

(1994) 04 DEL CK 0004

In the Delhi High Court

Case No : First Appeal No's. 183 and 195 of 1993

Cruickshank and Co. Ltd.

APPELLANT

Vs

DA Breweries and Distilleries Ltd.

RESPONDENT

Date of Decision : 11-04-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1

Citation : (1994) 2 AD 245 : (1994) 29 DRJ 196

Hon'ble Judges : G.C. Mittal, J;Arun Kumar, J

Bench : Division Bench

Advocate : Ashok Sen, S. Pappu, M.G. Ramachandran, Shishir Sharma, Madan Bhatia and Rajiv Nayar, for the Appellant;

Judgement

Arun Kumar, J.

(1) This judgment will dispose of F.A.O. No. 195/93 and F.A.O. (OS) No.183/93.

(2) F.A.O. 195/93 is directed against an order dated 27th July 1992/28th July 1992 passed by Smt. R.S. Dalvi, Judge, City Civil Court, Bombay, granting an ad interim injunction in favor of M/s Bda Breweries & Distilleries Ltd. (hereinafter referred to as BDA) and against M/s Cruickshank & Co.Ltd. (hereinafter referred to as C&C) restraining C&C from in any manner directly or indirectly using in relation to any Indian made Foreign Liquors the trade marks and/or labels mentioned in Anx's to the Deed of Assignment, Exhibit "A" or any other mark or marks or labels deceptively similar thereto.

(3) Fao (OS) 183/93 arises from an order dated 25th January 1993 passed by a learned Single Judge of the Bombay High Court in the suit filed by C&C against Bda & others refusing to grant any ad interim order in favor of C&C.

(4) Both cases revolve around the Deed of Assignment dated 26th February 1991 executed between C&C and BDA. Bda claims that by virtue of the said Deed of Assignment three trade marks/brand names/labels, namely, "Officer's Choice", "1000 Guineas" and "Calypso Rum" together with goodwill of the business

attached thereto in regard the business of manufacturing and sale of India made foreign liquor products were assigned by C&C in favor of BDA. Thus Bda claims the right to use the said trade marks and labels and to get them registered in its favor. It is further claimed by Bda that the said assignment was for a valid consideration of Rs.15 lacs paid by it to C&C. Before the execution of the Deed of Assignment on 26th February 1991 the parties had entered into an agreement regarding the said assignment on 30th August 1990. Bda has further pleaded in its plaint that the Deed of Assignment contains an express negative covenant on the part of C&C whereby C&C agreed and covenanted that upon assignment of the said trade marks in favor of Bda it would not use the same for IMFL. Bda has also pleaded that by virtue of the Deed of Assignment dated 26th February 1991 C&C as the assignor and Bda as the assignee for a consideration of Rs.15 lacs acknowledged to have been received by C&C, duly assigned and transferred in favor of Bda all the proprietary rights including common law rights, title, interests, benefits in respect of the said trade marks Along with goodwill of the business relating to the goods in respect of which the said trade marks and labels were used and all benefits, right, title and interest in respect of the trade mark applications so that the same were transferred to and vested in Bda together with goodwill of the business relating to the goods in respect of which the trade marks and labels were used absolutely. On this basis Bda claimed the following reliefs in suit filled by it in the Bombay City Civil Court:-

"(A)that it be declared that the plaintiffs are de sole and exclusive owners of and entitled to the trade marks and labels mentioned in the Annexures to the Deed of Agreement Exhibit "C" hereto together with all benefits, rights and interest including the rights of registration thereof under the Trade & Merchandise Marks Act, 1952 including common law rights and goodwill of the business relating to the goods viz. Indian made foreign liquors and to use the said trade marks and labels; (b) that it be declared that the Defendants by themselves their servants and agents or anyone claiming by through or under them or otherwise whoever have no right, title or interest in respect of and are not entitled to use the said trade marks and/or labels mentioned in the annexures to the Deed of Assignment Exhibit "C" here to in respect of any Indian made foreign liquor; (c) that the Defendants by themselves, their servants and agents or anyone claiming by under or through them or otherwise whosoever be restrained by a permanent order and injunction by this Hon"ble Court from in any manner directly or indirectly using in relation to any Indian made foreign liquors the said trade marks and/or labels mentioned in the annexures to the Deed of Assignment Exhibit "C" hereto or any other mark or marks or labels deceptively similar thereto."

(5) By the impugned order dated 27th/28th July 1992 the Bombay City Civil Court Judge made the motion absolute in favor of the plaintiff Bda and against C&C. In the Notice of Motion Bda the plaintiff in the Court had prayed:-

"(A)that the Defendants by themselves their servants and agents or anyone

claiming by or under them or otherwise whosoever be restrained by order and injunction by this Hon''ble Court from in any manner directly or indirectly using in relation in any Indian made foreign liquors the said trade marks and/or labels mentioned in the annexures to the Deed of Assignment Exhibit "A" hereto or any other mark or marks on labels deceptively similar thereto; (b) for interim reliefs in terms of prayer (a) above; (c) for ad interim reliefs in terms of prayer (b) above; (d) for costs of the Notice of Motion; (e) for such further and other reliefs as the nature and circumstances of the case may require."

(6) On or about 18th January 1993 C&C filed a suit against Bra and Others for declaration that C&C is the rightful owner of the said three trade marks/brand names/labels together with all benefits, rights and interests. Further declaration was sought that the agreement dated 30th August 1990 and the Deed of Assignment dated 26th February 1991 and all other connected documents etc. whereby any right, title or interest devolves on Bda are void and ineffective in law and shall stand cancelled with no legal effect whatsoever and that the plaintiff, i.e. C&C shall be entitled to all benefits and rights in the said three trade marks/brand names/labels treating the above said documents as void and non est. C&C further sought an injunction as well as decree for specific " performance against Bda for directing Bda to reassign the three trade marks brand names/labels in favor of CfeC in terms of the Memorandum of Understanding dated 20th March 1991. CfeC further prayed for injunction to restrain Bda from claiming any right, title, interest or otherwise from using or authorising the use of the aforesaid three trade marks/brand names/labels in respect of their business or otherwise in connection with any other purpose, injunction was also sought to restrain Bda from transferring, alienating, encumbering, dealing with or otherwise disposing of the said trade marks or any right or interest attached thereto or entering into any arrangement concerning the said trade marks. C&C, i.e. the plaintiff in the said suit have raised several grounds to challenge the validity of the agreement to assign dated 30th August 1990 and the Deed of Assignment dated 26th February 1991. They further rely on a Memorandum of Understanding dated 20th March 1991, under which on payment of Rs.30 lacs by CfeC to BDA, on or before 30th March 1992, Bda was to re-assign the said three trade marks in favor of CfeC. The assignment of the brands was to be completed within three months from the date of payment of the consideration amount. CfeC has pleaded that the amount of Rs.30 lacs was paid by it to Bda on 31st January 1992, Therefore, re-assignment of the trade marks is sought by CfeC in its suit. CfeC has also claimed that consideration of Rs.15 lacs in the Deed of Assignment was totally sham and illusory. According to CfeC the Deed of Assignment was a part of a composite deal. In pursuance of the Deed of Assignment, a Marketing Agreement dated 1st April 1991 was executed whereby C&C was given the right to market the Imfl products manufactured by Bda against payment of certain charges. By another agreement of the same date referred to as the Services Agreement Bda was to provide services of its staff to C&C. According to Bda the Deed of Assignment and other co-related documents are valid and were duly

acted upon. Bda has challenged the Memorandum of Understanding as a forged and fabricated documents and the alleged payment of Rs.3() lacs by C&C to Bda on 31st January 1992 has also been explained. According to Bda no such payment was made in pursuance of the alleged MOU. It is stated that accounts of both the companies used to be maintained in the same office and practically the same staff was handling the accounts. The voucher regarding payment of Rs.30 lacs has been disputed by Bda and it claims that the same has been manufactured subsequently by C&C.

(7) The learned Single Judge of the Bombay High Court after having considered the submissions on behalf of both the sides refused to grant any ad interim injunction in favor of C&C vide order dated 25th January 1993 which is under appeal in Fao (OS) 183 of 1993.

(8) Besides stating his own reasons for not granting ad interim relief to C&C, the learned Single Judge has also relied on the reasoning contained in the order of the Bombay City Civil Court Judge dated 28th July 1993 of the Bombay High Court. The impugned order dated 25th January 1993 is a speaking order containing reasons for refusal to grant ad interim injunction in favor of the plaintiff. In fact it is noted in the said order that the "learned counsel for the plaintiff stated that, at the moment, they would be pressing only for an ad interim order to restrain the First Defendant from creating any third party rights in the three marks which are very valuable". In this context the learned Judge goes on to observe " I have been taken through the averments made in the plaint on this aspect of the matter. Although it is contended by the plaintiff that, in order to ensure maintenance of quality one representative of Shaw Wallace Group was deployed in every manufacturing unit wherein products sold under the three names/marks were manufactured and bottled, this is not borne out from any material on record. In any case, it is not possible to accept that this condition can be imposed upon the First Defendant if it has ceased to be part of Shaw Wallace Group. At this stage at least, the First Defendant has been held to be the rightful owner of the concerned three marks, and, Therefore, prima facie, it would be entitled to do everything that a rightful owner is entitled to do. The argument that the assignment was for a pittance (Rs.15 lacs for the marks, which are stated to be worth at least Rs.15 crores) or that the assignment was only a working arrangement within the family Group so as to get over the difficulties posed by the Excise Authorities are matters which the parties were aware of at the time when the agreement to assign and the Deed of Assignment were both signed. They must be presumed to have fore seen the contingency and the consequences of the First Defendant opting out of the Shaw Wallace Group. The argument that the assignment is void or the alternative argument that the Memorandum of Understanding dated 20th March 1991 requires the First Defendant to reassign the marks to the plaintiff for stated consideration, are not issues that can be decided at this stage."

(9) "IN my view, there is no justification for taking a view different from one

taken by the learned Judge of the City Civil Court on several aspects of the matter canvassed here which were also canvassed in City Civil Court, as evident from the order in the Notice of Motion No.3761 of 1992."

(10) One of the points urged by C&C in its suit to challenge the Deed of Assignment and other co-related documents is that the defendant Bda was obliged to continue the marketing arrangement incorporated in the agreement dated 1st April 1991 referred to hereinbefore. Bda served a notice dated 31st December 1992 terminating the marketing agreement dated 1st April 1991 and the service agreement of the same date with immediate effect. According to C&C the act of termination of the said agreement is a circumstance giving rise to the apprehension in the mind of the plaintiff. The point was turned down by the learned Single Judge of the Bombay High Court on the ground that clause 13 of the Marketing Agreement dated 1st April 1991 reserves the right of termination and Bda had exercised the said right. Further no relief of declaration was claimed in the suit filed by C&C that the termination of the marketing agreement was in any way illegal or that it continues to bind BDA. It was also felt that the stand of C&C regarding the Marketing Agreement was different in the suit filed by Bda in the Bombay City Civil Court, Therefore, the said point was turned down.

(11) The above resume of facts gives the nature of controversy between the parties in this litigation. In this context it is also worthwhile to mention that C&C and Bda were both part of the Shaw Wallace Group of Companies when the admitted documents, namely, agreement to assign dated 30th August 1990, the Deed of Assignment dated 26th February 1991, marketing agreement dated 1st April 1991 and the service agreement dated 1st April 1991 were executed. These agreements were devised for the benefit of the Group as a whole. One of the overt considerations for these documents was stated to be to overcome certain excise problems. It appears that subsequently the two brothers, namely, M.R.Chhabria and K.R. Chhabria who were one at the time of the execution of the said documents, fell out. Matters came to a head in March/April 1992. Open confrontation between two brothers is manifested by the meeting of the Board of Directors of Bda "stated to have been held on 9th March 1992 in which four erstwhile directors are stated to have resigned and four new directors were taken in. This was followed by another meeting of the Board of Directors of Bda held on 9th April 1992 in which K.R. Chhabria was appointed as the Chairman of the Board of Directors of Bda and one of his confidante was appointed as the managing Director. C&C disputes both these meetings. K.R.Chhabria issued a circular on 10th April 1992 regarding control of affairs of BDA. On 16th April 1992 C&C filed a suit for injunction at Aurangabad in a bid to take over actual control of BDA. This was followed by a suit filed by C&C on 5th May 1992 in the Calcutta High Court challenging the aforesaid meetings of the Board of Directors of Bda and regarding control of management of affairs of BDA.

(12) From these facts it appears that as long as the two brothers were together the entire arrangement manifested by the Deed of Assignment was perfectly

alright and was acted upon. M.R. Chhabria who retained the control of C&C started disputing these documents after the two brothers fell out.

(13) Since the Deed of Assignment is the most important document in this case at this stage it is worthwhile to quote the relevant portions thereof:

"TO assign and transfer all the benefits, titles, interests and rights including the common law rights Along with the goodwill of the business relating to the said goods bearing the said trade marks for which the said trade marks have been used; And Whereas the Assignee being desirous of acquiring the said Trade Marks Along with the goodwill of the business relating to the said goods bearing the said trade marks and the entire rights, titles, interests and benefits vested in the said Trade Marks Applications for the commercial expediency and diverse other reasons has agreed to acquire the said Trade Marks Along with the goodwill of the business relating to the said goods bearing the said trade marks in consideration of the payment of Rupees fifteen lacs and covenants hereinafter contained and on the part of the parties hereto to be observed and performed. xxx xxx xxxx 1. In consideration of the payment of the sum of Rs. 15 lacs by the Assignee to the Assignor, the receipt of which is acknowledged by the Assignor and the mutual covenants and obligations herein given and undertaken by and between the parties hereto, the Assignor as the owner Doth hereby Assign and Transfer unto the ASSIGNEE. a. All the proprietary rights including common law rights, titles, interests and benefits in and to the said Trade Marks Along with the goodwill of the business relating to the goods in respect of which the said Trade Marks are used. b. All the benefits, rights, titles and interests vested in the said Trade Marks Application, this Assignment shall operate to vest the same in the name of Assignee Together with the goodwill of the business relating to the goods and To Hold the same unto the Assignee absolutely from the date hereof in perpetuity in consideration of the payment of the said sum of Rupees 15 lacs by the Assignee to the Assignor, the receipt of which is acknowledged herein by the ASSIGNOR." xxx xxx xxx 6. The Assignor further covenants that the Assignee shall have and enjoy quiet and absolute possession of the said Trade Marks being the subject matter of the said Trade Mark Applications uninterrupted or disturbed in any manner what so ever by the Assignor or any person claiming under or through or in trust of the ASSIGNOR. 7. The Assignor agrees and undertakes that the Assignor shall not use the said trademarks and/or any other marks deceptively similar in any manner whatsoever to the said trade marks being the subject matter of the said Trade Mark Applications in respect of the goods for which the said Trade Marks have been used by the Assignor and/or in respect of the goods for which the said Trade Mark Applications will be granted registration under the Trade and Merchandise Marks Act, 1958."

(14) In the suit filed by Bda in the Bombay City Civil Court the main thrust of argument on behalf of the plaintiff was to enforce the negative covenant contained in the Deed of Assignment. According to Bda despite the said negative covenant C&C used or caused to be used the trade mark assigned to Bda under

the Deed of Assignment. In defense C&C set up a case that the Deed of Assignment was entered, into between the parties on grounds of commercial expediency and was not meant to be acted upon as the parties belonged to the same Group of companies. C&C and Bda were both subsidiaries of the ultimate parent company, i.e. Shaw Wallace & Co. Ltd. Bda was the subsidiary of Arunava Investments Limited which in turn was a subsidiary of C&C. C&C is wholly owned subsidiary of Shaw Wallace & Co. Ltd. Further the apparent reason for the Deed of Assignment given was that it was meant to overcome certain excise problems. Sub Subsequently Bda de subsidiaries itself and thus became independent of the Shaw Wallace Group.

(15) C&C has taken a two-pronged stand in support of its case. Firstly, that the Deed of Assignment and related documents were by way of commercial expediency to obviate excise problems faced by the Group as a whole and were never intended to be acted upon. Secondly, almost simultaneously after the Deed of Assignment, the Memorandum of Understanding (MOU) w executed between the parties on 20th march 1991 pursuant to which Bda agreed to reassign the said trade marks to C&C. The reassignment was to be done for a consideration of Rs.30 lacs to be paid on or before 31st March 1992. The assignment of the brands was to be completed with in three months from the date of payment. There is lot of controversy between the parties regarding the execution of MOU.

(16) The Bombay City Civil Court Judge has considered the various rival contentions regarding the Memorandum of Understanding in detail and we are broadly in agreement with the reasoning contained in the said judgment regarding treatment the Memorandum of Understanding deserves at this stage. In view of the controversy regarding the Memorandum of Understanding we do not consider it safe and proper to attach much importance to the said document at this stage of the case and for purposes of the present decision,. We would rather go by the admitted documents. The controversial facts regarding Memorandum of. Understanding are such that without evidence which is yet to be led in the suit no definite finding regarding it can be given either way. In such circumstances it is always prudent to rely on admitted documents for purposes of taking a prima facie view of the matter. The following observation of the Bombay City Civil Judge on the Mou is worth mentioning:

"THE circumstantial evidence seen with regard to the execution of the Mod and the payment of Rs.30 lacs points to the fact that the said agreement was neither executed nor was the said payment made on the dates on which they are alleged to have been granted".

(17) Since C&C has heavily relied on the Memorandum of Understanding dated 20th March 1991 we consider it necessary to examine it further. On the basis of a detailed consideration of the rival contentions of the parties regarding the Memorandum of Understanding, Mrs. Dalvi, the learned Judge of the Bombay City Civil Court has made the following observation (to which we have added some on our own):-

A. Each of the documents produced by the defendants are on similar stamp papers and run into 3 or 4 pages. Memorandum of Understanding is the only document executed by the parties which runs into only one page. Memorandum of Understanding is the only document which shows the entire typewriting in single space. This is in the background of the case of Bda that several blank stamp papers had been signed by their executive in view of all the parties being one at that stage. B. It is the only document which sets out the title of the document on the top. C. If Mou was executed on 20th March 1991 why they went ahead with execution of Marketing & Service agreements on 1.4.1991? D. If the arrangement was to overcome some excise problem as stated in the Deed of Assignment, how could the problem be overcome within three weeks when the Memorandum of Understanding is stated to have been executed. E. No resolution of Board of Directors of either Company for execution of the Mou while there were such resolutions for execution of the Deed of Assignment. F. Resolution regarding corporate guarantee by C&C was passed on 28th April 1991, i.e. after a month of Memorandum of Understanding but the Memorandum of Understanding mentions about corporate guarantee. G. Shankar Sanyal was not authorised to sign the Memorandum of Understanding. The power of attorney in his favor was executed on 1 st April 1991 and the resolution in this regard was passed on 27th March 1991. H. Doubts payment of Rs.30 lacs by C&C to Bda in pursuance of the MOU. I. The Bda has produced five user agreements with various distilleries as set out in Ex. 'K' to the affidavit in rejoinder. Four of the agreements have been admitted by C&C. it is not understood as to why if there had been an agreement to reassign in terms of the Memorandum of Understanding dated 20th March 1991, the admitted agreements of Bda with distilleries were allowed to continue. J. Why did C&C not disclose the existence of the Mou at the earliest opportunity? It saw the light of the day at a very late stage of the various litigations going on between the parties. C&C plaint in Aurangabad suit is after the Mou, but there is no mention of it. Rather this plaint damages their present case in many ways. C & C' s rejoinder affidavit dated 29.4.1992 finds no mention of the MOU. No mention of it is found in the Calcutta proceedings. K. The learned counsel for Bda has drawn our attention to certain letters exchanged between C&C, Bda and the parent company Shaw Wallace in early 1992. These letters are on record (pages 623 to 625 Vol.R-5). Shaw Wallace refers to the three brands as that of Bda, C&C sends to Bda on 26.2.1992 draft of a proposed agreement to be entered into by Bda with a licensee. These letters prima facie destroy C&C case on the Mou since they are post MOU.

(18) C&C has tried to meet these points. One of the points made out is that the Mou was acted upon In as much as bank guarantees were furnished by C&C toward loans and advances to BDA. For this it is to be noted that when the bank guarantees were furnished the parties were one and both the companies belonged to the Shaw Wallace Group. Therefore furnishing of bank guarantees does not necessarily establish that they were in pursuance of the MOU. The

Explanations" are prima facie not convincing enough to persuade us to take a different view. Ultimately whether C&C will be able to sustain these Explanations by leading any convincing evidence, we do not know. However, at this stage and for what we are called upon to decide, we find ourselves unable to take a contrary view, i.e. a view contrary to the view taken by the learned Judges whose orders are in appeal.

(19) The case of C&C that the Deed of Assignment was by way of commercial expediency and to obviate excise problems and was never intended to be acted upon, prima facie does not stand scrutiny. If it was a commercial expediency meant to obviate some excise problems, why the re-assignment of the three trade marks was sought through the alleged Mou stated to have been executed within about three weeks of the execution of the Deed of Assignment? So far as the question of acting upon of the Deed of Assignment is concerned, prima facie C & C's case is belied by the admitted documents on record. The Deed of Assignment was preceded by the agreement dated 30th August 1990. In pursuance of the said agreement Bda on 26th October 1990 filed applications for registration of the three trade marks in its name. The marketing and service agreements are documents showing that the Deed of Assignment was acted upon. The Marketing agreement specifically mentions that Bda is engaged in the business of manufacture and sale of IMFL. After the Deed of Assignment Bda entered into various license agreements with distilleries. Some of these agreements are not disputed by C&C. On the other hand C&C did not enter into any such agreements there after p73 while before it, they had. The accounting system prima facie shows that out of the sale proceeds, C&C used to get only its share as per the marketing arrangement for its marketing services. The main proceeds/royalty used to go to BDA. Even the money received from Karam Chand Thaper (coal sales) with whom C&C had a prior license agreement, was divided. Royalty went to Bda as the products became Bda owned. Some amount towards marketing charges went to C&C.

(20) The fax circular issued by defendants on 23rd March 1992 sets out the mode of accounting pursuant to the Deed of Assignment by virtue of which Bda became entitled to the royalty. It was in pursuance of the Deed of Assignment that when the distributors sold the goods to Bda who in turn re-sold to the distributors they were not required to pay any royalty but only the marketing services charges to C&C pursuant to the marketing agreement dated 1st April 1991. This arrangement militates against both the main pleas advanced on behalf of C&C, i.e. the Deed of Assignment was not meant to be acted upon and in pursuance of the Memorandum of Understanding Bda was required to reassign the three trade marks. If reassignment was agreed to why the facade of this manner of accounting? Further the list of distilleries with whom Bda had tie up agreements pursuant to the Deed of Assignment shows that the Deed of Assignment was acted upon and there was no understanding about reassignment of the trade marks in question. Some of the tie up agreements of Bda with the distilleries are admitted by C&C itself while some are

disputed.

(21) The plea advanced on behalf of C&C that the entire production of Imfl by Bda or its licensees was under the supervision and control of C&C by posting the staff of C&C in the respective units is a matter of evidence and the material relied upon at this stage in this behalf is not sufficient to form an opinion one way or the other. In fact on this the learned Single Judge of the Bombay High Court has observed that this is not borne out from any material on record.

(22) In the background of these facts and faced with judicial orders though based on prima facie view, against them, C&C changed its strategy in the present appeal. The main plank of the argument on behalf of C&C in the present appeals has been this. The three trade marks/brand names were admittedly not registered trade marks. At common law a trade mark is only a right incidental to or a part of the goodwill of the business of the owner and as such an unregistered trade mark can be assigned only Along with goodwill of the business. Conversely only the sale and transfer of the goodwill of a business had, at common law, the effect of assignment of the trade mark used in the business to the purchaser and the transferee by implication. In other words the case is that the unregistered trade marks in the present case could not be assigned without the assignment of the goodwill of the business and the business Along with them. For purposes of making good this proposition it is contended that the good will of the business and the business were never assigned to BDA. Therefore, mere assignment of trade marks even if that was so, was illegal and invalid. In support of this legal proposition Mr. Ashok Sen, the learned counsel for C&C has .cited various. authorities. We do not propose to refer to or discuss these authorities in view of the fact that the learned counsel for the respondent Mr. Madan Bhatia did not dispute the legal proposition. The submission of the learned counsel for the respondent is that the legal proposition advanced on behalf of the appellants is not attracted in the facts of the present case. According to him the facts show that it is not a case of mere assignment of trade marks. According to Mr. Bhatia it is established on facts which include (the agreement to assign and the Deed of Assignment, which are admitted documents, that the trade marks/brand names were assigned together with goodwill of the business of the trade. The matter will really turn on whether on a prima facie view of the facts it is a case of mere assignment of trade marks/brand names or assignment in gross, as it was called at common law, or it is a case of assignment of trade marks/brand names together with goodwill of the business. It is for this reason that we do not consider it necessary to dilate upon the legal proposition advanced on behalf of the appellant regarding validity of assignment of-trade marks without goodwill of the business and the business. Respondent concedes that if it is mere assignment of trade mark without assignment of good will of the business it will be bad in law. Thus there is no controversy on the legal proposition advanced on behalf of appellant.

(23) Of course, in this connection it was argued on behalf of the respondents

that the appellant has not pleaded its case as such arid the argument is being raised for the first time in the present appeal. Since the point of law is not really being contested we are not called upon to express any opinion on it.

(24) It has already been noticed that Bda has pleaded at length in its plaint in the Bombay City Civil Court that the assignment of the trade marks in question was together with the goodwill of the business and the business. Bda mainly relies for this purpose on the agreement to assign, the Deed of Assignment and the facts showing how the Deed of Assignment was acted upon including how accounting was done in pursuance of the Deed of Assignment. The relevant portions of the Deed of Assignment have also been quoted hereinbefore, which prima facie show that it is a case of assignment of trade marks together with the goodwill of the business and the business. Besides the clear and unambiguous language of the Deed of Assignment, the system of accounting that followed it shows that the goodwill of the business and the business stood assigned to BDA.

(25) The Deed of Assignment talks about assignment of trade marks together with goodwill of the business not only in the positive, it also contains a negative covenant that C&C will have nothing to do with the trade marks in question thereafter, which makes the case of Bda all the more stronger. On the contrary C&C has tried to build its argument that there was no assignment of goodwill of the business and it was at best an assignment of mere trade marks, on various propositions most of which are highly controversial. For example C&C submits

(A)the three brands of Imfl products were conceived, developed and promoted by the C&C. All matters concerning the development of the above brands from the initial stage up to the last stage were entirely done by C&C. The development of the brands involved a detailed work. (b) the essence, blend and blending ingredients of the Imfl products of the above brands, arc secret formulae developed by C&C. The essence and blends always belong to C&C. They were never transferred or assigned to BDA. The mixing of essence, blends and blending ingredients are the most important aspects of the manufacturer of Imfl products. C&C at all material times had assured that mixing of essence and blending ingredients is done under the technical supervision and control of the experts who were employees of the Shaw Wallace Group.

Of course Bda docs not claim any credit for developing and initially promoting the three brand names.. However, it says after the assignment thereof Bda got full rights with respect to the said brand names and C&C cannot be permitted to make any bones about it. Regarding the essences, blends and blending ingredients which are claimed to be its secret formulae by C & C, Bda seriously disputes the same. Bda has placed material on record to show that the essence were really purchased from a third party earlier by C&C and subsequent to the assignment by BDA. Letters from the said third party regarding supply of the essences have also been placed on record. Therefore, the above points which we have mentioned to illustrate a part of the case of C&C, are not sufficient to persuade us for even a prima facie finding in favor of the C&C. As regards claim

of C&C about posting of staff, we have already made a mention and that again is a disputed and controversial proposition. At this stage we are only called upon to take a prima facie view of the matter and we consider it safe to rely on undisputed documentary, evidence rather than on controversial pleas."

(26) The crux of the matter to be decided at this stage, which of course will only be a prima facie view, is whether the assignment of trademark"s was Along with the goodwill of the business or not. For the prima facie view that we are taking on this point we are supported by the findings of the learned Judges whose orders are in appeal before us. We derive support from these orders because we prima facie agree with the reasoning contained therein and are unable to persuade ourselves to take a different view. In matters requiring taking a prima facie view on a controversy before a Court, the Courts have always found it safer to rely on facts which prevailed when the parties were not at dispute and the documents and facts which are admitted on record. As against such material on record the Courts will be loathe to rely on controversial or disputed facts. On the facts which are in controversy at this stage When parties have yet to lead their evidence in support of these facts, it is not possible to arrive at a clear finding one way or the other. -Even a prima facie finding is difficult.

(27) We cannot help observing that the appellant is trying to persuade us to take a view contrary to the admitted documents on record, which as already stated, we are not inclined to do. Further the fact that the appellant has chosen to heavily rely on a document like the Mou which prima facie has a doubtful origin, casts a cloud on the entire case set up by it. Relying on R. vs. Weisz , 1951 (2) AII.E.R. 408, the learned counsel for the respondents went on to urge that this amounts to contempt of Court. We feel it proper and safer to rely on documents which were admittedly executed when the parties were not quarreling with each other. These show the real intention of the parties. The entire edifice of the argument on behalf of the C&C is built around pleas which are contrary to what is contained in black and white in the admitted documents. The Deed of Assignment clearly records the assignment of the three trade marks together with goodwill attached thereto and the business of manufacturing and sale of Imfl products. It further enjoins C&C "to hold the same (the trade marks) unto Bda absolutely". It is difficult to sustain a case of lack of sufficient consideration or document not having been acted upon etc. in the face of such clear statements contained in the document. Sufficiency of consideration prima facie is not for the Courts to go into. The party seeking relief on the basis of such a plea has to establish a very strong case on evidence to be led by it. There is also substance in the contention of the respondents that C&C has been changing its stand on the admitted documents. Before Mrs. Dalvi C&C stand on the Marketing agreement was that it is inchoate, not meant to be acted upon. Before us the stand is that it was part of a composite deal.

(28) The Bda suit is an action mainly on the basis of the Deed of Assignment. It asserts its rights on the basis of the said Deed. Prima facie on the basis of the

material on record at this stage Bda has been able to satisfy us that the Deed of Assignment was duly executed between the parties and was also acted upon. This view is the outcome of the above discussion. As against the Mou which is a document prima facie totally embroiled in controversy, we have chosen to rely on various other documents which are beyond controversy. Whatever may ultimately happen to the Mou after the parties have led evidence in the suits, we do not know and the matter will remain open till the final pronouncement. The material on record at this stage leads us to the prima facie view that the Deed of Assignment was in fact acted upon by and between the parties and reliefs on its basis should flow. Therefore, Bda is entitled to the ad interim relief sought by it vide prayer (a) of Notice of Motion No.3761 of 1992 in the Bombay City Civil Courts which is to the following effect:

"THAT the Defendants by themselves their servants and agents or anyone claiming by under or them or otherwise howsoever be restrained by order and injunction by this Hon"ble Court from in any manner directly or indirectly using in relation to any Indian made foreign liquors the said trade marks and/or labels mentioned in annexures to the Deed of Assignment Exhibit "A" hereto or any mark or marks deceptively similar thereto."

(29) The Judge, Bombay City Civil Court in the impugned judgment has made an exception in favor of C&C regarding its agreement with M/s Karam Chand Thapar & Bros. (CoalSales) Ltd. This aspect is subject matter of F.A.O. 196 of 1993. Since we are not dealing with F.A.O. 196 of 1993, we leave the matter open to be decided in the said appeal. With these observations both the appeals are dismissed leaving the parties to bear their respective costs.