

CASE NO.:
Appeal (civil) 8815-8816 of 2003

PETITIONER:
Ramdev Food Products Pvt. Ltd.

RESPONDENT:
Arvindbhai Rambhai Patel & Ors.

DATE OF JUDGMENT: 29/08/2006

BENCH:
S.B. Sinha & P.P. Naolekar

JUDGMENT:
J U D G M E N T
W I T H
CIVIL APPEAL NO.8817 OF 2003

S.B.SINHA, J :

Interpretation of the provisions of the Trade and Merchandise Marks Act, 1958 (for short "the 1958 Act") arises for consideration in these appeals arising out of a judgment and order dated 08.05.2003 passed by the High Court of Gujarat at Ahmedabad.

FACTS

The appellant is a company incorporated under the Companies Act, 1956. The other parties to these appeals were/are its Directors.

In the year 1965, one Rambhai Patel started a business of grinding and selling spices under the name and style of 'Ramdev'. He had three sons and two daughters, Arvindbhai, Hasmukhbhai and Pravinbhai were his sons. A partnership firm was constituted in the year 1975. It applied for registration of the trademark 'Ramdev', which was granted on 03.01.1986 being Trademark No.447700. Another partnership deed was executed in supersession of the earlier partnership deed wherein new partners were inducted. On 06.01.1989, the appellant company was incorporated whereby and whereunder the pattern of shareholding amongst the three brothers was : Arvindbhai Group (40%); Hasmukhbhai Group (30%); and Pravinbhai Group (30%). The registered trademark was assigned by 'Ramdev Masala Stores' in favour of the appellant by a deed dated 20.05.1990. However, by the said deed the goodwill was not assigned. The trademark together with the goodwill was assigned in favour of the appellant company by another deed of assignment dated 20.05.1992. A 'user' agreement was also entered into by the same parties permitting the firm 'M/s. Ramdev Masala Stores' to use the said trademark subject to the terms and conditions stipulated therein. Another partnership firm being 'Ramdev Masala' was started on 01.04.1991 for carrying on the trade of grinding and trading of masalas. A user agreement was also entered into by and between the appellant company and the said firm permitting the latter to use the registered trade mark for seven years i.e. from 01.04.1991 to 31.03.1998 in terms whereof it was stipulated :

"3. AND WHEREAS the User is a firm registered under the Indian Partnership Act and wishes to use in the city of Ahmedabad except the area of Naroda City of Ahmedabad and district Mehsana, Gujarat State (India) registered proprietors aforesaid registered Trade Mark (hereinafter referred to as "the said Trade Mark") in respect of the said goods."User restricted to the

cities of Ahmedabad and Mehsana;

4(C) That the User will continue to use the said mark only so long as he manufactures his goods in accordance with the terms and specifications devised by the Registered Proprietor.

4(E) That within the terms of this agreement and thereafter the User will not acquire any right to the said mark by any means whatsoever except in accordance with law.

4(G) That the User covenants not to use the said Trade Mark in the advertisement, journal label and/ or other documents in such a manner that the said Trade Mark may in any way be diluted in respect of distinctiveness of validity if necessary and indication either usually, phonetically may be given to the purchasing public to the extent that the User uses the said mark by way of permitted use only."

Indisputably, the firm 'Ramdev Masala Stores' was dissolved on 04.11.1991. Yet again a new partnership firm came into being under the name and style of 'Ramdev Exports'. The said partnership firm was constituted for the purpose of export of spices manufactured by the appellants company.

It is not in dispute that the business of manufacturing and selling of spices under the trade name of 'Ramdev' was being run by the three brothers through the appellants company.

Another partnership firm being 'Ramdev Masala' was being run through seven outlets for retail sale of the products of the Company.

It is also not in dispute that both the firms 'Ramdev Masala' and 'Ramdev Exports' had distinct and separate existence. Their areas of operation were also different. The respective roles assigned to each of the partnership firm had clearly been specified in their respective partnership deeds. Whereas M/s. Ramdev Masala was allowed to manufacture and trade in spices, the business of M/s. Ramdev Exports was limited to export of the spices manufactured by the appellants company. Yet again, the partnership deed of Ramdev Masala was amended on 01.04.1995; in terms whereof the business of the said firm was confined only to trading in spices manufactured by the appellants company. In other words, the respective businesses under the partnership deeds of the said firms are stated to be as under :

- a. Type of business of Ramdev Masala under the first partnership deed was grinding and selling of spices.
- b. Type of business of M/s. Ramdev Masala under the second partnership deed was trading in spices.
- c. The business of M/s. Ramdev Exports was exporting the goods manufactured by the appellants company.

DISPUTES

Disputes and differences having arisen between the members of the family and in particular between the three brothers, the same was settled by their well-wishers, pursuant whereof and in furtherance whereof a Memorandum of Understanding (MOU) was executed by and between the parties, to which we would advert to a little later.

LEGAL PROCEEDINGS

On the premise that the respondents had been infringing its rights, trade name and logo, the appellant company filed a suit in the City Civil Court, Ahmedabad, which was numbered as CS No.828 of 2000, inter alia, for the following reliefs :

"A) The defendants by themselves, their servants, agents, partners and all persons claiming through or under them be restrained by a perpetual order of this Hon'ble Court from, in any manner, using the trade mark 'RAMDEV' in their label, packing materials, advertising materials, business materials etc., in respect of goods which are covered under registration of the plaintiff's mark and/or any mark which may be identical and/or deceptively similar to the plaintiff's registered trade mark and thereby restrain them from infringing the plaintiff's registered trade mark bearing No. 447700 and other marks bearing No.531084, 531085, 545253, 545253, 545255, 545257 and 545258."

An application for injunction was also filed wherein the following interim prayers were made :

"(A) The defendants by themselves, their servants, agents, partners and all persons claiming through or under them be restrained by an order of temporary injunction of this Hon'ble Court from, in any manner, using the trademark 'RAMDEV' in their label, packing materials, advertising materials, business materials etc. in respect of goods which are covered under registration of the plaintiff's mark and/or any mark which may be identical and/or deceptively similar to the plaintiff's registered trade mark and thereby restrain them from infringing the plaintiff's registered trade mark bearing No.447700 and other marks bearing No.531084, 531085, 545253, 545255, 545257 and 545258, till the hearing and final disposal of the suit.

(B) The defendants by themselves, their servants, agents, partners and all persons claiming through or under them be restrained by an order of temporary injunction of this Hon'ble Court from using in relation to any spices, masala bearing the name 'RAMDEV' as produced with separate list or any label or packing material or advertising material containing the trade mark 'RAMDEV' and/or any mark which is identical and/or mark containing word 'RAMDEV' either on label or in trading style or trading name, so as to pass off the defendants goods and/or business as that of the plaintiff, till the hearing and final disposal of the suit."

An application was also filed for appointment of a Court Commissioner.

DEFENCES OF THE RESPONDENTS

The principal defences raised by the respondents in the said suit are as under:

- (i) The appellant has no exclusive statutory right to use 'Ramdev' apart from the label as a whole. (Sections 15 and 17 issue)
- (ii) The first respondent has a right to use the mark as concurrent user; (Section 29 issue)
- (iii) That the use complained of is protected, as bona fide user and furthermore the appellant is not entitled to the reliefs sought for as the same were barred under the principles of estoppel, acquiescence, etc.

ORDER ON THE APPLICATION FOR INJUNCTION

By a judgment and order dated 17.03.2000, the learned Trial Judge opined that the plaintiff company was the owner of the trademark. It was further held that the defendants had started manufacturing and marketing the same business which is deceptively similar to the trademark of the plaintiff which created confusion in the mind of public. However, the defendants were given liberty to manufacture spices in their factory and sell the same in seven outlets under the trademark 'Ramdev Masala'.

On an interpretation of the said MOU dated 30.05.1998, it was, inter alia, held :

"\005Therefore, if there is agreement between the parties that the defendant No.1 should purchase spices from the plaintiff for the purpose of retail-sale in 7 outlets, it must have been mentioned in the MOU. No such condition is mentioned. If that be so, it cannot be presumed that the defendants should purchase spices from the plaintiff for the purpose of retail-sale in 7 outlets. In case of written-agreement between the parties, it should be taken as it is. It should be read as it is. No additional terms and conditions or agreement can be presumed. Therefore, in absence of any specific condition that the defendants should sell spices by using trade-mark "Ramdev" in 7 outlets by purchasing the goods from the plaintiff is not believable.

13. This condition also does not seem to be possible\005

14. \005The defendants have arranged for the packing material bearing regd. trade-mark "Ramdev" and used the same for the purpose of retail business. These facts clearly suggest that there was no restriction on the defendants to purchase spices from the plaintiff for the purpose of retail business in 7 outlets. On the contrary, the defendant was at liberty to manufacture in their factory and sell the same in 7 outlets for the purpose of retail business.

15. Relevant portion of MOU is reproduced earlier. Accordingly, the defendants are permitted to use the trade-mark or logo "Ramdev" for the purpose of retail-sale in 7 outlets. The words used suggest that the defendants were entitled to use the trade-mark "Ramdev" without any restriction for the purpose of retail sale of spices. It was not compulsory on the part of the defendants to

purchase spices from the plaintiff. They can arrange or manufacture in their way and sell the same in 7 retail outlets under the trade-mark "Ramdev".

21. \005Therefore, he cannot sell spices in other shops under the trade-mark "Ramdev". He can run spices' business and other business in his shop Ramdev Masala. The plaintiff cannot restrict him."

The respondents had been selling a large variety of spices under the trade name "Swad". However, the packings and labels adopted by them were also held to be deceptively similar to the trade-mark "Ramdev" of the appellant. Although they had been manufacturing and marketing spices under the trade name 'swad', the respondents had been writing the words "Ramdev Masala" in such a manner that it creates confusion in the minds of customers. It was, therefore, opined that the respondents had been passing off their goods as if it was manufactured by the appellant. The learned Judge, however, opined that as per the provisions of the Prevention of Food Adulteration Act, 1955, it was mandatory to disclose the name and address of the manufacturer they have been writing their name "Ramdev Masala" as manufacturer which does not create any deception or confusion. Noticing that the appellant got it entered in the records of the Registrar of Trade Mark by following due procedure and acknowledging that the appellant company is the registered proprietor of trade name bearing logo of "Ramdev", it was held that as the respondents had started manufacturing and marketing spices under the trade name "swad" and they had been selling spices in small packets and in view of the averments made by the appellant that the labels and packings adopted by the respondents were deceptively similar to the registered trademark 'Ramdev' and, therefore, passing off goods as if it is manufactured by the plaintiff. The learned Judge further observed :

"\005Comparing the packing material and label of both the parties, it is clear that the label of the defendants is phonetically and visibly similar with the label of the plaintiff. It is deceptively similar with the label of the plaintiff. It creates deception as well as confusion in the minds of customers who are literate, illiterate, male or female, who used to purchase in retail market from small shops as well as big departmental stores. Therefore, there is every likelihood of passing off the goods of the defendants as if it is manufactured by the plaintiff."

It was opined :

"As stated earlier, it is proved that the plaintiff is the regd. proprietor of trade-mark "Ramdev" bearing registration No.44770. The plaintiff has acquired goodwill and reputation of the trade mark "Ramdev Masala" in the market. Packing and label adopted by the defendants for their products "Swad" containing the word "Ramdev Masala" on the front page of the label in larger size, in first alphabet definitely creates deception and confusion. It is deceptively similar with the trade-mark of the plaintiff. Therefore, the plaintiff has proved prima facie case on this point. As regards the balance of convenience and

irreparable injury, it is settled legal position that in case of deception public at large is affected. Unvaried customers are likely to be deceived. When prima facie case is proved, it is necessary in the interest of justice to maintain status quo. Considering above all facts and circumstances, injunction should be granted against the defendants."

The learned Judge summarised his findings as under :

"Para 41\005 (i) The defendant No.1 and consequently all defendants are entitled to use trade mark "Ramdev" for the retail business of spices in 7 outlets as mentioned in M.O.U. It is not mandatory for the defendants to purchase goods from the plaintiff for retail sale in the said outlets. The defendants are at liberty to manufacture spices in their factory and carry on retail business in 7 outlets by using trade-mark "Ramdev" bearing registration No.44770.

(ii) The defendant No.1 is at liberty to run business under the trade name "Ramdev Masala" for retail and wholesale business of spices, instant mix and other articles. However, he should not use trade-mark "Ramdev" except 7 outlets as mentioned in M.O.U.

(iii) Label and packing adopted by the defendants for their goods under the trade-name "Swad" containing word "Ramdev Masala" is creating infringement of the trade-mark of the plaintiff as it is deceptively similar. Therefore, the defendants should be prevented in using the word "Ramdev Masala" on their label and packing in any manner. However, the defendants are at liberty to manufacture and market spices in any trade name without using the word "Ramdev" or "Ramdev Masala".

The respondents were, thus, restrained by temporary injunction from using registered trademark, logo 'Ramdev' or any other trademark, which is identical and deceptively similar to the trademark of the appellant in respect of label and packing material of their goods except in seven outlets mentioned in MOU till final disposal of the suit. They were held to be at liberty to run business of spices under the trade name 'Ramdev Masala' without using the registered trademark 'Ramdev Masala' except in seven outlets.

HIGH COURT JUDGMENT

Both the parties preferred appeals thereagainst before the High Court. The High Court by reason of its judgment opined:

(i) The chain of events goes to show that the business of grinding spices by using the words "Ramdev" and "Masala" in the formation of firm name continued all throughout and, thus, the

respondents could be restrained from carrying on business of manufacturing and selling of spices.

(ii) The respondents were permitted users in view of the registered user agreement executed between the parties.

(iii) The effect of the MOU could not be wholly determined as the deeds of retirement had not been produced.

(iv) Even if the MOU is kept out of consideration in view of the Rules framed under Prevention of Food Adulteration Act and Standards of Weights and Measures Act, the manufacturer is duty bound to display its name and address in the manner, size and placement as prescribed, on the packets. Thus, once a statute prescribes an obligation on manufacturer and stipulates the minimum standards of measurement, the manufacturer is bound to act in accordance with law and cannot be restrained from complying with specific statutory provisions.

It, while upholding the findings of the learned trial Judge contained in paragraphs 41(i) and 41(ii); in respect of the directions contained in Para 41(iii), opined:

"42.3 However, finding in paragraph 41(iii) of the impugned judgment requires to be modified. The trial court was in error for the aforesaid reasons when it held that printing and publication of the principal display panel was creating infringement of trade mark as it was deceptively similar. The defendants cannot be prevented from using the words "Ramdev" and "Masala" on their label and packing in light of the statutory requirements as stated hereinbefore. However, the defendants shall print the name of the manufacturer using only the minimum standard prescribed, depending upon the nature of the packing and the placement of the principal display panel shall be only at the bottom on the reverse side of the packing and the front portion of the packing shall not carry any principal display panel except for its own brand name "SWAD".

SUBMISSIONS:

Mr. C.A. Sundaram and Mr. Ashok Desai, learned Senior Counsel appearing on behalf of the appellant, in support of these appeals submitted :

(i) The appellant was entitled to an order of injunction in view of the well-settled principles of law that in case of a registered trade mark, the use thereof by any other person would constitute an infringement thereof.

(ii) As there can be only one mark, one source and one proprietor and in particular having regard to the public interest, it was impermissible for the Trial Judge as also the High Court to allow the respondents to use the registered trade mark of the appellant either in the seven outlets or the goods manufactured by them independently.

(iii) The trade mark 'Ramdev Masala' used by the respondents being deceptively similar with that of the registered trade mark, the same would interfere with the quality control product of the appellant and, thus, an order of injunction as was prayed for should have been passed.

(iv) The learned Trial Judge as also the High Court misconstrued and misinterpreted the provisions of the 1958 Act vis-à-vis Prevention of Food Adulteration Act and Standards of Weights and Measures Act, as in a case of such nature, a mandatory injunction could be issued directing change of the corporate name of the respondent No.1; as the appellant's right to protect its trade mark is absolute.

(v) By reason of the MOU, the respondents were only allowed to carry on the existing trade and thereby the respondents were not permitted to start manufacturing spices under the name and style of 'Ramdev Masala' as would be evident from the fact that they were only entitled to carry on retail business from the seven outlets for the purpose of selling only the end products upon printing the words "not for resale" which is a clear pointer to the fact that merely a right to trade therefrom and not manufacture of spices in the said name had been granted in terms thereof.

Mr. F.S. Nariman, learned Senior Counsel appearing on behalf of the respondents, on the other hand, submitted:

(i) The appellant could exercise their right only for the purpose of implementing the MOU which must be read with the deed of retirement dated 1st June, 1998, the remedies under the Trade Marks Act are not available against the respondents who were members of the family.

(ii) The Company, although was not a party to the MOU, but having been represented by the Directors therein must be held to be bound thereby and the parties to the MOU having not filed any special leave petition in their individual capacities, these appeals are liable to be dismissed.

(iii) As a distinction exists between a lis based on infringement of a registered trade mark and passing off, the principles which are applicable for grant of injunction in an action for passing off are applicable in the instant case.

(iv) The claim of the appellant to obtain an order of injunction is clearly barred by Sections 15(1) and 15(2) of the 1958 Act insofar as a distinctive label having been registered as a whole, no order can be passed restraining the defendants from using a part thereof, as has been held in *The Registrar of Trade Marks v. Ashok Chandra Rakhit Ltd.* [(1955) 2 SCR 252] and *Re Cadbury Brothers' Application* [1915 (2) Ch. 307].

(v) The appellant itself having applied for 'Ramdev' as a separate trade mark as would appear from a public document, viz., the Trade Mark Journal No. 6 dated 25.11.2003 and the said trade mark having not yet been registered in its favour, no order of injunction as had been prayed for can be passed in its favour.

(vi) In any event, if an order of injunction is passed, against the respondents, they would have to be completely dependent upon the appellant for carrying on business which would lead to discord between the members of the family, which was sought to be avoided by the MOU.

(vii) In view of the stipulations made in the MOU whereby and whereunder Shri Arvindbhai became the absolute owner of both 'Ramdev Exports' and 'Ramdev Masala' and Hasmukhbhai and Pravinbhai having given up their right thereupon, the First respondent is entitled to carry on the said business in those names which were not required to be changed by reason of the said MOU.

(viii) Furthermore, the stipulations made in the MOU clearly do not

oblige the respondent to buy any product from the appellant-Company, and in the event, if it be held that the respondent is bound to sell only the products of the appellant, running of business by the respondent would clearly depend upon the supply of the materials by the appellant alone.

(ix) As by reason of the said MOU, the respondent No.1 became entitled to use of mark from seven outlets, the same envisages its right to sell goods having the said mark and not sell of the plaintiffs' goods alone. The MOU must be interpreted in the light of the deed of retirement dated 1.6.1998, which categorically contained a stipulation that the continuing partner "have also decided to continue the said business in the same firm names, viz., 'Ramdev Exports' and 'M/s. Ramdev Masala'" and, thus, the appellant cannot now turn round and contend that the respondent cannot carry on business of grinding and selling masala.

(x) In the event the appellant's contention is accepted, the right of the respondent to continue the business under the name and style of or in the firm name of 'M/s. Ramdev Masala' and 'Ramdev Exports' would become inconsistent with the deed of retirement of Hasmukhbhai and Pravinbhai from 'M/s. Ramdev Masala' and 'Ramdev Exports'.

Dr. A.M. Singhvi, learned senior counsel appearing on behalf of some of the respondents supplemented Mr. Nariman urging that a document upon reading contextually may be found to be a family settlement although the said expression was not used therein. It was, therefore, urged that the courts would lean strongly in favour of the family settlement and the MOU, so read, would operate as estoppel against the other family members who have taken advantage thereof from denying or disputing implementation thereof.

STATUTORY PROVISIONS

It is not in dispute that the lis between the parties would be governed by the 1958 Act.

"Deceptively similar" has been defined in Section 2(d) of the 1958 Act to mean as under:

"A mark shall be deemed to be deceptively similar to another mark if it so nearly resembles that other mark as to be likely to deceive or cause confusion."

Section 2(j) defines "Mark" to include "a device, brand, heading, label, ticket, name, signature, word, letter or numeral or any combination thereof". The expression "registered proprietor" has been defined in Section 2(q) to mean a person for the time being entered in the register as proprietor of the trade mark in relation to a trade mark.

Chapter II provides for appointment of the Controller-General of Patents, Designs and Trade Marks for the purpose of the said Act. Sections 15 and 17 read as under:

"15. Registration of parts of trade marks and of trade marks as a series.--(1) Where the proprietor of a trade mark claims to be entitled to the exclusive use of any part thereof separately, he may apply to register the whole and the part as separate trade marks.

(2) Each such separate trade mark shall satisfy all the conditions applying to and have all the incidents of, an independent trade mark.

(3) Where a person claiming to be the proprietor of

several trade marks in respect of the same goods or description of goods which, while resembling each other in the material particulars thereof, yet differ in respect of--

(a) statement of the goods or services in relation to which they are respectively used or proposed to be used; or

(b) statement of number, price, quality or names of places; or

(c) other matter of a non-distinctive character which does not substantially affect the identity of the trade mark; or

(d) colour;

seeks to register those trade marks, they may be registered as a series in one registration.

17. Registration of trade marks subject to disclaimer. If a trade mark -

(a) contains any part--

(i) which is not the subject of a separate application by the proprietor for registration as a trade mark; or

(ii) which is not separately registered by the proprietor as a trade mark; or

(b) contains any matter which is common to the trade or is otherwise of a non-distinctive character, The tribunal in deciding whether the trade mark shall be entered or shall remain on the register, may require, as a condition of its being on the register, that the proprietor shall either disclaim any right to the exclusive use of such part or of all or any portion of such matter, as the case may be, to the exclusive use of which the tribunal holds him not to be entitled, or make such other disclaimer as the tribunal may consider necessary for the purpose of defining the rights of the proprietor under the registration:

Provided that no disclaimer shall affect any rights of the proprietor of a trade mark except such as arise out of the registration of the trade mark in respect of which the disclaimer is made."

Chapter III provides for the procedure for and duration of registration. The 1958 Act envisages filing of an application (Section 18), advertisement thereof (Section 20), opposition thereto (Section 21) and correction and amendment thereof (Section 22). Registration of a trade mark is envisaged in Section 23 of the 1958 Act, the effect whereof is stated in Section 27 thereof.

The rights which are conferred by registration are stated in Section 28 of the 1958 Act in the following terms:

"28. Rights conferred by registration.--(1)

Subject to the other provisions of this Act, the registration of a trade mark in Part A or Part B of the register 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.

(2) The exclusive right to the use of a trade mark given under sub-section (1) shall be subject to any conditions and limitations to which the registration is subject.

(3) Where two or more persons are registered proprietors of trade marks, which are identical with

or nearly resemble each other, the exclusive right to the use of any of those trade marks shall not (except so far as their respective rights are subject to any conditions or limitations entered on the register) be deemed to have been acquired by any one of those persons as against any other of those persons merely by registration of the trade marks but each of those persons has otherwise the same rights as against other persons (not being registered users using by way of permitted use) as he would have if he were the sole registered proprietor."

Section 29 provides for the consequences of infringement of trade marks in the following terms:

"29. Infringement of registered trade marks.--

(1) A registered trade mark is infringed by a person who, not being a registered proprietor of the trade mark or a registered user thereof using by way of permitted use, uses in the course of trade mark which is identical with, or deceptively similar to, the trade mark in relation to any goods 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.

(2) In an action for infringement of a trade mark registered in Part B of the register an injunction or other relief shall not be granted to the plaintiff if the defendant establishes to the satisfaction of the court that the use of the mark of which the plaintiff complains is not likely to deceive or cause confusion or to be taken as indicating a connection in the course of trade between the goods in respect of which the trade mark is registered and some person having the right, either as registered proprietor or as registered user, to use the trade mark."

Section 33 provides for saving of vested rights.

INTERPRETATION OF DEED \026 PRINCIPLES OF

MOU, for the purpose of these appeals, may be treated to be a family settlement. It is, however, well-known that intention of the parties to an instrument must be gathered from the terms thereof examined in the light of the surrounding circumstances. [See *Sohan Lal Naraindas v. Laxmidas Raghunath Gadit*, (1971) 1 SCC 276]

In *Delta International Ltd. v. Shyam Sundar Ganeriwalla* [(1999) 4 SCC 545], this Court noticed:

"17. For construction of contracts between the parties and for the interpretation of such document, learned Senior Counsel, Mr Desai has rightly relied upon some paragraphs from *The Interpretation of Contracts* by Kim Lewison, Q.C. as under:

"1.03 For the purpose of the construction of contracts, the intention of the parties is the meaning of the words they have used. There is no intention independent of that meaning.

6.09 Where the words of a contract are capable of

two meanings, one of which is lawful and the other unlawful, the former construction should be preferred.

Sir Edward Coke [Co. Litt. 42a] expressed the proposition thus:

'It is a general rule, that whensoever the words of a deed, or of one of the parties without deed, may have a double intendment and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken.'

It is further stated:

"For that purpose, he referred to the following observations of Buckley, J. from the paragraphs which are sought to be relied upon from The Interpretation of Contracts by Kim Lewison, Q.C.: "My first duty is to construe the contract, and for the purpose of arriving at the true construction of the contract, I must disregard what would be the legal consequences of construing it one way or the other way."

Moreover, the document is to be read as a whole. It is equally well settled that the deed has to be construed keeping in view the existing law.

It is now a well-settled principle of law that a document must be construed having regard to the terms and conditions as well as the nature thereof. [Union of India v. M/s. Millenium Mumbai Broadcast Pvt. Ltd. 2006 (5) SCALE 44]

MOU

We may proceed on the basis that the MOU answers the principles of family settlement having regard to the fact that the same was actuated by a desire to resolve the disputes and the courts would not easily disturb them as has been held in S. Shanmugam Pillai and Others v. K. Shanmugam Pillai and Others [(1973) 2 SCC 312], Kale and Others v. Deputy Director of Consolidation and Others [(1976) 3 SCC 119] and Hari Shankar Singhania & Ors. v. Gaur Hari Singhania & Ors. [JT 2006 (4) SC 251].

Although at one point of time the appellant-Company had taken a stand that it being not a party to the MOU, it is not bound by the terms thereof but the same would not mean that in an action for infringement of trade mark, when the MOU was put as a shield to its claim, it could not have taken recourse to proper interpretation thereof for the purpose of determination of the rights of the parties to use the trade mark in question. It is not a case where the courts refused to lean in favour of family arrangement or base its decision on technical or trivial ground. We have been taken through the MOU again and again. It fell for judicial interpretation. Interpretation processes were undertaken by the Courts below. The same would also be reviewed by us hereafter.

MOU \026 ANALYSIS OF

The appellant before us is a Company registered and incorporated under the Companies Act. Indisputably, the parties to the MOU being Arvinbhai, Hasmukhbhai and Pravinbhai were its Directors. They are all brothers. All the shares of the Company were held by them and their family members. The Company although is a juristic person was not made

a party thereto. The effect of the Company being not a party may have to be considered by the Trial Court in the suit; but, as the parties for the purpose of disposal of this appeal proceeded on the basis that the MOU was entered into by and between the parties thereto; an endeavour shall be made to construe the same as it stands. We would, however, like to observe that in the event any other attending circumstances are brought on record by way of adduction of oral evidences, if permissible in law, warranting a different interpretation of the said MOU, the learned Trial Judge would be at liberty to do so. We may furthermore place on record that we are construing the said MOU only for the purpose of disposal of an interlocutory matter which would not, thus, be binding on the courts below at the final hearing of the suit.

The broad propositions which are evident from a perusal of the said MOU appear to be as under:

Among all the three brothers, Arvindbhai who was the eldest among them is on one side and Hasmukhbhai and Pravinbhai are on the other. The division of the assets is broadly arrived at in that proportion. The Counsel appearing before us proceeded on the basis that MOU for all intent and purport was a family settlement. Disputes and differences having arisen between the parties, the said MOU was entered into with a view to resolve the same as regards the business and property held by them so as to enable them to be in peace, harmony and understanding in the family. The said settlement was arrived at through the mechanism of mediation of the well-wishers of the family. MOU was, thus, entered into for the purpose of distribution of the properties and business and the same was given effect to on and from 1.4.1998. It stipulates:

(i) Manufacturing and selling of masala (spices) and instant mix was being done by the Company.

(ii) The goods used to be manufactured in a factory situated in village Sola. Another factory was constructed on block No. 527, 542 and 528 at Changodar. The Joint family, viz., the Partnership (Ramdev Masala) had been selling goods in retail in the name of 'Ramdev Masala' to seven outlets named therein.

(iii) The export business in respect of goods, viz., pepper-spices, instant mix, groceries and other articles was being done in the name of Ramdev Exports.

The Trade Mark or trade name which was registered in the name of the company, viz., Ramdev and its logo of a saint astride on a horse with a standard went to the Company. The expression "Ramdev" is written in the Gujarati language just above the said logo and the word "masala" which is again in the Gujarati language appears just below the same.

Arvindbhai became the exclusive owner of the business Ramdev Exports (Partnership Firm) and Ramdev Masala (another Partnership Firm). MOU contained a clarification to the effect that the other two brothers, viz., Hasmukhbhai and Pravinbhai became the owners thereof and would carry on the management of the business of the Company. The two brothers, Hasmukhbhai and Pravinbhai were given the right to carry on export business under the brand name of 'Ramdev' but in a manner which would not cause any loss to Arvindbhai or vice-versa. Whereas the land situated at Sola went to Arvindbhai along with the building, the machineries belonging to the company remained with the Company. The new factory and machinery also went to the Company. A right of pre-emption in respect of the trade mark Ramdev was also created in terms whereof Hasmukhbhai and Pravinbhai was to offer sale of the said trade mark to Arvindbhai in the event they intend to do so. It was, thus, made clear that the manufacturing activities were to be restricted to the Company through Hasmukhbhai and Pravinbhai.

The two brothers, viz., Hasmukhbhai and Pravinbhai, also had the right to carry out export business under the brand name of Ramdev but in a manner which would not cause any loss to the eldest brother or vice-versa.

We have noticed hereinbefore that the partnership Ramdev Masala had an user agreement for seven years from 1.4.1991 which lapsed on 31.3.1998. MOU came into force with effect from 1.4.1998. By reason of the said MOU prima facie Arvindbhai had not been given any manufacturing right through the user agreement. The trade mark Ramdev, thus, belonged exclusively to the Company.

Although several trade marks were registered and belonged to the Company, we are primarily concerned with the trade mark bearing No. 447700 having the aforementioned description.

Both the learned Trial Judge as also the High Court proceeded on the basis that in terms of the said MOU, the Company acquired an exclusive right to use the same.

It is not in dispute that the respondents have been manufacturing spices under and name and style of 'Swad'. The said mark is a registered one.

The Courts below proceeded on the basis that the mark used by the respondents are deceptively similar to the trade mark registered in favour of the appellant. There is no dispute in regard to the said findings. We would hereinafter consider the effect thereof.

TRADE MARK-CONCEPT

The concept of trade mark dates back to ancient times. Even in the Harappan Civilization marks of trade with foreign countries such as Mesopotamia and Babylonia were found embossed on articles. The law of trade marks was formalised with the process of registration which gave exclusivity to a trader right to deal in goods using a symbol or mark of some sort to distinguish his goods from similar goods sold by other traders. Even today the grant of a trade mark is an indicator of exclusivity in trade under that mark and this right cannot be transferred. Only a limited right of user can be granted via licence.

In The Modern Law of Trade Marks by Christopher Morcom, Butterworths 1999, it is stated:

"\005The concept of distinguishing goods or services of the proprietor from those of others was to be found in the requirements for a mark to be registrable. Essentially, whatever the wording used, a trade mark or a service mark was an indication which enabled the goods or services from a particular source to be identified and thus distinguished from goods or services from other sources. In adopting a definition of 'trade mark' which simply describes the function in terms of capability of 'distinguishing the goods or services of one undertaking from those of other undertakings' the new law is really saying precisely the same thing."

In Gujarat Bottling Co. Ltd. and Others v. Coca Cola Co. and Others [(1995) 5 SCC 545], it was held that licensing of trade mark is governed by common law which is also statutorily permissible provided:

"\005 (i) the licensing does not result in causing confusion or deception among the public; (ii) it

does not destroy the distinctiveness of the trade mark, that is to say, the trade mark, before the public eye, continues to distinguish the goods connected with the proprietor of the mark from those connected with others; and (iii) a connection in the course of trade consistent with the definition of trade mark continues to exist between the goods and the proprietor of the mark\005"

Making use of another's trade mark is not only a violation of business ethics but has also been linked to dishonestly making use of the goodwill and reputation built up and associated with the mark.

In Laxmikant V. Patel v. Chetanbhai Shah and Another [(2002) 3 SCC 65], it was stated:

"10. A person may sell his goods or deliver his services such as in case of a profession under a trading name or style. With the lapse of time such business or services associated with a person acquire a reputation or goodwill which becomes a property which is protected by courts. A competitor initiating sale of goods or services in the same name or by imitating that name results in injury to the business of one who has the property in that name. The law does not permit any one to carry on his business in such a way as would persuade the customers or clients in believing that the goods or services belonging to someone else are his or are associated therewith. It does not matter whether the latter person does so fraudulently or otherwise. The reasons are two. Firstly, honesty and fair play are, and ought to be, the basic policies in the world of business. Secondly, when a person adopts or intends to adopt a name in connection with his business or services which already belongs to someone else it results in confusion and has propensity of diverting the customers and clients of someone else to himself and thereby resulting in injury."

PURPOSE OF TRADE MARK

A trade mark is the property of the manufacturer. The purpose of a trade mark is to establish a connection between the goods and the source thereof which would suggest the quality of goods. If the trade mark is registered, indisputably the user thereof by a person who is not otherwise authorised to do so would constitute infringement. Section 21 of the 1958 Act provides that where an application for registration is filed, the same can be opposed. Ordinarily under the law and, as noticed hereinbefore, there can only be one mark, one source or one proprietor. Ordinarily again right to user of a trade mark cannot have two origins. The first respondent herein is a rival trader of the appellant-Company. It did not in law have any right to use the said trade mark, save and except by reason of the terms contained in the MOU or continuous user. It is well-settled that when defences in regard to right of user are set up, the onus would be on the person who has taken the said plea. It is equally well-settled that a person cannot use a mark which would be deceptively similar to that of the registered trade mark. Registration of trade marks is envisaged to remove any confusion in the minds of the consumers. If, thus, goods are sold which are produced from two sources, the same may lead to confusion in the mind of the consumers. In a given situation, it may also amount to fraud on the public. A proprietor of a registered trade mark indisputably has a statutory right thereto. In the event of such use by any person other than the person in

whose name the trade mark is registered, he will have a statutory remedy in terms of Section 21 of the 1958 Act. Ordinarily, therefore, two people are not entitled to the same trade mark, unless there exists an express licence in that behalf.

DIFFERENT FUNCTIONS OF A TRADE MARK

We may now note a few precedents on the function of a trade mark.

In *Sumat Prasad Jain v. SheoJanam Prasad (Dead) and Others and State of Bihar* [(1973) 1 SCC 56], this Court held:

"\005Thus, the distinction between a trade mark and a property mark is that whereas the former denotes the manufacture or quality of the goods to which it is attached, the latter denotes the ownership in them. In other words, a trade mark concerns the goods themselves, while a property mark concerns the proprietor. A property mark attached to the movable property of a person remains even if part of such property goes out of his hands and ceases to be his."

In *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc.* [(1999) RPC 117], the European Court of Justice emphasised the test of likelihood of confusion in the following terms:

"40. That view is also confirmed by the judgment of the court in *SABEL*, in which it held that the "likelihood of confusion must\005be appreciated globally, taking into account all factors relevant to the circumstances of the case" (at paragraph 22). It is true that that statement was made in a different context: the court was there considering the question whether conceptual similarity of the marks alone could give rise to confusion within the meaning of Article 4(1)(b), in a situation in which the goods in question were clearly the same. However, the statement is one of general application."

In *Baker Hughes Limited v. Hiroo Khushalani* [1998 PTC (18) 580], the question as regards likelihood of confusion even by the enlightened public was noticed in the following words :

"Again in *Grotrian, Helfferich, Schulz, Th. Steinweg Nachf, a Corporation Vs. Steinway & Sons, a corporation*, 365 F.Supp. 707 (1973), striking a similar note the Court held as under:

"Plaintiff argues that purchaser will not be confused because of the degree of their sophistication and the price (*B & L Sales Associates Vs. H. Daroff & Sons, Inc.*, supra, 421 F.2d at 354). It is true that deliberate buyers of expensive pianos are not as vulnerable to confusion as to products as hasty buyers of inexpensive merchandise at a newsstand or drug store [*Callmann, Unfair Competition Trademarks and Monopolies*, (3d ed. 1971)]. The sophistication of buyers, however, does not always assure the absence of confusion

[Communications Satellite Corp. Vs. Comcet, Inc., 429 F.2d at 1252]. It is the subliminal confusion apparent in the record as to the relationship, past and present, between the corporate entities and the products that can transcend the competence of even the most sophisticated consumer. Misled into an initial interest, a potential Steinway buyer may satisfy himself that the less expensive Grotrian-Steinweg is at least as good, if not better, than a Steinway. Deception and confusion thus work to appropriate defendant's good will. This confusion, or mistaken beliefs as to the companies' interrelationships, can destroy the value of the trademark which is intended to point to only one company [American Drill Busing Co. v. Rockwell Mfg. Co., 342 F.2d 1922, 52 CCPA 1173 (1965)]. Thus, the mere fact that purchasers may be sophisticated or discriminating is not sufficient to preclude the likelihood of confusion. "Being skilled in their own art does not necessarily preclude their mistaking one trademark for another when the marks are as similar as those here in issue, and cover merchandise in the same general field" [Id].

Having regard to the above discussion prima facie I am of the opinion that the word Baker occurring in the corporate name of the second defendant suggests its connection or nexus with 'Baker', which depicts a wrong picture as from February, 1995 'Baker' has terminated its relation with the defendants. The continuance of the word Baker as part of the corporate name of the second defendant is likely to cause deception and confusion in the mind of the customers. There would be no justification for the second defendant to use the word Baker as part of its corporate name after the ties between the first plaintiff and the second defendant have ceased to exist."

The said decision has been noticed by this Court in Baker Hughes Ltd. and Another v. Hiroo Khushlani and Another [(2004) 12 SCC 628].

In Milmet Oftho Industries and Others v. Allergan Inc. [(2004) 12 SCC 624], in regard to medicinal products, this Court opined:

"\005Whilst considering the possibility of likelihood of deception or confusion, in present times and particularly in the field of medicine, the courts must also keep in mind the fact that nowadays the field of medicine is of an international character. The court has to keep in mind the possibility that with the passage of time, some conflict may occur between the use of the mark by the applicant in India and the user by the overseas company. The court must ensure that public interest is in no way imperilled\005"

We may in this connection notice a recent judgment of the European Court of Justice in Canon Kabushiki Kaisha (supra) wherein it was opined:

"28. That case concerned the interpretation of Article 4(1)(b) of the Directive in so far as it refers to "a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark". The court explained that it had been submitted that "the likelihood of association may arise in three sets of circumstances: (1) where the public confuses the sign and the mark in question (likelihood of direct confusion); (2) where the public makes a connection between the proprietors of the sign and those of the mark and confuses them (likelihood of indirect confusion or association); (3) where the public considers the sign to be similar to the mark and perception of the sign calls to mind the memory of the mark, although the two are not confused (likelihood of association in the strict sense). (Paragraph 16 of the judgment).

29. The court stated that it was therefore necessary to determine "whether Article 4(1)(b) can apply where there is no likelihood of direct or indirect confusion, but only a likelihood of association in the strict sense" (paragraph 17 of the judgment). It concluded: "The terms of the provision itself exclude its application where there is no likelihood of confusion on the part of the public". (paragraph 18 of the judgment). Thus, the court held that "the mere association which the public might make between two trade marks as a result of their analogous semantic content is not in itself a sufficient ground for concluding that there is a likelihood of confusion" within the meaning of Article 4(1)(b)."

TRADE MARK AND GOODWILL

Traditionally, a trade mark has always been considered a vital and inseparable part of the goodwill of the business. In fact, the sale of a trade mark without the sale of the goodwill to the same buyer is considered null and void. However, the trade mark can be assigned with or without the goodwill of business though subject to certain conditions. [See V.A. Mohta's Trade Marks, Passing Off and Franchising, pages 12, 313.]

ENTITLEMENT TO USE

The contention of the appellant before the Courts below was that its right to the said trade mark has been entrenched by the respondents on account of use of the same as part of the trade name in view of the fact that although it has started the business in the trade name 'Swad', the first respondent, on the label and the packing material of the said product, had printed the name of the manufacturer 'Ramdev Masala' in such a prominent manner that the same would create an impression in the mind of the ordinary unwary customer that the same is a product of the appellant Company. It also alleged that the respondents had adopted advertisements, marketed and displayed boards in such a manner so as to deliberately deceive the customer.

The concurrent finding of fact arrived at by both the courts was that the packing material and wrapper of both the parties was phonetically and visibly similar to the registered mark. The packing material and label used by the respondents were deceptively similar to that of the appellant and the same creates deception as well as confusion in the minds of customers who are literate, illiterate, male or female, who used to purchase in retail market from small shops as well as big departmental stores.

The learned Trial Court as also the High Court proceeded on the basis that the respondents are entitled to use the said trade mark by reason of the stipulations contained in the said MOU as a result whereof they became entitled to use the trade mark Ramdev for their retail business of spices in seven outlets, which used to be belonging to the company. The said outlets were meant to be used for retail sale of the products of the appellant alone.

The learned Trial Judge as also the High Court, however, failed to notice two significant and important provisions in the said MOU, viz., (i) the defendants could not carry on business in wholesale of the said products; (ii) it was meant to be sold directly to the consumers and on the productions "not for resale" was required to be printed on each packet. What, therefore, could be done by the respondents was to sell the products of the appellant through the said outlets. It was one of the primary business of the partnership firm which was given to the first respondent. Prima facie, therefore, the first respondent could sell only the product of the appellant. The respondents, however, were not restrained from manufacturing spices in their own factory. They were entitled to do so. They started the same under the brand name of 'Swad'. They could even use the same retail outlets for the purpose of promoting their own products but prima facie they could not use the mark registered in the name of the appellant Company. The registration number of trade mark is 447700. Once the appellant had acquired goodwill and reputation thereto, in the event of any infringement to the said right, the remedies provided for in the 1958 Act would be available to it. The terms of the MOU, in our opinion, are clear and unambiguous. It was required to be construed, even if it was obscure to some extent by making attempt to uphold the one which would be in consonance with law and not offend the same. Quality control by a registered trade holder vis-à-vis the one produced by an unregistered one is one of the factors which is required to be taken into consideration for the purpose of passing an order of injunction. It is one thing to say that the respondents were permitted to carry on trade but it would be another thing say that they would be entitled to manufacture and market its products under a name which would be deceptively similar to that of the registered trade mark of the appellant. So long the parties to an arrangement can continue to carry out their respective businesses without infringing the right of another, indisputably the terms thereof must be given effect to. But the matter would be entirely different when a party who has not been expressly authorised to manufacture the goods in which the Company had been carrying on business under the same name, the respondents under law could not have been permitted to carry on the manufacturing and marketing of their products under the same name. In a case of this nature, even a mandatory injunction can be granted. The respondents in the instant case have adopted a part of the appellant's registered trade mark as a part of its corporate name. They had merely been permitted to trade from seven outlets. In that view of the matter, they had a limited right under the MOU and by reason thereof they could not have been permitted to start manufacturing of spices under the name and style of 'Ramdev Masala'. Even under the common law, licence has to be interpreted to subsume the law and prevent the mischief which is deceptive having regard to the fact that trafficking in trade mark is not permitted.

It is true that the respondents have been permitted in terms of the MOU to continue their business in the name of the partnership firm and to use the label mark, logo, etc. but the said MOU must be construed in the light of the law operating in the field. For the said purpose, prima facie, the deeds of retirement are not required to be looked into. When a right to use a trade mark is given, such a right can be exercised only in the manner laid down therein. If in absence of any express licence or agreement to use its label the respondents use the self-same trade mark, the same would not only lead to confusion but may also cause deception. Even a common law licence, it is well-settled, cannot result in the dilution of the trade mark.

In that view of the matter, we are not in a position to subscribe to the views of the learned Trial Judge and the High Court that although the first respondent would be at liberty to carry on the business of manufacture of spices, it can use the mark 'Ramdev' only in seven outlets. It evidently in view of the legal position, could do so in respect of the products of the appellant alone, which would be evident from the fact that at the relevant point of time, the respondents were not carrying any such business. The direction of the learned Trial Judge that the respondents should be prevented from using the word "Ramdev Masala" and their label and packing, however, has been over-turned by the High Court on the premise that they are required to observe the statutory requirements under the Prevention of Food Adulteration Act, 1955 as also the Standards of Weights and Measures Act, 1976.

NON-OBSTANTE PROVISIONS

The non-obstante nature of a provision although may be of wide amplitude, the interpretative process thereof must be kept confined to the legislative policy. A non-obstante clause must be given effect to, to the extent the Parliament intended and not beyond the same. [See ICICI Bank Ltd. v. Sidco Leathers Ltd. & Ors., 2006 (5) SCALE 27]

The question which also escaped the attention of the High Court was that having regard to the non-obstante clause contained in the 1958 Act ordinarily for any purpose, the trade mark cannot be infringed. If an infringement of trade mark is established, the onus would be on the defendants to show that he is entitled thereto either by reason of acquiescence on the part of the owner of the registered trade mark or he himself has acquired a right thereto. The Provisions of the Standards of Weights and Measures Act or the Prevention of Food Adulteration Act do not confer such right. Yet again, significantly, a pre-emptive right had been conferred in favour of the first respondent which is itself suggestive of the fact that the first respondent admitted and acknowledged the right of the appellant to the said trade mark.

In the MOU, furthermore it was categorically stated that the use of the trade mark was only to the extent of retail sale as on the packages, the words "not for resale" were to be printed. If the parties intended to allow the first respondent herein to manufacture his own products and to market the same by using the name of Ramdev Masala, the question of grant of a right to sell only in retail and that also printing the words 'not for resale' would not have arisen. A manufacturer is not only entitled to sell his own products in retail but also in wholesale. It can use any outlet for the said purpose whether belonging to it or any other. It would lead to an anomaly if it be held that the first respondent would be permitted not only to sell the products of the appellant but also its own products under the same trade name albeit only from the seven outlets.

By reason of the said MOU, the respondents are not bound to buy any product from the appellant but there is an obligation on the part of the appellant to supply the same as otherwise it would lead to closure of business of Arvindbhai which would have been the intention of the parties. When the parties had settled their disputes, it was expected that the outlets would be utilised for the purposes for which they were meant to be utilised. What were the mutual obligations of the parties is a matter which can be considered only at the trial or in any other appropriate proceeding, but prima facie it goes without saying that the first respondent, in any event, was entitled to sell also his own products from the said outlets. The parties for the said purpose thought of remaining mutually dependent as it was stipulated that while also competing with each other they would see to it that by action of one, the other is not harmed at least while exporting the materials. It is, thus, not a case where the appellant having taken advantage of the terms of the MOU had resiled therefrom and in that view of the matter the principle of estoppel cannot be said to have any application in the instant case.

We are also not in a position to accept the submission of Mr. Nariman that the MOU must be read with the deed of partnership or the deeds of retirement whereby and whereunder the firm 'Ramdev Masala' and 'Ramdev Exports' were permitted to use the word 'Ramdev'.

What is registered is a logo wherein the words 'Ramdev' and 'Masala' are prominent. A person may be held to be permitted to carry on business in spices as contradistinguished from the permission to carry on manufacturing goods which are similar to that of the appellant, but in terms of the statutory provisions, the respondents were not legally permitted to sell its products in packages or labels which would be deceptively similar to that of the registered owner of a trade mark. The right to manufacture masala and to sell the same with the registered logo, it will bear repetition to state, was assigned as far back in 1991. If the contention of the Senior Counsel is accepted, the said purpose would be lost. In a case of this nature, therefore, ordinarily an injunction would issue.

By reason of interpretation of MOU, trade mark cannot be infringed and further when the right of user has been relinquished, the same could not have been claimed by the respondents.

WAIVER

The matter may be considered from another angle. If the first respondent has expressly waived his right on the trade mark registered in the name of the appellant-Company, could he claim the said right indirectly? The answer to the said question must be rendered in the negative. It is well-settled that what cannot be done directly cannot be done indirectly.

The term 'Waiver' has been described in the following words:

"Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct\005A person who is entitled to rely on a stipulation, existing for his benefit alone, in a contract or of a statutory provision may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted upon it is sufficient consideration\005 It seems that, in general, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, so as to alter his position, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he has himself so introduced, even though it is not supported in point of law by any consideration.

[See 16 Halsbury's Laws (4th edn) para 1471]

Waiver may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel. [See 45 Halsbury's Laws (4th edn.) para 1269]

In *Indu Shekhar Singh & Ors. v. State of U.P. & Ors.* [2006 (5) SCALE 107], this Court held:

"They, therefore, exercised their right of option. Once they obtained entry on the basis of election,

they cannot be allowed to turn round and contend that the conditions are illegal\005"

SECTIONS 15 AND 17 ISSUE

Section 15 of the 1958 Act postulates registration of the whole and a part thereof as separate trade marks. The nature of the trade mark of the appellant has been noticed hereinbefore.

There are three elements in the said trade mark, viz., 'Ramdev', 'Masala' and the 'horse'. The deception could be as regard the prominent features of the said trade mark.

Section 15 of the 1958 Act, in our considered opinion, is not attracted in the instant case. By reason of the said provision, registration of trade mark in regard to the exclusive use is permissible both in respect of the whole trade mark as also the part thereof separately. Where such separate trade mark in regard to a part of it is applied for, the applicant must satisfy the conditions applying to and have all the incidents of an independent trade mark. Sub-section (3) of Section 15 of the 1958 Act provides for a case where the proprietor of several trade marks claimed registration in respect of the same goods or description of the goods which while resembling each other in the material particulars thereof yet differ in respect of the matters provided for therein. We are not, in this case, concerned with such a legal question.

In Ashok Chandra Rakshit Ltd. (supra), whereupon reliance has been placed by Mr. Nariman, this Court was concerned with a proprietary mark of 'Shree'. It was claimed that the mark 'Shree' was a trade mark apart from the device as a whole and it was an important feature of its device. The respondents were carrying on business in the name and style of Shree Durga Charan Rakshit. It was in the peculiar factual background obtaining therein, this Court, referred to the decision of Lord Esher in *Pinto v. Badman* [8 RPC 181] to say that where a distinctive label is registered as a whole such registration cannot possibly give any exclusive statutory right to the proprietor of the trade mark to the use of any particular word or name contained therein apart from the mark as a whole. This Court in the aforementioned factual backdrop opined:

"\005This, as we have already stated, is not quite correct, for apart from the practice the Registrar did advert to the other important consideration, namely, that on the evidence before him and the statement of counsel it was quite clear that the reason for resisting the disclaimer in this particular case was that the Company thought, erroneously no doubt but quite seriously, that the registration of the trade mark as a whole would, in the circumstances of this case, give it a right to the exclusive use of the word "Shree" as if separately and by itself it was also its registered trade mark and that it would be easier for it to be successful in an infringement action than in a passing off action. It was precisely the possibility of such an extravagant and untenable claim that called for a disclaimer for the purpose of defining the rights of the respondent company under the registration\005"

(Emphasis supplied)

The said decision has no application to the fact of this case.

Mr. Nariman is also not correct in contending that only a label has been registered and not the name 'Ramdev'. Definition of 'mark' as contained in Section 2(j) of the 1958 Act also includes name, signature, etc.

SECTION 29 ISSUE

Section 28 of the 1958 Act confers the right of registration whereas Section 29 thereof provides for the remedies for infringement of trade mark. What is needed by way of cause of action for filing a suit of infringement of trade mark is use of a deceptively similar mark which may not be identical. What would be deceptively similar, as defined in Section 2(d) of the 1958 Act, would be a mark if it nearly resembles that other mark as to be likely to deceive or cause confusion. It is, therefore, not a case where the respondents could raise valid defence in terms of Section 29 of the 1958 Act.

The right conferred in terms of Section 28 of the 1958 Act although is required to be read with Sections 15 and 17 thereof but it is difficult to accept that each part of the logo was required to be separately registered. Section 28 of the 1958 Act confers an exclusive right of using trade mark to a person who has got the trade mark registered in his name. Such right is, thus, absolute. Sub-section (3) of Section 28 raises a legal fiction for the purposes specified therein but we are not concerned therewith in the instant case. Sub-section (2) of Section 29 inter alia provides for the defences.

We may not in this case go into the question as to whether it was essential having regard to the provisions contained in the MOU that the user agreement should have been registered in terms of Section 49 of the 1958 Act as was opined by the High Court. But, we have no doubt in our mind that the user agreement having come to an end on 31st March, 1998, i.e., on the expiry of seven years from the date of execution, the respondents could no more claim any right thereunder. The user agreement was valid from 01.04.1991 to 31.03.1998. The MOU came into force from 1.4.1998. The right to user has not been conveyed by reason of the said MOU. The cut off date for determining the respective rights of the parties would, thus, be 1.4.1998. Submission of the learned counsel that the MOU for the purpose of Section 28 of the 1958 Act should be read with the partnership deed is not acceptable to us. In fact, the respondents have consciously relinquished their right, if any.

It is not a case where Sections 48 and 49 of the 1958 Act would be applicable so as to enable the respondents to raise a defence in terms of Section 30(1)(b) thereof.

It is also not a case where non-registration of MOU as was the case in *Amteshwar Anand v. Virender Mohan Singh and Others* [(2006) 1 SCC 148] was taken as a shield to defeat the purpose of the agreements entered into by and between the parties. In that case, however, what was contended was that the agreement required registration in terms of Section 17(1) of the Registration Act whereas the High Court had found that the user agreement was not registered in terms of Section 49 of the Act holding:

"\005The Composition Deed in this case was a transaction between the members of the same family for the mutual benefit of such members. It is not the appellants' case that the agreements required registration under any other Act. Apart from this, there is the principle that Courts lean in favour of upholding a family arrangement instead of disturbing the same on technical or trivial grounds particularly when the parties' have mutually received benefits under the arrangement. Both the courts below had concurrently found that the parties had enjoyed material benefits under the agreements. We have ourselves also re-scrutinized the evidence on record on this aspect and have found nothing to persuade us to take a contrary view. Furthermore, in this case the agreements had

merged in the decree of the Court which is also excepted under Sub-section 2(vi) of Section 17 of the Registration Act, 1908"

In re Cadbury Brothers' Application (supra), it is stated:

"It seems to me manifest that the registration of this trade mark cannot give rise to any rights except a right to the mark as a whole. It cannot give any statutory rights at all in respect of the word "Tudor"; and, that being so, it is inexpedient to place on the register an unnecessary disclaimer, because the effect of so doing is to unsettle the law and give rise to doubts in other cases, where such disclaimers are not inserted\005"

For the self-same reason, this decision is also not applicable.

ESSENCE OF PASSING OFF ACTION

In a case of this nature, the test for determination of the dispute would be the same where a cause of action for passing off arises. The deceptively similar test, thus, would be applicable herein.

The doctrine of passing off is a common law remedy whereby a person is prevented from trying to wrongfully utilise the reputation and goodwill of another by trying to deceive the public through 'passing off' his goods.

In Kerly's Law of Trade Marks and Trade Names' Supplement pages 42 and 43, paragraph 16-02, the concept of passing off is stated as under:

"The law of passing-off can be summarised in one short general proposition no man may pass off his goods as those of another. More specifically, it may be expressed in terms of the elements which the plaintiff in such an action has to prove in order to succeed. These are three in number. Firstly, he must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying 'get-up' (whether it consists simply of a brand name or a trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive specifically of the plaintiff's goods or services. Secondly, he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to belief that the goods or services offered by him are the goods or services of the plaintiff. Thirdly, he must demonstrate that he suffers or, in a quick time action, that he is likely to suffer damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or service is the same as the source of those offered by the plaintiff..."

PASSING OFF - INFRINGEMENT

Although, the defendant may not be using the actual trade mark of

the plaintiff, the get up of the defendant's goods may be so much like the plaintiff's that a clear case of passing off could be proved. It is also possible that the defendant may be using the plaintiff's mark, the get up of the defendant's goods may be so different from the get up of the plaintiff's goods and the prices also may be so different that there would be no probability of deception of the public. However, in an infringement action, an injunction would be issued if it is proved that the defendant is improperly using the plaintiff's mark. In an action for infringement where the defendant's trade mark is identical with the plaintiff's mark, the Court will not enquire whether the infringement is such as is likely to deceive or cause confusion. The test, therefore, is as to likelihood of confusion or deception arising from similarity of marks is the same both in infringement and passing off actions. [See Ruston & Hornsby Ltd. v. The Zamindara Engineering Co., (1969) 2 SCC 727]

In Parle Products (P) Ltd. v. J.P. and Co., Mysore [(1972) 1 SCC 618], emphasis was laid on the broad and essential features of the impugned mark holding:

"\005It would be enough if the impugned mark bears such an overall similarity to the registered mark as would be likely to mislead a person usually dealing with one to accept the other if offered to him\005"

Noticing the similarity of the mark in question with that of the impugned mark, it was opined that "if one was not careful enough to note the peculiar features of the wrapper on the plaintiffs' goods, he might easily mistake the defendants' wrapper for the plaintiffs' if shown to him some time after he had seen the plaintiffs'".

It was further stated:

"\005After all, an ordinary purchaser is not gifted with the powers of observation of a Sherlock Homes. We have therefore no doubt that the defendants' wrapper is deceptively similar to the plaintiffs' which was registered. We do not think it necessary to refer to the decisions referred to at the bar as in our view each case will have to be judged on its own features and it would be of no use to note on how many points there was similarity and in how many others there was absence of it."

In Kaviraj Pandit Durga Dutt Sharma v. Navaratna Pharmaceutical Laboratories [AIR 1965 SC 980], this Court held:

"\005These matters which are of the essence of the cause of action for relief on the ground of passing off play but a limited role in an action for infringement of a registered trade mark by the registered proprietor who has a statutory right to that mark and who has a statutory remedy for the event of the use by another of that mark or a colourable imitation thereof. While an action for passing off is a Common Law remedy being in substance an action for deceit, that is, a passing off by a person of his own goods as those of another, that is not the gist of an action for infringement. The action for infringement is a statutory remedy conferred on the registered proprietor of a registered trade mark for the vindication of the exclusive right to the use of the trade mark in relation to those goods" (Vide Section 21 of the Act). The use by the defendant of the trade mark of the plaintiff is not essential in an action for passing off, but is the sine qua non in the case of an action

for infringement. No doubt, where the evidence in respect of passing off consists merely of the colourable use of a registered trade mark, the essential features of both the actions might coincide in the sense that what would be a colourable imitation of a trade mark in a passing off action would also be such in an action for infringement of the same trade mark\005

In Poddar Tyres Ltd. v. Bedrock Sales Corporation Ltd. and another [AIR 1993 Bombay 237], Srikrishna, J., as His Lordship then was, repelled the contention that any trader who exclusively sells the goods bearing a registered trade mark, has a right to adopt a trade name which could include the said trade mark and that such adoption would not amount to infringement or passing off stating:

"\005Mr. Rahimtoola was not able to cite any authority for the proposition propounded, which I find somewhat startling. The consequences of accepting this proposition would mean that the registered proprietor would be at the mercy of anyone who sells the goods bearing his trade mark. In a situation like the present, where the businesses are overlapping, the trade channels are almost identical and the family background is conspicuous, I am of the view that there would be an inherent likelihood of confusion in the minds of the public that not only that the goods, which emanate from the first defendants, are "Bedrock" goods, but also further that the first defendants' business is somehow intimately connected with the plaintiffs', either as a branch, agency or otherwise. There is also the danger, as rightly emphasized by the plaintiffs, that any act or omission of the first defendants would have deleterious repercussion on the credit, reputation and goodwill of the plaintiffs themselves. For example, if the first defendants were to commit an act of insolvency or do any act which tarnishes their reputation in the market, there is imminent likelihood of people jumping into the confused conclusion that the plaintiffs had committed an act of insolvency or that they had done something objectionable. I am, therefore, unable to accept the contention of the first defendant that, by their purportedly selling exclusively "Bedrock" goods, they are entitled to adopt the word "Bedrock" as a part of their company name or trading style. That they have done so is not really disputed. In my view, therefore, there is both infringement and passing off action, prima facie."

De Cordova and Others v. Vick Chemical Co. [1951 (68) RPC 103] is nearer the issue involved herein as in that case the registered trade mark consisting of the word 'Vaporub' and another registered trade mark consisting of a design of which the words 'Vicks Vaporub Salve' formed a part. The defendants in the suit advertised their ointment as 'Karsote Vapour Rub'. It was held that the defendants had infringed the registered trade mark.

The said decision was quoted with approval by this Court in K.R. Chinna Krishna Chettiar v. Shri Ambal and Co., Madras and Another [1969 (2) SCC 131] wherein the question was whether the word 'Ambal'

resembles the sound of the word 'Andal'. It was held to be so upon rejecting an argument advanced on behalf of the defendant that the same had distinct meanings stating:

"\005The Hindus in the south of India may be well aware that the words Ambal and Andal represent the names of two distinct Goddesses. But the respondent's customers are not confined to Hindus alone. Many of their customers are Christians, Parsees, Muslims and persons of other religious denominations. Moreover, their business is not confined to south of India. The customers who are not Hindus or who do not belong to the south of India may not know the difference between the words Andal and Ambal. The words have no direct reference to the character and quality of snuff. The customers who use the respondent's goods will have a recollection that they are known by the word Ambal. They may also have a vague recollection of the portrait of a benign goddess used in connection with the mark. They are not likely to remember the fine distinctions between a Vaishnavite goddess and a Shivaite deity\005"

We may not lose sight of the fact that the mark was assigned in favour of the Company as far back in the year 1992. The mark did not come to the company through MOU or otherwise.

LACHES AND ACQUIESCENCE

The plea of acquiescence on the part of the appellant herein has been raised on two counts:

(i) The plaintiffs- appellant permitted the respondents to carry on business in the trade name of 'Ramdev Masala'.

(ii) It is, thus, also not entitled to an order of injunction.

The appellant by a registered notice dated 12/15-12-1998 asked the defendant Nos. 1 and 7 that the firm 'Ramdev Masala' had been unauthorisedly using the appellant-company registered trade mark in respect of its product sold and manufactured by them and on the packing materials, labels, boxes, poly pouches. They were called upon to restrain from doing so with immediate effect and destroy the necessary label/packets of packing materials failing which it was threatened that a legal action would be taken.

For determining the said issues, we may notice the following facts.

A civil suit was filed by the first respondent in the Ahmedabad City Civil Court wherein a prayer was made that the deed of assignment be declared null and void and the appellant herein be permanently restrained from using the same as also for a declaration that they are the owners of the said trade mark/trade name. However, an interim order as prayed for therein was not granted. A First Information Report was also lodged against the respondents by the appellant-Company before the Madhupura Police Station for commission of an alleged offence under Section 63 of the Copyright Act and Sections 78 and 79 of the 1958 Act as well as Sections 417, 420, 419 and 486 of the Indian Penal Code. An application for quashing the said complaint was filed before the Gujarat High Court on 4.8.1999. It was dismissed by an order dated 26.10.1999. A Special Leave Petition preferred thereagainst being SLP (CrI.) No. 3900 of 1999 was also dismissed by this Court by an order dated 14.12.1999. In the meanwhile, a

rectification application was filed by the respondents before the Registrar of Trade Mark, Mumbai allegedly stating that the registered trade mark bearing No. 447700 was not being used by the plaintiff, it was not entitled to continue to claim title thereover or use the same. Various applications were moreover filed by the respondents herein for rectification of the entry in the register in respect of various label marks of the appellant. The appellant thereafter issued a public notice on 17.12.1999 calling upon the respondents to restrain themselves from infringing upon the trade mark of the appellant, in respect whereof a public notice was also issued by the respondents herein on 21.12.1999. The suit thereafter was filed on 10.2.2000. Contention of the respondents in this behalf was that not only in terms of the MOU the appellant had been allowed to carry on business under the name and style of 'Ramdev Masala', no immediate step having been taken after issuance of the public notice dated 15.12.1998 for long time, they were not entitled to obtain an order of injunction. Delay in some cases may defeat equity but the chronology of events noticed hereinbefore do not suggest that the appellant's consciously allowed the respondents to use the trade mark.

Acquiescence is a facet of delay. The principle of acquiescence would apply where: (i) sitting by or allow another to invade the rights and spending money on it; (ii) it is a course of conduct inconsistent with the claim for exclusive rights for trade mark, trade name, etc.

In M/s. Power Control Appliances and Others v. Sumeet Machines Pvt. Ltd. [(1994) 2 SCC 448], this Court stated:

"Acquiescence is sitting by, when another is invading the rights and spending money on it. It is a course of conduct inconsistent with the claim for exclusive rights in a trade mark, trade name etc. It implies positive acts; not merely silence or inaction such as is involved in laches\005"

In an infringement of trade mark, delay by itself may not be a ground for refusing to issue injunction as has been observed by Lahoti, J. (as His Lordship then was) in Midas Hygiene Industries (P) Ltd. v. Sudhir Bhatia and Others [(2004) 3 SCC 90] in the following terms:

"The law on the subject is well settled. In cases of infringement either of trade mark or of copyright, normally an injunction must follow. Mere delay in bringing action is not sufficient to defeat grant of injunction in such cases. The grant of injunction also becomes necessary if it prima facie appears that the adoption of the mark was itself dishonest."

(Emphasis supplied)

The defence of acquiescence, thus, would be satisfied when the plaintiff assents to or lay by in relation to the acts of another person and in view of that assent or laying by and consequent acts it would be unjust in all the circumstances to grant the specific relief.

Kerr in his "Treatise on the Law and Practice of Injunction", Sixth Edition at pages 360-361 states as under:

"Mere delay after knowledge of the infringement to take proceedings, not sufficient to call the Statute of Limitations into operation, or where the infringement continues, is not, it seems, a bar to the right of an injunction at the trial. Lapse of time unaccompanied by anything else is, it seems, no more a bar to a suit for an injunction in aid of the legal right than it is to an action deceit.

But delay may cause the Court to refuse an interlocutory injunction, especially if the defendant has built up a trade in which he has notoriously used the mark\005"

Specific knowledge on the part of the plaintiff and prejudice suffered by the defendant is also a relevant factor. [See Spry on Equitable Remedies, Fourth Edition, page 433]

Applying the aforementioned principles in the instant case, it is evident that the time gap between the issuance of the notice and filing of an application for grant of injunction was not a voluntary act on the part of the appellant herein. It had to wait for the outcome of various proceedings pending before different courts. The respondents having themselves taking recourse to judicial proceedings, as noticed hereinbefore, cannot now be permitted to set up the defence of acquiescence on the part of the appellant. Indisputably, in a case of infringement of trade mark, injunction would ordinarily follow where it is established that the defendant had infringed the trade mark and had not been able to discharge its burden as regard the defence taken by it.

In Pioneer Electronic Corporation and Another v. Registrar of Trade Marks [(1978) RPC 716], an Australian Court referring to a large number of decisions observed:

"These cases demonstrate that the essential requirement for the maintenance of the validity of a trade mark is that it must indicate a connection in the course of trade with the registered proprietor, even though the connection may be slight, such as selection or quality control or control of the user in the sense in which a parent company controls a subsidiary. Use by either the registered proprietor or a licensee (whether registered or otherwise) will protect the mark from attack on the ground of non-user, but it is essential both that the user maintains the connection of the registered proprietor with the goods and that the use of the mark does not become otherwise deceptive. Conversely, registration of a registered user will not save the mark if there ceases to be the relevant connection in the course of trade with the proprietor or the mark otherwise becomes deceptive."

[See also Holly Hobbie Trade Mark, (1984) RPC 329.]

INJUNCTION ISSUE

It is although beyond any doubt or dispute that the defendant had been manufacturing and selling its products; what is sought to be enjoined is using a label which is deceptively similar to that of the plaintiff.

Our attention has been drawn to the right of the parties of the second and third part of the MOU to carry out export business in the brand name of 'Ramdev' which, in our opinion, does not advance their case as by reason thereof, the appellant-Company had been also conferred right to carry on the export business in the name of 'Ramdev'.

It is also not correct that having regard to the fact that the property situated at Sola having been given in favour of the respondents, they have

acquired a vested right in the trade mark as has been urged before us or otherwise. Respondents did not have any right over the trade mark. They in fact, it will bear repetition to state, assigned the same in favour of the appellant-Company. They have assigned the said trade mark and having relinquished their right, Respondents, thus, now cannot fall back on Section 33 of the 1958 Act. It may be true that there exists a distinction between a suit in a trade mark action against the whole world and a suit for implementation of division of assets amongst the members of the family. But, after the MOU was entered into the parties having separated ceased to be members of a joint family. What was, thus, essential for determining the right of the parties would be the terms of the MOU.

Registration of a trade mark and user thereof per se may lead to the conclusion that the plaintiff has a prima facie case, however, existence thereof would also depend upon the determination of the defences raised on behalf of the respondents. The appellant has raised a triable issue. The same by itself although may not be sufficient to establish a prima facie case but in view of our findings aforementioned, we are satisfied that the appellant has been able to establish existence of a legal right in itself and violation of the registered trade mark on the part of the respondents. We have also considered the comparable strength of the cases of the parties and are of the opinion that the case of the plaintiff-appellant stands on a better footing than the defendants-respondents.

A question as regards the matter relating to grant of injunction has been dealt in *S.M. Dyechem Ltd. v. Cadbury (India) Ltd.* [(2000) 5 SCC 573] wherein upon noticing a large number of decisions including *Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd.* [(1999) 7 SCC 1] as also the subsequent distinction made in respect of the decision of the House of Lords in *American Cyanamid v. Ethicon Ltd.* [(1975) 1 All ER 853], it was stated :

"\005Therefore, in trademark matters, it is now necessary to go into the question of "comparable strength" of the cases of either party, apart from balance of convenience.

In *M/s. Transmission Corporation of A.P., Ltd. v. M/s. Lanco Kondapalli Power Pvt. Ltd.* [JT 2005 (10) SC 542], it was held :

"The interim direction ordinarily would precede finding of a prima facie case. When existence of a prima facie case is established, the court shall consider the other relevant factors, namely, balance of convenience and irreparable injuries. The High Court in its impugned judgment although not directly but indirectly has considered this aspect of the matter when on merit it noticed that the Appellant has raised a dispute as regard payment of an excess amount of Rs.35 crores although according to the Respondent a sum of Rs.132 crores is due to it from the Appellant and the Appellant had been paying the amount for the last two years as per the contract.

Conduct of the parties is also a relevant factor. If the parties had been acting in a particular manner for a long time upon interpreting the terms and conditions of the contract, if pending determination of the lis, an order is passed that the parties would continue to do so, the same would not render the decision as an arbitrary one, as was contended by Mr. Rao. Even the Appellant had prayed for adjudication at the hands of the Commission in the same manner. Thus, it itself

thought that the final relief would be granted only by the Arbitrator."

We also do not appreciate the conduct of the respondents. They were aware of the rights under the MOU. They had all along been enforcing the same. Legal defence were available to them under the 1958 Act. Evidently, they filed a suit to scuttle the intended action on the part of the respondents pursuant to the public notice dated 15.12.1998.

In P.M. Diesels Ltd. v. Patel Field Marshal Agencies & Others [2001 PTC 20 (Del)], the High Court noticed the distinction between logo, trade mark and trade name and was of the view that the defendants cannot be permitted to use the trade name so as to defeat the other portion of the order of injunction already passed against him. An injunction can also be granted against the respondents to use the corporate name.

Relief by way of interlocutory injunction would be material in a suit for infringement of trade mark. Balance of convenience, however, would have a vital role to play.

We are not oblivious of the fact that respondents have been manufacturing and carrying on business in the sale of spices under the name 'Ramdev Masala' even during pendency of the suit. The learned Trial Judge had made an attempt to strike the balance. The High Court, however, had overturned a part of it having regard to the statutory interdict contained in the Rules made under the Prevention of Food Adulteration Act and Standards of Weights and Measures Act.

Kerly's Law of Trade Marks and Trade Names, Thirteenth Edition states as under about the general test for grant of an interim injunction:

"In trade-mark infringement cases irreparable damage, in this sense, is relatively easily shown, since infringement may easily destroy the value of a mark or at least nullify expensive advertising in a way that is hard to quantify for the purposes of an inquiry into damages. This has more recently come to be referred to, in cases where the defendant's conduct is not directly damaging but merely reduces the distinctive character of the claimant's mark, as "dilution"\005.

\005In particular, although it is usually neither necessary nor appropriate to assess the degree of probability of success which the claimant's action has (provided that it is arguable, and subject to the principle of American Cyanamid that the merits may be resorted to as a 'tie-breaker' if the balance of convenience is very even,) in trade mark and passing off cases, it is very hard to avoid doing so, since the better the claimant's case on the likelihood of deception (frequently the major issue) the greater the harm which he is likely to suffer. Accordingly, in appropriate cases, where the state of the evidence permits it, the court may seek to weigh up the merits in deciding whether to grant interim relief."

Thus, when a prima facie case is made out and balance of convenience is in favour of the appellant, it may not be necessary to show more than loss of goodwill and reputation to fulfil the condition of irreparable injury. In fact, if the first two pre-requisites are fulfilled, in trade mark actions irreparable loss can be presumed to have taken place.

The expression "irreparable injury" in that sense would have established injury which the plaintiff is likely to suffer.

In Mahendra & Mahendra Paper Mills Ltd. v. Mahindra & Mahindra Ltd. [(2002) 2 SCC 147], this Court observed:

"23. The Bombay High Court in the case of Kirloskar Diesel Recon (P) Ltd. v. Kirloskar Proprietary Ltd. considered the scope of granting injunction in a suit for infringement of a trade mark under Section 106 of the Act by the use of the mark "Kirloskar", held:

"The principle of balance of convenience applies when the scales are evenly balanced. The existence of the 1st appellant in each appeal is very recent whereas the existence of the respondents belonging to 'Kirloskar Group of Companies' has been for over a period of 50 years. On their own showing, the appellants are not using the word 'Kirloskar' as trade mark but as part of trading style whereas the respondents have not only acquired distinctiveness and goodwill in the word 'Kirloskar' but it is even the registered trade mark of the 1st respondent. There is sufficient evidence on record to show that the huge business is carried by 'Kirloskar Group of Companies'.

There is nothing on record to show the extent of the business of the appellants. The 2nd appellant has throughout been aware about the business reputation of the respondents and efforts of the respondents in protecting their rights in the trade marks as also of preventing others to use the word 'Kirloskar' as a part of the trading name or trading style. By grant of the interim injunction in favour of the respondents, the appellants are not prevented from carrying on business without the word 'Kirloskar' forming part of the corporate name of the 1st appellant in each appeal. In the facts of the case, the respondents' reputation is likely to be adversely affected if the appellants are not prevented from using name of the 1st appellant in each appeal. In the facts of the case, the balance of convenience is not in favour of the appellants.

* * *

The real question in each case is whether there is as a result of misrepresentation a real likelihood of confusion or deception of the public and consequent damage to the plaintiff. The focus is shifted from the external objective test of making comparison of activities of parties to the state of mind of public in deciding whether it will be confused. With the passage of time and reputation acquired, the trade mark 'Kirloskar' has acquired the secondary meaning and has become almost a household word. The judgments relied upon by Mr Kane pertain to the cases of one type of business and not where variety of businesses have been carried by the plaintiff and the defendant as in the instant case. The business activities of the respondents vary from pin to piano as borne out from the object clauses of the memorandums of association of the respondents. The appellants have still to commence their business activities but as

mentioned in the memorandums of association of the 1st appellant in each appeal, some of the object clauses therein overlap with the activities of respondents and more particularly of Respondents 6 and 7."

APPELLATE COURT'S JURISDICTION TO INTERFERE WITH ORDERS OF THE TRIAL JUDGE

We are not oblivious that normally the appellate court would be slow to interfere with the discretionary jurisdiction of the trial court.

The grant of an interlocutory injunction is in exercise of discretionary power and hence, the appellate courts will usually not interfere with it. However, appellate courts will substitute their discretion if they find that discretion has been exercised arbitrarily, capriciously, perversely, or where the court has ignored settled principles of law regulating the grant or refusal of interlocutory injunctions. This principle has been stated by this court time and time again. [See for example *Wander Ltd. v. Antox India P. Ltd* (1990) Supp SCC 727, *Lakshmikant V. Patel v. ChetanBhai Shah* (2002) 3 SCC 65 and *Seema Arshad Zaheer v. MC of Greater Mumbai* (2006) 5 SCALE 263]

The appellate court may not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that 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.

However, in this case the courts below proceeded on a prima facie misconstruction of documents. They adopted and applied wrong standards. We, therefore, are of the opinion that a case for interference has been made out.

CONCLUSION

Our findings aforementioned, it goes without saying, are prima facie in nature. We place on record that Mr. Nariman contended that there is evidence to show the contrary intention of the parties in respect whereof a large number of documents are available. Evidently respondents may prove. No such document is, however, before us. If the respondents, at the trial, could bring the same on record, evidently the court would be entitled to draw its own inference.

We have differed with the findings of the courts below primarily on the interpretation of the MOU. In that view of the matter, we are of the opinion that in this case this Court would be justified to interfere with the said findings. We are, however, not oblivious of the damages which may have to be suffered by respondents herein in the event the suit of the appellant is to be ultimately dismissed. We intend to protect the same also.

For the said purpose, we would take into consideration the terms of the injunction granted by the Trial Judge that the respondents were entitled to sell their products in the name of M/s. Ram Dev Masala only from the seven outlets. The modification made by the High Court has already been noticed by us.

We, in view of our findings aforementioned, direct:

(i) The respondents be restrained from using the trade mark including the trade name 'Ramdev Masala' in any of their products.

(ii) They may, however, carry on their business in any other name insofar as manufacturing of spices is concerned.

(iii) The appellant shall, as and when demands are made, supply spices produced by it for retail sale thereof to seven outlets belonging to respondents on usual terms, and in respect of such articles on the labels/pouches, on the reverse thereof, the following shall be mentioned in the minimum permissible size in terms of the provisions of Weights and Measures Act and Prevention of Food Adulteration Act:

"This product is manufactured and marketed by M/s. Ramdev Masala (Arvindhbai Group) (Or M/s. Ramdev Exports Arvindhbai Group) having no relationship whatsoever with Ramdev Food Products Pvt. Ltd."

(iv) The appellant shall deposit a sum of Rs. 50 lakhs before the Trial Court or furnish a bank guarantee for the said sum by way of security.

(v) Despite pending applications for rectification before the Registrar of Trade Marks, the final hearing of Civil Suit No. 828 of 2000 shall be expedited and the learned Trial Judge is hereby directed to complete the hearing as expeditiously as possible preferably within a period of six months from the date of communication of this order.

For the reasons aforementioned, these appeals are allowed. The respondents shall pay and bear the costs of the appellant of these appeals. Counsel's fee assessed at Rs. 25,000/-.