
(2004) 05 MP CK 0036

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No. 904 of 2004

Dhariwal Industries Limited and Others

APPELLANT

Vs

M.S.S. Food Products

RESPONDENT

Date of Decision : 11-05-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2

Citation : (2004) 29 PTC 45

Hon'ble Judges : P.C. Agarwal, J

Bench : Single Bench

Advocate : Arun Mohan and Sekhar Bhargava and Sameer Parekh, Suraj Govindraj, Lalit Singh Chouhan, A. Shah and Vivek Dalal, for the Appellant; P.K. Saxena, B.L. Pavecha, S.C. Bagadiya and A.S. Garg, Senior Advs. and H.P. Singh, Geeta Rizwani, Vinod Bhagat and G.S. Yadav, for the Respondent

Final Decision : Dismissed

Judgement

P.C. Agarwal, J.—By impugned order dated 06.04.2004, the learned District Judge, Mandleshwar in his Civil Suit No. 8-A/2004 (M.S.S. Food Products v. Dhariwal Industries Limited and Anr.) has allowed a temporary injunction application filed under Order 39 Rules 1 and 2 of the CPC (Code for short) by the respondent and has dismissed in application under Order 39 Rule 4 of the said Code filed by the appellants.

2. As per plaint the respondent manufacturers of gutkha, pan masala and supari mix under trade name of "Malikchand" since 1959-60 and have been selling these goods at Maharashtra, Madhya Pradesh, Karnataka, Gujarat and other parts of India. Ramprasad was father of Pabhudayal Choube who had started supari and ayurvedic pan masala medicine business in 1959-60 in the name of "Malikchand" upto May, 1986. He assigned his trade mark on 26.04.1986 to Ashok Sharma who also assigned his trade mark to M/s. Tulsi Stores on 01.04.1992. Business was continued by him in the name of "Malikchand" till 1996 when it was sold to the respondent in 1996. The respondent has applied for

registration of such trade name under the Trade and Merchandise Marks Act, 1958 (Act for short) vide Memo No. 717630 dated 23.09.1996. As per plaint appellants are selling their gutkha, pan masala and other goods in the name of "Manikchand", such name is not registered even then sign (R) signifying its registration is being used. It was claimed that the appellants are passing off their inferior goods under phonetically and deceptively similar trade name and was causing damage to the reputation and business of the respondent. It was claimed that cause of action had arisen on 13.03.2004 at Mandleshwar when Nitesh Wadhwani came to know that goods were being sold in the name of "Manikchand". IA No. 1 was filed under Order 39 Rule 3 of the Code for ex-parte injunction. It was allowed on 16.03.2004. IA No. 2 was filed under Order 39 Rules. 1 and 2 of the Code with the affidavits of Nitesh Wadhwani, Anil Kumar Mishra which was hotly contested but was allowed by the impugned order.

3. On the other hand, the appellants hotly contested such civil suit and filed the detailed written statement claiming that they had filed a Civil Suit No. 574/2004 in the High Court of Bombay seeking injunction. According to them the present civil suit is a counter blast to the same. The respondent has suppressed the factum of such civil suit. It was claimed that all the deeds of assignment and other documents submitted by the respondent have been recently fabricated and forged to prepare a false case for their suit. According to them other papers relating to central excise department, advertising agencies with publicity material have also been prepared to strengthen their false case. It was claimed that appellants is a well known concern in the field who is working under the trade name of "Manikchand" since year 1961. It was claimed that the respondent has been trying to take benefit of their well known trade mark. "Manikchand" gutkha and pan masala sachets are sold @ Rs. 5/-, Rs. 3/- and 2/- while sachets of the respondent are sold at the price of only 50 paise per sachet. No one marketing or dealing in the business of gutkha, pan masala or zarda can be ignorant of the name of "Manikchand" and the claim that the respondent could come to know about such name only on 13.03.2004 has been false. It is claimed that name of "Manikchand" is well known through out India and abroad. It is also claimed that the appellants had established its huge business and has invested large amount of money in advertising and sale promotion schemes. On the other hand the respondent is a least known concern who has invented a false trade name "Malikchand" to pass off his inferior quality goods in well reputed trade name of the appellants. Injunction application has also been replied to by the appellants on similar allegations. Appellants had filed an affidavit of Ajit Jain, the power of attorney holder and has submitted a bunch of documents in support of their case.

4. After hearing advocates of both the parties, the learned District Judge granted temporary injunction in favour of the respondent ordering that the appellants are restraining from using trade name of "Manikchand" and to stop their production of pan masala and gutkha under that trade name.

5. Principles for grant of temporary injunction are well settled. In Dalpat Kumar

and Another Vs. Prahlad Singh and Others, , Apex Court has held as follows:-

"Injunction is a judicial process by which a party is required to do or to refrain from doing any particular act. It is in the nature of preventive relief to a litigant to prevent future possible injury. In other words, the court, on exercise of the power of granting ad-interim injunction, is to preserve the subject-matter of the suit in the status quo for the time being. It is settled law that the grant of injunction is a discretionary relief. The exercise thereof is subject to the court satisfying that (1) there is a serious disputed question to be tried in the suit and that an act, on the facts before the court, there is probability of his being entitled to the relief asked for by the plaintiff/defendant; (2) the court's interference is necessary to protect the party from the species of injury. In other words, irreparable injury or damage would ensue before the legal right would be established at trial; (3) that the comparative hardship or mischief or inconvenience which is likely to occur from withholding the injunction will be greater than that would be likely to arise from granting it."

6. In Hazrat Surat Shah Urdu Education Society v. Abdul Saheb 1988 (4) JT (SC) 232 the same principles were reiterated in following words:-

"No temporary injunction should be issued unless the three essential ingredients (i) Prima facie case, (ii) balance of convenience, and (iii) irreparable injury which could not be calculated in terms of money, if a party fails to make out any of the three ingredients the court will be justified in declining to issue injunction."

7. In M/s. Gujarat Bottling Co. Ltd. and others Vs. Coca Cola Company and others, , the Apex Court held that interlocutory injunction is purely an equitable relief and thus, conduct of the party invoking jurisdiction of the court should be fair and honest. Certainly one who seeks equity must come with clean hands.

8. In Laxmikant V. Patel Vs. Chetanbhat Shah and Another, ; Laxmikant V. Patel Vs. Chetanbhat Shah and Another, , the Supreme Court laid down guidelines for grant of injunction in passing off. Certainly, one who seeks equity must come with clean hands action that is (i) plaintiff must prove a prima facie case, (ii) balance of convenience in his favour, and (iii) his suffering irreparable injury in the absence of grant of injunction. The Apex Court reiterated the principles of restrictive interference, when his discretionary interim orders except when such discretion is used arbitrarily or capriciously or erroneously or where the court had ignored the settled principles of law, regulating the grant or refusal at interlocutory stage in Wander Ltd. and Another Vs. Antox India P. Ltd., and N.R. Dongre and Others Vs. Whirlpool Corpn. and Another, here interference in discretionary matters must be circumspect. In Sree Jain Swetambar Terapanthi Vid.(S) Vs. Phundan Singh and Others, also the Hon'ble Apex Court had emphasized an caution and circumspect interference in discretionary orders.

9. The Apex Court relying upon Oertly v. Bowman (1957) RPC 388 : (1957) CLY 3549 (CA) summarized the law in following words:-

"The gist of passing off action was defined by stating that it was essential to the success of any claim to passing off based on the use of given mark or get-up that the plaintiff should be able to show that the disputed mark or get-up has become by user in the country distinctive of the plaintiff's goods so that the use in relation to any goods of the kind dealt in by the plaintiff of that mark or get-up will be understood by the trade and the public in that country as meaning that the goods are the plaintiff's goods. It is in the nature of acquisition of a quasi-proprietary right to the exclusive use of the mark or get-up in relation to goods of that kind because of the plaintiff having used or made it known that the mark or get-up has relation to his goods. Such right is invaded by anyone using the same or some deceptively similar mark, get-up or name in relation to goods not of plaintiff. The three elements of passing off action are the reputation of goods possibility of deception and likelihood of damages to the plaintiff. In our opinion, the same principle, which applies to trade mark, is applicable to trade name."

10. Reputation of the goods, possibility of deception and likelihood of the damages to the plaintiff are essential elements of the action for passing off. *Laxmikant V. Patel Vs. Chetanbhat Shah and Another*, .

11. Certainly, trade name "Malikchand" was not registered under the Act. Even appellants could not show that trade name "Manikchand" was a registered trade name under the Act. Provisions of Section 28 and 29 of the Act did not apply to it. Basically, present was a suit for passing off. *Arya Aushadh Pharmaceutical Works v. Himalaya Drug Company Pvt. Ltd.* 1994 MPJR SN 8, *Himalaya Drug Co. Pvt. Ltd. v. Arya Aushadhi Pharmaceutical Works* 2000 (1) MPJR 523 are clearly non-applicable to the facts of the case. Certainly, the other rulings on the point in when an owner of the registered trade mark or when its user can institute a civil suit for infringement of registered trade mark are also not relevant for our purposes. Present is a case to save goodwill of the established trade name. In such a case absence of intention to deceive is no defence though possibility of deception is main ingredients *Ruston and Hornsby Ltd. Vs. The Zamindara Engineering Co.*, , *Kaviraj Pandit Durga Dutt Sharma Vs. Navaratna Pharmaceutical Laboratories*, . Thus, the most pertinent questions had been firstly, whether two trade names had been deceptively similar or likely to cause confusion in the minds of consumers so that goods of one could be passed off in name of other and secondly, whom among the respondent or the appellants had been continuous prior user.

12. Phonetic similarity in trade names "Malikchand" and "Manikchand" has been admitted by both the parties in their pleadings. Actually, the appellants have filed a Civil Suit No, 574/2004 (*Ramniklal Manikchand Dhariwal v. Kishore Wadhwani*), on the original side of the High Court of Bombay on that basis. They had applied for grant of temporary injunction also on that ground though of course no injunction had been granted so far. Both have alleged that the other has been passing off its goods in its trade name. *Cadila Health Care Ltd. Vs. Cadila Pharmaceuticals Ltd.*, , *Mahendra and Mahendra Paper Mills Ltd. Vs.*

Mahindra and Mahindra Ltd., have been relied upon by the respondent where in observations in *S.M. Dyechem Ltd. v. Cadbury (India) Ltd.* AIR 2000 SCW 2172 : AIR 2000 SC 2114 which sought to examine the difference between the two marks "PIKNIK" and "PICNIC" and has emphasized on an dissimilarities over phonetic similarity has been dis-approved as being opposed to *National Sewing Thread Co. Ltd. Vs. James Chadwick and Bros. Ltd. (J. and P. Coats Ltd., Assignee), , Corn Products Refining Co. Vs. Shangrila Food Products Ltd., , Amritdhara Pharmacy Vs. Satyadeo Gupta, , Kaviraj Pandit Durga Dutt Sharma Vs. Navaratna Pharmaceutical Laboratories, and F. Hoffmann-la Roche and Co. Ltd. Vs. Geoffrey Manner and Co. Pvt. Ltd., .* Phonetically both trade names are similar in a way to cause confusion in the mind of an unwary customer.

13. However, dis-similarity in visual get-up of the sachets have not been emphasized by either party so as to take any inspiration *White Hudson & Co. Ltd. v. Asian Organisation Ltd.* (1965) All ER and *Lee Kar Choo v. Lee Lian Choon* (1966) 3 AH ER 1000. However, it is noteworthy that the price of sachets of the respondent has been lesser in comparison to the sachets of the appellants but that in itself is not conclusive or determinative of the matter.

14. Certainly, both "Malikchand" and "Manikchand" operate in the common field of activity i.e. in field of pan masala and gutkha. However, if the appellants operate in other fields of activities in trade name to "Manikchand", in the present appeal the same is not relevant for our purposes. Both have applied for registration of their respective marks. Question to be decided is as to who is the continuous prior user, in view of *Uniply Industries Ltd. Vs. Unicorn Plywood Pvt. Ltd. and Others, .* The appellants have relied upon *Senor Laboratories Ltd. v. Jagsonpal Pharmaceuticals Ltd.* 1998 (18) TC 449(DB) wherein no injunction was held proper against prior user. *Usha Intercontinental Ltd. v. Usha Television Ltd.* 1997 PTC 240-A wherein injunction was granted in favour of the prior user. *Castrol Ltd. v. Mr. Subhash Kapoor* 1995 TC 31 where injunction granted in favour of prior user had been confirmed. *Metropol India (P) Ltd. v. Praveen Industries India (Regd.)* 1997 (17) TC 779(DB) where plaintiffs prior user of mark was protected. Prior user has to be established in view of *Laxmi Gudakhu Factory v. Avinash Gudakhu Factory* 2001 (1) MPLJ92 also. The action is based on the principle that no body has a right to represent his goods as the goods of some body else. *Cadila Health Care Ltd. Vs. Cadila Pharmaceuticals Ltd., ; Cadila Health Care Ltd. Vs. Cadila Pharmaceuticals Ltd.,* In substance it is an action for deceit under the law of torts. *M/s. Bengal Waterproof Limited Vs. M/s. Bombay Waterproof Manufacturing Company and Another, , Wander Ltd. and Another Vs. Antox India P. Ltd.,*

14. The claim of the respondent of the prior user is based on the theory that Ramprasad@Malikchand the father of Prabhudayal Choube used to manufacture supari and ayurvedic medicines in his own name. Later on such goodwill or trade name was assigned by three type written deeds of assignment on stamp papers dated 01.05.1986, 01.04.1992 and 01.04.1996. All these deeds of assignment

had been verified by notary public. The letter from the office of Assistant Collector, Central Excise, Indore as back as on 15.11.1960 addressed to M/s Malikchand Udyog has also been submitted besides that several invoices from art studios advertising and publicity agencies had been filed which clearly go to show that supari mix and ayurvedic medicines were being prepared under that trade mark. Besides that the respondent has submitted affidavit of Nitesh Wadhwani and Anil Kumar Mishra also in support of his cause of action. The learned District Judge has been impressed with such evidence of prior user.

15. On the other hand, appellants claimed that they had been transacting their business in the name of M/s. Rasiklal Manikchand Dhariwal (HUF) with trade name of "Manikchand" for diverse range of goods including chewing tobacco, pan masala, gutkha, tea, coffee, packaging material, drinking water, flour, safety matches etc. They used to market chewing tobacco under the trade name of "Manikchand" zarda. They adopted trade name "Manikchand" for the middle name that is name of father of Rasiklal. In the year 1988-89 Dhariwal Tobacco Products Pvt. Ltd. was incorporated which became subsequently a deemed limited company in name of Dhariwal Tobacco Products Limited and then Dhariwal Industries Limited. They clearly and frankly did not claim from what date they launched their pan masala and gutkha products. They have been emphatic that they have invested huge amount in sales promotion schemes, in advertisements, wall paintings, show on television and even display in international cricket matches also. However, various documents filed by them clearly show that they had entered in the field of pan masala or gutkha only as late as 1988-90. They had applied for registration of hindi labels of "Manikchand" gutkha in March, 1997. They claimed that their trade name "Manikchand" had acquired worldwide goodwill and reputation and has become well known trade mark in the field. It is to be noted that products other than gutkha or pan masala are not disputed in the present case. It is true that the appellants have submitted good attractive figures of their gross sales, paid excise duty, paid income tax, export and expenses on advertisements etc. and certainly, figures of the respondent cannot be compared favourably to their figures, yet is it noteworthy that these figures comprise all sorts of diversified products in which the appellants have been dealing and it cannot be said that they pertain only to gutkha or pan masala which is the subject-matter of this appeal.

16. Here, in this Court, the appellants have submitted IA No. 1724/2004 under Order 41 Rule 27 of the Code to take certain additional documents on record. Such application has been contested by the respondent on the ground that these documents had already been in possession or power of the appellants, yet they had not produced the same before the District Judge. It is argued that it is not a case where the court below had refused to admit such documents on being produced nor this Court requires these documents to be produced to enable it to pronounce a reasonable or justified order. They have relied upon *Mahavir Singh v. Naresh Singh* AIR 2001 SC 134, *Sunderlal and Son Vs. Bharat Handicrafts (P.) Ltd.*, . However, as the evidence sought to be produced happen to be certain

magazines, newspaper and certificate etc., the application is allowed and these documents are also considered for the decision of this appeal. Film Fare issues of March 1994, April 1995, April 1997, February 1999, April 2003 show that annual Film Fare award nites were sponsored by the appellants. In these issues advertisements of pan masala and gutkha are certainly there but they are post 1989-90. In Hindi Dainik Bhaskar also advertisements have appeared only recently. On such material on record, the learned District Judge has held that the respondent had been prior continuous user of trade name "Malikchand".

17. It is noteworthy that during the arguments learned advocate for appellants has tried to demonstrate that the deeds of assignment, letter of Assistant Collector, Central Excise and other official letters, invoice and cash-memos of advertising agency all have been forged and fabricated by the respondent. He has emphasized that the respondent has fabricated false documents after he came to know that the appellants filed a Civil Suit No. 574/2004 (Rasiklal Manikchand Dhariwal and 2 others v. Kishore Wadhvani) at the original side of Bombay High Court to counter blast or to create a false defence against such action. On such argument alone the documents relied upon by the respondent and accepted by the District Judge cannot be brushed aside lightly. Such objections had to be taken and tried at the trial.

18. It is noteworthy that examiner of trade marks, Trade Mark Registry, Mumbai-20 on 10.09.2003 has dismissed the application for registration of trade mark "Manikchand" in Clause 34 on the ground that the sachets submitted before it had misrepresented that such trade mark as already registered, though the same was not registered. It is to be noted that continuous use of trade mark "Manikchand" since 1990 only was claimed in the application. Paragraph "No. 5 onwards of the order are hereby quoted for ready reference: -

"(5) I have considered full documentary evidence of applicants, sales bill, invoices, advertisement bills etc. user affidavit filed by Mr. Rasiklal Manikchand (Karta of HUF) who is not the applicant in this matter - application is filed by Mr. Rasiklal Manikchand as proprietor of M/s Manikchand Zarda. I say that user affidavit and full documentary evidence in this matter is not supported the claim of Mr. Rasiklal Manikchand, proprietor of M/s. Manikchand Zarda. All the documentary evidence is belonged to M/s. Dhariwal Tobacco Products Pvt. Ltd. who is not the applicant in this matter. No any single document and affidavit in support of the user claim of applicant Mr. Rasiklal Manichand Dhariwal (proprietor) of M/s. Manichand Zarda since the year 1990.

(6) Applicant is further fail to comply with the official requirement of letter dated FCR 72 dated 04.03.1997. In which 10 fresh labels of trade mark is called for after deleting the (r) the label of the mark.

In this label applicant is wrongly mentioned that mark is registered trade mark which is u/s 81 of Trade & Merchandise Marks Act, 1958. Trade description of the applicant in this is also false.

(7) There is another inconsistency in the applied label of the mark and applicant named in the application as per applied label mark to M/s. Dhariwal Tobacco Products Ltd. not the applicant in the matter that is applied by Mr. Rasiklal Manikchand Dhariwal as proprietor of M/s Manikchand Zarda. It is very clear that trade description of this application is false. In view of the all above grounds applicant affidavit and documentary evidence in this matter is not supported the user claim since the year 1990 of applicant Mr. Rasiklal Manikchand Dhariwal (Proprietor) of M/s. Manikchand Zarda. In view of this application is refused for the registration under Sections 9 and 18(1) of Trade and Merchandise Marks Act, 1958."

19. Certainly, such a refusal for registration of trade mark with the grounds for refusal justify the order of the learned District Judge.

20. Further more the respondent had submitted copies of several reports of state public analyst under Prevention of Food Adulteration Act, numbers being 4360/326 dated 15.06.1995, No. 12634/11 dated 18.01.1997, No. G.14-898 dated 09.01.1998, 76/83/SL/517 dated 18.09.1997, 529/74621 dated 16.09.1997 and a report of Central Food Laboratory No. 1304/PFA/90 dated 27.08.1998 in which the samples of "Manikchand" pan masala and gutkha were found adulterated. Copies of criminal complaint u/s 7(1) readwith Section 16(1) (a)(ii) of the Prevention of Food Adulteration Act, 1954 filed before CJM, Amravati and CJM, Akola have also been filed. A copy of fax message which goes to show that the appellant had applied to the High Court for transfer and stay of several criminal cases under Prevention of Food Adulteration Act pending before different criminal courts which clearly show that several food adulteration cases are pending against the appellants and that the appellants had not been maintaining the quality of its pan masala and gutkha which has not certainly been not creditable to the appellants.

21. The Advocate for appellant had vehemently argued that the respondent had been guilty of delay, laches and acquiescence. According to him the respondent had also been dealing in pan masala and gutkha business. He had knowledge from the very beginning that the appellants have also been operating in the same field by the wide publicity and country bound sale promotion schemes including television shows, film fare awards etc. which had been indulged into by the appellants. According to him the respondent has suppressed the fact and has feigned ignorance. He has relied upon Hindustan Pencils Ltd. v. Aptudet Industries , Paras Traders 1991 TC 204v. Rajasthan Copy Manufacturers Association 1996 (16) TC 229 and Veerumal Praveen Kumar v. Needle Industries (India) Ltd. 2001 TC 889 all being Delhi High Court cases for the argument that the respondent cannot now at this late stage claim that the appellants would not use the trade name "Manikchand" after they have spent considerable money in sales promotion and advertisements and have gathered transborder reputation and goodwill. However, learned advocate for respondent has drawn my attention to Midas Hygiene Industries Pvt. Ltd. v. Sudhir Bhatia 2004 (28) TC 121 (SC)

holding that mere delay and laches cannot be a ground for vacating an injunction order. Much depends on the facts and circumstances of each particular case. Here, in this case both parties had been working in the same field for the years with their respective trade names and had been doing business according to their capacity. However, the appellants under took to file a civil suit No. 574/2004 which created an apprehension as to his own and his trade name's existence in the mind of the respondent who was hitherto had been working peacefully and meekly without any objection. Trading in pan masala and gutkha had become lucrative only recently. Earlier the traders could trade into the business without much publicity or in anonymity even. Even today market is very large and could contain several traders. The respondent had reacted only when his own existence as well as the existence of his old trade name had been challenged. From that point of view grant of injunction by the District Judge cannot be said to be either arbitrary or perverse in exercise of discretion and no interference is warranted.

22. The learned advocate for appellants has vehemently argued that once the District Judge was apprised that a previous suit by the appellants has already been instituted before High Court of Bombay, it should have withdrawn its hands u/s 10 of the Code and directed the parties to approach the High Court of Bombay instead of giving ex parte or bi parte temporary injunction. He has relied upon *Suraj Industries v. Manik Industries* 1991 PTC 141 on the point. It is noteworthy that par-tics in both these civil suits had not been identical. Before Bombay High Court, suit was filed by the appellants against Mr. Kishore Washwani carrying on business in name of M/s. M.S.S. Food Products while the present suit was filed by M/s. M.S.S. Food Products through Nitesh Wadhvani, the sole proprietor. Secondly, no application u/s 10 of the Code for stay of the present suit had been filed before the District Judge. Thirdly, actual proof of filing such civil suit before High Court of Bombay was necessary before stay of this civil suit. No certified copy of any of the order of Bombay High Court that suit was actually filed therein had been submitted. Fourthly, the District Judge could have certainly decided an application for temporary injunction under Order 39 Rules 1 and 2 before deciding whether the suit could be stayed u/s 10 of the Code. In *Indian Bank Vs. Maharashtra State Co-operative Marketing Federation Ltd.*, the Apex Court had held that stay u/s 10 is not absolute. It is well settled that temporary injunction application could be considered or allowed before such technical objections are decided, particularly when proof of actual filing the prior suit before the Bombay High Court was not there before the court. Fifthly, in view of *Indian Bank Vs. Maharashtra State Co-operative Marketing Federation Ltd.*, the word trial in Section 10 of the Code is not used, its widest sense and subsequently instituted summary suit could be tried and need not be stayed. Certainly, even stay of a suit did not mean that the court had no jurisdiction. It could certainly have decided the incidental matters or could pass interlocutory orders even after such stay, such as for appointment of receiver, injunction, attachment before judgment or amendment of the plaint by adding a defence etc. Thus, grant of temporary injunction by the District Judge had not been

barred on this ground.

23. The learned advocate for appellants has vehemently argued that M/s. M.S.S. Food Products claimed to be a proprietary concern in the plaint could not have filed this suit in its name through Nitesh Wadhwani. He had drawn my attention to Order 30 Rule 10 of the Code and has argued that any person carrying on business in a name or style other than his own name cannot sue in such name. Certainly, such argument is misconceived firstly Rule 10 of Order 30 of the Code is directed towards person sued in his assumed name that is the defendant whose name might not be known to the plaintiff and not to the plaintiff himself who could sue in his own trade name disclosing his own name also. At this stage neither any objection had been raised that M/s. M.S.S. Food Products had been a partnership firm instead of being proprietary concern nor the appellants had sought discovery of names of partner. The respondent in his plaint had claimed that the same was a proprietary concern and prima facie the suit was competent. The argument that Kishore Washwani against whom civil suit in Bombay High Court was filed by the appellants and Nitesh Washwani had been the same person or there has been collusion could not have been decided at this stage. The same can be decided only at the trial when evidence of parties is to be recorded.

24. Thus, the impugned order given by the District Judge, Mandleshwar cannot said to be either incorrect, arbitrary or perverse. The appeal is dismissed. However, District Judge is directed to conclude the trial expeditiously preferably within a period of six months from the date of receipt of copy of this order. Record of District Judge be sent back immediately with a copy of this order.