011 passed in the first suit, injunction order granted by the learned trial Court in the second suit would become insignificant and in-operative. The obvious reason is such that though the learned trial Judge granted ex-parte injunction in the second suit on 20.12.2011, but when this Court by consent order, vacated the ex-parte injunction operating in the first suit on 21.12.2011 and when this Court also found that in both the suits, the plaintiff has claimed identical relief or in other words, both the suits include reliefs for passing off action, the order of this Court would remain in operation i.e. vacation of ex-parte injunction order granted in favour of the plaintiff even pending the second suit. So, once there is no existence of ex-parte injunction order, the learned trial Judge was not justified to confirm the injunction orders by ignoring the averments/reliefs claimed in both the suits and the order passed by this Court in Appeal from Order No. 467 of 2011.

26. It transpires from the order passed in Appeal from Order No. 467 of 2011 that the plaintiff did not make mention of filing of second suit and obtaining ex-parte injunction order from the learned trial Court and not only that, the plaintiff also concealed the fact of cancellation proceedings against its impugned registered trademark in Clause-30 before the IPAB and further, as per order dated 17.11.2011 passed in the said cancellation proceedings, the plaintiff gave undertaking before the IPAB not to initiate any proceedings for infringement of trademark 'DANDI' against the defendants. Concealment of undertaking reflects in both the suits. No doubt when the plaintiff was exposed before the learned trial Judge at the time of hearing of injunction application, the plaintiff conveniently deleted relief of copyright at the time of final arguments of injunction application but it did not pray to delete relevant averments related to the relief deleted. This conduct cannot save the plaintiff from the consequences of concealment of material facts and making misrepresentation in the Court. In this connection, it will be relevant to refer to the following observations made by the Hon'ble Supreme Court in the case of Chandra Shashi v. Anil Kumar Verma reported in MANU/SC/0558/1995 : JT 1994(7) SC 459:-

1 . The stream of administration of justice has to remain unpolluted so that purity of court's atmosphere may give vitality to all the organs of the State. Polluters of judicial firmament are, therefore required to be well taken care of to maintain the sublimity of court's environment; so also to enable it to administer justice fairly and to the satisfaction of all concerned.

2 . Anyone who takes recourse to fraud, deflects the course of judicial proceedings; or if anything is done with oblique motive, the same interferes

with the administration of justice. Such persons are required to be properly dealt with, not only to punish them for the wrong done, but also to deter others from indulging in similar acts which shake the faith of people in the system of administration of justice.

8. To enable the courts to ward off unjustified interference in their working, those who indulge in immoral acts like perjury, pre-verification and motivated falsehoods have to be appropriately dealt with, without which it would not be possible for any court to administer justice in the true sense and to the satisfaction of those who approach it in the hope that truth would ultimately prevail. People would have faith in courts when they would find that satyamev jayate (truth alone triumphs) is an achievable aim there; or yatro dharmastayo jay (it is virtue which ends in victory) is not only inscribed in emblem but really happens in the portals or courts.

27. Unfortunately, the learned trial Judge has not dealt with the material suppressions made in the case and further, the conduct of the plaintiff in overreaching the process of law. Suffice it to say that the plaintiff has concealed from the learned trial Court, in both the suits, the factum of cancellation of its copyright registration at the behest of the defendants, orders passed by the Copyright Board, dismissal of appeal by this Court and subsequent dismissal of the proceedings by the Hon'ble Supreme Court in this regard and further, suppressed the fact of refusal of trademark application for the trademark 'DANDI' under Registration Nos. 1408876 and 1408875 dated 26.12.2005. On the top of it, the plaintiff made a wrong and false statement before the learned trial Court pertaining to the factum of two registered trademarks and the same were incorporated in the ex-parte order of injunction dated 20.12.2011 despite the fact that the said trademark registrations were not in force in view of the plaintiff's own undertaking before the IPAB.

28. The learned trial Judge did not notice series of false declarations averred by the plaintiff in the plaint. In plaint para 17, it is averred by the plaintiff that the cause of action of the second suit arose in the month of March, 2009 when the defendants were found indulged into the offences of falsification of trademark etc., against which, the plaintiff lodged complaint against them and the defendants again committed illegal acts of violation of vested property rights of the plaintiff and were found selling their salt under the identical and deceptively similar mark DANDI NAMAK/DANDI SALT in Jaipur City and other parts of the country in the month of August, 2010 at which, the plaintiff filed suit against the defendants in the District Court, Jaipur and accordingly, the defendants were restrained and remained restrained till 12.10.2011. It is further asserted in the plaint that thereafter, once again the defendants resumed illegal acts of violation of the vested property rights in active collusion with the defendant No. 1 and also circulated visiting cards and business papers bearing identical name 'DANDI' and 'DANDI SALT PVT. LTD.' and thereafter, though the learned trial Court restrained the defendant Nos. 2 to 4 by interim injunction order in the first suit, the defendant Nos. 2 to 4 resumed illegal acts of passing off and violation of vested property rights of the plaintiff in active collusion with the defendant No. 1 and such violation of vested property rights of the plaintiff is continued to arise 'de die in dem' in Gandhidham. On plain reading of plaint para 17 of the second suit, it is asserted by the plaintiff that the first time cause of action arose in the month of March, 2009 when the defendants were found indulged into the offences of trademark. But on perusal of various documentary evidences placed on record, it transpires that the plaintiff was well within the knowledge about the claim of the defendants as to use of trademark 'DANDI' since the year 2000. It is so because the plaintiff has knowledge of the defendants' trademark

applications filed in the year 2000 and the plaintiff was fully aware about the proceedings of Hon'ble Andhra Pradesh High Court initiated against defendant's M/s. Kunwar Ajay Group in the year 2003.

The plaintiff, as claimed by the defendants, being a job worker of the defendants, various invoices and order forms so refers the status of the plaintiff and refusal of registration of plaintiff's trademark application in the year 2005 at the behest of the defendants. The defendants filed a suit bearing Civil Suit No. 2 of 2006 against the plaintiff in the District Court, Surat for the trademark 'DANDI' and also various civil/criminal proceedings initiated and litigated between the parties at various Courts. Still however, the plaintiff made false declaration in the plaint which also dis-entitles the plaintiff to have any discretionary relief in its favour. So, looking to the various documents/orders of the various Courts placed on record, it is quite evident that the plaintiff has deliberately made false statement by furnishing wrong cause of action in the plaint as it is apparent that the plaintiff was fully aware about the activities of the defendants right from the year 2000 and so, on this count alone, the learned trial Judge ought not to have protected the plaintiff and, more particularly, the learned trial Judge failed to compare the averments/reliefs asserted and prayed for in both the suits though the learned trial Judge was required to do so as per orders passed in Appeal from Order No. 242 of 2012 and Appeal from Order No. 7 of 2012.

29. Learned Senior Counsel Mr. Soparkar, during the course of hearing of the present Appeal from Order, made a statement at the bar that the first suit has been withdrawn from the learned trial Court on 30.07.2013 as it was a composite suit for infringement of its registered trademark as well as for infringement of common law copyright in the artistic works on the packaging of salt. But the withdrawal of the first suit would not save the plaintiff from the consequences which arises due to concealment of material facts and furnishing false cause of action and on the top of it, suppression of material fact before this Court as to obtaining ex-parte injunction order in the second suit when this Court passed consent order dated 21.12.2011 vacating ex-parte injunction order obtained in the first suit. For the sake of repetition, it needs to be noted here that if the first suit was composite suit being not maintainable, then there was no reason on the part of the plaintiff again to file the second suit claiming the same relief and then to delete relief of copyright at the time of final arguments before the trial Court. In the considered opinion of this Court, the plaintiff has neither any cause of action to file a second suit nor there is any justification or reason to say that the first suit was not for passing off action as claimed by the plaintiff. So, the reliance placed by learned Senior Counsel Mr. Soparkar upon the judgment in the case of M/s. Bengal Waterproof Ltd. v. M/s. Bombay Waterproof Manufacturing Company and another reported in MANU/SC/0327/1997 : AIR 1997 SC 1398 (1) : 1997 (17) PTC 98 (SC), so as to maintain different suits on continuous cause of action, cannot be accepted because the facts of the present case are absolutely different. In the case before the Hon'ble Supreme Court, the earlier suit was disposed of as not found maintainable on the technical ground and accordingly, thereafter, the second suit was filed after disposal of the first suit on subsequent cause of action which occurred due to the defendants' continuous use of the trademark and the defendant therein was continuously passing off and causing infringement of plaintiff's rights. But in the case on hand, the plaintiff in both the suits claims both the rights upon the same cause of action and second suit is filed during the pendency of the first suit. So, there never can be an accrual of the continuous cause of action as the defendants were already under injunction till 21.12.2011 when the ex parte order of injunction was vacated by this Court by consent order and the plaintiff obtained ex-parte injunction order on 20.12.2011 in the second suit.

30. From the comparison chart of relevant averments of both the suits along with the reliefs prayed for in both the suits, as reproduced hereinabove, it is quite clear that in both the suits, the plaintiff has at various places used terms like 'prior use', 'Vested property rights' and 'passing off'. Needless to say that all the terms are synonyms to each other. In case of *L.D. Malhotra Industries v. Ropi Industries* reported in MANU/DE/0150/1975 : (1976) ILR Delhi 278 : PTC (Suppl) (2) 564 (Del), the Hon'ble Delhi High Court held that vested right under Trade Mark Act means prior use. Before the Hon'ble Supreme Court in the case of *M/s. Dodha House (supra)*, the plaint for a composite suit for infringement of trademark and copyright and passing off had come up for consideration. The ratio of the case is that if one relief is maintainable in a particular Court, other reliefs could not have been entertained could not in that guise be tried by the Court which was not competent to do so. This is not the case here. The very Court in which the first and second suit is filed, is competent to grant relief for passing off action because the plaintiff has filed both the suits in the same Court. Again, if first suit as per plaintiff's case being non-maintainable on account of it being composite suit, the plaintiff could retain necessary/relevant causes of action set out in the plaint and strike off from the plaint that part which the plaintiff believes unnecessary/irrelevant to maintain action for passing off. Instead of doing so, the plaintiff filed second suit in utter disregard of consent order invited by the parties to the suit in Appeal from Order No. 467 of 2011.

31. Now, let us examine the matter from another angle or as projected by learned Senior Counsel Mr. Soparkar to the effect that the first suit was not for passing off action. Even then, the second suit filed by the plaintiff is barred by Order 2 Rule 2, Sub-Rule (3) of the Code. The said Rule, its Sub-Rule and illustration below read as under:-

2. Suit to include the whole claim.

(1) Every suit shall include the whole of the claim which the plaintiff's entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim. - Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs:- A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation:-For the purpose of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

Illustration

A lets a house to B at a yearly rent of Rs. 1200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. A sues B in 1908 only for the rent due for 1906. A shall not afterwards sue B for the rent due for 1905 or 1907.

32. On perusal of the provisions, it show that once the plaintiff comes to a Court of law for getting any relief basing his case on an existing cause of action, the plaintiff must include the whole claim pertaining to that cause of action. If at all the plaintiff has given up part of the claim i.e. passing off action based on the said cause of action or omitted to sue in connection with the same, as claimed by learned Senior Counsel Mr. Soparkar, then the plaintiff cannot subsequently revive the said claim of passing off action based on the same cause of action. The Court has noticed that the second suit of the plaintiff is barred by Order 2 Rule 2, Sub-Rule (3) of the Code because the second suit is based on the same cause of action on which, the first suit was filed. Since the cause of action is the same in both the suits and if the plaintiff has omitted the claim of passing off action, as claimed here, on account of composite suit being not maintainable and in the first suit, the plaintiff has not sued for relief of passing off action available to it on the basis of the cause of action, the reliefs which the plaintiff can very well avail and failed to press in service in the first suit, cannot be subsequently allowed to pray for relief of passing off action except with the leave of the Court. Admittedly, in the instant case, the plaintiff has not obtained any leave in the first suit, as required under Order 2 Rule 2 Sub-Rule-(3) of the Code.

33. Order 2 Rule 2 of the Code requires that cause of action in the first suit must be the same on which, the subsequent suit is based and unless there is identity of causes of action in both the suits, the bar of Order 2 Rule 2 will not get attracted. Learned Senior Counsel Mr. Soparkar is right in submitting that if there is recurring cause of action or there is fresh cause of action and if the plaintiff is pursuing the suit on such fresh or recurring cause of action, the bar under Order 2 Rule 2 would not be attracted. In support of his submissions, learned Senior Counsel Mr. Soparkar pressed into service the following decisions:-

(i) Smithkline Beecham Consumer Healthcare Gmbh & Ors. v. Hindustan Lever Limited and Anr. reported in MANU/MH/1921/2002 : 2002 (25) PTC 417 (Bom) (DB);

(ii) G.M. Modular Pvt. Ltd. v. T.M. Marketing (India) & Others reported in MANU/DE/9842/2007 : 2007(35) PTC 406 (Del.);

(iii) Dhara Seeds v. Gujarat Farm Seeds (Pvt.) Ltd. reported in 2009 (0) GLHEL-HC 223154;

(iv) Kewal Singh v. Mt. Lajwanti reported in MANU/SC/0491/1979 : AIR 1980 SC 161;

(v) Shri Inacio Martins, deceased through LRs. v. Narayan Hari Naik and others reported in MANU/SC/0288/1993 : AIR 1993 SC 1756;

(vi) Deva Ram and another v. Ishwar Chand and another reported in MANU/SC/0097/1996 : AIR 1996 SC 378;

(vii) H.K. Dhruva v. Union of India reported in 2001(0) GLHEL-HC 204491 and;

(viii) Smt. Nirmala v. Hari Singh reported in MANU/HP/0002/2001 : AIR 2001 HP 1.

34. In this connection and after referring the settled principles in the cases cited at bar including the decision in case of M/s. Bengal Waterproof Ltd. (supra), it is settled by the Hon'ble Supreme Court and other High Courts that in the cases of continuous causes

of action or recurring causes of action, bar of Order 2 Rule 2 Sub-Rule-(3) of the Code cannot be invoked. At the same time, Section 22 of the Limitation Act states that in the case of a continuing breach of contract or in the case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues. It is equally true that act of passing off is an act of deceit and tort every time when such tortuous acts or deceit is committed by the defendant, the plaintiff gets a fresh cause of action to knock the door of the Court. Similarly, infringement of registered trademark would also be continuing wrong as so long as infringement continues. Now, on perusal of the impugned order, it appears that the learned trial Judge has not taken trouble to find out whether the second suit is barred by the provisions of Order 2 Rule 2, Sub-Rule (3) of the Code? For the sake of repetition, it may be recalled here that the plaintiff filed the first suit in the year 2011 but ultimately, during the hearing of the present Appeal from Order, it was withdrawn from the Court on 30.07.2013 whereas, the plaintiff filed the second suit on 20.12.2011 for the same cause of action as recorded hereinabove, after making some cosmetic changes in mentioning various expressions but in the sum and substance, the prayer for passing off action though available at the time of filing of the first suit, incorporated in the second suit without leave as required under Order 2 Rule 2 Sub-Rule (3) of the Code. So, it is not a case where, after withdrawal of the first suit on 30.07.2013 or even during pendency of the first suit, any fresh or recurring cause of action accrued in favour of the plaintiff to file the second suit. So, in the considered opinion of the Court, no new infringement took place for filing a fresh suit and, therefore, the second suit instituted by the plaintiff was barred by the provisions of Order 2 Rule 2, Sub-Rule (3) of the Code and, therefore, such institution of the second suit amounts to abuse of process of law and the learned trial Judge ought to have dealt with this aspect of matter when this particular contention raised by the defendants kept open and undecided while disposing Appeal from Order Nos. 7 of 2012 and 242 of 2012. Therefore, in view of the peculiar facts of the present case, none of the cases, as cited at bar by learned Senior Counsel Mr. Soparkar, is applicable to the present case.

35. Surprisingly, in para 3.14 of the plaint of subject matter of second suit, the plaintiff has stated that in the year 2004, the plaintiff changed the mark from 'DANDI' to 'DAANDEE' then the question arises as to authenticity of invoices placed on record along with the two affidavits namely, affidavit of one Mr. Shivkumar Krishnakumar Vaid and affidavit of one Smt. Indra Dindayal Agarwal filed in the suit of Thane Court by the plaintiff against Smt. V.M. Raizada and others in the month of November, 2010. In the invoices annexed with the said affidavits, spelling of mark 'DANDI' is 'DAANDEE'. So, when the plaintiff has changed the mark from 'DANDI' to 'DAANDEE', in the year 2004, how such affidavits can be relied upon which were affirmed in November, 2010 which did not reflect the plaintiff's changed mark from 'DANDI' to 'DAANDEE', In any case, this Court do not consider this fact as so serious or one of the factors to accept the appeal but it definitely erodes the credibility of plaintiff's case.

36. As recorded hereinabove, the learned trial Judge ought to have come to a prima facie conclusion that the plaintiff has obtained ex-parte injunction order by not only misrepresentation of the facts but because of its conduct in overreaching the process of law and suppression of material facts as to filing of the second suit on 20.12.2011 before this Court while inviting consent order on 21.12.2011 in Appeal from Order No. 467 of 2011, the learned trial Court ought not to have confirmed ex-parte order which, eventually, vacated by this Court in Appeal from Order No. 467 of 2011.

37. As recorded hereinabove, the plaintiff was fully aware of the use of impugned trademarks by the defendants since the year 2000. However, the plaintiff asserted in the

plaint that the cause of action to file the second suit arose in the month of March, 2009. Assuming for the sake of arguments that the cause of filing of second suit arose in the month of March, 2009, however, the plaintiff approached the Court in the month of October, 2011. In order to justify the suit filed at Gandhidham Court, the plaintiff took shelter of litigation pending before the Court at Jaipur and since the defendants were restrained and remained restrained till 12.10.2011 till the Hon'ble Rajasthan High Court pronounced judgment in S.B. First Appeal No. 483 of 2011, the plaintiff did not take any action in respect of violation of vested property rights at Gandhidham. The pendency of litigation at Jaipur or at any other place cannot save the present injunction application for being defeated on the ground of delay in applying for interlocutory relief. Any unjustified delay of more than few month is always fatal to the plaintiff's case and, therefore, delay is always considered to be a legal base to refuse the relief. So, in the considered opinion of the Court, the learned trial Judge ought to have refused the interim injunction application without going into the merits or, in whose favour, balance of convenience lies.

38. One more important fact surfaces on record is such that it is the specific case of the plaintiff that the defendants have not produced a single invoice, bill, supply order or purchase order or any document regarding selling of salt. Still however, the plaintiff is knocking the door of the Court in a manner as indicated hereinabove, which smacks some malafide intention on the part of the plaintiff. If at all the plaintiff has meritorious case in its favour, it ought to have proceeded with the hearing of injunction application filed in the first suit as per order passed by this High Court in Appeal from Order No. 467 of 2011 but instead of following such legal course of action, the plaintiff overreached the process of law in clear violation of the order of this Court passed in Appeal from Order No. 467 of 2011 and in the considered opinion of this Court, this sole act of plaintiff is sufficient to reject the interim injunction outright.

39. In view of the findings recorded hereinabove, it would not be out of place to refer to the observations recorded by the Hon'ble Supreme Court in paras 13 to 15 in the case of Ramjas Foundation and Anr. v. Union of India (UOI) and Ors. reported in MANU/SC/0930/2010 : (2010) 14 SCC 38 which read as under:-

13. Strangely, in the list of dates of the special leave petition out of which this appeal arises, there is not even a whisper about large number of cases filed by appellant No. 1 challenging the acquisition of land situated at village Sadhora Khurd, the grounds on which the challenge was founded and the orders passed by the High Court and this Court. The appellants also suppressed the fact that after dismissal of the first appeal by the Division Bench of the High Court, possession of the land was taken by the Land Acquisition Collector on 13.7.2001 and transferred to the Delhi Development Authority. What could be the possible reason for these omissions? Any person of reasonable prudence will at once respond to this question by saying that sole object of not disclosing the facts relating to other cases was to keep the Court in dark about rejection of challenge to the acquisition of a portion of land which the appellants are claiming to be Wakf property. We have no doubt that the appellants did so for the purpose of persuading this Court to pass an interim order and they succeeded in this venture because while issuing notice on 26.11.2001, this Court directed that there shall be stay of dispossession.

14. The principle that a person who does not come to the Court with clean hands is not entitled to be heard on the merits of his grievance and, in any case, such person is not entitled to any relief is applicable not only to the

petitions filed under Articles 32, 226 and 136 of the Constitution but also to the cases instituted in others courts and judicial forums. The object underlying the principle is that every Court is not only entitled but is duty bound to protect itself from unscrupulous litigants who do not have any respect for truth and who try to pollute the stream of justice by resorting to falsehood or by making misstatement or by suppressing facts which have bearing on adjudication of the issue(s) arising in the case. In **Dalglish v. Jarvie** 2 Mac. & G. 231,238, Lord Langdale and Rolfe B. observed: "It is the duty of a party asking for an injunction to bring under the notice of the Court all facts material to the determination of his right to that injunction; and it is no excuse for him to say that he was not aware of the importance of any fact which he has omitted to bring forward. In **Castelli v. Cook** (1849) 7 Hare, 89, 94 Wigram V.C. stated the rule in the following words: "A plaintiff applying ex parte comes under a contract with the Court that he will state the whole case fully and fairly to the Court. If he fails to do that, and the Court finds, when other party applies to dissolve the injunction, that any material fact has been suppressed or not properly brought forward, the plaintiff is told the Court will not decide on the merits, and that, as he has broken faith with the Court, the injunction must go." In **Republic of Peru v. Dreyfus Brothers & Company** 55 LT. 802, 803, Kay J. held as under:

I have always maintained, and I think it most important to maintain most strictly, the rule that, in ex parte applications to this Court, the utmost good faith must be observed. If there is an important misstatement, speaking for myself, I have never hesitated, and never shall hesitate until the rule is altered, to discharge the order at once, so as to impress upon all persons who are suitors in this Court the importance of dealing in good faith in the Court when ex parte applications are made.

The same rule was restated by Scrutton L.J. in **R. v. Kensington Income Tax Commissioner** (1917) 1 K.B. 486. The facts of that case were that in April, 1916, the General Commissioners for the Purposes of the Income Tax Acts for the district of Kensington made an additional assessment upon the applicant for the year ending April 5, 1913, in respect of profits arising from foreign possessions. On May 16, 1916, the applicant obtained a rule nisi directed to the Commissioners calling upon them to show cause why a writ of prohibition should not be awarded to prohibit them from proceeding upon the assessment upon the ground that the applicant was not a subject of the King nor resident within the United Kingdom and had not been in the United Kingdom, except for temporary purposes, nor with any view or intent of establishing her residence therein, nor for a period equal to six months in any one year. In the affidavit on which the rule was obtained the applicant stated that she was a French subject and resident in France and was not and had not been a subject of the United Kingdom nor a resident in the United Kingdom; that during the year ending April 5, 1913, she was in the United Kingdom for temporary purposes on visits for sixty-eight days; that she spent about twenty of these days in London at her brother's house, 213, King's Road, Chelsea, generally in company with other guests of her brother; that she was also in the United Kingdom during the year ending April 5, 1914, for temporary purposes on visits, and spent part

of the time at 213, King's Road aforesaid; and that since the month of November, 1914, she had not been in the United Kingdom. From the affidavits filed on behalf of the Commissioners and of the surveyor of taxes, who showed cause against the rule nisi, and from the affidavit of the applicant in reply, it appeared that in February, 1909, a leasehold house, 213, King's Road, Chelsea, had been taken in the name of the applicant's brother. The purchase-money for the lease of the house and the furniture amounted to 40001, and this was paid by the applicant out of her own money. The accounts of household expenses were paid by the brother and subsequently adjusted between him and the applicant. The Divisional Court without dealing with the merits of the case discharged the rule on the ground that the applicant had suppressed or misrepresented the facts material to her application. The Divisional Court observed that the Court, for its own protection is entitled to say "we refuse this writ of prohibition without going into the merits of the case on the ground of the conduct of the applicant in bringing the case before us". On appeal, Lord Cozens-Hardy M.R. and Warrington L.J. approved the view taken by the Divisional Court. Scrutton L.J. who agreed that the appeal should be dismissed observed:

and it has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts - facts, not law. He must not misstate the law if he can help it - the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the Court will set aside any action which it has taken on the faith of the imperfect statement.

15. The above noted rules have been applied by this Court in large number of cases for declining relief to a party whose conduct is blameworthy and who has not approached the Court with clean hands - **Hari Narain v. Badri Das** MANU/SC/0226/1963 : AIR 1963 SC 1558, **Welcome Hotel v. State of A.P.** MANU/SC/0029/1983 : (1983) 4 SCC 575, **G.Narayanaswamy Reddy v. Government of Karnataka** MANU/SC/0386/1991 : (1991) 3 SCC 261, **S.P. Chengalvaraya Naidu v. Jagannath** MANU/SC/0192/1994 : (1994) 1 SCC 1, **A.V. Papayya Sastry v. Government of A.P.** MANU/SC/1214/2007 : (2007) 4 SCC 221, **Prestige Lights Limited v. SBI** MANU/SC/3355/2007 : (2007) 8 SCC 449, **Sunil Poddar v. Union Bank of India** MANU/SC/0322/2008 : (2008) 2 SCC 326, **K.D. Sharma v. SAIL** MANU/SC/3371/2008 : (2008) 12 SCC 481, **G. Jayashree v. Bhagwandas S. Patel** MANU/SC/8451/2008 : (2009) 3 SCC 141 and **Dalip Singh v. State of U.P.** MANU/SC/1886/2009 : (2010) 2 SCC 114. In the last mentioned judgment, the Court lamented on the increase in the number of cases in which the parties have tried to misuse the process of Court by making false and/or misleading statements or by suppressing the relevant facts or by trying to mislead the Court in passing order in their favour and observed:

For many centuries Indian society cherished two basic values of life i.e. "satya" (truth) and "ahimsa" (nonviolence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in the pre-Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-Independence period has seen drastic changes in our value system. The materialism has overshadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings.

In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final.

(emphasis supplied)

40. After considering the relevant averments of both complaints, this Court found that relief to claim for passing off action was available and however, without obtaining leave, the second suit is filed which is barred under the provisions of Order 2 Rule 2, Sub-Rule (3) of the Code. The plaintiff furnished false declaration and both the suits are based on same cause of action and suppression of material facts and thus, the plaintiff failed to approach the Court to invoke the discretionary power with clean hands, as recorded hereinabove.

41. Now, the Court would like to decide the question whether the plaintiff is prior user of the trademark or not? There is no dispute on the proposition of law that whenever the suit is filed challenging the passing off action, it gives rise to common law remedy available to the aggrieved party for the purpose of deciding the issue of passing off and in such action, the relevant factor is to establish as to who is the prior user of the disputed marks within the meaning of Section 27(2) of the Trade Marks Act. There is no doubt that base of the second suit is passing off action and what is required to be considered in this appeal is as to whether the learned trial Judge came to the right conclusion that the plaintiff prima facie established that it is the prior user of the disputed trademark or committed an error in coming to such conclusion. After detailed analysis of evidence placed on record by the parties to the suit before the trial Court and after considering voluminous evidence in the form of documentary evidence, the learned trial Judge came to the conclusion that the plaintiff is the prior user of the trademark. On this aspect, both the learned Senior Counsel argued at great length and took me through the various documents submitted in the paper-book containing around 2000 pages and most of the documents came to be referred to and, therefore, I have also gone through those relevant documents relied upon by both the sides.

42. As is evident, in the suit, the plaintiff produced copies of two affidavits from the record of Thane Court of one Mr. Shivkumar Krishnakumar Vaid and affidavit of one Smt. Indra Dindayal Agarwal along with the number of invoices showing the deponents purchased the salt under the brand name 'DANDI' from the plaintiff at least from the month of June, 1998 and onwards though, the validity and authenticity of the said

affidavits and invoices were challenged being genuine. Thus, the said affidavits and invoices were hotly contested by the defendants. On consideration of the observations made by the trial Court about those affidavits and invoices in the impugned order and on the other hand, the defendants did not produce a single invoice or bill showing that, in fact, the defendants supplied the salt to any buyer under the trade name DANDI SALT/DANDI NAMAK, though the defence of the defendants is such that the defendants received the disputed trademark from M/s. Kunwar Ajay Foods Pvt. Ltd. by an assignment deed dated 10.01.2005. However, the defendants if at all manufactured the salt and sold it under the disputed trade name, the defendants in support of their defence regarding prior use of trademark 'DANDI' could have produced invoices before the trial Court. No doubt, the defendants produced voluminous documents in the form of advertisement by firm - Kunwar Ajay Group of Industries as well as by Company - M/s. Kunwar Ajay Foods Pvt. Ltd and media reports showing that the firm and the company earned huge money by selling salt under the trademark DANDI SALT/DANDI NAMAK. Despite this, not a single invoice/bill produced to substantiate the defence of the prior user. As against this, the plaintiff produced number of invoices prima facie showing that the plaintiff used to manufacture and sell the salt under the brand name 'DANDI' at least from June, 1998 and onwards and considering the invoices, it transpires that there were endorsements to the effect that the amount referred to in the individual invoice came to be paid by cheque and, therefore, the learned trial Judge has rightly come to the conclusion that the invoices in question are reliable. Therefore, this Court do not find that the trial Court has committed any error in coming to such conclusion.

43. It may be true that M/s. Kunwar Ajay Group of Industries used to purchase salt from the different companies including the plaintiff and the plaintiff used to supply the goods under the brand name 'DANDI'. In this regard, the defendants submitted before the trial Court as well as before this Court that Kunwar Ajay Group of Industries was the inventor of the trademark and the same was coined by them which came to be transferred to the Company and, in turn, the said mark transferred to the defendant No. 3. On examination of the various documents relied upon by the defendants on this aspect of the case, the deed of assignment dated 10.01.2005, apart from the fact whether it is executed on sufficient stamp paper or not or registered or not, the issue remains as to whether assignor has actually used the trademark 'DANDI' before it is assigned to the defendants. It is relevant to note here that vide letter dated 01.09.2001, written by Mrs. Anju Agarwal, proprietor of Kunwar Ajay Group of Industries addressed to one Mr. Suresh Chand Agarwal, she in terms, stated that she has never used the brand name i.e. trademark. Thus, the learned trial Judge prima facie found that neither Mrs. Anju Agarwal nor the partnership firm, in fact, used the marks and prima facie it is not proved whether the company was using the mark immediately preceding the date of assignment i.e. 10.01.2005. So, it appears that the marks which were not used, prima facie, came to be assigned by the said company to the defendant No. 3. What was the relationship amongst the plaintiff and M/s. Kunwar Ajay Foods Pvt. Ltd. is not required to be taken any further because where, the relationship between the manufacturer and the marketer is that of principal and his dealer/distributor or agent, the issue of proprietorship of a trademark would be a matter of agreement between the parties which is yet to be established. It is also true that presumption of ownership of trademark cannot be held in favour of the manufacturer in view of the decision rendered by Hon'ble Delhi High Court in case of Trans Tyres India Pvt. Ltd. v. Double Coin Holdings Ltd. and Anr. reported in MANU/DE/1212/2012 : 2012(49) PTC 209 (Delhi) (DB). So, considering the two sets of evidence, namely, document of assignment produced by the defendants and invoices produced by the plaintiff, prima facie, at this stage, which evidence to be accepted, appears to be an issue before the trial Court

while deciding prima facie evidential value of deed of assignment viz-a-viz invoices. The learned trial Judge rightly accepted the evidence placed by the plaintiff on record and, therefore, this Court do not find any valid reason or ground to interfere with this finding, prima facie, arrived at by the trial Court in light of limited scope to examine this issue in an appeal.

44. Learned Senior Counsel Mr. Bansal for the defendants gave much emphasis on the order passed by the District Court, Jaipur in the suit filed by the plaintiff in the year 2010. I have examined the orders passed by the Court at Jaipur and also by the Hon'ble Rajasthan High Court. In the said proceedings, the District Court, Jaipur disposed of the suit filed by the plaintiff on the ground of lack of territorial jurisdiction and such findings arrived at by the District Court, Jaipur came to be upheld by the Hon'ble Rajasthan High Court in light of provisions contained under Order 7 Rule 11 of the Code. So, rejection of the plaint by the Hon'ble Rajasthan High Court cannot be said to be dismissal of the suit on merits and therefore, the said rejection of the plaint of the plaintiff by the Hon'ble Rajasthan High Court will not be helpful to the defendants in dislodging the plaintiff's claim of prior user.

45. It was one of the contentions of learned Senior Counsel Mr. Bansal for the defendants that the plaintiff filed criminal complaints against Kunwar Ajay Foods Pvt. Ltd. in the Court of learned Judicial Magistrate, Gandhidham regarding the offence punishable under Section 138 of the Negotiable Instruments Act and in the statutory notice issued by the plaintiff to the said company and so also, in the verification recorded by the learned Magistrate, the responsible officer of the plaintiff made an admission that the plaintiff was doing job work for and on behalf of M/s. Kunwar Ajay Foods Pvt. Ltd. On minute examination of the relevant papers placed on record regarding the said proceedings, nothing prima facie emerges that the plaintiff admitted that the defendants are the owners and proprietors of the said trademark 'DANDI'. It appears that the plaintiff pleaded before the Magisterial Court that the company i.e. M/s. Kunwar Ajay Foods Pvt. Ltd. approached the plaintiff to pack and process the salt in the brand name of 'DANDI' and accordingly, the plaintiff processed and packed salt in the brand name of 'DANDI' on behalf of the accused company i.e. M/s. Kunwar Ajay Foods Pvt. Ltd. So, the learned trial Judge found that such admission cannot be read as an admission on the part of the plaintiff that it admitted the ownership of trademark in question as belonged to the accused company i.e. M/s. Kunwar Ajay Foods Pvt. Ltd. In light of the various decisions cited at bar in case of passing off action, the paramount consideration before the Court would be as to who was the first user of the trademark and, therefore, the learned trial Judge rightly confined itself in answering as to who was the prior user of the trademark and so, while concurring with the prima facie findings so recorded by the learned trial Judge in favour of the plaintiff, it appears that the learned trial Judge did not commit any error in appreciating and dealing with this contention regarding alleged admission made by the plaintiff in the said criminal proceedings.

46. Learned Senior Counsel Mr. Bansal submitted that the defendant No. 2 is the successor of one Kunwar Ajay Group of Industries and as the said company was a prior user of the trademark 'DANDI' as compared to the plaintiff, it is also entitled to claim status of prior user. This issue raised by the defendants, ignores the affidavit which was filed in Company Petition No. 210 of 2002 for winding up of company of Mr. Suresh Chand Agarwal wherein, he categorically stated on oath that the Directors of Kunwar Ajay Group of Companies sold two trademarks namely 'DANDI NAMAK' and 'FRIENDLY WASH' through a deed of assignment dated 10.01.2005 for consideration of about Rs. 10.75 crores to one M/s. Pinky Advertising Company Pvt. Ltd. So, prima facie, there is nothing on record to show as to how defendant No. 1 can claim to be the successor of

the predecessor i.e. Kunwar Ajay Group of Industries. There is no evidence in any legal form in favour of the defendants so as to accept the defendants' case inasmuch as intellectual property of the Kunwar Ajay Group of Industries belongs to the other companies on account of Directors of different companies are being common. Therefore, various judgments cited by learned Senior Counsel Mr. Bansal, namely, (i) George V Records, SARL v. Kiran Jogani reported in MANU/DE/0275/2004 : 2004(28) PTC 347 (Del.), (ii) Pankaj Aluminium Industries Pvt. Ltd. v. Bharat Aluminium Company Ltd., (iii) Cycle Corporation of India v. T.I. Raleigh Industries reported in MANU/SC/0886/1996 : 1996 PTC (16), (iv) Kirloskar Diesel Recon v. Kirloskar Proprietary Ltd. reported in MANU/MH/0033/1996 : AIR 1996 Bom. 149 : 1997 (17) PTC 469 (Bom), (v) Mahendra and Mahendra Seeds P. Ltd. v. Mahindra & Mahindra Ltd. reported in MANU/GJ/0427/2002 : 2003(26) PTC 434 9 (Guj.) and (vi) Novaris AG v. Adarsh Pharma reported in MANU/TN/0598/2004 : 2004(29) PTC 108 (Mad) on the issue of group of companies or single economic unit, are not applicable to the facts of the present case because in the judgments cited at bar, the plaintiff therein sued for infringement of trademark and for passing off action was found to have used the mark in question either by himself as also by the other group of companies and in that circumstances, the concept of group of companies or single economic entity was recognized.

In the case on hand, neither the learned trial Judge nor this Court found that the Kunwar Ajay Group of Industries was using the mark DANDI SALT/DANDI NAMAK at any point of time or objected the use or registration of the trademark 'DANDI NAMAK' in the name of plaintiff nor any affidavit of such group is filed authorising the defendant No. 2 to use the disputed mark and on the top of it, there is no single piece of document placed on record to show any sale of salt under the mark 'DANDI' ever made by the said predecessor of the defendant No. 2 - Company and, therefore, concept of group of companies is not applicable to the facts of the present case. Therefore, there is no substance in the contention so raised by the learned Senior Counsel Mr. Bansal. As is evident, the parties to the proceedings have filed series of litigation before the various competent courts/forums/authority but at nowhere, the defendants were found as prior user of the mark 'DANDI' SALT/DANDI NAMAK and, therefore, the contentions as to prior user of the disputed mark by the defendants cannot be considered as the claim as to prior user of the mark DANDI SALT/DANDI NAMAK on the part of the plaintiff is on paper and at no point of time, the defendants have produced or sold the salt under the disputed mark prior to June, 1998. Whatever evidence pointed out to the trial Court and also to this Court, relates to the year 2000 and onwards and that too, not relied upon by the learned trial Judge for the reasons recorded in the impugned order and this Court finds itself in agreement with such findings recorded qua plaintiff's prior use.

47. Seen this matter in above context as to who is the prior user of the trademark 'DANDI', this Court has found that there is no reason whatsoever to interfere with the findings as to the plaintiff being found prior user by the learned trial Judge in the impugned order and to that extent only, the learned trial Court has rightly reached to the conclusion in favour of the plaintiff.

48. The off-shoot of the above discussion is such that though the plaintiff succeeds to establish claim of prior user but the plaintiff's injunction application must fail as it furnished false declaration and suppressed the material facts and thus, approached the Court with uncleaned hands, as recorded hereinabove. Therefore, no Court of law can exercise its discretionary power in favour of the plaintiff. The suppression of fact by the plaintiff disqualifies it from obtaining any relief and the learned trial Judge overlooked the plaintiff's conduct to mislead the Court inasmuch as on 21.12.2011, the plaintiff

invited consent order in Appeal from Order No. 467 of 2011 and on the other hand, on 20.12.2011, obtained ex-parte injunction order for the relief of passing off and infringement of registered trademark. On this count alone, the plaintiff is not entitled to be heard on merits of the case. Similarly, the Court has found that both the suits are for passing off and the relief which is not permissible in the first suit i.e. infringement of registered trademark, could have been deleted in the first suit itself which, in fact, the plaintiff again claimed in the second suit and subsequently, at the time of hearing of the injunction application, deleted the same. There is no bar to club the relief for infringement and passing off trademark. As recorded hereinabove, in substance, the cause of action in both the suits is identical and, therefore, the plaintiff is prohibited and prevented by bar of Order 2 Rule 2 Sub-Rule-(3) from filing a fresh suit without leave of the Court in the first suit and so, when the suit itself is barred, the learned trial Judge ought not to have granted any relief in favour of the plaintiff. On reading of the impugned order in its entirety, the learned trial Judge failed to observe the directions issued by the High Court in Appeal from Order No. 7 of 2012 and 242 of 2012 and focused only on the issue of prior user ignoring other vital issues concerning suppression of facts, conduct of the plaintiff, true nature of both the suits and such other connected issues/aspects as discussed hereinabove. On the top of it, the learned trial Judge failed to give true effect of legal consequences arising out of consent order invited by the parties to the suit in Appeal from Order No. 467 of 2011.

49. The resultant effect of the above discussion is such that the present appeal filed at the instance of defendants is required to be accepted and allowed and accordingly, it is hereby allowed. Order dated 31.01.2013 passed by the learned 5th Additional District Judge, Gandhidham, Kutch below Exh.5 in Civil Suit No. 3 of 2011 is hereby quashed and set aside. No order as to costs. While parting with the order, it is clarified that this Court has examined the impugned order passed by the learned trial Judge within the limited scope of provisions of Order 43 Rule 1(r) of the Code, whereas the main controversy involved in the suit is at large before the trial Court to be adjudicated through full-fledge trial. Therefore, the learned trial Judge shall not be influenced by any observations recorded in the impugned order and observations recorded by this Court herein above while deciding the suit at the end of trial. The findings recorded either by the trial Court or by this Court at interlocutory stage of the suit are tentative in its nature and the learned trial Judge shall decide the case on its merits preferably within a period of six months from the date of receipt of copy of this judgment and as per evidence that may be led during the course of trial and in accordance with law.

Further Order

After pronouncement of judgment today, learned advocate Mr. Pratik Jasani appearing for the respondent requests to stay the judgment with a view to approach the Hon'ble Supreme Court.

Accordingly, the judgment pronounced today is stayed upto four weeks from today so as to enable the respondent to approach the Hon'ble Supreme Court.

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