

(2012) 03 GUJ CK 0005
In the Gujarat High Court

Case No : First Appeal No. 3 of 1992 With Civil. Application No. 4071 of 2011 in First Appeal No. 3 of 1992

Dharamsi Morarji Chemical Co. Ltd. Prospect Chambers, 3rd Floor, 317-21 Dr. Dadabhoy Naoroji Rd. Bombay-400001 **APPELLANT**

Vs

Tulsidas Jesang and Sons Nr. Harish Talkies, Porbandar, Dist. Junagadh and T.J. Fertilizers 225, G.I.D.C., Porbandar, Dist. Junagadh **RESPONDENT**

Date of Decision : 30-03-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, Order 41 Rule 33
Trade and Merchandise Marks Act, 1958 — Section 107, 136, 20, 21, 23

Citation : (2012) 3 GLR 2535 : (2013) 1 RCR(Civil) 686

Hon'ble Judges : Rajesh H Shukla, J

Bench : Single Bench

Advocate : R.R. Shah, as for the Appellant No. 1, for the Appellant; Y.J. Jasani, as Advocate for the Defendant No. 1 -2, for the Respondent

Final Decision : Dismissed

Judgement

Honourable Mr. Justice Rajesh H. Shukla

1. The present First Appeal has been filed by the appellant-original plaintiff challenging the judgment and order passed by the learned assistant Judge, Junagadh at porbandar in Trade mark suit Ho. 1 of 1985 dated 09.09.1991 on the grounds stated in the memo of First Appeal inter alia that the learned Judge has erred in comparing the respective trade marks according to the well-established principles of comparison of trade marks before expressing any opinion- It is also contended that the learned judge ought to have appreciated that the Suit for infringement is statutory remedy and whether the trade mark is in actual use or not is immaterial. It is also contended that the learned Judge has failed to appreciate that section 18(1) of the Trade and Merchandise Marks Act, 1958 (hereinafter referred to as "the Act) relates to registration of the trade mark and does not deal with the trade mark already registered and it is not

necessary to have any prior use of the trade mark before registration. It is also contended that the learned Judge has failed to appreciate that the appellant has been manufacturing the "chemical products since 1922 and it has entered into the field of super phosphate in 1945 after considerable research- Therefore, such infringement could not have been allowed in view of the provisions of the Act. It is also contended that the learned Judge has failed to appreciate that the registration of the trade mark is conclusive u/s 32 of the Act and as it has not been challenged by separate proceeding, same is the property of the appellant, which gives right of infringement action, it is also contended that the learned Judge has failed to appreciate that in view of the decision of the Hon'ble supreme Court in case of Ruston and Hornsby Ltd. Vs. The Zamindara Engineering Co., , the action i.e. infringement action and injunction would be issued as soon as it is proved that the defendant in improperly using the plaintiff's registered trade mark. In the aforesaid First Appeal, the respondent has filed Civil Application No. 4071 of 2011 for the orders raising contentions that there is found of litigation and the appellant had obtained the registration of trade mark under No. 221534, 224495, 227548 & 339729 in respect of the goods interalia "Chemical products used in industry, science, agriculture, horticulture and forestry and manures (artificial and natural) included in Class-1 under the provisions of the Act. It is contended that the additional issue was framed in view of the applications at Exh. 54 at Exh. 63 given by the applicant-original defendant and the earlier suit filed by the same appellant was disposed of in view of the purshis. It is contended that the developments, which have taken place subsequently, are required to be taken into consideration, particularly, provisions of section 20 read with section 30 of the Act. It is contended that no Suit for infringement would lie against the use of the trade mark, which is registered and renewed from time to time. It is contended that the applicant being registered owner of the registered trade mark "nauka brand", no suit for infringement would lie against the applicant. It is also contended that Section 107 of the Act read with Order 41, Rules 27 & 33 provides ample power to take into consideration the subsequent events pending Appeal. Therefore, it has been contended that the entire material and evidence may be considered and in light of the provisions of the Act, particularly, section 23 read with sections 28 and 30(1)(d) of the Act, the present Appeal is not maintainable and is required to be dismissed. It is specifically contended that the applicant is the registered proprietor of the trade mark "nauka" u/s 28 of the Act and is entitled to use exclusively, It is also contended that as the applicant is the registered proprietor of the said trade mark "nauka "brand" as provided u/s 28(3) read with section 30(1)(d) of the Act, no such for infringement for mark would be maintainable.

2. Affidavit-in-reply has also been filled by the opponent-defendant in the First Appeal No. 3 of 1992 raising similar contentions.

3. Learned counsel, Shri R.R. Shah appearing for the appellant has referred to the papers and submitted that the plaintiff is the proprietor of registered trade

mark "ship brand" since 1945 in respect of the fertilizer. He referred to the impugned judgment and submitted that the registration was granted and, therefore, the plaintiff had Absolute right to use the said trade mark. He compared other label mark of the opponent, which is at Page No. 19 of the Civil Application. He, therefore, submitted that this aspect has not been, properly appreciated. Learned counsel, Shri Shah also referred to the discussion on the issue nos. 1B and 6 in the judgment in Para No. 10 and 11 with regard to the use of the mark. He also referred to the provisions of Section 136 of the Act and submitted that repeals and savings clause clearly provide that without prejudice to the provisions contained in the General clauses Act, registration, certificate etc. shall remain in force and shall have the effect if it is issued or given under the corresponding provision of this Act.

4. Learned counsel, Shri Shah strenuously submitted that the use of the mark is not relevant for the purpose of considering the infringement action or granting any relief for infringement of registered trade mark. He, therefore, submitted that it is not in dispute that the plaintiff was the registered owner of the trade mark and the opponent has used the similar mark for the similar product which itself is sufficient for the injunction on the ground of infringement. He also referred to memo of civil Application No. 4041 of 2011 and submitted that as stated in detail, the application for registration was made by the opponent and it is pending for decision by the Registrar when it has been objected. Learned counsel, Shri Shah submitted that some third party has also raised objection with opposing application to the mark of the respondent-defendant.

5. Learned counsel, Shri Shah also submitted" that the objection Application No. 126 was filed by the third party and the mark of the opponent regarding "nauka brand" was objected and as it is evident from the picture mark produced at Page No. 19 with picture of "nauka brand", it was given up and the objection application filed by the applicant being AMD Application No. 125 is pending and it has not been decided. He, therefore, submitted that at the opponent cannot claim that he is the registered owner of the trade mark when such trade mark is pending for decision of the objection. Learned counsel, Shri Shah submitted that the opponent made another application with modification", which has been granted by the Registrar, which is the base of the contention. He submitted that it could not have been granted when the objection application filed by the appellant is pending. Therefore, the contentions raised referring to Section 28(3) read with Section 30 (1) (d) of the Act are misconceived- in support of his submission, he has referred to and relied upon the judgment reported in case of Union of India (UOI) Vs. Pramod Gupta (D) by L.Rs. and Others, . He again referred to and relied upon the Judgment reported in case of Bhandari Products, A Proprietary Concern vs. Giriraj Enterprises & Anr., reported in 2008 (36) PTC 558.

6. Learned counsel, Shri Y.J. Jasani appearing for the respondent has submitted that the Suit was filed for both, infringement and passing off. However, passing

off was not pressed and though the plaintiff has claimed as registered owner of the trade mark "ship brand" for chemical since years, there is no evidence placed on record. Learned counsel, Shri Jasani submitted that in fact, the pursis, Exh. 86 was given that they do not want to lead any evidence. Learned counsel, Shri Jasani, therefore, submitted that it is for the plaintiff to prove and establish that the registered trade mark is likely to cause Confusion or deception, for which, complaint of infringement was made. He, therefore, submitted that it was incumbent upon the plaintiff first to produce the evidence vis-a-vis other marks of other defendant-present respondent as to how it is identical or so similar that it is likely to create confusion or deception in the mind of common man and then only, he could have claimed for the relief. Learned counsel, Shri Jasani submitted that in the fact of the present case, there is no such evidence and, therefore, as it has not been even established broadly that two marks are identical or so nearly similarly, there is no question of any infringement or passing off. Therefore, the impugned judgment and order is just and proper. He further submitted that for the purpose of considering even similarity or whether two marks are identical or not, whole label with mark has to be considered and if the marks of the plaintiff and the defendant are compared, there is hardly any similarity. Therefore, it cannot be said that there was any infringement or violation of any registration of trade of the plaintiff and/or any chance of passing off. Learned counsel, Shri Jasani submitted that the Hon'ble Supreme Court in a judgment reported in case of Ruston & Harnsby Ltd. (supra), in Para no. 7 has discussed this aspect about the difference between the infringement and passing off action and how the marks are to be considered and compared. Learned counsel, Shri Jasani has also referred to and relied upon the judgment reported in case of Kaviraj Pandit Durga Dutt Sharma Vs. Navaratna Pharmaceutical Laboratories, and pointedly emphasized the observation made in Para Nos. 28 and 29. Learned counsel, Shri Jasani referred to the papers and submitted that though the plaintiff claims to be registered owner of four trade marks for the similar products, same have not been renewed even during the pendency of the Suit. He emphasized that this aspect has been considered in the impugned judgment in Para Nos. 9, 10, and 11. Therefore, learned counsel, Shri Jasani submitted that though he claims to be registered owner, it is required to be considered whether on the date on which suit has been filed, he remained a registered proprietor of the said trade mark in absence of any renewal, " Learned counsel, Shri Jasani submitted that in fact after the registration, it cannot be said that it would remain on book for all time to come and law itself provides for the renewal for this very purpose. Therefore, learned counsel, Shri Jasani Submitted that unless it is shown that it was renewed from time to time by the plaintiff, he cannot claim any right for the registered owner or proprietor of the trade mark and, therefore, infringement action would be bad.

7. Learned counsel, Shri Jasani also referred to civil Application along with the documents produced including two marks of both, plaintiff and the defendant and submitted that there is vast difference if both marks with entire label are

considered. He emphasized that prominent is the AGROPHOS and work "nauka brand" is written on one side, whereas the mark of the plaintiff refers to the "ship brand". Learned counsel, Shri Jasani submitted that the defendant is also registered owner of the said "nauka brand" trade mark, which he has been using since 1983 and once he is the registered owner, he cannot be estopped from using the same. He submitted that law in this aspect is very clear and again he referred to the provisions of section 28 read with Section 30 of the Act and submitted that as provided, it would be valid against whole world except other registered owner in such cases. Learned counsel, Shri Jasani, therefore, submitted that the respondent-defendant is entitled to use the registered trade mark which he has been using since 1983 and the applicant was put to the knowledge since 1998. Learned counsel, Shri Jasani referred to and relied upon the judgment in case of Dharansi Morarji Chemicals Company Limited vs. T.J. Fertilisers, reported in 2002 (24) PTC 10 (Para No. 7) and submitted that it is required to be considered. He has also submitted that the subsequent events and the development also have to be considered in light of the provisions of the civil Procedure Code, which provides for such eventuality. He submitted that the judgment of the Hon'ble supreme Court in case of M.M. Quasin vs. Manohar Lal Sharma, reported in MR 1981 sc 1113 is clearly providing for such subsequent event, which can be considered. Learned counsel, Shri Jasani has referred to and relied upon the judgment in case of Mangalsing Narsing Singh vs. Nanibai Laxmanbhai Kuberbhai Sioni, reported in 1974 glr 598 and in case of Kedar Nath Agrawal (Dead) and Another Vs. Dhanraji Devi (Dead) by LR. and Another, .

8. In rejoinder, learned counsel, Shri R.R. Shah submitted that while comparing mark and label, essential features of the entire mark or label have to be considered. He submitted that when there is a label mark, the mark has to be compared in order to decide as whether it is similar or not. Learned counsel, Shri Shah submitted that the marks are similar as the defendant has also used "nauka brand", which is similar to that of the present appellant.

9. Learned counsel, Shri Shah submitted that Section 28(3) of the Act would not be attracted as the Appeal of the appellant is pending and in fact, no registration could not have been granted to the respondent. He submitted that Appeal against the grant of registration is pending and still the registration is granted, which would require consideration. He has referred to and relied upon the judgment of the Hon'ble Apex court, reported in Kaviraj Pandit Durga Dutt Sharma (supra) and submitted that for the purpose of considering the infringement, what is required to be considered is the statutory right. He submitted that the statutory right against the infringement has to be protected and it cannot be taken away by showing some modification or minor changes if broadly two marks or the label are comparable. He has also referred to and relied upon the judgment reported in Huston & Harnsby Ltd. (supra) and submitted that while deciding both infringement as well as passing-off, the Hon'ble Apex Court has considered the ground/criteria, which is required to be considered in any infringement action. He, therefore, submitted that as the court

below has committed error, the present Appeal may be allowed.

10. In view of the rival submissions, it is required to be considered whether the present Appeal can be entertained or not.

11. The undisputed facts as recorded hereinabove clearly reveal that the appellant-original plaintiff is the proprietor of the registered trade mark "ship brand" since 1945 in respect of the fertilizer, copy of which is produced on record. The appellant-original plaintiff has obtained Registration of the trade mark under NO. 221534, 224495, 227548 & 339729 in respect of the goods interalia "Chemical products used in industry, science, agriculture, horticulture and forestry and manures (artificial and natural)" included in class-1 under the provisions of the Act and the device of ship circulated by letters is produced on record, where the word "ship brand" or "jahaj chhap" in devnagari script and "vahan chhap" in gujarati is used. The defendant has also trade mark "nauka brand with a device of ship with sails in an open diamond outling forming a part of a triangle. The same has been used with word "AGROPHOS" used for the sale of menure and chemical used by the agriculturist. In or about September, 1984, the plaintiff came to know that the defendant was also marketing fertilizer in plastic bag under the name of "AGROPHOS" with the trade mark "nauka brand" and, therefor, legal notice was served to discontinue the offending trade mark of the plaintiff in respect of the same goods, specific contention was raised in the written submission, which has been discussed in the impugned judgment and it has been specifically contended that two marks are totally different with label and colour scheme. As it transpires from the discussion in the impugned judgment, there is no dispute about the registration of the trade mark by the appellant-plaintiff in respect of his mark. However, as reflected in the judgment that the registration of this mark is renewed till 16.08.1985, 21.09.1985, 01.04.1985 and 03.03.1986 respectively and, thereafter, the plaintiff has not produced any renewal certificate of the said registration as required u/s 25 of the Act. It appears from the scheme of Section 25 of the Act, the registration of the mark shall be for a period of seven years subject of further renewal. Therefore, the thirst of the argument of the learned counsel, Shri Shah has been that once the mark has been registered, it is the conclusive proof as to the validity and proprietary right. On the other hand, the defendant has specifically contended that the defendant is also registered owner of the trade mark "nauka brand" and there is no infringement. He has further claimed that he has been using mark for "nauka brand" fertilizer in the State of Gujarat since 1983. There is also reference to the contention raised in the affidavit that Trade Mark suit no. 1/1985 came to be dismissed after trial on 09.09.1991 and during the pendency of the First Appeal before the Court, the respondent-original defendant no. 2 has been granted the registration of the trade mark "nauka brand" in respect of the fertilizers included in Class-I under Registration No. 536372 with effect from 04.09.1990. Therefore, it is contended that the respondent is also owner of the trade mark "nauka brand" with device of yacht in triangle object and below same, word "AGROPHOS" with monograph containing the word TJF has been

used. It is, therefore, the case of the respondent that on the basis of the necessary evidence and after following procedure, the trade mark, which has been used by the respondent since 1983 was granted the registration. It is also the case of the respondent that u/s 21 of the Act, the application was opposed by the plaintiff appellant herein as well as one another opponent, M/s. Rashtriya Chemicals & Fertilizer Ltd. under opposition Application Nos. 125 and 126 respectively. It is, therefore, contended that as per Rule 53 of the Trade & Merchandise Marks Rules, 1959, the contentions are misconceived because Review Application has also filed which has been abandoned and the same was considered in OJ Appeal No. 2/1992 by this court and the abandonment of the said opposition came to be set aside, in the meantime, the respondent restricted to the word "nauka brand" in place of her trade mark and label and a settlement was arrived at with other opponent in AMD No. 126 and after hearing the parties, the registration was granted as per the order passed by the Registrar of Trade Mark in respect of "nauka brand", which has been used as "NKP Fertilizer". It is in this background, the contentions are required to be appreciated referring to the provisions of Section 23 as well as Sections 28 and 30 of the Act. Section 28(3) of the Act provides as under -

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

12. Therefore, section 28 of the Act also "provides proprietor of the registered mark, exclusive right to use the mark with relation to the goods, for which, the trade mark is registered and it will have to be considered with the provisions of section 30(1) (d) of the Act. section 30(1) (d) of the Act refers to such trade marks. Which are identical or similar. A conjoin reading of Section 28(3) and section 30(1)(d) would suggest that the proprietor of the registered trade mark cannot file any infringement action against the proprietor of identical or similar trade mark. This is the complete answer to the submissions made by the learned counsel, Shri Shah over and above the contentions raised with regard to the non-renewal. It is required to be mentioned that admittedly no material has been placed on record with regard to subsequent renewal nor to establish that the appellant-plaintiff denied to be a registered owner of the mark. Even assuming that the appellant-plaintiff, who was the registered owner of the trade mark had some right though it was not renewed after 1985, the question will have to be examined in context of the provisions of the Act read with Rules, which provides for renewal of such trade mark. However, when the Suit was filed in the year 1992, there was no renewal after 1985 that itself would come in the way of the

appellant-plaintiff herein. Assuming for the sake of arguments that once he has been a registered owner of the trade mark for the purpose of infringement action, mere registration or the proprietary right in his favour has to be considered and not subsequent evidents even then, the respondent-original defendant as discussed above had also acquired similar right after the registration of the trade mark "nauka brand" to the knowledge of the appellant-original plaintiff. It is required to be mentioned that opposition application No. 125 was also filed and till has not been decided. Another opposition Application No. 126 by other party was also filed and settlement was made with some modification and the registration has been granted. However, the appellant herein has not bothered to raise any contention and on the contrary, aspect of abandonment of the opposition lead to further litigation by AO No. 2 of 1992 before this Court. Therefore, on one hand, having failed to remain vigilant after such filing of application for objection, It is not open for him to contend that the application for opposition was alive and till it is decided, the registration in favour of the respondent ought not to have been granted. Assuming that It was not required to be granted, the fact remains that the Law provide In such a situation that when there are two registered owners of identical or similar marks, it may not be objected by other proprietor on similar mark though both can claim the proprietary right against infringement qua others. Therefore, the appellant-plaintiff having filed objection Application No. 125 not remain vigilant and after pursuing remedy in a litigation before this court also, when it was remanded for deciding that it should not have been treated as abandonment, the registration of the mark, which has been granted treating such application as having abandoned, cannot be wiped off or ignored nor the appellant-plaintiff can complain about any infringement. These submissions and discussions are in fact one limb of the arguments.

13. Another facet of the submissions made, which has been contended and discussed at length in the impugned judgment is with regard to whether both marks can be said to be similar or identical, for which, injunction or infringement action can be prayed. The discussion has been made referring to settled position of law including criteria laid down by the Hon"ble Apex court in a judgment reported in Ruston ft Harnsby Ltd. (supra), wherein the Hon"ble Apex court has clearly laid down the guidelines with regard to the criteria, "which is required to be considered or complied. Therefore, for the purpose of comparing the marks, underlying object has been laid down by the Hon"ble Apex court in the aforesaid judgment and it has been observed in Para No. 7 as under :-

The statute law relating to infringement of trade marks is based on the; same fundamental idea as the law relating to passing off. But it differs from that law in two particulars, namely (1) it is concerned only with one method of passing-off, namely, the use of a trade mark, and (2) the statutory protection is absolute in the sense that once a mark is shown to offend the user of it cannot escape by showing that by something outside the actual mark itself he has distinguished his goods from those of the registered proprietor. Accordingly, in considering the

question of infringement the Courts have held, and it is now expressly provided by the Trade Marks Act, 1938, section 4, that infringement takes place not merely by exact imitation but by the use of a mark so nearly resembling the registered mark as to be likely to deceive." In an action for infringement where the defendant's trade mark is identical with the plaintiff's mark, the court will not inquire whether the infringement is such as is likely to deceive or cause confusion. But where the alleged infringement consists of using not the exact mark on the Register, but something similar to it the test of infringement is the same as in an action for passing-off. In other words, the test as to likelihood of confusion or deception arising from similarity of marks is the same both in infringement and passing-off actions.

14. Therefore, it is also well accepted that while comparing two marks, it has to be considered whether the mark is so Identical so as likely to deceive. The test with regard to create Confusion or deception or the similarity of two marks, which is base or foundation for Infringement. Therefore, has to be considered by considering two marks as to whether they are so nearly identical that man of ordinary prudence is likely to get conducted or deceived. It is also well accepted that in catena of judicial pronouncement, the Hon"ble Apex court has observed that while considering this, test of common man has to be considered and whether common man of overage intelligence would get confused or deceived while comparing two label or marks is the test for deceptive similarity. In the facts of the present case when two marks are considered. It cannot be said that they both are so identical or similar that one is likely to get confused or deceived, it is also well accepted that while comparing such marks or the marks with label, it has to be considered as a whole and instead of trying to point out distinction or small points of difference or either similar or at dissimilar, it has to be compared as a whole. In other words for the purpose of considering the aspect of deceptive similarity when it is compared with basic or essential features, both should not be resembled so nearly so as to create any confusion. Therefore, in order to examine the constitute, infringement of the mark has to be considered; (1) whether the defendant's trade mark is identical with the plaintiff's trade mark, (2) whether the defendant's trade mark contains or consists of the whole or any essential or leading features of the plaintiff's mark combined with other matter, and (3) whether the defendant's mark is deceptively similar to and is a colourable imitation of the plaintiff's mark notwithstanding that none of the integers appearing in the defendant's mark is identical with any of the min the plaintiffs mark. As discussed above, two marks will have to be compared and following the judgment of the Hon"ble Apex Court in case of Amritdhara Pharmacy Vs. Satyadeo Gupta, as well as other judgments including the judgment of the Hon"ble Apex court it casa of Cadila Health Care Ltd. Vs. Cadila Pharmaceuticals Ltd., , broad principles, which are required to be considered, are that "in an action for an"" alleged Infringement of a registered trade mark. It has first to be seen whether the impugned marks of the defendant is identical with the registered mark of the plaintiff, if the mark is found to be identical, no further

question arises and it has to be held, that there was infringement. If the mark of the defendant is not identical, it has to be seen whether the mark of the defendant is deceptively similar in the sense that it is likely to deceive or cause confusion in relation to goods in respect of which the plaintiff's mark is registered. For that purpose, the two marks have to be compared, "not by placing them side by side, but by asking itself whether having due regard to relevant surrounding circumstances the defendant's mark as used is similar to the plaintiff's mark as it would be remembered by persons possessed of an average memory with its usual imperfections", and it has then to be determined whether the defendant's mark is likely to deceive or cause confusion. For such determination, the distinguishing or essential features (and not every detail) of the two marks and the main ideal, if any, underlying the two marks which a purchaser of average intelligence and imperfect memory would retain in his mind after seeing the marks, have to be noticed. It has then to be seen whether they are broadly the same or there is an overall similarity or resemblance and whether the resemblance or similarity is such that there is a reasonable probability of deception or confusion, in doing so the approach has to be from the point of view of purchaser of average intelligence and imperfect memory or recollection, "and not an ignorant thoughtless and incautious purchaser, in an action for passing off, the test for deceptive similarity, i.e., as to the likelihood of confusion or deception arising from similarity of the marks of the get up, packing etc. is practically the same as in an action for infringement".

15. In other words, it is the essential features of two marks, which have to be seen and it has to be considered broadly as a whole whether they are so similar to create confusion or not. The mark in the present case admittedly registered by the respondent with modification is only "nauka brand", which has more emphasis on "nauka" as well as other logo, which has been used with word "AGROPHOS" in a prominent manner, whereas the mark of the appellant-plaintiff is the "ship brand" with word "jahaj chhap" in devnagari script and "vahan chhap" in gujarati, which is totally different in its entire get up that it can hardly be said that it is likely to cause confusion with the mark of the defendants. Therefore, the submissions, which have been made by the respondent on this aspect that it is not identical or deceptively similar has also been accepted and as discussed above, it can hardly be said that if nearly reassemble with makes of the appellant-plaintiff. Therefore, on any count, the plaintiff cannot be said to have any case and the impugned judgment and order cannot be said to be erroneous. May be the broad reasonings and the discussion may not have focused in the background of the facts and law applicable still the conclusion arrived at broadly cannot be said to be erroneous. In any view of the matter, the finding referring to provisions of Section 28(3) read with 30(1) (d) is complete answer to the contention raised. The provisions of section 30(1) (d) reads as under :-

30. Act not constituting infringement.- (1) Notwithstanding anything contained in this Act, the following acts do not constitute an infringement of the right to the

use of a registered trade mark :-

(a) XXX

(b) XXX

(C) XXX

(d) the use of a registered trade mark, being one of two or store trade marks registered under this Act which are identical or nearly resemble each other, in exercise of the right to the use of that trade mark given by registration under this Act.

It is also required to be mentioned at the cost of repetition that while considering this aspect, the court is also required to take into consideration the subsequent events or the development as rightly referred to and relied upon by learned counsel, Shri Jasant referring to the Judgment of the Hon''ble Apex court reported in case of Kedar Nath Agrawal (Dead) and Another Vs. Dhanraji Devi (Dead) by LRs. and Another, that though It was the case with regard to the landlord and the tenant, wherein earlier judgment which has been observed as under :-

We affirm the proposition that for asking the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the Court can, and in many cases must, take cautious cognizance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed.

16. It is In this background, the subsequent events after filing of the suit regarding non-renewal of the mark by the plaintiff would certainly have a bearing and when it has not been renewed, couple with the fact that the respondent has been granted registration of the mark after following procedure, it cannot be said that there is any error in the findings and conclusion arrived at by the court below.

17. Therefore, the present Appeal deserves to be dismissed and accordingly stands dismissed, No cost. In view of dismissal of main First Appeal, civil Application does not survive and stands disposed of accordingly.