
(2011) 05 MAD CK 0012
In the Madras High Court
Case No : O.S.A. Nos.7 and 8 of 2011

Blue Hill Logistics Private Ltd.

APPELLANT

Vs

Ashok Leyland Ltd. and Dilip Chhabria Design Private Ltd.

RESPONDENT

Date of Decision : 05-05-2011

Acts Referred:

Trade and Merchandise Marks Act, 1958 — Section 11(2), 16, 2(1), 2(3), 28(1)

Citation : (2011) 4 CTC 417

Hon'ble Judges : V. Periya Karupiah, J;R. Banumathi, J

Bench : Division Bench

Advocate : P.S. Raman for P.V.S. Giridhar and Sai, Associates, for the Appellant;
Arvind Dattar for A.A. Mohan, for the Respondent

Final Decision : Dismissed

Judgement

R. Banumathi, J.—Challenge in these Appeals is the correctness of the order of learned single Judge in O.A. Nos. 1240 & 1241 of 2010 in C.S. No. 979 of 2010 whereby the learned single Judge granted temporary injunction restraining the Appellant-1st Defendant from in any manner infringing the 1st Respondent-Plaintiff's registered trade mark "LUXURA" by use of similar mark "LUXURIA". 1st Defendant is the Appellant and Plaintiff is the 1st Respondent herein.

2. Plaintiff is engaged in the business of manufacture and sale of commercial vehicles for the past six decades offering range of buses, trucks, engines, defence and special application vehicles. Plaintiff has seven manufacturing plants and sophisticated modern state of the art research and development facilities. Plaintiff launched several established brands such as "LYNX, CHEETAH, VIKING, CRUISER, PANTHER" etc. In the course of its business, Plaintiff coined and adopted a trade mark "LUXURA" in the year 2006 in relation to the commercial vehicles/comfort buses equipped with distinctive features catering the needs to the traveling passengers to have comforts and luxurious travel. Plaintiff obtained registration of the said mark "LUXURA" under trade mark No. 1552326 dated 20.04.2007 in Class 12 relating to Motor Vehicle Chassis, Motors for land

Vehicles, Apparatus for Locomotion by land including Commercial Vehicles, Couplings, Motor parts and fittings. Plaintiff launched its "LUXURA" bus during the Auto Expo held in January, 2006 at New Delhi. Plaintiff sold "LUXURA" bus to many customers all over India including the Transport Corporations. Plaintiff had spent a considerable expenditure towards sales and promotion of "LUXURA" branded buses through print and electronic media. In August 2010, Plaintiff came to know that the 2nd Defendant-Dilip Chhabria Design Private Limited had designed and engineered a business class bus under the mark "LUXURIA". Plaintiff issued a legal notice dated 13.08.2010 to the 2nd Defendant calling upon them to "cease and desist" using the infringing mark "LUXURIA". 2nd Defendant issued a reply dated 21.08.2010 stating that they do not own the vehicle mentioned in the magazine "Premium Practicality" and that they build bodies for the vehicles of their clients. 2nd Defendant refused to disclose the details of the owner for whom the vehicle was designed. There was exchange of second notice between the Plaintiff and the 2nd Defendant. Through enquiries, Plaintiff came to know that Blue Hill Foods and Retail Private Limited, Bangalore was proposing to operate bus services under the trade mark "LUXURIA" and therefore, Plaintiff issued "cease and desist" notice dated 20.09.2010 to the said company. Blue Hill Foods and Retail Private Limited, Bangalore issued notice dated 29.09.2010 stating that they are not concerned with the manufacturing of vehicles, but engaged in the business of running supermarkets. In the mean time, 1st Defendant company Blue Hill Logistics Private Limited served a caveat upon the Plaintiff which made it clear that Blue Hill Logistics Private Limited of Blue Hill Group was proposing to market the buses under the trade mark "LUXURIA" and therefore, Plaintiff issued a "cease and desist" notice dated 03.11.2010 to 1st Defendant-Blue Hill Logistics Private Limited. In spite of receiving the notice, 1st Defendant-Blue Hill Logistics Private Limited proceeded with the launch of bus services on 12.11.2010 under the trade name "LUXURIA" and thereafter issued reply dated 15.11.2010 refusing to comply with the demand made by the Plaintiff. Thereafter, Plaintiff filed the suit C.S. No. 979 of 2010 for infringement and passing off and for various consequential relief's such as rendition of accounts, surrender and destruction of all offending materials and for compensatory and punitive damages to the tune of Rs. 1 crore.

3. 1st Defendant resisted the suit/applications for temporary injunction contending that they are part of the family of Blue Hill Investment Private Limited and that their company has introduced a high quality and luxurious intercity travel services; super luxury intercity bus services have been launched with 12 VOLVO buses and necessary infrastructure, the services have been launched under the name and style of "LUXURIA". 1st Defendant had filed an application for registration of the trade mark "LUXURIA" under Class 39 relating to transport, packing and storage of goods, travel arrangements etc. Since Plaintiff has registered its trade mark under Class 12 and Plaintiff is not operating any travel services for the public, there is no likelihood of confusion in the minds of the consumers. Even assuming that there was some similarity in the goods/

services rendered, there is no similarity between the trade marks. The mark adopted by the 1st Defendant "LUXURIA" is preceded by an image of a luxurious reclining seat. Case of 1st Defendant is that both the words "LUXURA" and "LUXURIA" are derived from the generic word "LUXURY" and Plaintiff cannot claim monopoly either over the word "LUXURY" or over the variants of that word. According to 1st Defendant the registered trade mark of the Plaintiff pertains to goods, while the trade mark adopted by the 1st Defendant pertains to services and that there is neither prima facie case nor balance of convenience infavour of the Plaintiff to grant injunction.

4. Upon consideration of documents filed by the Plaintiff and 1st Defendant and the rival contentions, learned single Judge held that Plaintiff having obtained registration of the trade mark "LUXURA" in respect of the goods falling under Class 12 by virtue of Section 28(1) of Trade Marks Act, Plaintiff has exclusive right to use the trade mark in relation to those goods. Pointing out the dubious conduct of Blue Hill Logistics Private Limited and finding that Plaintiff has established prima facie case and that the balance of convenience is infavour of the Plaintiff, the learned single Judge granted temporary injunction infavour of Plaintiff on the following findings:

Words "LUXURA" and "LUXURIA" are only variants of the descriptive term "LUXURY" and as a consequence, the protection available to such marks are not very strong. But the 1st Defendant cannot take advantage of the same for the reason that 1st Defendant themselves have applied for registration of the trade mark "LUXURIA" under Classes 35 and 39, despite the fact that there is a prohibition u/s 9(1)(b) of the Act.

Plaintiff's registered trade mark is "LUXURA" and the mark adopted by the 1st Defendant is the word "LUXURIA" along with the device of a reclining chair and therefore, the mark adopted by the 1st Defendant is similar to the registered trade mark of the Plaintiff. Hence, Clause (a) of Sub-section (4) of Section 29 of Trade Marks Act stands satisfied.

By the use of similar mark viz., "LUXURIA", 1st Defendant would certainly tend to take undue advantage and the same is also detrimental to the reputation of the registered trade mark of the Plaintiff and therefore, Section 29(4)(c) of the Trade Marks Act would also stand satisfied.

Once dilution is permitted by allowing the 1st Defendant to use deceptively similar mark on the very same goods purchased by them from the competitors of the Plaintiff, the competitors of the Plaintiff themselves would acquire a right to infringe the rights of the Plaintiff.

5. Upon consideration of materials, order of learned single Judge and the rival contentions of 1st Defendant and Plaintiff, the following points arise for consideration along with the other incidental and related issues:

(1) By virtue of registration of the mark "LUXURA" in Class-12, whether Plaintiff

has got exclusive right to use the trade mark "LUXURA" and consequently, whether an action for infringement is maintainable?

(2) Whether 1st Defendant's user of the mark "LUXURIA" is in respect of Classes 39 and 35 used in relation to the services which are similar and whether such user is infringement u/s 29(1) of Trade Marks Act?

(3) Whether the user of trade mark "LUXURIA" in respect of services under Classes 39 and 35 are not similar to Plaintiff's goods and whether the alleged user is infringement u/s 29(4) of Trade Marks Act?

(4) Whether the learned single Judge was right in saying that Plaintiff has established the ingredients of Section 29(4) of Trade Marks Act?

6. Point No. 1: In January 2006, news appeared in "The Hindu" announcing Plaintiff's launch of the bus Intercity "LUXURA". During the preview, it was reported that "LUXURA" would be competitively priced and would compete with the buses in that segment from VOLVO. Ashok Leyland Employees Journal "Ashley News/February 2006 contains details about the launch of the vehicle "LUXURA" in the Auto Expo 2006 in New Delhi. After initial launching of the vehicle in the Auto Expo 2006, Plaintiff registered its trade mark. Plaintiff registered the trade mark "LUXURA" in Class 12 relating to "Motor Vehicle Chassis, Motors for land Vehicles, Apparatus for Locomotion by land including commercial Vehicles, Couplings, Motor parts and fittings".

7. On 20.04.2007, after the registration of trade mark if valid, Section 28 shall give to the registered proprietor of a 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 the relief in respect of infringement of the trade mark in the manner provided by the Act. The exclusive right shall be subject to the conditions and limitations to which the registration is subject to. If there is any invasion of this right by any other person using his trade mark which is the same or deceptively similar to his trade mark, he can protect his trade mark by an action for infringement in which he can obtain injunction, damages or account of profits made by the other person. However this right of the owner of the registered trade mark is subject to the other provisions contained in the Act. The exclusive right to the use of a trade mark is limited to the goods or services in respect of which the trade mark is registered falling in one or more of the Classes in the Fourth Schedule.

8. No doubt when a person gets his trade mark registered, he acquires valuable right by reason of such registration and registration of his trade mark gives him exclusive right to the use of the trade mark in connection with the goods in respect of which it is registered. If there is any invasion of this right by any other person using his trade mark which is the same or deceptively similar to his trade mark he can protect his trade mark by an action for infringement in which he can obtain injunction, damages or account of profits made by the other person. However this right of the owner of the registered trade mark is subject to other

provisions contained in the Act.

9. Point No. 2: Section 29 of Trade Marks Act deals with infringement of trade marks and states as to the various acts which constitute infringement. Section 29 reads as follows:

S.29. Infringement of registered trade marks. - (1) A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which is identical with, or deceptively similar to, the trade mark in relation to goods or services in respect of which the trade mark is registered and in such manner as to render the use of the mark likely to be taken as being used as a trade mark.

(2) A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which because of

(a) its identity with the registered trade mark and the similarity of the goods or services covered by such registered trade mark; or

(b) its similarity to the registered trade mark and identity or similarity of the goods or services covered by such registered trade mark; or

(c) its identity with the registered trade mark and the identity of the goods or services covered by such registered trade mark,

is likely to cause confusion on the part of the public, or which is likely to have an association with the registered trade mark.

(3) In any case falling under Clause (c) of Sub-section (2), the court shall presume that it is likely to cause confusion on the part of the public.

(4) A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which

(a) is identical with or similar to the registered trade mark; and

(b) is used in relation to goods or services which are not similar to those for which the trade mark is registered; and

(c) the registered trade mark has a reputation in India and the use of the mark without due cause takes unfair advantage of or is detrimental to, the distinctive character or repute of the registered trade mark.

(5) A registered trade mark is infringed by a person if he uses such registered trade mark, as his trade name or part of his trade name, or name of his business concern or part of the name, of his business concern dealing in goods or services in respect of which the trade mark is registered. ...

Section 29(1) of Trade Marks Act is a general proposition of law. The various

circumstances in which the trade mark is infringed are enumerated in Sub-sections (2) to (9) of Section 29 of the Act.

10. On a careful reading of Section 29 of the Act, it is seen that Sub-section (2) of Section 29 entitles an action being filed for infringement of a registered trade mark against an identical, nearly identical or deceptively similar trade mark used in relation to the same goods in respect of which the trade mark is registered or to similar goods. In case, the trade mark is not identical and the goods are also not the same for which the trade mark is registered, an infringement action will lie u/s 29(4) only if the conditions of Sub-section (4) of Section 29 are satisfied.

11. Mr. P.S. Raman, learned Senior Counsel for Appellant-1st Defendant contended that Plaintiff obtained registration of their trade mark "LUXURA" in Class 12 for manufacture of buses whereas the 1st Defendant is running intercity transport services and their application for registration of trade mark is in respect of Class 39 [Transport and Travel Services] and Class 35 [Advertising, Business Management and Office Functions] and since both are operating in different field, 1st Defendant's services are not similar to Plaintiff's goods. Learned Senior Counsel further contended that when the goods and services are different, only Section 29(4) is attracted and the learned single Judge ought to have appreciated that the ingredients necessary for protection u/s 29(4) were neither pleaded nor established. In support of his contention, learned Senior Counsel has placed reliance upon 2007 Vol.109 (2) Bom. LR 0911 (Balkrishna Hatcheries v. Nandos International Ltd. and Anr.); Marico Limited Vs. Agro Tech Foods Limited, ; Nestle India Limited Vs. Mood Hospitality Private Limited, ; ITC Limited Vs. Philip Morris Products SA and Others, ; Consim Info Pvt. Ltd. Vs. Google India Pvt. Ltd. and Others, and Raymond Limited Vs. Raymond Pharmaceuticals Pvt. Ltd., .

12. Per contra, Mr. Arvind Dattar, learned Senior Counsel for Plaintiff has submitted that since Plaintiff has obtained registration of the trade mark "LUXURA" in respect of the goods falling under Class 12 relating to Motor Vehicle Chassis, Motors for land Vehicles, Apparatus for Locomotion by land including commercial Vehicles, Couplings, Motor parts and fittings. Case of Plaintiff is that Section 29 entitles an action for infringement of a registered trademark against an identical or nearly identical or deceptively similar trade mark used in relation to the same goods in respect of which Plaintiff has registered the trade mark "LUXURA". Learned Senior Counsel for Plaintiff has further contended that the transport services operated by the 1st Defendant is similar and the transport services is having similarity of the Plaintiff's goods and therefore, it is a clear case of infringement u/s 29(2) of the Trade Marks Act. It was submitted that having regard to the similarity of the goods or services and that the mark adopted by the 1st Defendant "LUXURIA" is deceptively similar/identical, the learned single Judge rightly held that such use is likely to cause confusion on the mind of the public and rightly granted injunction. It was further submitted that where there is an infringement in respect of Plaintiff's goods by similar service,

u/s 29(1) and (2) of Trade Marks Act, injunction has to follow. It was further argued when the learned single Judge has correctly exercised the discretion in granting temporary injunction, Appellate Court may not lightly interfere with the same. In support of his contention, learned Senior Counsel placed reliance upon AIR 1992 Mad 253 [G.T.C. Industries Ltd., Bombay v. I.T.C. Limited, Madras]; M/s. Gujarat Bottling Co. Ltd. and others Vs. Coca Cola Company and others, ; Cadila Health Care Ltd. Vs. Cadila Pharmaceuticals Ltd., ; Ramdev Food Products Pvt. Ltd. Vs. Arvindbhai Rambhai Patel and Others, .

13. The scope of infringement u/s 29(2) of Trade Marks Act is wide and consists of three parts. A registered trade mark is infringed if the alleged use of the mark is likely to cause confusion on the part of the public, or is likely to have an association with the registered trade mark, because of

(a) its identity with the registered trade mark and similarity of the goods or services covered by such trade mark; or

(b) its similarity to the registered trade mark and the identity or similarity of the goods or services covered by such trade mark; or

(c) its identity with the registered trade mark and the identity of the goods or services covered by such trade mark.

Sub-section (3) expressly enacts that in any case falling under Clause (c) of Sub-section (2), the court shall presume that it is likely to cause confusion on the mind of the public. In other words, where the rival trade marks are identical and the competing goods or services are also identical, there is a statutory presumption that such use is likely to cause confusion in the mind of the public. The Plaintiff has merely to prove that the Defendant has been using an identical mark, in relation to identical goods/services, as a mark in relation to such goods/services, not being those of the Plaintiff, and no further.

14. Plaintiff registered its trademark "LUXURA" under Class-12 relating to MOTOR VEHICLES, CHASSIS, MOTORS FOR LAND VEHICLES, APPARATUS FOR LOCOMOTION BY LAND INCLUDING COMMERCIAL VEHICLES, COUPLINGS, MOTOR PARTS AND FITTINGS. Whereas, 1st Defendant filed application for registration of a trade mark "LUXURIA" under Class 39 relating to "TRANSPORT AND TRAVEL SERVICES" and Class 35 relating to "ADVERTISING, BUSINESS MANAGEMENT AND OFFICE FUNCTIONS".

15. Contention of Plaintiff is that u/s 29(2), user of trade mark is infringed by a person using the similar trademark in relation to similar goods or services so as to cause confusion on the mind of the public or which is likely to have an association with the trade mark. Learned Senior Counsel for Plaintiff contended that use of almost identical trademark "LUXURIA" on buses in respect of bus service by the Defendants is bound to make the trade and public associate the Defendants' services with the Plaintiff who is a well known manufacturer of the vehicles and using the mark "LUXURA" since from the year 2007. Learned Senior

Counsel further contended that use of identical trademark "LUXURIA" for bus services by the 1st Defendant is likely to cause confusion and therefore, Defendants committed infringement within the meaning of Section 29(2) of the Act.

16. Per contra, learned Senior Counsel for 1st Defendant Mr. P.S. Raman contended that 1st Defendant is only running intercity transport services and that their goods/services are not similar/identical with the goods of the Plaintiff and therefore, the case would not fall u/s 29(2) of the Act. It was further contended that the scheme and provisions of Trade Marks Act clearly disclose distinction between "goods" on the one hand and "services" on the other and therefore, the trade mark registered for goods would confer right upon the proprietor, only in respect of that Class and the statutory protection cannot be extended to a different Class of goods or to services. In support of his contention, learned Senior Counsel heavily placed reliance upon 2007 Vol.109 (2) Bom.L.R.0911 (Balkrishna Hatcheries v. Nandos International Limited and Anr.).

17. In the said case, Plaintiff's registered trade mark "NANDU" was in respect of processed and frozen meat products. Defendants were using the trade mark "NANDOS" in relation to eatable goods or restaurant or hoteling services. In the said case, Defendants started the business in restaurant or hoteling services from 1987 and had established Anglo Portuguese Cuisine restaurant in more than 40 countries, had registered the mark "NANDOS" in more than 100 countries and had established restaurant in Mumbai in the year 2005. The Defendant serves Afro Portuguese Cuisine (Vegetarian and Non-vegetarian) and the Defendants claimed that it is a major international chain running fast food outlets and the restaurant business. Plaintiff dealing in processed or frozen chicken had not even started the business and had only an intention to start the business in India. In the said case after elaborately considering the scheme and the provisions of the Act, single Judge held that "use of the trade mark in relation to the goods is distinct from the use of the trade mark in relation to the services" and that there is a fine distinction between "goods" and "services".

18. In NANDOS case, the single Judge of Bombay High Court held that "scheme and provisions of the Act clearly disclose the dichotomy between goods on the one hand and services on the other". After referring to various English and American Case Laws, the single Judge of Bombay High Court held as under:

12. (iii) ... Section 28(1) confer upon the registered proprietor a statutory monopoly to use the trade mark in relation to the goods or services in respect of which the trade mark is registered. This would mean that a trade mark registered for goods or for any particular goods will confer upon the proprietor a monopoly only in respect of that class or if the registration is narrow only in respect of the goods for which the registration is given within a particular class. Similarly, the monopoly over the mark qua services would be restricted to only those services mentioned in the registration certificate. In the present case, as the Plaintiffs registration certificate discloses that the first trade mark is only in

respect of "processed and frozen meat products" falling in Class 29 of Schedule IV to the 2002 Rules. The mark confers upon the Plaintiff the exclusive right to use the trade mark in respect of processed or frozen meat product and qua no other goods.

(vi) Section 29(2) must necessarily be interpreted with this in mind otherwise by the method of action for infringement u/s 29(2), the proprietor would be able to expand its statutory monopoly to a different class of goods or even to services.

After applying various tests and factors, it was further held as follows:

17. ... the goods of the Plaintiff (processed or frozen meat products) and the first Defendant's services/goods (restaurants/food outlets and sale of sauces) cannot be said to be similar or associated.

19. We fully concur with the findings of the single Judge of Bombay High Court that use of the trade mark in relation to goods is distinct from the use of the trade mark in relation to services. It is to be noted that Fourth Schedule contains number of Classes. Classes 1 to 34 refer to "Goods" and "Services" are included in Classes 35 to 42. As pointed out earlier, Plaintiff has obtained the registration of the trade mark "LUXURA" under Clause 12 # "Goods". Whereas 1st Defendant has applied for registration of trade mark in respect of Classes 39 and 35 # "Services", Plaintiff has to show that 1st Defendant's "Services" are similar to "Goods" by the Plaintiff.

20. The scheme and provisions of the Act clearly disclose the dichotomy between "Goods" on the one hand and "Services" on the other. Section 2(i)(j) defines "Goods" in an identical terms to the 1958 Act i.e. as meaning anything which is the subject of trade or manufacture. However, Section 2(1)(z) added a definition of the term "Services" as follows: "Section 2(1)(z) - "services" means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising."

21. The distinction between "Goods" and "Services" is made clear by the provisions of the 2002 Rules. Under Rule 22(1) of the 2002 Rules, "Goods" and "Services" are to be classified in the manner specified in the Fourth Schedule. The Fourth Schedule contains various classes of "GOODS" # Classes 1 to 34. Thereafter, under a separate heading "SERVICES" follow Classes 35 to 42. Classes 35 to 42 are exclusively services making it clear that Classes 1 to 34 are exclusively goods. Class 42 includes "Providing of food and drink" which would mean food items listed in Class 29 to 34 do not include any services in respect of food items and drinks. Class 42 also contains a residuary class i.e. "services that cannot be classified in other classes". This residuary class applies only to services and does not extend to goods. This also shows that "Goods" and "Services" are

treated separately.

22. The significant guide is found in Section 2(3) of the Act which reads as follows:

Section 2(3) # For the purposes of this Act, goods and services are associated with each other if it is likely that those goods might be sold or otherwise traded in and those services might be provided by the same business and so with descriptions of goods and descriptions of services." Association of Trade Marks are defined u/s 2(1)(c): 2(1)(c) "Associated trade marks" means trade marks deemed to be or required to be registered as associated trade marks under this Act.

23. u/s 16 of the Act, a trade mark can be registered or is deemed to be registered as an associated trade mark if it satisfies the conditions set out therein which include the requirements that both the marks must be in the name of the same proprietor and in respect of goods and services which are associated with those goods. u/s 44 of the said Act, the associated trade marks are assignable and transmissible only as a whole and not separately. From the aforesaid provisions, it is clear that for goods and services to be associated with each other and to be registered or to be deemed to be registered the following requirements are essential:

- (a) The goods which must be sold or traded in and the services to be provided must be by the same business;
- (b) That the trade mark in respect of the associated goods and services must be registered in the name of the same proprietor;
- (c) The use of the trade mark in respect of the same goods or description of goods or the same services or description of services is identical to that which is registered in the name of the same proprietor; and
- (d) The marks are either identical or there is such a close resemblance as is likely to deceive or cause confusion if used by a person other than the proprietor.

As pointed out by the learned Judge of Bombay High Court, Sub-section (3) of Section 2 represents the only point of convergence between goods and services in the said Act. It represents the legislative intent that goods and services can be said to be associated only if the aforesaid provisions are satisfied.

24. The onus is on the registered proprietor who is invoking the provisions of Section 29 of the Act to establish that the Plaintiff's mark is infringed under Sub-section (2)(a) or Sub-section (2)(b) of Section 29 of Trade Marks Act. Where the rival marks are identical and the goods or services are also identical, there is a statutory presumption of confusion and accordingly a prima facie case of infringement would exist. The onus then shifts to the Defendant.

25. If the objective tests are applied, we find that there is no similarity or association between Plaintiff's goods i.e. buses with the mark "LUXURA" and 1st

Defendant's intercity transport services i.e. "LUXURIA" for the following reasons:

(i) Respective users of goods/services: Plaintiff's goods/buses are bought by bus operators, State Transport Corporation. Whereas, 1st Defendant operates transport services.

(ii) Respective users of goods/buses: Plaintiff's goods/buses are bought by bus operators, State Transport Corporation who in turn use the buses for luxurious travel of the passengers. Buyers of buses are totally different from passengers who buy bus tickets. 1st Defendant's services are enjoyed by passengers for a comfortable/luxurious intercity travel.

(iii) Trade channels through which goods/services reach the market: Bus operators, Transport Corporation purchase buses after review of performance of the buses. Whereas the passengers who buy bus ticket for luxurious travel are mass of people who purchase bus tickets for intercity travel.

In our considered view, there is no similarity in between the Plaintiff's goods # "LUXURA" buses and 1st Defendant's transport services with the mark "LUXURIA" so as to attract infringement under Sub-section (2) of Section 29 of the Act.

26. 1st Defendant's sister concern Blue Hill Foods and Retail Private Limited had given an application for registration of trade mark "LUXURIA" under Class 12 relating to VEHICLES, APPARATUS FOR LOCOMOTION BY LAND, AIR OR WATER also. Of course, arguments were advanced as to whether Blue Hill Logistics Private Limited or Blue Hill Foods and Retail Private Limited had given the said application for registration of trade mark "LUXURIA" for Class 12. Be that as it may, during the course of arguments, 1st Defendant had filed an affidavit stating that they are undertaking to withdraw the application filed under Class 12. In the affidavit, 1st Defendant has further stated that they do not wish to compete with the Plaintiff in the business of manufacturing and marketing Motor Vehicles and they are only interested in providing travel services to common public. Had the 1st Defendant persisted in their application for registration of trade mark "LUXURIA" in Class 12, the position would have been different attracting infringement u/s 29(2) of the Act. Therefore, at this stage, there is no necessity for us to find out infringement of trade mark "LUXURA" interse with the goods or services of Plaintiff and the 1st Defendant. In our considered view, as of now, Plaintiff cannot complain any infringement under Sub-section (2) of Section 29 of the Trade Marks Act.

27 Points No. 3 and 4: Section 29(4) enacts that the registered trade mark is infringed by a person if he uses the mark which is identical or similar to the trade mark but on goods or services which are not similar subject to the satisfaction of the conditions. Section 29(4) postulates that

(a) infringing mark is identical or similar to the registered mark; and

(b) such mark is used in relation to goods or services which are not similar to

those for which the trade mark is registered; and

(c) the registered trade mark has a reputation in India and the use of the infringing mark is without due cause and takes unfair advantage of or is detrimental to the distinctive character or repute of the registered trade mark.

28. Learned Senior Counsel for 1st Defendant Mr. P.S. Raman contended that the learned single Judge erred in not keeping in view the onus lies upon the Plaintiff to plead and prove the conditions necessary to seek protection u/s 29(4) and that the ingredients necessary for protection u/s 29(4) of Trade Marks Act were neither pleaded nor established by the Plaintiff. Learned Senior Counsel further contended that the learned single Judge ought to have tested whether the ingredients u/s 29(4) of Trade Marks Act are satisfied or not.

29. Learned Senior Counsel for Appellant contended that the mark used by the 1st Defendant "LUXURIA" is in respect of "transport services" registered under Classes 39 and 35 whereas the trade mark of the Plaintiff "LUXURA" is registered under Class 12. It was further argued that the mark "LUXURIA" phonetically different from "LUXURA" and "LUXURIA" cannot be said to be identical or similar with the registered trade mark. Learned Senior Counsel further contended that 1st Defendant's mark "LUXURIA" is used with reclining chair indicating luxurious travel offered by the 1st Defendant making the journey comfortable and therefore, 1st Defendant's mark cannot be said to be identical/similar with "LUXURA".

30. Learned Senior Counsel for Appellant has also contended that the word "LUXURIA" is phonetically dissimilar from the mark "LUXURA" and the word "LUXURIA" is not going to create any confusion. It was further submitted that the overall similarity of the two names had to be considered and the users of Plaintiff's goods and Defendant's services being well informed, there is no likelihood of any confusion being caused. Reliance was placed upon *Indo-Pharma Pharmaceutical Works Ltd. Vs. Citadel Fine Pharmaceuticals Ltd.*, ; 2000 3 L.W 165 (Kalai Malar Publications Pvt. Ltd. Rep. By its directors And Ors. v. Dinamalar, A Partnership Concern Having Office At No. 161, Anna Salai, Chennai-2, rep. by its Partners) and 2007 Vol.109(2) Bom.L.R.0911 (*Balkrishna Hatcheries v. Nandos international Ltd. And another*).

31. Countering the arguments, Mr. Arvind Dattar, learned Senior Counsel for Plaintiff contended that the infringing mark "LUXURIA" is identical and deceptively similar to the registered trade mark "LUXURA". It was further contended that when two words are phonetically similar the additional device/reclining chair will not make any difference.

32. Clause (a) of Section 29(4) of Trade Marks Act requires that the mark in question be identical or similar to the registered trade mark. Now it has become necessary to find out whether the marks are similar or identical. Let us consider whether the infringing mark "LUXURIA" is identical or similar to the registered trade mark "LUXURA". Whether the two marks are identical or similar is a

question of fact to be decided based on the same tests that are applied to comparison of marks. In the absence of any definition of the words "similar to", for the purpose of examination u/s 11(2), the Registrar takes the expression to be equivalent to "deceptively similar" which has been defined as a "mark likely to deceive or cause confusion". In relation to goods or services, the expression "similar" is construed as equivalent to the phrase used in the 1958 Act, "goods of the same description".

33. Whether two marks are identical or similar is a question of fact to be decided based on the tests that are applied to comparison of the marks. It is important to consider the mode in which the marks are used. In the Plaintiff's buses the word "LUXURA" is displayed in front and in big fonts on the left side of the bus. In the bus service operated by the 1st Defendant, there is a clear display of the impugned mark "L U X U R I A" with reclining chair on the left side of the bus. Excepting for the reclining chair and slight variation in the font, there is no difference between the user of the infringing mark "LUXURIA". 1st Defendant is using almost identical trade mark "LUXURIA" prominently displayed on the buses in the same position as that of the Plaintiff.

34. In any trade mark infringement action, the question of similarity of rival marks to be addressed first. Placing reliance upon AIR 1992 Bombay 35 Astra-IDL Ltd. v.T.T.K. Pharma Ltd., it was contended that question of likelihood of confusion has to be decided by comparison of marks as a whole and the totality of the mark is required to be considered. Reliance was also placed upon MIPR 2010 (3) 0273 (Del) Stockely Van Camp. Inc. and Anr. v. Heinz India Private Ltd. and MIPR 2010 (1) 0217 ACME Pharmaceuticals v. Torrent Pharmaceuticals. Learned Senior Counsel has also placed reliance upon Amritdhara Pharmacy Vs. Satyadeo Gupta, , where the Supreme Court was considering the phonetic similarity of two names "Amritdhara" and "Lakshamandhara". The Hon"ble Supreme Court held that "... question had to be approached from the point of view of a man of average intelligence and imperfect recollection".

35. Learned Senior Counsel for 1st Defendant has contended that the words "LUXURA" and "LUXURIA" are only derivatives of the generic word "LUXURY" and that no one can claim any exclusive right to the use of the same. It was further contended that 1st Defendant is the provider of transport service to the public and had providing luxury travel and adoption of the word "LUXURIA" are only derivative of common English word "LUXURY" to indicate the high-end services offered by the 1st Defendant. In Paragraphs 20 to 27 of the impugned order, the learned single Judge elaborately considered this point and arguments advanced as to the words "LUXURA" and "LUXURIA" are derivative of the generic word "LUXURY". In Paragraph 26, the learned single Judge pointed out that:

26. words that are self laudatory of the goods or services, such as BEST, SUPERIOR, HIGH etc. are placed in the descriptive category and therefore, the word "LUXURY" would also fall only under such a category, since it happens to be self laudatory of the quality of the goods manufactured by the Plaintiff or the

quality of the services rendered by the 1st Defendant.

36. Learned Senior Counsel for 1st Defendant has contended that there is no distinctiveness about the word "LUXURA" adopted by the Plaintiff and the word "LUXURA" being derivative of the word "LUXURY", Plaintiff cannot seek to appropriate the word "LUXURA" to themselves. It was further submitted that others are also using the mark "LUXURA" in bath tubs and other products. It was further submitted that "LUXURA" - "LUXURIA" itself are derivative words from "LUXURY" which indicates quality of goods/services and Plaintiff cannot seek to appropriate to themselves as if they invented the word "LUXURA".

37. The words "LUXURA" and "LUXURIA" are only variants of the descriptive term "LUXURY" and as a consequence, the protection available is not so strong. But the 1st Defendant cannot take advantage of the same. As pointed out by the learned single Judge, 1st Defendant himself had applied for registration of trade mark "LUXURIA" under Classes 39 and 35 despite the fact that there is a prohibition u/s 9(1)(b) of the Act. The person claiming exclusive right over the expression cannot challenge the same expression as generic.

38. The same points were raised in 2007 (35) PTC 474 (Mad.) (Health & Glow Retailing Pvt. Ltd. v. Dhiren Krishna Paul, Trading As Health And Glow Clinic and Anr.). Rejecting the said contention, in the said decision, Justice V. Ramasubramaniam, J held as under:

48. The objection that the trade mark of the Plaintiff was not an invented word and hence not entitled to protection, could have been raised only at a pre-registration stage. But after registration, a person is entitled to raise such an objection only by taking recourse to the remedies available under the Act (such as rectification of the Register) and not by committing an infringement. Otherwise, the Proprietor of a registered mark would have no more protection than the Proprietor of an unregistered mark. ...

39. In a catena of decisions, the Supreme Court applied the test of phonetical similarity in judging the competing marks. Learned Counsel for Plaintiff relied upon the decision in Cadila Health Care Ltd. Vs. Cadila Pharmaceuticals Ltd., . In the said case, the Appellant was selling its drug "Falsigo" and the Respondent thereon sold its drug under the trade mark of "Falcitab". Observing that phonetical similarity is one of the essential feature to consider the similarity or dissimilarity, the Supreme Court held as follows:

19. we are unable to agree that the principle of phonetic similarity has to be jettisoned when the manner in which the competing words are written is different and the conclusion so arrived at is clearly contrary to the binding precedent of this Court in Amritdhara Pharmacy Vs. Satyadeo Gupta, where the phonetic similarity was applied by judging the two competing marks. Similarly, in Kaviraj Pandit Durga Dutt Sharma Vs. Navaratna Pharmaceutical Laboratories, , it was observed that "in an action for infringement, the Plaintiff must, no doubt, make out that the use of the Defendant's mark is likely to deceive, but where the

similarity between the Plaintiff's and the Defendant's mark is so close either visually, phonetically or otherwise and the Court reaches the conclusion that there is a limitation, no further evidence is required to establish that the Plaintiffs rights are violated.

The Supreme Court differed from the views earlier taken in *S.M. Dychem Limited v. Cadbury (India) Ltd.* (AIR 2000 SC 2114).

40. The decisions *Cadila Health Care*, *Astra-Idl Ltd.* and *Amritdhara Pharmacy* deal with passing off/infringement with medicinal products. In a catena of decisions, the Supreme Court held that when the Court is concerned with medicinal product, the Court has to be more cautious for the reason that an average person with average intelligence and imperfect recollection should not be misguided and should not due to some mistake or due to inadvertence purchase another product.

41. In a passing off action, the Courts look to see whether there is misrepresentation; whereas in infringement matters, it is important to note that the Trade Marks Act gives the proprietary and exclusive right to use the mark which will be infringed in the case of an identical mark. The statutory protection in the case of registered trade mark is absolute. Therefore, infringement takes place not merely by exact imitation, but by the use of the mark merely resembling the registered mark as to likely to be deceptive. When the 1st Defendant's mark "LUXURIA" is compared with the registered trade mark "LUXURA", both in the positioning and phonetic similarity, in our considered view the conditions specified in Clause (a) of Section 29(4) of Trade Marks Act are satisfied.

42. Clause (b) of Section 29(4) of Trade Marks Act stipulates that the mark in question is used in relation to goods or services which are not similar to those for which the trade mark is registered. Plaintiff has registered the trade mark "LUXURA" in Class 12. According to 1st Defendant, it has given the application for registration of the trade mark "LUXURIA" under Classes 39 and 35. As discussed earlier, Plaintiff's trade mark "LUXURA" is in respect of the "goods"/ buses manufactured. Defendant's mark "LUXURIA" is associated with the services # Classes 39 and 35 and the conditions specified in Clause (b) of Section 29(4) of Trade Marks Act is also satisfied.

43. Clause (c) of Section 29(4) of Trade Marks Act requires several conditions to be satisfied. They are:

1. The registered trade mark must have a reputation in India; and
- 2 The use of the mark in question is without due cause; and
- 3 Such use must take unfair advantage of or be detrimental to the distinctive character or repute of the registered trade mark.

44. The first question which arises is whether the mark "LUXURA" has reputation

in India. While considering whether the ingredients of Section 29(4)(c) is satisfied, the learned single Judge proceeded to observe that "the focus of Section 29(4)(c) is on the reputation of the mark and not on the reputation of its maker and that the Court has to assess and determine the reputation of a mark". The reputation of a mark has to be assessed on the basis of several factors, such as publicity that preceded and succeeded the launch of the product carrying the mark, the volume of turnover and the impact that the mark has created in the minds of the public enabling them to associate the mark with the product.

45. Learned Senior Counsel for 1st Defendant contended that reputation of the manufacturer/Ashok Leyland is not to be confused with the reputation of the mark "LUXURA" and Plaintiff has neither pleaded nor proved as to how much they spent for advertising for promoting the trade mark "LUXURA". It was further submitted that there is neither pleading nor evidence to show the actual proof of "LUXURA" buses sold and other than the press reports, no other material was produced to show that the trade mark "LUXURA" has gained reputation in the market so as to satisfy the ingredients of Section 29(4)(c) of the Act.

46. Plaintiff launched its luxury bus with the mark "LUXURA" in the Auto Expo 2006 at New Delhi. Prior to launching, Plaintiff had widely published the news in the newspapers and also in its internal news/Ashly News. In January 2006, news was published that Plaintiff plans to enter "luxury bus segment competing with the buses in that segment from Volvo". Launching of Plaintiff's luxurious bus with "LUXURA" was also widely published in the newspapers and an article appeared in the newspapers viz., "Business Standards" on 06.4.2007 about Plaintiff's bus "LUXURA". News item appeared in "The Times of India" in its Hyderabad Edition dated 09.03.2009 about the Andhra Pradesh State Transport Corporation introducing Ashok Leyland's "LUXURA" buses for their interstate and intercity services. Plaintiff also sold its "LUXURA" buses to Rajasthan State Transport Corporation.

47. On behalf of 1st Defendant, it was contended that the learned single Judge failed to appreciate that the ingredients of Section 29(4) of the Act has not been established. Case of 1st Defendant is that excepting the press reports, Plaintiff has neither pleaded nor furnished any particulars or produced any materials to show that the mark "LUXURA" has acquired reputation in India. It was further urged that no particulars have been furnished as to how many buses were sold and how many were running and in which places and while so, the learned single Judge was not justified in confusing the reputation of Plaintiff's company with the reputation of the mark "LUXURA".

48. Paragraph 7 of the Plaint refers to the investment of huge amount on research and development for manufacturing the aforesaid "LUXURA" bus model with distinctive features of aesthetic appearance, quality and comfort and that "LUXURA" have acquired tremendous reputation in India. Paragraph 7 also refers to the sales turnover of "LUXURA" bus and that "LUXURA" has become a great success in the transport industry for its appearance, quality and comfort. Even

though Plaintiff has not produced materials showing the actual turnover of "LUXURA" buses, materials are produced showing that "LUXURA" buses are sold to Andhra Pradesh State Road Transport Corporation and Rajasthan State Road Transport Corporation. To substantiate the plaint averments, Plaintiff can always produce materials during trial. In any event, reputation of mark need not always be reflected by volume of turnover alone. Placing reliance upon *M/S. Thermofriz Insulations v. Vijay Udyog* (1981 PTC 128) and *S.C. Cambatta and Co. Private Ltd. Vs. Commissioner of Excess Profits Tax, Bombay*, the learned single Judge rightly pointed out that "the reputation mark need not always be reflected by volume of turnover alone".

49. "Adopting the mark without due cause": In the context of Section 29(4)(c) of Trade Marks Act, the next question to be considered is whether 1st Defendant adopted the mark "without due cause". According to 1st Defendant, the mark "LUXURIA" has been adopted to indicate the comforts offered in the intercity transport services of the 1st Defendant. Learned Senior Counsel for 1st Defendant would further contend that such luxurious transport service offered by the 1st Defendant is a striking departure from the normal comforts of travel and that the passenger has the feeling of either having air travel or being inside the luxurious car and only to indicate the luxurious bus travel, 1st Defendant has adopted the mark "LUXURIA" and consequently, it cannot be said that 1st Defendant has used the mark "LUXURIA" without due cause and therefore, mere use of "LUXURIA" would not bring it within the mischief of Clause (c) of Section 29(4) of Trade Marks Act. In support of his contention, the learned Senior Counsel placed reliance upon *Nestle India Limited Vs. Mood Hospitality Private Limited*. In the said case, Plaintiff sought for an injunction against the Defendant from using the trade mark "Yo! China". Defendant has used the word "Yo!" as part of the expressions "Masala Yo!" and "Chilly Chow Yo!". The Division Bench of Delhi High Court held that "mere use of the mark "Yo" would not bring it within the mischief of Clause (c) of Section 29(4) of the Act.

50. One of the essential facts to be established by the Plaintiff under Sub-section (4)(c) of Section 29 is about the use of the impugned mark by the 1st Defendant being "without due cause". The purpose of Section 29(4) is to protect the value and goodwill of trade marks, particularly in cases where they are well known from being unfairly taken advantage of or unfairly harmed. Use of the words "without due cause" requires the 1st Defendant to show that not merely the use of infringing mark is in connection with the 1st Defendant's services but "with due cause". It requires the 1st Defendant to establish justifiable reason and to show that use of the mark "LUXURIA" is not "without due cause". In our considered view, adding one "I" to the word "LUXURA" and displaying the same on the bus in the same position as that of the Plaintiff cannot be said to be "with due cause". More so, in the light of the conduct of the 1st Defendant which we have elaborated *infra*. Even though the words "LUXURA" and "LUXURIA" are derivative word of "LUXURY", 1st Defendant cannot be said to have adopted the mark "LUXURIA" with due cause.

51. Section 29(4)(c) enacts that "use of the mark without due cause" takes unfair advantage of or is detrimental to the distinctive character or reputation of the registered trade mark.

52. Section 11(2) enacts that "the use of the later mark without due cause would take unfair advantage of or be detrimental to the distinctive character or repute of the earlier trade mark". In cases where the public are confused into thinking that there is a commercial connection between the suppliers of the goods or services supplied under the earlier trade mark and the mark the subject of the application, then it is to be anticipated that the prohibition will apply. Such confusion as to origin (origin association) is likely to take unfair advantage of and be damaging to the distinctive nature of reputation of the earlier trade mark [See KERLY ON TRADE MARKS, 13th Edition, Para 8.83].

53. Learned Senior Counsel for 1st Defendant mainly contended that the target population of the Plaintiff is distinct and different from the target population of the 1st Defendant and that there is no likelihood of confusion. The above contention cannot be countenanced. It is true that Plaintiff is a manufacturer of buses and the consumers targeted by the Plaintiff are actually transport operators either in the public sector such as State Transport Corporation or in the private sector such as 1st Defendant themselves. It is also true that the consumers of the 1st Defendant are ordinary travelers looking for combination of luxury and economy. As pointed out by the learned single Judge, ultimately the end user of the goods of Plaintiff and the end user of the services of 1st Defendant are one and the same.

54. This can be viewed from a different angle also. The buses supplied by the Plaintiff to its customers such as Andhra Pradesh State Transport Corporation would carry both the logo Ashok Leyland with the letter "L" appearing in a circle along with the registered trade mark "LUXURA". On the buses supplied by VOLVO to the 1st Defendant, if the 1st Defendant allowed to operate the transport services with the word "LUXURIA" along with the reclining chair, two similar marks will be carried in the buses manufactured by the Plaintiff as well as by the competitors leading to confusion in the minds of a common man. As we pointed out earlier, in January 2006, when Plaintiff-Ashok Leyland planned to launch its luxury buses during preview of company's offering, the Company's Executive informed the media persons that "the "LUXURA" would be competitively priced around Rs. 50 lakhs and would compete with the buses in that segment from Volvo". As rightly pointed by the learned single Judge, once the 1st Defendant is permitted to use the mark "LUXURIA" on the buses purchased by them from the competitors of the Plaintiff, the competitors of the Plaintiff [VOLVO] could not also be prevented from using the said mark later on. We may usefully refer to the finding of the learned single Judge in Paragraph 47 as under:

47. Moreover, once the first Defendant is permitted to use the mark "LUXURIA" on the buses purchased by them from the competitors of the Plaintiff, the competitors of the Plaintiff could not also be prevented from using the said

mark later on. Once dilution is permitted by allowing the first Defendant to use a deceptively similar mark on the very same goods, purchased by them from the competitors of the Plaintiff themselves would acquire a right to infringe the rights of the Plaintiff. Therefore, the third defence taken by the first Defendant is also rejected." We fully endorse the above views of the learned single Judge. In our considered view, 1st Defendant is only trying to take unfair advantage of the Plaintiff's trade mark "LUXURA" by carrying the infringing mark "LUXURIA" on the buses purchased by them from the competitors of the Plaintiff.

55. Conduct of the 1st Defendant: Grant or vacating of interim injunction is discretion of the Court. While examining the equitable considerations, conduct of parties also have to be kept in view. 2nd Defendant-Dilip Chhabria Design Private Limited is a designee in luxury bus. On coming to know that 2nd Defendant is designing the bus under the mark "LUXURIA", on 13.08.2010, Plaintiff issued "cease and desist" notice. 2nd Defendant sent a reply dated 21.08.2010 stating that they build bus bodies for their clients and that they cannot share client information with the Plaintiff. Again on 01.09.2010, Plaintiff issued a notice "cease and desist" to the 2nd Defendant and the 2nd Defendant in turn sent a reply dated 05.09.2010 stating that they have a "non-disclosure agreement with their client and cannot release information about their client" and therefore, they cannot divulge the name of their client at that point. 2nd Defendant however informed the Plaintiff that they have forwarded the notice to their client to take cognizance and necessary action.

56. On 20.09.2010, Plaintiff sent a "cease and desist" notice to Blue Hill Foods and Retail Private Limited [Blue Hill Group] from using the mark "LUXURIA". Blue Hill Foods and Retail Private Limited sent a reply notice dated 29.09.2010 stating that Blue Hill Foods and Retail Private Limited is primarily into the business of running supermarkets and no way concerned with the manufacturing of vehicles (as per Class 12 of Indian Trade Mark Classification) and that they have not filed any trade mark application bearing No. 2003298.

57. In the mean while, Plaintiff received a Caveat Petition and from the Caveator, Plaintiff became aware that 1st Defendant is proposing to market luxury buses with the trade mark "LUXURIA". Plaintiff immediately issued a "cease and desist" notice dated 03.11.2010 calling upon the 1st Defendant to restrain from using the trade mark "LUXURIA". In spite of the said notice, 1st Defendant proceeded with the launching of the bus service under mark "LUXURIA" on 12.11.2010 and issued a reply dated 15.11.2010. It is pertinent to note that the notice issued to Blue Hill Foods and Retail Private Limited was addressed to No. 171, 2nd Floor, Brigade Road, Bangalore-560 001. Blue Hill Logistics Private Limited is also located in the same address. The various advertisement of "LUXURIA" issued in the news paper was from Blue Hill Group which has its registered office at No. 171, Nilgiris Building, 1st Floor, Brigade Road, Bangalore-560 001. From the materials, it is seen that even on 03.08.2010, Blue Hill Logistics Private Limited had given an application for registration of the mark "LUXURIA" under Classes 39

and 35. On the same date 03.08.2010, Blue Hill Foods and Retail Private Limited had also given application for registration of trade mark "LUXURIA" in Class 12 of Indian Trade Mark Classifications - Vehicles, Apparatus for Locomotion by Land, Air or Water. It is seen from the information down loaded from web site <https://www.ipindiaonline.gov.in/eregister/viewdetails.aspx> [as on 30.11.2010] that "Blue Hill Foods and Retail Private Limited" has presented an application for registration of the mark "LUXURIA" in Class 12. Much arguments were advanced as to who presented the application for registration of the trade mark "LUXURIA" in Class 12, whether it was Blue Hill Foods and Retail Private Limited or whether it was Blue Hill Logistics Private Limited. In the said information down loaded, it is specifically stated as "not for legal use" and it also contains disclaimer. At this stage, we do not propose to go into the disputed question as to who presented the application for registration of trade mark "LUXURIA" in Class 12 for two reasons. Firstly, at the stage when we are considering prima facie case, such disputed questions need not be gone into. Secondly, 1st Defendant has filed an affidavit stating that they are withdrawing the application presented by them for registration of trade mark "LUXURIA" in Class 12. Thirdly, the fact remains that application was presented from the same Blue Hill Group.

58. In the month of September, 2009 even though notice was sent to Blue Hill Foods and Retail Private Limited of Blue Hill Group, very cunningly Blue Hill Foods and Retail Private Limited has feigned ignorance of trade mark application No. 2003298 with the mark "LUXURIA" for which the application has been made by its own group company Blue Hill Logistics Private Limited. Pointing out the conduct of the 1st Defendant, learned single Judge rightly observed that there is no bonafide/honest conception of the trade mark "LUXURIA" by the 1st Defendant.

59. After elaborate discussion, learned single Judge held that the ingredients of Section 29(4) has been established and that Plaintiff had proved prima facie case. Registration of trade a mark and user thereof perse may lead to the conclusion that Plaintiff has prima facie case., however, grant of injunction would depend upon the determination of the defences raised by the Defendant. As elaborated earlier, Plaintiff has established a case to attract the ingredients of Section 29(4) and the infringing by use of such mark would amount to 1st Defendant taking unfair advantage of reputation of the Plaintiff's mark and would be detrimental to the registered trade mark of the Plaintiff.

60. Since Plaintiff is the registered proprietor of the trade mark, its statutory right is to be protected. The end service is to the passengers. Once prima facie case of infringement of trade mark is established, normally an injunction must follow. Since the case of Plaintiff is not marginal, there is no doubt that Plaintiff will suffer, if the Defendants are not restrained from using the infringing mark "LUXURIA". On the other hand, if the Defendants are restrained from using the mark "LUXURIA", 1st Defendant may not lose the business. Having regard to the Plaintiff's exclusive right to use of the mark and weighing the various factors and

also balance of convenience, the learned single Judge rightly granted temporary injunction.

61. When the learned trial Judge grants temporary injunction in exercise of discretionary power, the Appellate Court will not usually interfere with the exercise of discretion of the Court of first instance and substitute its own discretion, except where the discretion has been shown to have been exercised arbitrarily. Observing that Appellate Court will not lightly interfere with the discretionary power of the trial Court, in *Ramdev Food Products Pvt. Ltd. Vs. Arvindbhai Rambhai Patel and Others*, , the Supreme Court held as under:

126. The grant of an interlocutory injunction is in exercise of discretionary power and hence, the appellate courts will usually not interfere with it. However, the appellate courts will substitute their discretion if they find that discretion has been exercised arbitrarily, capriciously, perversely, or where the court has ignored the settled principles of law regulating the grant or refusal of interlocutory injunctions. This principle has been stated by this Court time and again. [See for example *Wander Ltd. and Another Vs. Antox India P. Ltd.*, ; *Laxmikant V. Patel Vs. Chetanbhat Shah and Another*, and *Seema Arshad Zaheer and Others Vs. Municipal Corpn. of Greater Mumbai and Others*, . Applying the ratio of the above decision, we are of the view that 1st Defendant has not made out any substantial ground for interference with the well considered order of the learned single Judge and both the Appeals are liable to be dismissed.

62. In the result, both the Appeals are dismissed. Consequently, connected M. Ps. are closed. No costs.