THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 03.07.2008

+ **IA No.2463/2008 in CS (OS) 355/2008 (u/O 39 R 1 & 2 CPC)**
& IA No. 3031/2008 in CS (OS) 355/2008 (u/O 39 R 4 CPC)

M/s S. Narendra Kumar & Co. ... Plaintiff

- versus –

Everest Beverages and Foods Inudstries & Anr. ...Defendants

Advocates who appeared in this case:
For the Plaintiff : Mr Jagjit Singh with Mr Shekhar Guj
For the Defendant : Mr S. K. Bansal with Mr Pankaj Kumar

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED

1. Whether Reporters of local papers may be allowed to see the judgment ? YES

2. To be referred to the Reporter or not ? YES

3. Whether the judgment should be reported in Digest ? YES

BADAR DURREZ AHMED, J

1. IA No. 2463/2008 has been filed by the plaintiff under Order 39 Rules 1 and 2 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC') seeking an interim injunction restraining the defendants from using the mark 'EVEREST' in respect of any of their products falling under Classes 29 and 30 of the Fourth Schedule to the Trademark Rules, 2002 inasmuch as such use allegedly amounts to infringement of the plaintiff's alleged registered trademark 'EVEREST'. By an order dated 25.02.2008 this Court had granted an *ex parte* ad-interim injunction against the defendants in respect of the use of the said mark 'EVEREST'. The defendants, after notice of the said order dated 25.02.2008, have not only

filed their written statement in the suit and reply to the plaintiff's application under Order 39 Rules 1 and 2 CPC but have also filed an independent application (IA No. 3031/2008) under Order 39 Rule 4 seeking vacation of the *ex parte* ad interim injunction granted by this Court on 25.02.2008. Both the applications are taken up together.

2. In the plaint the plaintiff had stated that it is the proprietor of the registered trademark 'EVEREST' in classes 29 and 30 of the Fourth Schedule to the Trademark Rules 2002 under a deed of assignment dated 26.09.1994 executed by the original owners — (1) Smt. Gulabben Nand Lal Shah (2) Sh. Vadilal Nandlal Shah and (3) Sh. Narendra Chamapk Lal Shah who were allegedly jointly carrying on business under the name and style of "Vadilal Champak Lal & Co.". That firm is said to have been conducting its business from 1967 to 1995 whereafter the plaintiff firm has been running the business stemming out of the business of Vadilal Champak Lal & Co.

3. It has also been alleged in the plaint that the plaintiff is carrying on the business of manufacturing and marketing *masalas* of different types and that they are well known manufacturers and merchants of all kinds of spices, pan masala, betel-nuts, papad, pickles, cosmetics, heena powder (mehandi powder) etc. since the year 1967. It has also been alleged that the plaintiff has been using the registered trademark "consisting of and containing the word 'EVEREST' since the year 1967 in respect of their aforesaid products". It is stated that the plaintiff is the registered proprietor of the trademark 'EVEREST' in many classes including Classes 29 and 30

of the Fourth Schedule to the Trademark Rules 2002 in respect of goods falling in these classes which include "vinegar , sauces, spices of all kinds including pickles". It is further stated that the plaintiff has about 40 registered trademarks and they are all registered and renewed up to date. The list of the trademarks and renewals is set out in paragraph 6 of the plaint. The earliest registration indicated in the said list is of 13.07.1981 and that pertains to Class 31. The earliest registration in respect of Class 30 (spices of all kinds, tea masala and milk masala) bears No. 431291 and is of 21.12.1984. The earliest registration under Class 29 is registration No. 461928 dated 20.10.1986 in respect of "preserved, dried, cooked and tinned fruits and vegetables, jellies, jams, milk and other dairy products, preserves and pickles". There is another registration bearing No. 461929 of the same dated i.e. 20.10.1986 under Class 30 which is, *inter alia*, in respect of vinegar, sauces and spices of all kinds. On going through the entire list given in paragraph 6 of the plaint it is apparent that the trademark registrations in respect of which the plaintiff claims proprietorship primarily relate to spices of all kinds, tea masala and milk masala. There are a few registrations as noted above appearing for the first time on 20.10.1986 under Class 29 and 30 which cover other products such as preserved, dried, cooked and tinned fruits and vegetables, jellies, jams, vinegar, sauces and spices.

4. It was alleged by the plaintiff that the defendants have used the identical trademark 'EVEREST' in respect of identical and similar goods despite the fact that the defendants do not have any registration under the

Trademarks Act, 1999 (hereinafter referred to as the 'said Act') or under the Trade and Merchandise Marks Act, 1958 in respect of the mark 'EVEREST'.

5. As noted in the order dated 25.02.2008, the learned counsel for the plaintiff had submitted that the mark 'EVEREST' had been used by the plaintiff since 1967 and that their registrations date back to 1981 onwards. The learned counsel, at that point of time, had also submitted that the defendants have been made aware of the infringement being done by them through various letters from the year 2000 onwards upto 2006. But the defendants had not refrained from using the mark. It was contended that the mark employed by the defendants was identical to the plaintiff's registered trademark 'EVEREST' and was being used in respect of the very same goods falling under Classes 29 and 30 and, therefore, it was a clear-cut case of infringement of the plaintiff's registered trademark. It had also been contended by the learned counsel for the plaintiff, as noted in the order dated 25.02.2008, that the plaintiff had decided to file the present suit in 2008 because the defendants had "recently" entered the market in Delhi whereas prior to November-December 2007 the defendants had confined their activities to smaller towns in and around Meerut, U. P.

6. Considering all these factors, this Court took a view on 25.02.2008 at the *ex parte* stage that the mark employed by the defendants was identical to the registered trademark of the plaintiff and was also in respect of similar, if not identical, goods and consequently the defendants

were restrained from using the mark 'EVEREST' in respect of any of their products falling under Classes 29 and 30 so as to amount to infringement of the plaintiff's registered trademark 'EVEREST'.

7. In their written statement as also in the application under Order 39 Rule 4 CPC (IA No. 3031/2008) the defendants have taken the stand of prior user. It has been contended that the firm by the name of Everest Fruit Products had been constituted in 1965-1966. All the assets and liabilities of Everest Fruit Products were taken over by the present defendant No.1 (Everest Beverages and Foods Industries) on 01.04.2001. It is alleged that Everest Fruit Products was using the mark 'EVEREST' even in 1965 as would be evident from the licence under the Fruit Products Order, 1955 issued on 03.11.1965 by the licencing Officer, Agricultural Marketing Advisor to the Government of India from Nagpur in respect of squashes, synthetic vinegar, ready to serve beverages, tomato ketchup and sauces.

8. The defendant has also placed on record various renewals upto date of the said FPO licence. The defendant has also indicated that in 1991 additional items were included in the licence on 19.01.1987 and again on 12.02.1991 by including even pickles and chutney. The defendants have also filed sales tax assessment orders in respect of the period 1969-70 which indicates that the defendant No.1 was in the business of manufacture of fruit juices. There are other sales tax assessment orders also placed on record.

9. It has, therefore, been contended on behalf of the defendants that assuming, without admitting, that the plaintiff is the registered proprietor of the mark 'EVEREST', the present suit for infringement of the said mark would not lie against the defendants in view of the fact that the defendants are prior users of the mark 'EVEREST' which they have been continuously using since 1965 till date in respect of their products which are - tomato ketchup, sauces, vinegar, fruit juices, non-alcoholic drinks, noodles and pickles. The defendants are, therefore, protected under Section 34 as also under Section 27 of the said Act. It was also contended that in any event the defendants have been using the mark honestly and concurrently for all these years.

10. It was also contended on behalf of the defendants that the plaintiff is not entitled to any interim injunction on account of delay and acquiescence. It was submitted that, as admitted in the plaint, the plaintiff was aware of the defendants using the mark 'EVEREST' in respect of their products in the year 2000 yet they chose to file the suit only in 2008 on the false pretext that till November-December, 2007 the defendants were localized in small towns in and around Meerut, U.P and that the defendants had only recently entered the market in Delhi. It was also contended that apart from the fact that the defendants have been in the market in Delhi for a long time, the plaintiff ought to have filed the suit as soon as it became aware of the defendants in the year 2000. The fact that the plaintiff delayed the filing of the suit disentitled the plaintiff to any interim injunction.

11. It was then contended on behalf of the defendants that while the suit filed by the present defendant No.1 (Suit No. 4/2006) in the District Court at Meerut against the present plaintiff has been mentioned in the plaint, the averments made therein and the stand taken by the parties have not been indicated in the plaint. Particularly the plea of prior use taken by the defendant No.1 in the said suit has not been mentioned in the plaint. It has also been contended that the plaintiff suppressed the defendants reply dated 08.04.2000 to one of the legal notices issued by the plaintiff. In that reply, as also in other replies, the defendants had taken the specific plea of prior use. In particular, it was pointed out that in the plaint filed by the present defendant No.1 in the Meerut suit prior user since 1965 has been pleaded. On the other hand, in the written statement in the Meerut suit, the present plaintiff has stated that they are "well-known manufacturers and merchants of spices of all kinds, pan masala, betel-nuts, papad, pickles, cosmetics, heena powder (mehandi powder) etc. since the year 1967". It is further stated that the plaintiff herein had been using a registered trademark "consisting of and containing the word 'EVEREST' since the year 1967 in respect of their products." According to the defendants, even if what is stated by the plaintiff in its written statement in the suit at Meerut is taken to be true, three things are apparent — (i) That the trademark which has been used by the present plaintiff "consists of and contains" the word 'EVEREST'; (ii) The trademark in question has been used by the present plaintiff since 1967 and (iii) It has been used in respect of pan masala, betel-nuts, papad, pickles, cosmetics, heena powder (mehandi powder). It was contended on behalf of the defendants that had the pleadings in the

Meerut suit as well as the defendants' reply dated 08.04.2000 to the plaintiff's legal notice been brought to the notice of this Court, the Court would have been aware of the defendants' consistent stand since 2000 of its legitimate use of the trademark 'EVEREST' on the ground of prior user and, in such an eventuality, this Court may not have passed the order that it did on 25.02.2008. It was contended that since the plaintiff suppressed and concealed these material facts, the *ex parte* ad interim order passed on 25.02.2008 deserves to be vacated on this ground alone.

12. In response to these submissions made on behalf of the defendants, the learned counsel for the plaintiff submitted that the entire defence of the defendants to the plaintiff's suit for infringement is based upon the plea of prior user. He submitted that the first registered trademark of the plaintiff (through its predecessor-in-interest) was the registration No. 243840 dated 24.08.1967 and that the defendant has to show user prior to this date. According to the learned counsel for the plaintiff the only evidence that has been produced by the defendants is the FPO licence of 1965 which does not indicate user of the mark 'EVEREST'. It has been contended that the defendants have produced voluminous records but the records are from 1968 onwards. Consequently, it is submitted, the entire documentary evidence indicates that the business of the defendants under the said mark is after the registration of the trademark in favour of the plaintiff and that the defence of prior user has not been, *prima facie*, established. Consequently, such a defence is not available to the defendants

and, therefore, the plaintiff is entitled to seek the relief of interim injunction purely on the ground of infringement as stipulated under the said Act.

13. With regard to the objection in respect of delay in filing of the suit, the learned counsel for the plaintiff submitted that firstly there was no delay because the plaintiff and the defendants were exchanging communications in the form of legal notices and replies thereto and the plaintiff was hopeful that the defendants would cease and desist from using the mark 'EVEREST'. It is when the defendants sought to enter the market in Delhi in January 2008 that the plaintiff became sure that the defendants would not cease and desist and, therefore, the present suit was filed. It was contended, in any event, delay in instituting a suit cannot take away the substantive right which the plaintiff has under the said Act. He placed reliance on the decision of the Supreme Court in the case of ***Ramdev Food Products Pvt. Ltd. v. Arvindbhai Rambhai Patel: AIR 2006 SC 3304*** to submit that in an infringement action, delay in filing of the suit would not come in the way of the plaintiff to assert his exclusive rights over a registered trademark. The principles of delay which apply to an action of passing off are different from those which apply to a suit for infringement of a registered trademark.

14. With regard to the objection of non-disclosure of the pleadings in the Meerut suit and the stand taken by the defendants in its reply dated 08.04.2000 of prior user, the response of the plaintiff is that the plaintiff has mentioned about the Meerut suit in paragraph 11.1 of the plaint and has also

mentioned the letters/ notices issued by the plaintiff to the defendants in paragraph 11 of the plaint. Therefore, according to him, there is no suppression or concealment as alleged by the defendants. The learned counsel requested that the *ex parte* order passed on 25.02.2008 be confirmed till the disposal of the suit and the defendants' application under Order 39 Rule 4 (IA No. 3031/2008) be dismissed.

15. Section 27 (1) of the said Act stipulates that no person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trademark. Sub-Section (2) of Section 27 is material for the purposes of the present case. It reads as under:-

> "(2) Nothing in this Act shall be deemed to affect rights of action against any person for passing off goods or services as the goods of another person or as services provided by another person, or the remedies in respect thereof."

This provision makes it clear that the Act which deals with the statutory rights flowing from registration of a trademark, does not affect the rights of action against any person for passing off goods or services as the goods of another person or as services provided by another person or the remedies in respect thereof. Clearly the common law action for passing off and the remedy by way of injunction and damages in respect of that have been preserved and are independent of the rights conferred under the said Act upon a proprietor of registered trademark. Section 28 (1) stipulates that "subject to the other provisions of this Act", the registration of a trade mark shall, if valid, give to the registered proprietor of the trade mark the exclusive right to the use of the trade mark in relation to the goods or

services in respect of which the trade mark is registered and to obtain relief in respect of infringement of the trade mark in the manner provided by this Act. This provision entails that the registered proprietor of the trademark has the exclusive right to the use of the trademark "in relation to the goods or services in respect of which the trade mark is registered". It also confers upon such registered proprietor the right to obtain relief in respect of infringement of the trademark in the manner provided by the Act. It is important to note that this provision begins with the words "subject to the other provisions of this Act". Section 34 of the said Act reads as under:-

> "34. **Saving for vested rights**.—Nothing in this Act shall entitle the proprietor or a registered user of registered trade mark to interfere with or restrain the use by any person of a trade mark identical with or nearly resembling it in relation to goods o services in relation to which that person or a predecessor in title of his has continuously used that trade mark from a date prior—
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> (a) to the use of the first-mentioned trade mark in relation to those goods or services by the proprietor or a predecessor in title of his; or
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> (b) to the date of registration of the first-mentioned trade mark in respect of those goods or services in the name of the proprietor of a predecessor in title of his;
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> whichever is the earlier, and the Registrar shall not refuse (on such use being proved) to register the second mentioned trade mark by reason only of the registration of the first-mentioned trade mark."

This provision clearly indicates that the proprietor of a registered mark cannot interfere with or restrain the user by any person of an identical trademark in relation to goods or services when such person has continuously used that trademark from a date prior to the use of the registered trademark in relation to those goods or services or to the date of

registration of the said registered trademark, again, in respect of those goods or services, whichever is the earlier. In plain words, this means that a registered proprietor cannot bring an action under the Act against a person who uses an identical trademark in relation to his goods or services from a date prior to the date of user by the proprietor of the registered trademark or the date of registration of such mark, whichever is earlier. Thus, in the context of the present case, if the defendants are able to demonstrate that they have been using the mark 'EVEREST' prior to the user by the plaintiff or prior to the date of registration of the trademark in favour of the plaintiff, whichever is earlier, then the defendants would have set up a defence and the plaintiff would not be entitled to any order which would interfere with or restrain the use by the defendants of the said mark. It is in this context that the defendants have taken the defence of prior user and have filed various documents beginning from the FPO licence of November, 1965 and including various sales tax assessment orders for the period 1969-1970 and onwards to show that they have been in the business of, *inter alia*, fruit juices for a long stretch of time and have been using the mark 'EVEREST' in respect of their products.

16. Before proceeding to examine the facts and circumstances of the present case it would be necessary to point out the observations of this Court in the case of ***Rana Steels v. Ran India Steels Pvt. Ltd.: 2008 II AD (Delhi) 46*** where I had an occasion to examine the provisions of Sections 28 and 29 of the said Act. The following observations in the said decision are material:-

"19. To examine the relative merits of these contentions a brief survey of the relevant provisions of the said Act would be necessary. Section 28 (1) of the said act prescribes that, subject to the other provisions of the said act, the registration of a trademark, if valid, gives to the registered proprietor of the trademark, the exclusive right to the use of the trademark "*in relation to the goods or services in respect of which the trademark is registered*" and to obtain relief in respect of infringement of the trademark in the manner provided by the act. Sub-section (2) stipulates that the exclusive right to the use of a trademark given under sub-section (1) shall be subject to any conditions and limitations to which the registration is subject. As already indicated earlier, sub-section (3) deals with a situation where two or more persons are registered proprietors of trademarks which are identical to or nearly resemble each other. In such a situation, the exclusive right to the use of any of those trademarks shall not be deemed to have been acquired by anyone of those persons as against the other "*merely by registration of the trademarks"*. Of course, each of those persons would otherwise have the same rights as against other persons, not being registered users using by way of permitted use, as he would have if he were the sole registered proprietor. It is noteworthy that the registered proprietor of a trademark gets the exclusive right to use the trademark *in relation to the goods or services in respect of which the trademark is registered*. This means that a trademark is registered not merely in favour of a person but also bears relation to goods or services. So, while a particular trademark may be registered in favour of one person in respect of certain goods, that person may not have the exclusive right to use the mark in respect of other goods. This means that under normal circumstances the right to use a trademark to the exclusion of others is only in respect of the goods or services in connection with which the trademark is registered. There are exceptions which shall be alluded to presently.

20. Section 29 (1) of the Trade Marks Act, 1999, which deals with the issue of infringement of registered trade marks indicates that a trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which is identical with or deceptively similar to the trade mark "*in relation to goods or services in respect of which the trade mark is registered*" and in such manner as to render the use of

the mark likely to be taken as being used as a trade mark. So, for an infringement action, it must be shown that -- (1) the registered trade mark is being used by a person other than the registered proprietor or by a person permitted to use the same; and (2) the use must be in the course of trade; and (3) *in relation to goods or services in respect of which the trade mark is registered*. This means that if a trade mark is registered in respect of a certain set of goods or services, then the use of that trade mark by a person other than the registered proprietor or by a person permitted to use the same would not, *ipso facto,* amount to infringement if such person uses the trade mark in relation to an entirely different set of goods or services. However, sub-section (2) of section 29 of the said Act brings within the fold of infringement, uses of the registered trade mark by a person other than a registered proprietor in respect of "*similar*" goods also in three different sets of circumstances -- where there is (a) identity with the registered trade mark and *similarity* of the goods or services covered by the registered trade mark; or (b) similarity to the registered trade mark and identity or *similarity* of goods or services covered by such registered trade mark; or (c) identity with the registered trade mark and identity of the goods or services covered by the registered trade mark -- *and* there is likelihood of confusion being caused on the part of the public or the likelihood of such user having an association with the registered trade mark. Sub-Section (3) of Section 29 of the said Act provides that where there is an identity of the impugned trade mark with the registered trade mark and there is also an identity of the goods or services covered by the registered trade mark, the court shall presume that it is likely to cause confusion on the part of the public. By virtue of sub-section (4) of Section 29, there may be infringement of a registered trade mark even where the mark is used in relation to goods or services which are not *similar* to those for which the trade mark is registered provided, *inter alia*, the registered trade mark has a reputation in India and the use of the mark without due cause takes unfair advantage of or is detrimental to the, distinctive character or repute of the registered trade mark.

21. A reading of the relevant provisions of Sections 28 and 29 of the said Act, therefore, reveals that the registration of a trade mark is linked to the goods or services in respect of which the trade mark is registered. If a person uses a registered trade mark in

> relation to goods and services which are different and distinct from the goods or services in respect of which the trade mark is registered, then he would not be infringing the registered trade mark except in the case covered by Sub-Section (4) of Section 29 which requires that the registered trade mark must have a reputation in India and the use of the mark without due cause would be amounting to taking unfair advantage of or would be detrimental to the distinctive character or repute of the registered trade mark."

A reading of the said extract makes it clear that in order to succeed in an infringement action, the plaintiff must show that (1) the registered trademark is being used by a person other than the registered proprietor or by a person permitted to use the same; (2) the use must be in the course of trade; and (3) *in relation to goods or services in respect of which the trade mark is registered*. In the present case it is an admitted position that the defendants have produced voluminous documents from 1968 onwards with regard to the use of the mark 'EVEREST' in respect of their products, which were initially fruit juices but later on extended to tomato ketchup, sauces, vinegar, non-alcoholic drinks, noodles and pickles. According to the plaintiff this is not good enough inasmuch as their first registration dates back to 24.08.1967. Therefore, the defendants would not be able to invoke the provisions of Section 34 to set up their defence.

17. In the context of what has been noted in ***Rana Steels*** *(supra)*, it is necessary to examine as to in respect of which goods or services the plaintiff (through its predecessor) claims registration for the mark 'EVEREST'. The assignment deed under which the plaintiff claims title

over the said registration sets out all the trademark registrations which have been assigned in Schedule A thereto. The trademark bearing registration No. 243840 dated 24.08.1967 has been shown at serial No.1. It has been shown to be registered in respect of goods falling under Class 30. The mark which has been registered is — Everest Milk Masala Label. It is obvious that the said registration relates to milk masala. The mark registered is also not just the word 'Everest' but the 'Everest Milk Masala' Label. It is perhaps because of this reason that the plaintiff has cleverly used the expression "consisting of and containing the word Everest" whenever it has referred to this registration and similar other registrations in its pleadings. It is obvious that the Everest Milk Masala Label is registered in relation to milk masala. By virtue of Section 28 (1) the proprietor of such a mark would only get the exclusive right to use the said mark in relation to milk masala and or similar goods. However, the defendants have been allegedly using the mark 'EVEREST' in respect of entirely different products — fruit juices, tomato ketchup, sauces, vinegar, non-alcoholic drinks, noodles and pickles. Thus, insofar as the purported registration of 1967 is concerned, *prima facie*, there is no infringement by the defendants. It is only when the defendants obtained registrations in 1986 in respect of the products which the defendants allegedly produce and market, that the plaintiff could sustain an action for infringement. But, by that date, the defendants would be in a position to show prior use in view of the documents beginning from 1968 onwards. Whether the defendants would be in a position to establish their claim of prior use or not after a full-fledged trial is an altogether different consideration. What is relevant for the present is that the defendants have

been able to set up a plausible defence of user prior to the plaintiff's registrations under Classes 29 and 30 in the year 1986.

18. In coming to the aforesaid conclusion I have purposely ignored consideration of the FPO licence of November 1965 which, according to the defendants, clearly shows user even prior to the first registration of 24.08.1967 of the plaintiff's predecessors. It is obvious that even if the said FPO licence of November 1965 is not taken into consideration, the defendants have yet been able to demonstrate, *prima facie*, that they have a plausible defence of prior user and that the plaintiff's case is not one of clear-cut infringement under the said Act as it was thought to be at the time this Court passed the *ex parte* order on 25.02.2008. However, if one were to consider the FPO licence of November 1965 to be evidence of prior user, then the plaintiff would have no case at all. But that is in the realm of debate and controversy which can only be settled after the parties lead evidence. For the present it is clear that the defendants have been able to set up a plausible defence of prior user and that would be sufficient for me to vacate the *ex parte* ad interim injunction granted on 25.02.2008 at least insofar as the products of the defendants, namely, tomato ketchup, sauces, vinegar, fruit juices, non-alcoholic drinks, noodles and pickles are concerned.

19. As regards the question of delay and acquiescence, the plaintiff is right in submitting that in a case of infringement mere delay would not come in the way of a plaintiff seeking his remedy for such infringement

inasmuch as the right conferred by virtue of Section 28 (1) is an absolute right (see ***Ramdev Food Products***) (*supra)* (para 83). Thus, had it merely been a case of delay, the plaintiff would not have been barred from the remedy of injunction. But, as noted above, the defence raised by the defendant of prior user invoking the provisions of Section 34 is, *prima facie*, a plausible one and as such, the right conferred by Section 28 (1) which is "subject to the other provisions of the said Act", would have to take a back seat.

20. With regard to the question of suppression and concealment, while I am of the view that the plaintiff has employed "clever drafting", it cannot be said that it has indulged in out and out suppression / concealment. However, this does not alter the position in any way inasmuch as the *prima facie* finding is that the defendants have a plausible defence of prior user and that their vested rights have been saved by virtue of Section 34 of the said Act.

21. The result is that the plaintiff has not been able to establish a *prima facie* case for the grant of an interim injunction in its favour. Evidence would be required on both sides before a definitive answer can be given with regard to the defendants' defence of prior user. It is apparent that the defendant has been using the mark 'EVEREST' for some time. As per the plaintiff such user came to its notice in the year 2000. But, there is material on record to show, *prima facie*, that the defendants have been using the mark much prior to 2000 and at least from 1968 onwards. This is without even taking into consideration the FPO licence of November, 1965.

In these circumstances, I allow the defendants' application under Order 39 Rule 4 but, only to the extent that the order dated 25.02.2008 shall not operate in respect of the following products of the defendants:-

> "tomato ketchup, sauces, vinegar, fruit juices, non-alcoholic drinks, noodles and pickles".

In respect of other products which the plaintiff manufactures and markets, such as milk masala and spices of all kinds, the injunction order shall operate inasmuch as in relation to those products the defendants have not claimed any user, what to speak of prior user. The said applications are accordingly disposed of with the aforesaid directions.

BADAR DURREZ AHMED
(JUDGE)

July 03, 2008
SR