

(2010) 05 DEL CK 0027

In the Delhi High Court

Case No : I.A. No"s. 3845, 6564 and 8055 of 2008 in CS (OS) No. 302 of 2008
and I.A. No. 10930 of 2008 in CS (OS) No. 1882 of 2008

Kamdhenu Ispat Limited

APPELLANT

Vs

Kamdhenu Cement Ltd. and Another
 Kamdhenu
Cement Ltd. and Another Vs Kamdhenu Ispat Ltd. and Others

RESPONDENT

Date of Decision : 19-05-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 10 Rule 2, Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 2A, Order 39 Rule 4
Companies Act, 1956 — Section 20, 20(2), 22, 22(1), 291
Registration Act, 1908 — Section 17(2)
Trade Marks Act, 1999 — Section 158, 29, 29(5), 30

Citation : (2010) 43 PTC 533

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : Amarjit Singh Chandhiok, ASG and, U.K. Chaudhary, Nishant Datta and Sudhir Kumar, in I.A. Nos. 3845, 6564 and 8055/2008 in CSOS No. 302/2008, I.A. Nos. 2895 and 4012/2008 in CSOS No. 425/2008 and I.A. No. 15452/2008 in CSOS 2616/2008, Sandeep Sethi, Kamal Nijhawan, Jetinder Kumar and Sumit Gaur, in I.A. No. 10930/2008 in CSOS No. 1882/2008, for the Appellant; H.L. Tiku and Sandeep Sethi Kamal Nijhawan, Jetinder Kumar and Sumit Gaur, in I.A. Nos. 3845, 6564 and 8055/2008 in CS(OS) No. 302/2008, Sandeep Sethi Kamal Nijhawan, Jetinder Kumar and Sumit Gaur, in I.A. Nos. 2895 and 4012/2008 in CS(OS) No. 425/2008 and I.A. No. 15452/2008 in CS(OS) 2616/2008, Amarjit Singh Chandhiok, ASG and Sr. Advocate, U.K. Chaudhary Nishant Datta and Sudhir Kumar, in I.A. No. 10930/2008 in CS(OS) No. 1882/2008, for the Respondent

Judgement

Manmohan Singh, J.—Manifold litigation is on-going and pending between the parties involved in these suits. A comprehensive outline of the litigation between the parties is given hereinafter.

2. The plaintiff filed CS (OS) No. 302/2008 on 14.02.2008 for permanent injunction, passing off, rendition of accounts and delivery up. The plaintiff sought

to restrain the defendants from

a) selling, manufacturing, advertising etc. the marks PRIME GOLD, KAMDHENU, KAMDHENU GOLD, KAMDHENU TMT GAL with respect to steel bars (sarias) of various dimensions falling in Class 6 and the punch line "SAMPURNA SURAKSHA KI GUARANTEE" or any other trade mark/label/logo identical or deceptively similar to the plaintiffs registered marks;

b) selling, manufacturing, advertising etc. the plaintiffs registered trade marks/logo/label on the product S.S. Pipes of various dimensions;

c) using in any way what so ever the logo of KAMDHENU with the unique "Chakra" with colour combination yellow, red and purple as well as other logos/marks/punch lines such as "DESH KI SHAAN" etc.

d) using the word KAMDHENU as its corporate name/ trade name and from using the same as part of any email address, domain name or website etc.

3. The plaintiff was incorporated in 1994 and since then has been successfully carrying on the business of manufacturing steel bars and other allied and cognate goods like structural steel (angles, channels, beams etc.) under various trade marks such as KAMDHENU, KAMDHENU GOLD, KAMDHENU SARIA, KAMDHENU TMT GAL etc. The mark KAMDHENU has been registered since 1996 in classes 1 to 4, 7, 10 to 17, 19, 22 to 29, 32, 34 to 39, 41 and 42. Due to uninterrupted usage for the last 14 years, the plaintiff claims to have made a good name and considerable goodwill in the industry. The details of the amount spent on advertising along with the annual sales and income tax details are given in paragraph 9 of the plaint.

4. The defendant company has as its Chairman and Managing Director Sh. Pradeep Kumar Agarwal, who is the brother of Sh. Satish Kumar Agarwal and Sh. Sunil Kumar Agarwal, the latter two being the Directors of the plaintiff company. Sh. Pradeep Kumar Agarwal was a former Director and promoter of the plaintiff company. As per the plaint, the defendant acquired a license from the plaintiff to use its trade marks, trade names, logos and punch lines with respect to stainless steel pipes and fittings falling under Class 6 under a License Agreement dated 08.10.2005 for a period of two years. Two other companies M/s. Kali Metals Pvt. Ltd. and M/s. Raghuvir Metal Industries Ltd. being Group Companies of the defendant also acquired licensee rights vide agreements dated 05.09.2005 and 01.07.2006 respectively.

5. Due to bad blood between the brothers, Sh. Pradeep Kumar Agarwal resigned from the plaintiff company in 2007 and after the efflux of two years from the date of the aforesaid License Agreement allegedly started illegally using the trade marks of the plaintiff. Details of such unlawful use have been provided in paragraph 20 (A) to (C) of the plaint. The said use by the defendant would lead to confusion/ deception in the market and downfall of the plaintiff's goodwill, hence, the present suit was filed. A brief synopsis of the alleged unlawful use of

the plaintiff's intellectual property as mentioned in paragraph 20 (A) to (C) is as under:

A) Use of the mark "PRIME GOLD" for steel bars (sarias) in class 6 along with a promotional slogan being "a product of Kamdhenu Industries Ltd." with the punch line "HUM DETE HAIN SAMPURN SURAKSHA KI GUARANTEE". The said adoption of "PRIME GOLD" is stated to be deliberate and mala fide as the usage of the words "GOLD" along with the corporate name "Kamdhenu Industries Ltd." can lead to confusion and deception as the plaintiff's product of steel bars has the trademark "KAMDHENU GOLD" along with the punch line "SAMPURN SURAKSHA KI GUARANTEE".

B) The defendant has unauthorisedly continued the manufacture/sale of SS Pipes falling under Class 6 under the mark "KAMDHENU" along with the plaintiff company's registered logo and get up despite the fact that the license agreement between the two parties expired due to efflux of time. The defendant has also allegedly started a website kamdhenusspipes.com and stated therein that the plaintiff company is a flagship company of the Kamdhenu Group and that the address of the defendant company is 24, Shivaji Marg, Najafgarh Road, New Delhi - 110015. Reference has also been made to the 22.10.2007 issue of the magazine "India Today" wherein the trade marks/logo/ punch line of the plaintiff are shown as those of the defendant.

C) Sh. Pradeep Kumar Agarwal has wrongly claimed to be the Chairman of the Kamdhenu Group in the above mentioned website as the same is not true at all. Various photographs have been put up on the website which are the intellectual property of the plaintiff. Further, the slogan "DESH KI SHAAN" used by the defendant on the website is the prime advertising slogan used by the plaintiff company. The defendant has admitted the proprietary rights of the plaintiff as there was valid licensing agreement between the two parties which expired by efflux of time and is now only attempting to misuse the goodwill created by the plaintiff.

6. The matter came up before this Court on 18.02.2008 wherein an ex-parte interim injunction was passed and a Local Commissioner was also appointed. The said order was modified on 25.02.2008 and the operative portion thereof reads as under:

Considering the facts and circumstances of the case, and after perusing the plaint as also the documents placed on record, the Court is of the opinion that the plaintiff has made out a prima facie case for grant of ex-parte ad interim injunction in its favour. Accordingly, till further orders, the defendant, its directors, officers, employees and representatives etc. are restrained from manufacturing, selling, marketing or advertising the products such as steel bars, SS pipes and allied goods, registered in the name of the plaintiff in Class 6 bearing the trademark/logo of KAMDHENU, KAMDHNU GOLD, KAMDHENU TMT GAL and/or punch line "SAMPURN SURAKSHA KI GUARANTEE" and/or any

trademark/logo which is deceptively similar to that of the plaintiff's trademark/logo as aforesaid.

7. The Local Commissioner appointed vide order dated 18.02.2008 filed his report on 07.04.2008. As per report, the Local Commissioner visited the defendant's premises at M/s. Dudheswari Steel and Alloy Pvt. Ltd., Hapur Road, Pilakhua, District Ghaziabad, Uttar Pradesh and recorded the following:

5. That on inspection of the factory premises I have found only two brand names "Diamond" and "PRIME GOLD" being used on the Saria of different sizes. However these brand names were being manufactured for Kamdhenu Industries, on advise of the Kamdhenu Industries. The goods were sold under "PRIME GOLD" to the consumer directly.

8. I have found no promotional material on the site and on enquiry Mr. Sharad Lahoti states that all such material is in the Delhi office and also in the office of the Kamdhenu Industries Ltd.

9. That on thorough (sic) search of the premises no goods were found bearing the Trade Mark/ Logo Kamdhenu, Kamdhenu Gold as mentioned in the Order dated 18.02.2008 and 25.02.2008.

8. In the written statement filed on behalf of the defendant, it has been submitted that Sh. Pradeep Kumar Agarwal, Chairman and Managing Director of the defendant company had in fact conceived of the establishment and setting up of the plaintiff company and had called upon his brothers i.e. the current management of the plaintiff company to join him once he had the plaintiff company up and running. With time, the parent company Kamdhenu Ispat Ltd. incorporated various other companies being Kali Metals Pvt. Ltd., APS Buildcon Pvt. Ltd., Kamdhenu Cement Industries Ltd., Kamdhenu Concast Ltd. and Kamdhenu Infra Developers Ltd. Besides these, Sh. Pradeep Kumar Agarwal independently promoted and incorporated Kamdhenu Industries Ltd., defendant herein.

9. Due to irreconcilable differences between the parties, a family settlement was arrived at in February, 2006 and then on 11.02.2007, 23.02.2007 and 26.05.2007.

10. It is submitted by the defendant that Sh. Pradeep Kumar Agarwal ventured into the steel business independently in February, 2008 and launched steel products under the name "PRIME GOLD" without any conflict with the plaintiff. Various public notices were published in leading newspapers stating that "PRIME GOLD" products had no connection to the plaintiff company. It was also ensured that the corporate name "Kamdhenu Industries Ltd." did not feature anywhere on the steel products of the plaintiff. It is the defendant's submission that the plaintiff has concealed the factum of the Family Settlements and misled this Court into allowing the ex-parte ad interim injunction vide order dated 18.02.2008 be passed. Further, the Local Commissioner appointed found no

offending or illegal product/logo/mark at the defendant's premises. The defendant specifically denied the allegation of infringement and passing off as alleged by the plaintiff.

11. In its replication to the above written statement, the plaintiff has, among other things, denied the existence of the Family Settlements and stated that the said settlements were in fact preliminary discussions which were reduced into writing to satisfy the ego of Sh. Pradeep Kumar Agarwal and the said discussions have never culminated into definite formal agreements due to lack of any follow up and documentation.

12. Arguments on several applications were heard by me in this matter as well as the three other suits between the parties being CS (OS) No. 425/2008, CS (OS) No. 1882/2008 and CS (OS) No. 2616/2008. Since they concern the same parties and the trade mark Kamdhenu is the bone of contention in these matters and they revolve around a common subject, therefore with the consent of the parties, the interim applications in all the four matters will be disposed of by this common order.

13. The applications in the first suit being CS (OS) No. 302/2008 shall be taken up first.

IA No. 6564/2008 (u/O XXXIX Rules 1 & 2) in CS (OS) No. 302/2008

14. The plaintiff has filed this application under Order XXXIX Rules 1 and 2 read with Section 151 CPC for grant of further and specific interim injunction restraining the defendant and its employees etc. from using the corporate/ business/ trade name "Kamdhenu Industries Ltd." in advertisements, material etc for publicity of its PRIME GOLD bars and for appointment of a Local Commissioner for inspecting and seizing incriminating material as the same would amount to evidence necessary for proper adjudication.

15. In the present application, the plaintiff has submitted that the defendant has been trading under various trademarks/punch lines and tagging along with them the corporate name KAMDHENU since the said name is part of the defendant's name, i.e. "Kamdhenu Industries Ltd.". It is the plaintiff's contention that the use of the corporate name KAMDHENU for the advertisement/sale of saris under the name PRIME GOLD is a deliberate attempt on the defendant's part to cash in on the goodwill of the plaintiff as the mark/name KAMDHENU is associated with the plaintiff. Due to such acts of the defendant, the plaintiff has been suffering as the defendant's goods are of sub-standard quality and are cheaper, but are being bought by the public due to the trusted name KAMDHENU attached to them. Various dealers/ distributors have made complaints against the low quality and misrepresentation of the defendant.

16. Learned Counsel for the plaintiff has referred the case of Atlas Cycles (Haryana) Ltd. Vs. Atlas Products Pvt. Ltd., wherein the defendants were restrained from using word ATLAS in their corporate name/ trade name in

respect of bicycles and bicycle parts despite the fact that the products were being advertised/ sold under the brand name "Premium Gold" and not ATLAS, but the Court was of the view that the use of the word ATLAS in the defendant's corporate name would lead to confusion/deception in the market. Another case where the defendants were restrained from using a word as part of their corporate name in order to avoid confusion/ deception and which has been referred is Mahendra and Mahendra Paper Mills Ltd. Vs. Mahindra and Mahindra Ltd.,

17. In reply to IA No. 6564/2008 filed by the plaintiff for extension of the ex parte orders dated 18.02.2008 and 25.02.2008, the defendant has submitted that Sh. Pradeep Kumar Agarwal chose the name "PRIME GOLD" as it was distinct from the plaintiff's trademarks/names/punch lines etc. Further, the word KAMDHENU has never been used in isolation and has always been used as part of the defendant's corporate name Kamdhenu Industries Ltd. The defendant has submitted that the said corporate name is being used by it since 1998 and has not been objected to till now. Further, the corporate name Kamdhenu Industries Ltd. does not appear anywhere on the steel bars of the defendant, thus leaving no scope for confusion and/ or deception. With regard to the punch line SAMPURN SURAKSHA KI GUARANTEE, the defendant has contended that it used the phrase "HUM DETE HAIN SAMPURN SURAKSHA KI GUARANTEE" on its hoardings etc. for a very short period of time and its use was discontinued due to abundant caution practiced by the defendant. Either way, the said phrase in English means "We guarantee safety" and there is nothing illegal or out of ordinary if a vendor/ manufacturer uses the said words to convey the said sentiment to its consumers/ customers. It is also contended that since the defendant has been successful in becoming a competitor and has made a good name for itself, the plaintiff is attempting to down-size the defendant.

IA No. 8055/2008 (u/O XXXIX Rule 4) in CS (OS) No. 302/2008

18. The second application was filed by the defendant under Order XXXIX Rule 4 of the CPC for setting aside the orders dated 18.02.2008 and 25.02.2008. As per the defendant, the said interim orders have been obtained by the plaintiff by concealing/ suppressing many vital facts. The grounds for setting aside the ex parte orders mentioned above can be enumerated as under:

a) The factum of the existence of the Family Settlements has been suppressed by the plaintiff, as is the fact that the said settlement was reduced into writing and signed by all the four parties concerned in the presence of two witnesses being Ms. Sarita Agarwal and Ms. Shaifali Agarwal.

b) It has also been suppressed by the plaintiff that further settlements were arrived at between the parties which were reduced in writing by none other than Sh. Satish Kumar Agarwal, Director of the plaintiff company and was signed by Sh. S.K. Bansal, Advocate on behalf of the plaintiff along with Sh. Sunil Agarwal, Smt. Shaifali Agarwal, Smt. Radha Agarwal, Sh. Ayush Agarwal, Sh. Saurabh

Agarwal, Sh. Sachin Agarwal, Sh. M.K. Duggal and Sh. S.K. Singhal.

c) The plaintiff has also concealed that the afore mentioned Family Settlements resulted in the passing of a Resolution dated 14.05.2007 recording the sale of the brand KAMDHENU in respect of cement and other allied products to Sh. Pradeep Kumar Agarwal for Rs. 1.40 Crores. In pursuance to such resolution, the same was intimated to the Bombay Stock Exchange as well and the plaintiff sent a letter dated 31.05.2007 to the defendant stating that in view of the sale, the defendant could begin using the KAMDHENU brand for cement etc. pending preparation of an assignment deed and the plaintiff had no objection to the same.

d) It has also been concealed that the accounts of the dealers/ distributors of the plaintiff company with relation to cement business were voluntarily transferred to the defendant company in lieu of the family settlements.

e) The plaintiff suppressed that in performance of the family settlement, Sh. Satish Kumar Agarwal and his group members resigned from the Board of APS Buildcon Pvt. Ltd. and Kali Metals Pvt. Ltd., both companies which fell to Sh. Pradeep Kumar Agarwal's share. Further, the plaintiff has concealed that it received Rs. 20 lacs from the defendant on account of assignment of the mark KAMDHENU to the defendant in respect of cement and allied goods.

19. In reply, the plaintiff has submitted that the defendant's application is barred by delay. Further, the plaintiff was never a signatory to the alleged family settlements and being a separate legal identity from the Directors who signed the said settlements, the same cannot be held as binding over the plaintiff company. Various resolutions have been quoted in the reply. All the other averments have been denied by the plaintiff.

20. Let me now deal with the contentions of the parties in the interim applications filed in Suit No. 302/2008. It is not in dispute between the parties that by virtue of agreements dated 01.03.2005 and 08.10.2005, the defendant was permitted to use the trademark KAMDHENU as a licensee in relation to the goods falling class 19 and class 6 for a period of two years subject to payment of consideration. It is specifically mentioned in the agreements that after the expiry of the said period, the defendant shall claim no rights, titles or benefits of the trademark KAMDHENU in relation to the goods in question i.e. stainless steel, pipes, steel bars and fittings etc. or any other deceptively similar trademark thereof.

21. As per the terms, after the termination of the agreements, it was imperative on the part of the defendant to destroy all moulds and dies including stationery and other material bearing the trademark KAMDHENU. In view of these agreements as well as the family settlements dated 11.02.2007, 23.02.2007 and 26.05.2007, the defendant is not entitled to use the trademark KAMDHENU in relation to stainless steel, pipes, sarias, steel bars and fittings thereto.

22. It is asserted by the plaintiff that the defendant is using the device mark

Chakra with the colour combination yellow, red and purple which was distinctive with the goods of the plaintiff after the termination of agreements. The other submission of the plaintiff is that use of the trademark "PRIMA GOLD" amounts to infringement and passing off as their goods under the trademark KAMDHENU/ KAMDHENU GOLD are the goods of the plaintiff. The contention of the plaintiff is also that the defendant is also using the punch line "HUM DETE HAIN SAMPURN SURAKSHA KI GUARANTEE" which is similar to the punch line of the plaintiff "SAMPURN SURAKSHA KI GUARANTEE".

23. On merit, the defendant has denied infringement and any act of passing off. The main objection of the defendant is that the plaintiff has intentionally, deliberately and willfully concealed and suppressed the family settlements from this Court and it is asserted by the defendant that the interim order be vacated on this ground itself. According to the defendant, it was the duty of the plaintiff to disclose all material facts and particularly when the plaintiff has sought an interim order in the matter.

24. Learned Counsel for the plaintiff has tried to justify the act of the plaintiff on the reason that it was not necessary to disclose the said family settlements as the subject matter of the present suit is totally different and the same has been filed on the basis of cause of action for violation of statutory rights of the plaintiff despite admission not to use the trade mark after termination of two agreements dated 01.03.2005 and 08.10.2005, the details of the agreements have been mentioned in the plaint along with the documents placed on record along with the plaint. Learned Counsel for the plaintiff has argued that the question of concealment and suppression of facts is only relevant if it is pertaining to the matter, otherwise, the objection is totally without any merit. He referred the following cases in this regard:

- (i) Arunima Baruah Vs. Union of India (UOI) and Others,
- (ii) Ganpatbhai Mahijibhai Solanki Vs. State of Gujarat and Others,
- (iii) S.J.S. Business Enterprises (P) Ltd. v. State of Bihar (2004) 4 SCC 176.

25. This Court partly agrees with the explanation given by the learned Counsel for the plaintiff that no doubt the suit was filed for violation of registered trade mark and also for breach of terms in two agreements as referred above but at the same time on the date of filing of the suit, there were admittedly three family settlements between the parties pertaining to the mark KAMDHENU. There is no averment in the plaint about the said settlements. It might be possible that had the plaintiff disclosed the family settlements, the Court might not have passed the interim injunction dated 18.02.2008 and 25.2.2008. Admittedly, when the Local Commissioner visited the premises of the defendant he did not find any evidence in relation to the trademark with regard to which the ex-parte orders were passed by the Court. Therefore, at this stage, the defendant on merit is not affected by the non-disclosure of the family settlement. Even otherwise, the position would have been different if the averment had been made.

26. Thus, though I am not taking a serious view of the matter at this stage, however the objection raised by the defendant is left open and the same may be considered at the final stage of the suit. Thus, the interim application IA No. 6564/2008 filed by the plaintiff under Order XXXIX Rules 1 & 2 CPC and IA No. 8055/2008 filed by the defendant under Order XXXIX Rule 4 CPC are disposed of with the following directions:

(a) the defendant, its directors, officers, employees and representatives, etc. are restrained from manufacturing, selling, marketing or advertising products such as steel bars, Stainless Steel pipes and allied goods registered in the name of the plaintiff in Class 6 bearing the trademark/logo of KAMDHENU, KAMDHENU GOLD, KAMDHENU TMT GAL and/or punch line "SAMPURN SURAKSHA KI GUARANTEE" and/or any trademark/logo which is deceptively similar to the plaintiffs trademark/logo as aforesaid. However, the defendant is entitled to use the slogan "DESH KI SHAAN" as the same is neither identical nor deceptively similar to the slogan of the plaintiff i.e. "SAMPURN SURAKSHA KI GUARANTEE".

(b) The defendant is entitled to use the trademark "PRIME GOLD" which is prima facie not identical with or deceptively similar with the trademark KAMDHENU/KAMDHENU GOLD.

(c) The defendant is also restrained from using the word/mark KAMDHENU in relation to its web pages as well as part of domain name or any other combination in which the trademark KAMDHENU forms part thereof and the words "steel", ispat" and "alloys" with the mark PRIMA GOLD. The defendant is also restrained from issuing any common advertisement by way of any media in respect of its two businesses i.e. steel and cement in order to deceive the customers.

27. As far as the injunction prayed by the plaintiff to restrain the defendant from using the corporate name of the defendant i.e. Kamdhenu Industries Ltd. is concerned, the plaintiff has referred various decisions on the point of infringement of trademarks and delay. The details of these judgments are given as under:

- (i) M/s. Gujarat Bottling Co. Ltd. and others Vs. Coca Cola Company and others,
- (ii) M/s Midas Hygenic Industries Pvt. Ltd. Vs. Shri Sudhir Bhatia and others,
- (iii) K.G. Khosla Compressors Ltd. Vs. Khosla Extrakting Ltd. and Others, (1).
- (iv) British Bata Shoe Company Ltd. v. Czechoslovak Bata Company Ltd. Vol. LXIV-Reports of Patent, Design & Trademark Cases No. 4.
- (v) Montari Overseas Limited Vs. Montari Industries Limited,
- (vi) Atlas Cycles (Haryana) Ltd. Vs. Atlas Products Pvt. Ltd.,
- (vii) Ramdev Food Products Pvt. Ltd. Vs. Arvindbhai Rambhai Patel and Others,
- (viii) Rob Mathys India Pvt. Ltd. v. Synthes AG Chur (1998) I RAJ 396 delhi.

(ix) Power Control Appliances and Others Vs. Sumeet Machines Pvt. Ltd.,

28. Mr. Chandiok, ASG and Senior Advocate appearing on behalf of the plaintiff has referred Section 29(5) of Trademarks Act, 1999 in support of his submission. The said provision reads as under:

29. Infringement of registered trade marks- (1)

(2)

(3)

(4)

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

A plain reading of this provision clearly mandates that a registered trade mark is infringed by a party if he uses the mark as his trade name or part of his trade name.

29. The case of the defendant is that the said company Kamdhenu Industries Ltd. was incorporated in 1998 with the knowledge of the plaintiff who has failed to take any action against the same for the last 10 years. Thus, the plaintiff is not entitled to an injunction because of long delay and acquiescence.

30. In a recent judgment delivered by a Division Bench of this Court by my respected brothers Vikramjit Sen, J. and S.L. Bhayana, J. in the case of Atlas Cycles (Haryana) Ltd. Vs. Atlas Products Pvt. Ltd., the point of delay has been extensively discussed in paragraphs 15, 16, 17, 19 and 20. The same read as under:

15. As has been observed in Midas Hygiene Industries P. Ltd. and Anr. v. Sudhir Bhatia and Ors. 2004 (1) RAJ 586 (SC) where infringement of a trade mark occurs normally an injunction must issue even though there may be some delay in initiating proceedings. If the adoption of the trade mark is dishonest or notorious a prima facie case would exist in favour of the plaintiff. We are unable to discern from the Report of Midas the extent of the delay in that case. If there is inordinate delay the distinguishing line between delay and acquiescence becomes so blurred, in our opinion, that the grant or refusal of an ad interim injunction would hang in the balance. Dishonesty or notoriety on the part of the Defendant would then tilt the scales in favour of the plaintiff. The Trial Court must exercise its discretion in this regard, and unless the result falls in that extremely rare category of perversity, the Appellate Court must always be loath in substituting that decision with its own.

16. In Mahendra and Mahendra Paper Mills Ltd. Vs. Mahindra and Mahindra Ltd., the Supreme Court noted that the plaintiff/Respondent had numerous associate

and subsidiary companies and was transacting business in that name and style since 13-1-1948; and "Mahindra" was its registered trade name. The Defendant commenced business in 1974 as a sole proprietorship concern, Mahendra Radio House and thereafter a number of other concerns were flouted. The ad interim injunction granted in favour of the plaintiff by the Single Judge was affirmed by both appellate Courts. In *Montari Overseas Ltd. v. Montari Industries Ltd.* 1996 (16) PTC 142 the plaintiff was incorporated in 1983, and had several subsidiary companies also. The Defendant was incorporated in 1993 and it claimed to be operating in textiles, allegedly an altogether different field from the operation of the plaintiff. Nevertheless the Defendant was enjoined from using the corporate name. Upholding the grant of the interim injunction a Division Bench of this Court opined that "no company is entitled to carry on business in a manner so as to generate a belief that it is connected with the business of another company, firm or individual. The same principle of law which applies to an action for passing off of a trade mark will apply more strongly to the passing off of a trade or corporate name of one for the other".

17. The following passage from Kerly's Law of Trade Marks and Trade Names is indeed of relevance:

MANDATORY INJUNCTIONS; ORDERS TO CHANGE NAME

18-86 The Court has power to make mandatory as well as prohibitory injunctions. Procedurally, mandatory injunctions may be more difficult, because they require to be policed, but this is simply a factor to be considered (and in relation to interim injunctions it is a matter going to the balance of convenience, since it may be more prone to cause injustice than an order preserving the status quo, *Nottingham Building Society v. Eurodynamics* [1993] F.S.R. 468).

18-87 Mandatory relief in a passing-off action may include an order to compel the defendants to state that they are not connected with the claimant, where they are selling the claimant's goods but also falsely giving the impression that they are authorised agents [*Sony v. Saray* (1983) F.S.R. 302]. 18-88 A defendant whose company name is inherently deceptive may be ordered to change its name. Such an order may even be made at an interim stage : *Glaxo v. Glaxowellcome* (1996) F.S.R. 388. Likewise, a company registering a website with a name which is so inherently deceptive as to amount to an instrument of fraud may be ordered to change the name of the site or to transfer it to the claimant. *Marks and Spencer v. One-in-a-million* (1998) F.S.R. 265 : (1999) F.S.R. 1 (the order there being made following a successful application for summary judgment).

19. We now turn our attention to Section 22(1)(ii) of the Companies Act, 1956 and Section 29(5) of the Trade Marks Act, 1999 which reads thus-

22. Rectification of name of company.-(1) If, through inadvertence or otherwise, a company on its first registration or on its registration by a new name, is registered by a name which,-

(i)

(ii) on an application by a registered proprietor of a trade mark, is in the opinion of the Central Government identical with, or too nearly resembles, a registered trade mark of such proprietor under the Trade Marks Act, 1999, such company,-

(a) may, by ordinary resolution and with the previous approval of the Central Government signified in writing, change its name or new name; and

(b) shall, if the Central Government so directs within twelve months of its first registration or registration by its new name, as the case may be, or within twelve months of the commencement of this Act, whichever is later, by ordinary resolution and with the previous approval of the Central Government signified in writing change its name or new name within a period of three months from the date of the direction or such longer period as the Central Government may think fit to allow:

Provided that no application under Clause (ii) made by a registered proprietor of a trade mark after five years of coming to notice of registration of the company shall be considered by the Central Government.

29. Infringement of registered trade marks-

.....

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

(6) For the purposes of this Section, a person uses a registered mark, if, in particular, he-

(a) affixes it to goods or the packaging thereof;

....

The phrase "a name which is identical with or too nearly resembles the name by which a company in existence has been previously registered", is also to be found in Section 20(2) of the Companies Act which along with Section 22(1)(i), 22(ii) and its proviso was introduced thereto with effect from 15.9.2003. The date from which these amendments came into operation appears to have escaped the notice of the parties since the subject suit had been filed over a year earlier, in April 2002. Obviously Parliament had Section 29(5) of the Trade Marks Act, 1999 in sight.

20. Our attention has been drawn to Ellora Industries Delhi v. Banarsi Das 1981 PTC 46 in which this Court had injuncted the Defendant even from using the word "Ellora" as part of its business name as it would be misleading in the context of the plaintiff's "Elora" trade mark registered six years prior to the Defendant's use of the mark Ellora. Both parties were selling clocks. The Division

Bench opined that the misrepresentation pertained to the origin of the goods, and passing off could occur even where the goods were not similar. More recently, in Montari the Division Bench had ruled that the plaintiff has two independent rights of relief against the Defendant who may be using the corporate name of the previously incorporated plaintiff, firstly u/s 22 of the Companies Act and secondly of causing confusion (passing off) under the common law. These two provisions have been relied upon by Mr. Sundaram to contend that since the plaintiff has ventilated its grievance against the Defendant's use of "Atlas" as a part of its trade or corporate name only in 2002 whereas they had specific knowledge of this user since August, 1995, its demur had become statutorily barred. In Montari the Division Bench had rejected the argument to the effect that the plaintiff had to seek redressal only under the Companies Act. However, the suit had been filed and the injunction had been granted in 1995 much before the amendments to Sections 20 and 22 of the Companies Act came into force. As these provisions stood in 1995, no prescription had been provided under the Companies Act for initiating an action u/s 20 of that statute. It is trite that there is no legal bar against a party traversing or selecting one of several avenues leading to its ultimate destination. We are in respectful agreement with Montari with the caveat, however, that the Bench did not have to consider the question of limitation either under the Companies Act or the Trade Marks Act, 1999. Furthermore, the Bench was not called upon to construe provisions analogous inter alia to Section 29(5) of the Trade Marks Act, 1999, which does not contain any period of limitation after which the right to object gets extinguished, so far as litigative action is concerned. It is of significance that the present Sections 20 and 22 were introduced by Section 158 read with the Schedule thereto of the Trade Marks Act, 1999. The legislative intent is clear, namely, that whilst recourse to the Companies Act must be taken within five years, the right to restrain infringement or passing off is ever enduring, since no limitation period has been prescribed either u/s 29 or 30 of the Trade Marks Act. Of course, delay in filing a suit would always remain an important factor so far as interim relief in an infringement or passing off action is concerned. In any event, since the present Suit has been filed seventeen months before September 2003, when the amendments came into force, there is absolutely no merit in the arguments of the Defendants. For this reason we are also not required to delve deeper into the interesting but complex question of the effect of the unhappily worded proviso to Section 22(1) of the Companies Act. In our opinion the provisions should read thus - "Provided that no application under Clause (ii) made by a proprietor of a trade mark shall be considered by the Central Government after the expiry of five years from the date on which the applicant noticed the registration of the company having an offending name". Assuming that a plaintiff noticed the registration of an offensively named company in August 1998 would his challenge thereto stand extinguished being statutorily barred immediately on 15.9.2002, even though prior thereto neither remedy nor its limitation had been provided for. We would have expected the statute to clarify that where the cause of action had already arisen five years

prior to the introduction of the provision, requisite action should be initiated within one or more months. As already observed by us, we do not have to rule on this conundrum. The amendment to Section 22 incorporates widespread changes in form, but in substance introduces the proprietors' right to compel a company to change its name in certain circumstances.

31. Even otherwise if the family settlements are read carefully and the intention of the parties is considered after the execution of the documents, the main intention of the parties was to partition the group companies in order to avoid competition of business in the market, therefore different fields of activities were allotted to the rival parties under the trade mark/ name of Kamdhenu.

32. Clauses (g), (j) and (k) of the family settlement dated 23.02.2007 indicate as under:

g) It was agreed that Sh. Pradeep Agarwal will form new company to transfer Cement Brand or could transfer it in Kamdhenu Industries Ltd. on cost to be decided by Sh. M.K. Doogar.

j) It was further agreed that all assets and liabilities related to Cement, Plaster of Paris, Water Proofing Compound and wall Care Putty will be transferred to Company related Shri P.K. Agarwal and all securities related to those items will also be transferred after all adjustments upto 31.01.200.

k) It was agreed that name of Kamdhenu Cement Ltd. will be changed in due course and promoters of Kamdhenu Ispat will not use the name of cement in any Company/firm. Similarly Sh. Pradeep Agarwal and his group was not to use the word of "Steel" "Ispat" "Alloys" or similar related to steel in any company or firm with Kamdhenu. [Kandhenu Cement Ltd. referred to in the said clause was intended to be Kamdhenu Cement Industries Ltd.]

33. In view of the abovesaid reasons, this Court is of the considered view that the defendant is not entitled to use the corporate name Kamdhenu Industries Ltd. or any other corporate name in which the mark Kamdhenu shall form part in relation to its business of Stainless Steel, Saria. The defendant is granted time up to 31.03.2011 to adopt/use different name in this regard. However, the defendant is entitled to use the said corporate name in relation to its business of cement, POP and Wall Putty and allied goods as allowed as per Clause (g) of the family settlement dated 23.02.2007.

34. For the reasons mentioned above, IA No. 6564/2008 and IA No. 8055/2008 are disposed of.

IA No. 3845/2008 (u/O XXXIX Rule 2A) in CS (OS) No. 302/2008

35. The third application being IA No. 3845/2008 under Order XXXIX Rule 2A has been filed by the plaintiff due to the defendant's alleged violation of the orders dated 18.02.2008 and 25.02.2008 insofar as the name/mark KAMDHENU is still being used by the defendant as is the punch line "SAMPURN SURAKSHA KI

GUARANTEE" and the contentions in that application have been invoked as part of the contentions in IA No. 6564/2008. The following grounds for contempt have been made in the said application:

a) That the defendant company through its Directors/ Officials is consistently manufacturing and selling SS Pipes and Steel Bars (sarias) by using the corporate name KAMDHENU which is the proprietary mark of the plaintiff. The said name is also being used by the defendant and all the contemnors on posters, sales promotion material, pamphlets, hoardings etc. The plaintiff has submitted that it is in possession of the defendant's infringing product SS Pipes with the contemptuous use of the trade mark KAMDHENU and the punch line "SAMPURN SURAKSHA KI GUARANTEE". Further, the steel bars being sold under the name PRIME GOLD are advertised as a "premium product of Kamdhenu Industries Ltd. (Pradeep Agarwal Group)". The use of the name KAMDHENU near the word GOLD is clearly infringing upon the plaintiff's registered trademark KAMDHENU GOLD.

b) The said name is being used on the website kamdhenugroup.com despite this Court's orders to the contrary. Further, by representing itself through a domain name like "kamdhenugroup.com" the defendant is misusing the trade name/ trademark of the plaintiff.

c) On 03.03.2008 Sh. Pradeep Kumar Agarwal while launching the product steel bars misrepresented to the Press that the defendant was the real Kamdhenu Group and that it was in fact the owner of the plaintiff company as well. The said Press Release in various newspapers has been attached along with the application. A perusal of the newspaper reports shows that in several places Sh. Pradeep Kumar Agarwal has been referred to as the Director of Kamdhenu Ispat Ltd.

36. Replying to the contempt petition, the defendant reiterated the details of the family settlements and submitted that in addition to the fact that the corporate name has been used by the defendant since 1998, in lieu of the family settlements Sh. Pradeep Kumar Agarwal along with certain other persons is entitled to use the name "Kamdhenu" without any objections/ claims of the plaintiff or its group companies. The defendant has denied all the allegations of the plaintiff pleaded in the application.

37. It is asserted by the defendant that the family settlement dated 23.02.2007 restricted the defendant's usage of the words "Ispat", "Alloys", "Steel" or any similar/related word. Further, the defendant specifically got published a public notice to ensure that there was no confusion vis-?-vis the products of the defendant and the plaintiff.

38. As regards the website kamdhenugroup.com, the defendant has indulged in no willful disobedience as contended by the plaintiff and the same had not been changed simply because it escaped the defendant's attention. However instructions in this regard have been issued now and the said website cannot be

reached/ found on the internet. As regards the hoardings/ SS Pipes, it is contended that "PRIME GOLD" can in no way be said to be identical or deceptively similar to the plaintiff's marks.

39. The defendant has denied all the allegations made by the plaintiff in its contempt petition accusing the defendant of violating orders dated 18.2.2008 and 25.2.2008. The defendant has also relied upon the report of the Local Commissioner in support of its submission. It is stated that when the Local Commissioner visited the premises of the defendant no incriminating material was available or seized by the Local Commissioner and no evidence in this regard was recovered by the Local Commissioner.

40. The learned Counsel for the plaintiff referred various documents filed by the plaintiff along with the application. After having gone through the material produced by the plaintiff by way of documents, prima facie it appears that the defendant has tried to use the trademark KAMDHENU directly/indirectly as appears from the publicity material, newspapers and other printed material and has also used the logo of Chakra as well as the punch line. The defendant is not entitled to use the mark KAMDHENU on its products, advertisement material or by way of interviews in the newspapers. In case the defendant is allowed to use the same, the business of the plaintiff will definitely be harmed.

41. No doubt, when the Local Commissioner had visited the premises of the defendant no offending material was recovered. Therefore, considering the overall situation of the matter and in view of the above mentioned, I am of the opinion that in the present circumstances as two views are possible vis-?-vis the allegations of contempt leveled by the plaintiff against the defendant. It would be proper to give final warning with imposing punitive cost and the directions that if the defendant will violate the interim order passed in this matter in future, this Court will take stringent action in accordance with law. The contempt petition of the plaintiff is disposed of with the following directions:

(a) The defendant shall have to bear the cost of Rs. 2,00,000/- (two lac) for violation of the order and shall pay the same in the following manner:

(b) One lac to be deposited by the defendant within two weeks from today by way of a bank draft with the Registrar General of this Court. The Registrar General shall keep available this whole amount for utilization in Juvenile Justice.

(c) Remaining one lac to be deposited by the defendant with the Prime Minister's Relief Fund within two weeks from today.

With the above mentioned directions, IA No. 3845/2008 is disposed of.

42. During the pendency of the first suit, three more suits have been filed by the parties against each other. CS (OS) No. 425/2008 was filed by the plaintiff seeking an injunction restraining Sh. Pradeep Kumar Agarwal and his company Kamdhenu Cement Ltd. from using the trademark KAMDHENU with respect to cement, PoP, wall putty, water proofing compound and allied products.

43. M/s. Kamdhenu Cement Ltd., the defendants herein filed a third suit being CS (OS) No. 1882/2008 against the plaintiff company and its Directors for specific performance of the Family Settlements mentioned above and for permanent injunction restraining the plaintiff from using the trademark Kamdhenu in respect of Cement POP, putty and allied goods.

44. The plaintiff filed the fourth suit against the defendants being CS (OS) No. 2616/2008 praying for declaration that the alleged Family Settlements are inapplicable and unenforceable qua the plaintiff, and that no legal assignment of the trademark KAMDHENU has occurred vis-?-vis the plaintiff and the defendants in respect of cement, plaster of paris or any other allied goods as well as for permanent injunction restraining the defendants from acting on any of the alleged family settlements. I shall take up each application in each case one by one.

45. I have heard all the interim applications filed by the parties being I.A. No. 2895/2008 (u/O XXXIX Rules 1 & 2 CPC by plaintiff) and I.A. No. 4012/2008 (u/O X Rules 1 & 2 CPC by the defendants) in CS(OS) No. 425/2008, IA No. 10930/2008 (u/O XXXIX Rules 1 & 2 CPC) in CS(OS) No. 1882/2008 and IA No. 11542/2008 (u/O XXXIX Rules 1 & 2 CPC) in CS(OS) 2616/2008.

IA No. 2895/2008 (u/O XXXIX Rules 1 & 2 CPC) in CS (OS) No. 425/2008

46. As mentioned earlier, this suit was filed by the plaintiff Kamdhenu Ispat Ltd. against Kamdhenu Cement Ltd. for restraining the defendants from infringing and/or passing of any goods and/or services, including but not limited to cement, plaster of paris, water proofing compound and wall putty etc. using the plaintiff's registered trade mark KAMDHENU, its copyright therein, punch lines and slogans including SAMPURN SURAKSHA KI GUARANTEE and DESH KI SHAAN and also from using the word KAMDHENU as part of its corporate name.

47. The grounds for filing this suit are the same as those in CS (OS) No. 302/2008 and the plaintiff has contended that since Sh. Pradeep Kumar Agarwal failed to pay the agreed amount for transfer of selected rights in the trademark KAMDHENU, the permission to use the same pending the completion of formalities of transfer was retracted vide letter dated 06.11.2007 and use of the same by the defendants is unlawful.

48. With this in view, IA No. 2895/2008 was filed seeking ex parte ad interim injunction against the defendants. It is the plaintiff's case that the word KAMDHENU has become synonymous with its corporate identity and the use of the said word by the defendants in relation to their products, for its corporate name and domain name is only to cause deception and confusion in the trade and in the mind of the consumers.

49. The plaintiff has also referred an incident whence the plaintiff received summons from District Consumer Court at Aligarh in Case No. 242/2007 titled Madan Singh v. Anil Traders wherein the complainant/ consumer had used

Kamdhenu cement for construction and due to low quality of the same, the roof slab had collapsed. Though the cement was manufactured by the defendants, it was the plaintiff who was impleaded due to the confusion caused by the use of KAMDHENU.

50. In its reply, the defendants have contended that no cancellation letter/ email was sent to it by the plaintiff for revoking the transfer of selected rights of the mark KAMDHENU. The said emails have been alleged to be unreliable as a perusal of the same would indicate that the emails were only between the plaintiff company and its directors/officials. Further, a part payment of Rs. 20 lac was made to the plaintiff for the name "KAMDHENU CEMENT" by way of three cheques dated 14.11.2007, 16.11.2007 and 24.11.1007 being cheque numbers 960291, 960293 and 960297 for Rs. 10 lac, 5 lac and 5 lac respectively.

51. The rest of the consideration i.e. Rs. 1.20 Crores was to be paid after the Assignment Deed was executed, but the same was not executed by the plaintiff despite reminders. The defendants have never denied that it is still to pay the balance consideration of Rs. 1.20 Crores and to show its bona fide, the defendants have filed a suit for specific performance being CS (OS) No. 1882/2008 and has placed on record a cheque of Rs. 1.20 Crores in the said suit.

IA No. 4012/2008 (u/O X Rule 2 CPC) in CS (OS) No. 425/2008

52. The second application has been filed by the defendants in this suit under Order X Rule 2 of the CPC praying for calling of Sh. Satish Kumar Agarwal into the witness box to examine him in view of the facts alleged as under:

i) The plaintiff is trying to deprive the defendants of their lawful rights by one way or the other by filing suit after suit and by attempting to conceal/ render invalid the family settlements between the parties.

ii) The Resolution of the plaintiff company dated 14.05.2007 wherein the transfer of KAMDHENU rights vis-?-vis cement, wall putty etc. was allowed and various other documents have been misrepresented/ sought to be nullified by the plaintiff.

iii) The part payment by the defendants has been out rightly and wrongfully denied by the plaintiff. The suit filed by the plaintiff has been signed and verified by Sh. Satish Kumar Agarwal in his capacity as the Chairman and Managing Director of the plaintiff company, and it is the same Sh. Satish Kumar Agarwal who wrote down the terms and clauses of the family settlements between the parties.

53. In its reply, the plaintiff has submitted that Sh. Satish Kumar Agarwal has already been examined by this Court in so far as the Court in order dated 12.03.2008 directed the Chairman and Managing Directors of both the companies to be present in Court on 02.04.2008 on which date, both Sh. Satish Kumar Agarwal and Sh. Pradeep Kumar Agarwal were present and were questioned by the Court. The allusions of the defendants to the family

settlements are stated to be misleading as the plaintiff being a separate identity from its Directors could not be part of the said settlements.

54. Further, the Resolution dated 14.05.2007 has been referred selectively by the defendants and in fact, the conditions laid out in the Resolution were not adhered to by the defendants, leading to its termination as only a preliminary understanding. Further, the payment of Rs. 20 lac was also not in lieu of any transfer of rights to the word KAMDHENU but was towards the transfer/assignment of the Keyman Insurance Policy taken by the plaintiff for its erstwhile Director Sh. Pradeep Kumar Agarwal. The said Rs. 20 lac has no connection with the agreed amount of Rs. 1.40 Crore to be paid by the defendants.

55. It is admitted case of the witness that none of the parties has denied its signature or execution in the four family settlements dated February 2006, 11.02.2007, 23.02.2007 and 26.05.2007.

IA No. 10930/2008 (u/O XXXIX Rules 1 & 2) in CS(OS) No. 1882/2008

56. The above mentioned suit has been filed by Kamdhenu Cement Ltd. (defendant in other suits and referred to as "Kamdhenu Cement" herein for convenience) against Kamdhenu Ispat Ltd. (plaintiff in other suits and referred to as "Kamdhenu Ispat" for convenience) for specific performance of the Family Settlements and permanent and mandatory injunction against Kamdhenu Ispat. IA No. 10930/2008 has been filed by Kamdhenu Cement in this case under Order XXXIX Rules 1 and 2 of the CPC for an ex parte ad interim injunction seeking the following:

- a) restraining Kamdhenu Ispat and its representatives from issuing any communication with respect to "Kamdhenu Cement" and allied products to its franchisees, distributors, dealers or to the general public;
- b) restraining Kamdhenu Ispat from using the trademark KAMDHENU with respect to cement and allied products;
- c) restraining Kamdhenu Ispat from assigning the trademark KAMDHENU with respect to cement and allied products to anyone except Kamdhenu Cement; and,
- d) restraining Kamdhenu Ispat from appointing franchisees, dealers and distributors with respect to the Kamdhenu Cement brand.

57. While alleging the details of the family settlements of February, 2006 and the subsequent family settlements as already laid out above, Kamdhenu Cement has submitted that the said settlements were acted upon and the name KAMDHENU came to be associated with it in relation to cement and allied products. As per Kamdhenu Cement, while waiting for the assignment deed to be executed in terms of the family settlement, it came across the "Un-audited financial results" of Kamdhenu Ispat for the quarter ending 31.12.2007 published in Nav Bharat Times dated 31.12.2008 wherein in the Kamdhenu Product Portfolio, "cement" has been mentioned as one of the products of Kamdhenu Ispat. However, in the

earlier two quarterly results published by Kamdhenu Ispat, cement was not mentioned in the product portfolio.

58. Taking cognizance of the newspaper publishing, Kamdhenu Cement sent a communication dated 02.02.2008 apprising Kamdhenu Ispat that the same was in violation of the Family Settlements to which Kamdhenu Ispat replied on 22.02.2008 backtracking from the settlements and stating that no such settlements indeed existed. Kamdhenu Cement has submitted that Kamdhenu Ispat has accepted three cheques totaling Rs. 20 lac from it, details of which have been mentioned in this order. In utter disregard of the settlements, Kamdhenu Ispat filed two suits being Nos. 302/2008 and 425/2008 against Kamdhenu Cement herein.

59. It has also been submitted that from time to time Kamdhenu Ispat issues communications to the Kamdhenu Cement's franchises, distributors and dealers threatening them with dire consequences if they continue to deal with Kamdhenu Cement. Kamdhenu Ispat is illegally trying to nullify the effect of the family settlements and is damaging needlessly and irreparably the reputation and goodwill of Kamdhenu Cement in its attempt to do so. Kamdhenu Ispat has no right to terminate the sale by absolute assignment of the trademark KAMDHENU with respect to cement and allied products especially since it has received part payment of consideration for the same and therefore, the application for interim relief has been filed.

60. In its reply to IA No. 10930/2008, Kamdhenu Ispat herein has contended the following points:

i) Kamdhenu Cement has no prima facie case against Kamdhenu Ispat as the latter is the registered proprietor of the name/mark KAMDHENU with respect to various products including cement, wall putty etc. Further, the proposed assignment brought into effect by Kamdhenu Ispat's letter dated 31.05.2007 was terminated by it through its letter dated 06.11.2007 due to deliberate default of payment by Kamdhenu Cement.

ii) Kamdhenu Cement is not itself manufacturing the product in question as it has no manufacturing unit nor does it have any legal right to trade under the mark KAMDHENU with regard to cement and allied products.

iii) The agreements entered into by the parties termed "family settlements" by Kamdhenu Cement are not binding upon Kamdhenu Ispat since the signatories to the agreement are family members and have no bearing on Kamdhenu Ispat which is a separate entity.

iv) It is matter of fact that trademark related rights cannot be sold but can only be assigned and in this case, the said assignment was rescinded by the Kamdhenu Ispat. Various other arguments raised by Kamdhenu Ispat have not been stated herein as its stand on all these arguments/ issues has been recorded in this order already.

61. This suit was filed by the plaintiff against the defendants for declaration and permanent injunction vis-?-vis the family settlements alleged to have been executed by the defendants. IA No. 15452/2008 was filed praying for an interim injunction restraining the defendants from claiming before distributors, public etc. that it had rights in the mark KAMDHENU with respect to cement, plaster of paris, wall putty etc; from using the brand name KAMDHNU CEMENT and from claiming any right, title or interest on the basis of the settlements dated February, 2006, 11.02.2007, 23.02.2007 and 26.05.2007 as well as the resolution dated 31.05.2007 and the plaintiff's letter dated 31.05.2007.

62. In the interim application the main contentions of the plaintiff can be summarized as under:

i) The discussions between the brothers of the Agarwal family were inconclusive and lacked authorization of the plaintiff company. The said discussions have been mala fide misrepresented as "Family Settlements" by the defendants.

ii) The Resolution dated 14.05.2007 was for negotiation of the matter of assignment of trademark related rights vis-?-vis cement and allied products to the defendants for a consideration of Rs. 1.40 Crore. Since the amount was never paid to the plaintiff, the negotiation could not be enforced or acted upon.

iii) The plaintiff company is not bound by the alleged family settlements insofar as it is a separate juristic entity from the parties to the settlement. The parties that signed the said documents did so in their personal capacities and not as Directors of the plaintiff company and hence the same cannot bind the plaintiff company. The plaintiff has referred the following cases in its support which are as under:

(i) Potti Lakshmi Perumallu Vs. Potti Krishnavenamma,

(ii) Good Media Limited Vs. The Prasar Bharti,

(iii) V.B. Rangaraj Vs. V.B. Gopalakrishnan and others,

(iv) Shilpi Modes Pvt. Ltd. Vs. Shilpi Unitech,

(v) United Bank of India v. Ram Das Mahadeo Prasad (2004) 1 SCC 25255, SC 74.

(vi) Kiran Jain v. Janki Das Jain and Ors. (2009) 40 PTC 1 (Delhi).

(iv) Further contention of the plaintiff is that since the defendants failed to pay the agreed consideration due to which the plaintiff cancelled the assignment by letter dated 6.11.2007 therefore, the plaintiff is entitled to equitable and discretionary relief and no benefit should be given on the basis of family settlements as these settlements between the parties are not to be considered as a concluded contract. The plaintiff has referred the case of PVR Pictures Ltd. Vs. Studio 18,

63. The defendants have denied all the allegations made by the plaintiff in the plaint and application and have almost taken the same defences as raised in Suit Nos. 302/2008 and 425/2008.

64. Learned Counsel for the plaintiff has made his submission that Kamdhenu Ispat Limited has never signed the documents dated 11.02.2007, 23.02.2007 and 26.05.2007, though he has not denied the fact the same have been signed by the family members.

65. It has been argued that the plaintiff company is a separate legal juristic corporate entity and as shareholders are not owners of assets, assets cannot be divided amongst them by shareholders or even by the Directors. As regards the plaintiff being a separate entity, the learned Counsel for the plaintiff has referred Section 46, 48, 56, 291 and 293 of the Companies Act. The following decisions are also referred by the learned Counsel for the plaintiff in support of his submission:

(i) Bacha F. Guzdar Vs. Commissioner of Income Tax, Bombay,

(ii) Madhur Poddar v. Ashok Poddar and Ors. (2006) 2 CAL LT 133 (HC).

(iii) Smt. Pushpa Katoch Vs. Manu Maharani Hotels Ltd. and Others,

66. Learned Counsel appearing on behalf of the plaintiff submits that it is a public limited company and is not a closely held family company. Therefore, the signing of the documents/family settlements dated 11.02.2007, 23.02.2007 and 26.05.2007 in an individual capacity are not binding upon the plaintiff company.

67. He further submits that Mr. Pradeep Agarwal/defendant has resigned from the plaintiff company on his own and there are no EGM/ any meeting resolutions or letters referred to which state anything about the existence of family settlements. It is further submitted that the plaintiff company is a listed company wherein in the shareholders of the members of the Agarwal family is only restricted to 51% and the remaining stock is with the general public comprising more than 60% shareholders in India and abroad. Hence, the decision cannot be taken by one family member or Directors of the plaintiff company.

68. On the other hand, the submission of the defendants is that due to expansion of families of the brothers, some dispute between the families had arisen and in order to resolve the same between the family members, the family settlements were mutually reduced into writing. Initially the family settlement was entered into in the month of February, 2006 amongst three brothers and a nephew and thereafter on 11.02.2007, 23.02.2007 and 26.05.2007.

69. The said family settlements were executed between the family members i.e. the shareholders and the directors of the plaintiff company. The said family settlements were recorded in the handwriting of Sh. Satish Kumar Agarwal who is the Chairman and Managing Director of the plaintiff company. Another Director of the plaintiff Mr. M.K. Doogar is also a signatory to the settlement dated

11.02.2007. So is the position of Mr. S.K. Singhal, auditor of the plaintiff and Mr. S.K. Bansal, Advocate of the family/plaintiff who were both signatories to the family settlements. It is also contended by the defendants that the family settlements were admitted, confirmed, accepted, acted upon and adopted by the members of the Agarwal family.

70. It is asserted by the defendants that as per the family settlements, it was agreed by all the parties that the trademark KAMDHENU in relation to the goods Cement, POP, Water Proofing Compounds and Wall Care putty were assigned to Kamdhenu Cement Ltd., defendant No. 1 in Suit No. 425/2008, a company promoted and incorporated by Mr. Pradeep Agarwal who resigned from the Board of Directors of Kamdhenu Ispat Limited i.e. plaintiff company on 14.04.2007.

71. According to the defendants the said assignment was effected in the meeting and as per the valuation report of M/s. Vaish & Associate and M/s. Singhal & Co., the mark KAMDHENU was assigned in favour of Mr. Pradeep Agarwal in relation to cement etc. for a consideration of Rs. 1.40 crores and as per the family settlement, Mr. Pradeep Agarwal and his group transferred their 3% shares in favour of Mr. Satish Agarwal and his group. Similarly, as per the family settlement Mr. Pradeep Agarwal also resigned from the other group.

72. As far as the plaintiff company being a separate juristic entity is concerned, it is contended by the defendants that the plaintiff is a listed company of which the substantial shareholding is held by the Agarwal family and there is no bar in the Companies Act, 1956 which prohibits family members from entering into a family settlement. In pursuance to the family settlement, Sh. Pradeep Kumar Agarwal transferred his 3% share capital in the plaintiff company. Further, pursuant to passing of the Resolution dated 14.05.2007 the plaintiff company issued a communication to the Bombay Stock Exchange informing it of the same. Even a confirmation letter dated 31.05.2007 was issued by the plaintiff company in favour of Kamdhenu Cement Ltd. affirming that the trade mark KAMDHENU in relation to cement and allied products had been assigned.

73. It is argued by the defendants that the plaintiff had concealed the said family settlements in Suit No. 302/2008 and as there was no pleading reflecting the same in the matter, the said fact was brought to light by the defendants in the written statement although during the course of admission/denial of the documents the plaintiff through Satish Kr. Agarwal, the Chairman and Managing Director of the Company has admitted the documents filed in CS(OS) 1882/2008.

74. Further submission of the defendants is that the family settlements clearly recorded that all the groups were entitled to use trademark KAMDHENU. Therefore, the defendant No. 1 company was incorporated in view of the settlements and assignments in favour of Kamdhenu Cement Ltd. and on the resignation of Mr. Pradeep Kr. Agarwal from the plaintiff company the Keyman insurance policy of Mr. Pradeep Kumar Agarwal was assigned in favour of the defendant No. 1 i.e. Kamdhenu Cement Ltd. for which the said company has

issued a cheque dated 17.12.2007 bearing No. 960259 drawn on State Bank of Bikaner & Jaipur, Paschim Vihar, New Delhi for a sum of Rs. 7,68,000/-in favour of the plaintiff. However, the said cheque was not presented for encashment.

75. It is also contended by the defendants that the plaintiff company passed a Resolution on 14.05.2007 in the Extraordinary General Meeting of the plaintiff company wherein consent was accorded to transfer/assign the trademark KAMDHENU pertaining to the goods Cement, POP, Water Proofing Compounds and Wall Putty to the defendant No. 1 Kamdhenu Cement Ltd. for consideration not less than Rs. 1.40 crores. The plaintiff company also issued communication to the Bombay Stock Exchange thereby informing it of the Extraordinary General Meeting Resolution dated 14.05.2007.

76. According to the defendants, in pursuance to the family settlements as well as Extraordinary General Meeting dated 14.05.2007 the defendant No. 1 company made a part payment of Rs. 20 lacs to the plaintiff by way of three cheques drawn on State Bank of Bikaner and Jaipur towards part consideration for assignment. By communication dated 31.05.2007 issued by the plaintiff the assignment of trademark KAMDHENU was confirmed and no objection was raised by the plaintiff against the defendant No. 1 company stopping it from using the said trademark in a full-fledged manner. The defendants thereafter started their business at a large scale and achieved a unique reputation.

77. According to the defendants, in order to dislodge their business the plaintiff fabricated letter dated 06.11.2007 which came into the notice of defendants only on 22.02.2008 whereby the assignment deed was cancelled contrary to the fact that Mr. Pradeep Kumar Agarwal defendant No. 2 from time to time had informed his brother on social gatherings and otherwise kept reminding him as regards the preparation of the papers pertaining to assignment deed.

78. The defendants submit that the said letter dated 06.11.2007 is a forged and fabricated document. Otherwise, the plaintiff company could not have terminated the settlement when the said assignment deed had already been executed as part of the family arrangement and by the time of termination of the agreement, the defendant No. 2 had already established his business by appointing various franchisees in relation to the cement business and most of the terms and conditions had been acted upon by the parties.

79. The contention of the defendants is that the said e-mails filed by the plaintiff in Suit No. 2616/2008 are fabricated as it appears that the defendants are not party to the said e-mail and the same apparently were exchanged between the employees of the plaintiff itself. The minutes of the alleged meeting held on 16.10.2007 cancelling the understanding between the parties for assignment is also forged and fabricated as the defendant No. 1 company has paid part consideration and is ready to pay the remaining consideration as and when the assignment papers are finalized and there was no occasion on the part of the plaintiff to cancel the understanding between the parties or the assignment.

80. The learned Counsel for the defendants has also denied the plaintiff's averment that Rs. 20 lacs paid by the defendants are not towards the part payment of the consideration of the assignment but the same are the value of an insurance policy. It is argued that vide letter dated 16.11.2007 sent by Max New York Life to the defendant No. 2 for his request for cash Surrender Value, the same is clearly worth Rs. 12,28,344.65. The question of adjustment of the said amount of Rs. 20 lacs toward the premium of policy does not help the case of the plaintiff.

81. Let me examine the rival submission of the parties. Admittedly, the following are the relevant excerpts of the four family settlements executed by the family member of the parties:

A. February, 2006

The "Kamdhenu Group" is presently, directly or indirectly, owned and controlled by Sh. Pradeep Agarwal, Sh. Satish Agarwal, Sh. Sunil Agarwal and Sh. Ayush Agarwal, in the ratio of : 30%, 25%, 25% and 20% respectively.

5.3 All the brands of the group may also be clubbed and may be transferred to the parties on the basis of mutual agreement. In case of any disagreement, the ownership shall be determined in such a way that no one's interest is jeopardized. Any difference or dispute on this particular account shall be settled by way of arbitration by one or more mutually acceptable arbitrator and as per the laws for the time being in force. Any Kamdhenu Brand of any product already acquired or applied by anyone of the four parties or any company related to any of the four parties will be the joint property of all the four parties of this agreement. However, in case of "Kamdhenu Saria" or any other brand, which is not divisible, shall be distributed on the basis of Region. For this purpose the country shall be divided into four prominent Regions on the basis of market share of the Brand. The business relating to the Regions shall be distributed among four parties. Any difference of dispute on this particular account shall be settled as mentioned in the above paragraph i.e. by way of arbitration by one or more mutually acceptable arbitrator and as per the laws for the time being in force, or through the Court of Law.

B. Family Settlement dated 11.02.2007

a) The Net worth of the plaintiff Company and other Companies was assessed at Rupees 95.56 Crores, inclusive of brand valuation as per the following breakup:

- 1) Steel Rupees 60.00 crores.
- 2) Cement Rupees 15.00 crores
- 3) Housing Rupees 5.00 crores.

b) Shri Pradeep Agarwal was assigned the Cement Brand; a family company namely Kali Metals (P) Ltd. and cash/land.

c) Shri Pradeep Agarwal was to manufacture the Steel Products under license agreement of franchisees from Kamdhenu Ispat Ltd.

d) It was also agreed between the parties that the Cement Brand will be transferred to Sh. Pradeep Agarwal for a suitable amount as per the legal advice.

C. Family Settlement dated 23.02.2007

b) It was agreed that Shri Pradeep Agarwal will be entitled for Cement Product worth 15 crores; Kali Metals Pvt. Ltd. worth Rs. 5.33 crores; cash/land worth 8.34 crores. This all was worth 28.67 crores which was 30 percent of 95.56 crores, net worth of promoter company.

d) It was agreed that all assets other than cement brand, Kali Metals and land at Najafgarh will belong to Kamdhenu Ispat Ltd. Shri P.K. Agarwal, if require any assets, will pay the cost to Kamdhenu Ispat Ltd.

g) It was agreed that Sh. Pradeep Agarwal will form new company to transfer Cement Brand or could transfer it in Kamdhenu Industries Ltd. on cost to be decided by Sh. M.K. Doogar.

j) It was further agreed that all assets and liabilities related to Cement, Plaster of Paris, Water Proofing Compound and wall Care Putty will be transferred to Company related Shri P.K. Agarwal and all securities related to those items will also be transferred after all adjustments upto 31.01.2007.

k) It was agreed that name of Kamdhenu Cement Ltd. will be changed in due course and promoters of Kamdhenu Ispat will not use the name of cement in any Company/firm. Similarly Sh. Pradeep Agarwal and his group was not to use the word of "Steel" "Ispat" "Alloys" or similar related to steel in any company or firm with Kamdhenu. [Kamdhenu Cement Ltd. referred to in the said clause was intended to be Kamdhenu Cement Industries Ltd.]

l) It was agreed that Sh. Pradeep Agarwal will transfer the shares of his family members and company i.e. Kamdhenu Industries Ltd. at cost price as per their balance sheet if the shares are transferred at indexed cost than the additional cost of funds mobilized by the transferees shall be reimbursed by the transferor. Market value of shares was no consideration in any circumstances. Shares were to be transferred by 30.04.2007.

m) It was agreed that A.P.S. Buildcon (P) Ltd. will be retained by Sh. P.K. Agarwal and shares of other companies like Kamdhenu Ispat Ltd., Kamdhenu Cement Ltd. or the companies not related to Sh. P.K. Agarwal will be transferred to names related to Sh. Pradeep Agarwal.

n) It was agreed that all shares of Kali Metals (P) Ltd. will be transferred to companies or share holder related to Sh. P.K. Agarwal from Kamdhenu Ispat Ltd. and other related companies, at indexation cost on the date of transfer.

o) It was agreed that all other brands other than Steel (class-6) Cement and

Housing will be settled among four promoters with mutual consent.

D. Family Settlement dated 26.05.2007

the parties divided the brands and reduced the same into writing in the following manner:

SHRI PRADEEP AGARWAL

Class 05 Pharmaceutical Class 10 Surgical and Medical

Class 11 Apparatus Heating Refrigeration

Class 12 Vehicle

Class 19 Building Material Natural

Class 19 Building Material non metallic

Class 20 Furniture and Mirrors

Class 22 Ropes and Strings Class 28 Games

Class 31 Agriculture products

Class 33 Alcoholic Beverages

Class 36 Insurance

SHRI SUNIL AGARWAL

Class 01 Chemical

Class 07 Machine and Machine Tools

Class 08 Hand Tools

Class 16 Paper and card Board

Class 17 Rubber Gutta

Class 19 Ply Board.

Class 24 Textile

Class 29 Meat, Fish and Poultry.

Class 34 Tobacco.

Class 40 Treatment of Metal

SHRI SATISH AGARWAL

Class 02 Paint and Varnishes.

Class 03 Cosmetics

Class 06 Metal excluding Steel

Class 09 Photography, cinema etc.

Class 13 Ammunition.

Class 15 Musical Instruments

Class 18 Leather Goods

Class 23 Yarn and Threads

Class 25 Clothing

Class 26 Lace and Embroidery

Class 30 Tea, Coffee and Sugar

Class 41 Education

SMT. SHAIKALI AGARWAL

Class 04 Oils and Greases

Class 14 Jewellery

Class 19 Tiles

Class 21 Kitchen Utensils (Excluding all Steel Items)

Class 27 Carpet, Rugs and Mats

Class 32 Beers and Minerals

Class 38 Telecommunication

Class 42 Providing Foods and Drinks

82. The plaintiff has not denied the fact that after the family settlements, Mr. Pradeep Kumar Agarwal/defendant No. 2 transferred 3% share capital to the plaintiff company in favour of other groups. Similarly, the Chairman of the plaintiff company had also resigned from the Board of APS Buildcon Private Ltd. and Kali Metals Private Ltd. and transferred his group shareholdings in these companies in favour of Mr. Pradeep Kumar Agarwal. The following are the admitted facts as per the pleading and documents produced by the parties:

A. The family settlements were mutually reduced into writing. Initially, a family settlement was entered into in February 2006 amongst three brothers and a nephew (son of deceased brother Sh. Shailender Agarwal).

B. Thereafter on 11.2.2007, 23.2.2007 and 26.5.2007, the parties entered into family settlements between the family members, shareholders and Directors of the plaintiff company. The above mentioned three family settlements were recorded in the handwriting of Mr. Satish Kumar Agarwal who is the Chairman and Managing Director of the plaintiff company.

C. Sh. M.K. Doogar, who was Director of the plaintiff company was also a

signatory to the family settlement dated 11.2.2007. Besides them, Sh. S.K. Singhal, auditor of the plaintiff and Sh. S.K. Bansal, plaintiff's Advocate were also signatories to the family settlement executed on 11.2.2007.

D. Mr. Satish Agarwal, the Chairman of the plaintiff company had also resigned from the Board of APS Buildcon Private Ltd. and Kali Metals Private Ltd. and transferred his group shareholdings in these companies in favour of Mr. Pradeep Kumar Agarwal. Mr. Pradeep Kumar Agarwal after the family settlement started using the trademark "PRIME GOLD" and also issued public notices in the leading newspapers informing the public that he had nothing to do with the plaintiff company.

E. A rolling mill i.e. M/s. Kali Metals Pvt. Ltd. as per the family settlement fell to the share of Mr. Pradeep Kumar Agarwal who already owned a rolling mill namely M/s. Raghuveer Metal Industries.

F. Mr. Satish Kumar Agarwal who is the Chairman and Managing Director of the plaintiff company is admittedly one of the signatories of the family settlements.

83. In furtherance to the family settlement, the plaintiff company passed a Resolution at the general body meeting held on 14.5.2007 which reads as under:

2. To consider and if thought fit, to pass with or without modification(s), the following resolution as an ORDINARY RESOLUTION:

Resolved that consent be and is hereby accorded to transfer/assign trade mark related rights pertaining to cement, POP, water proofing compounds and wall putty business including to increase its efficiency, production, supply, distribution, profitability and market standing the cement, POP, water proofing compounds and wall putty goods only (hereinafter referred as assigned goods), to M/s Kamdhenu Cement Limited, (A company under incorporation) proposed to have its registered office at 24, Shivaji Marg, Najafgarh Road, New Delhi-110 015 along with the trade marks/trade names/copyright Kamdhenu and logo and Kamdhenu formative trade marks/logos in relation thereto for a sum as may be felt appropriate by the management at its absolute discretion, provided that the sale amount shall not be below Rs. 140 lacs (Rs. One Crore Forty Lacs Only) towards the trade marks/trade names/copyrights and in such a manner that company except for the above said assigned goods retains its rights in its said trade marks/trade names/copyrights in relation to all other goods/business and services including of allied/cognate nature whether present or prospective along with its goodwill and reputation.

Resolved that the company shall not use nor cause to be used the said trade marks/trade names/copyrights in relation to the goods/units assigned only. Further, resolved that the assignment/ transfer be made only on the condition that the assignee company shall not use nor cause to be used nor manufacture trade or a deal in any other goods or business under the said trade marks/trade names/copyrights or confusingly similar thereto or bearing the same other than

for the goods/hereby assigned and would pervert the strength and standing of the said trade marks/trade names/copyrights.

Item No. 2 of the Explanatory Statement also reads as under:

Item No. 2 - As you are aware that your company has entered into various segments and usage of the trade marks. Off late your management is contemplating on its focused attention in the core business of manufacturing, marketing and branding of the steel products, which are at present mainly contributing to the profits of the company. As such your board has decided that as there has not been much contribution from cement trademark, therefore, this trademark be disposed off alongwith the brand pertaining to the cement and its allied businesses/ activities of POP, water proofing compound and wall putty. In order to ascertain the value of the brand your company has got it valued from a reputed firm of chartered accountants M/s. Vaish and Associates, New Delhi, and from auditors of the company. They have valued the same at Rs. 138.05 lac and Rs. 130.38 lac respectively vide their letters dated 11.04.2007 and 12.04.2007. These letters are open for inspection at the registered office of the company on all working days during the business hours upto the date of this meeting. Shri Pradeep Agarwal, Ex-Whole time director was the person who was looking after this segment. He has shown his intention to purchase the said trademark/trade name/copyright of cement, POP, Water Proofing compound and wall putty alongwith its all assets and liabilities, if any, within the said price of Rs. 140 lac under the name of the company "Kamdhenu Cement Limited" which as on date of issue of this notice is under incorporation. Though it is neither a sale of whole or substantially the whole of the undertaking and there is no specific requirement of taking shareholders approval yet your directors feel that as a prudent corporate practice matter be brought to the knowledge of the shareholders by seeking their approval by way of an ordinary resolution. Your directors recommend the passing of the resolution. None of the directors except Shri Satish Kumar Agarwal and Shri Sunil Kumar Agarwal being relatives of Shri Pradeep Agarwal are interested or concerned in the above resolution.

84. The detail of the transfer of shareholding of the plaintiff to M/s. Kali Metals Pvt. Ltd. and APS Buildcon Private Ltd. are placed on record. Form 32 was also attached with the documents. Admittedly, Mr. Pradeep Kumar Agarwal resigned from the plaintiff company with effect from 14.4.2007 and information in this respect was given to the Registrar of Companies and Security and Exchange Board of India, Bombay Stock Exchange and National Stock Exchange. Bombay Stock Exchange in view of the Bombay Stock Exchange vide information dated 25.4.2007 made a corporate announcement, the operative part of which reads as under:

2. To transfer/assign trademark related rights pertaining to cement POP, water proofing compounds and wall putty business including to increase its efficiency, production, supply, distribution, profitability and market standing the cement, POP, water proofing compounds and wall putty goods only (assigned goods), to

M/s. Kamdhenu Cement Ltd. (A company under incorporation) proposed to have its registered office at Najafgarh Road, New Delhi alongwith the trade marks/ trade names/copyright Kamdhenu and Logo and Kamdhenu formative trade marks/logos in relation thereto for a sum as may be felt appropriate by the management at its absolute discretion provided that the sale amount shall not be below Rs. 140 lac towards the trademarks/trade names/ copyrights and in such a manner that company except for the above said assigned goods retains its rights in its said trade marks/copyrights in relation to all other goods/business and services including of allied/cognate nature whether present or prospective alongwith its goodwill and reputation, subject to necessary provisions and approvals....

85. Admittedly, later on a letter dated 31.5.2007 was issued by the plaintiff to the defendant M/s. Kamdhenu Cement Limited signed by Mr. Satish Agarwal, Chairman and Managing Director which reads as under:

M/s. Kamdhenu Cement Ltd.

24, Shivaji Mark, Najafgarh Road,

New Delhi-110015

K/A : - Sh. Pradeep Agarwal-Chairman

Sub : Assignment of Kamdhenu brand in your favour for Cement, POP, WPC and WP

With reference to the above, we confirm that we have sold the trade mark selected rights with respect to the above brands for Rs. 1.40 crores to you. The necessary assignment deed for giving affect to the said sale is under preparations. In the mean time, we hereby confirm that, we have no objection if you start using the "Kamdhenu" brand for above products.

Thanking you,

Yours faithfully,

for KAMDHENU ISPAT LTD.

(SATISH KUMAR AGARWAL)

Chairman & Managing Director

86. There is a material on record to show that the defendant company M/s. Kamdhenu Cement Ltd. issued licence agreements to various parties allowing them to use the trade mark Kamdhenu in relation to cement, POP (Plaster of Paris), wall putty, water proofing compound and various other goods and services.

87. The correspondence between the plaintiff, defendant and customers/traders is also available on record to reveal information as regards the start of business by the defendants in relation to the products cement, PoP, wall putty and water

proofing compound. There is material on record to show that the defendants were using the trade mark KAMDHENU CEMENT on television and newspapers and in various media from the month of May 2007 onwards. The said documents and advertisement material shows the knowledge of the plaintiff in this regard.

88. The defendants have placed on record their letter dated 02.02.2008 written to Mr. Satish Kumar Agarwal, Chairman and Managing Director of the plaintiff company, expressing their displeasure by referring the unaudited financial result of the plaintiff for the quarter period ending on 31.12.2007 published in the newspaper Nav Bharat Times dated 31.01.2008 wherein the plaintiff had advertised cement as one of its products bearing trade mark Kamdhenu. The said letter was duly replied by the plaintiff on 22.2.2008 informing that in view of the defendants' failure to make the payment of the consideration amount and completion of the related paper formalities including execution of the assignment agreement after a lapse of six months, the plaintiff had already issued a letter dated 6.11.2007 asking the defendants to cease all use of the trade mark KAMDHENU. It was also indicated in the letter that in case the letter dated 6.11.2007 is not complied with, the plaintiff would initiate legal proceedings against the defendants.

89. The said letter of the plaintiff was replied to by the defendants in the letter dated 4.3.2008. The contents of the letter read as under:

March 4, 2008

Shri Satish Kumar Agarwal,
Chairman & Managing Director
Kamdhenu Ispat Limited,
Regd. Office-L-311, Street No. 7,
Mahipalpur Extension,
New Delhi

Subject:

Dear Sir,

We are in receipt of your letter dated February 22nd 2008, received by us on February 25th, 2008 and are rather intrigued to note its contents. Without even advertng to the contentions raised by you in the aforesaid reply dated February 22nd, 2008, at the very outset we would like to state that we are shocked at the volt face committed by you. To once again put the records straight we would like to point out that since with the grace of God, the business of Agarwal Group was expanding by leaps and bounds and the family too had expanded over the years, therefore, it was considered expedient that to avoid any future disputes, the family should sit together and demarcate the business/ properties/assets so as to ensure peace, harmony and understanding in the family. It was decided that

through the mechanism of mediation of the well wishers of the family, understanding and settlement be arrived at to achieve the aforesaid. Accordingly, the first sitting was held on February 11, 2007 at Sushant Lok.

After deliberations, a settlement amongst family members was arrived at and was reduced into writing, taken acknowledgement of any signed by all present.

In continuation to the first meeting, another meeting was held on February 23, 2007, at E-127, RIICO, Phase-I, Gurgaon, Haryana and a final settlement was agreed, arrived and reduced into writing which was also signed by concerned parties.

The last and final meeting was held on May 26, 2007 at the residence of Shri Satish Agarwal at Gurgaon when details of class wise products was prepared and distributed amongst all, which as well was reduced into writing between the parties.

It is unfortunate that you have despite the family settlements referred to above pretended ignorance. Your retraction and denial about execution of family settlement is fallacious besides being purposeful.

The settlements have been partly acted upon by all the parties and remaining are in the process of execution. To your knowledge the said family settlements were adopted and accepted by the Kamdhenu Ispat Ltd. in the Extra Ordinary General Meeting of the company held on May 14, 2007. In pursuance to said family settlements, you have derived benefit under the same in that; Shri Pradeep Agarwal transferred his three percent shares of the Value of Rs. 1.27 crore (Approx) in Kamdhenu Ispat Ltd. in favour of different members of your group. Shri Pradeep Agarwal also tendered his resignation from the Kamdhenu Ispat Ltd. on April 14, 2007. In furtherance to the said settlements, Shri Pradeep Agarwal also paid to your group a part payment of a sum of Rs. 20 lac as and by way of consideration for transfer and assignment of Trademarks, rights in respect of "Kamdhenu Cement" in favour of Kamdhenu Cement Ltd. of Shri Pradeep Agarwal group and the balance payment of Rupees One Crore Twenty Lac is payable at the time of your having got prepared the assignment deeds and the declarations. Your group also acted upon the settlements and in furtherance thereto resigned from the board of APS Buildcon (P) Ltd. and Kali Metals (P) Ltd.

Despite repeated reminders from Shri Pradeep Agarwal, the assignment deeds were not forthcoming from you, therefore, there was no occasion for Shri Pradeep Agarwal to pay balance money of Rupees One Crore Twenty Lac which Shri Pradeep Agarwal is prepared to pay upon you fulfilling your part of the corresponding obligations in this behalf.

In furtherance to the said settlements in the Extra Ordinary General Meeting of the Kamdhenu Ispat Ltd. on May 14, 2007, it was resolved that the company shall not use nor cause to be used the trademarks/trade names/copyrights in relation to goods/units assigned. Shri Pradeep Agarwal was always and is still

ready and willing to make the balance and has never backed out from the same.

Your letter dated November 6, 2007 has never been received by us. The said letter is an afterthought and it seems that you have manufactured the said letter with ulterior motives of backing from the settlements arrived between you and Shri Pradeep Agarwal. It is unfortunate that you should give go by to the settlements arrived at in the family without objectively to ensure peace, harmony in the respective families. Please be assured that we will not permit you to thwart the settlements arrive at.

We hereby request you to forward the assignment deed and our client is ready with Rupees one Crore Twenty Lacs. You are also requested to perform the other acts for final de-merger.

Authorised Signatory

(Kamdhenu Cement Ltd.)

90. It emerges from the above facts that the parties do not deny the execution of the family settlements and it seems that the said arrangements have been partly acted upon between the parties. Analysis of the family settlements referred above clearly shows that as far as the trademark Kamdhenu in respect of cement, PoP, wall putty and water proofing compound is concerned, the said business was apparently assigned to the defendants with a view to avoid competition with other groups by bifurcation of the products.

91. The main arguments of the plaintiff are as under:

a) That the family settlements are not binding upon the plaintiff company as the signatories to the agreements are family members and have no bearing on plaintiff company i.e Kamdhenu Ispat Limited which is a separate entity. Thus, the said arrangements were inconclusive and were merely a negotiation of the matter of assignment.

b) The said assignment of the trademark Kamdhenu in respect of cement, PoP, wall putty and water proofing compound was resented by the plaintiff as no consideration was made by the defendants to the plaintiff. Therefore, the said proposed assignment was terminated by the plaintiff vide letter dated 6.11.2007 due to deliberate default of payment.

c) As regard Resolution dated 14.5.2007, it was merely passed on the basis of negotiations of the assignment of the trademark Kamdhenu in respect of cement, PoP, wall putty and water proofing compound to the defendants for consideration of Rs. 1,40,00,000/-. Since the said amount was not paid, the defendants cannot take any benefit of the same.

d) Since the plaintiff has already cancelled the assignment by letter dated 6.11.2007, the defendants are, therefore, not entitled for the equitable and discretionary relief claimed by the defendants in their suit in IA No. 10930/2008 under Order 39 Rule 1 & 2 CPC and the plaintiff's application under Order 39

Rule 1 & 2 CPC in suit No. 425/2008 being IA No. 2895/2008 ought to be allowed.

92. As already discussed, the parties do not deny the execution of the family settlements/family arrangement. As far as the first contention of the plaintiff is concerned, that the said agreements are not binding upon the plaintiff company as the plaintiff company itself had not signed the family settlements being a separate entity, I do not accept the plea raised by the learned Counsel for the plaintiff in view of the conduct of the parties after the execution of the family settlements. This argument of the plaintiff is self-defeating in view of the following excerpt from the following arrangement of February, 2006:

DEFINITION OF "KAMDHENU GROUP":

Kamdhenu Group" means and includes the companies, business, properties and assets being jointly owned controlled and held by the four parties i.e. Sh. Pradeep Agarwal, Sh. Satish Agarwal, Sh. Sunil Agarwal and Sh. Ayush Agarwal, except the following companies, which are promoted or controlled by one or more of the parties on individual basis:

1. M/s Kamdhenu Industries Ltd., owned by Sh. Pradeep Kumar Agarwal
2. Kamdhenu Concast Ltd. owned by Sh. Sunil Kumar Agarwal
3. Kamdhenu Overseas Pvt. Ltd. owned by Sh. Satish Kumar Agarwal

But shall include any future development/inclusion in the joint properties/business of the parties.

CONTROL OF "KAMDHENU GROUP" OR "GROUP BUSINESS"

The "Kamdhenu Group" is presently, directly or indirectly, owned and controlled by Sh. Pradeep Agarwal, Sh. Satish Agarwal Sh. Sunil Agarwal and Sh. Ayush Agarwal, in the ratio of: 30% 25% 25% and 20% respectively.

93. The plaintiff cannot deny the fact that as per the material available on record, prima facie it appears that the family settlements have been partly acted upon by both the parties as various actions have been taken in furtherance to the family settlements including passing of Resolution dated 14.5.2007 and in furtherance thereto a letter dated 31.5.2007 issued by the plaintiff to the defendants which establishes that the plaintiff company itself agreed to assign the trademark Kamdhenu in respect of cement, PoP, wall putty and water proofing compound to the defendants against consideration. The letter dated 31.5.2007 confirmed that the said trademark was sold to the defendants for a consideration of Rs. 1,40,00,000/-. The information given by the plaintiff to the Registrar of Companies and Security and Exchange Board of India, Bombay Stock Exchange and National Stock Exchange and the circulation of letter dated 24.5.2007 which issued the corporate announcement by the Stock Exchanges fortifies that the plaintiff company Kamdhenu Ispat had virtually accepted the various terms and conditions of the family settlements.

94. Family Settlement and underlying principles are defined in the Law of England (Vol.17) 3rd Edition at page-215-216) as under:

Definition of family arrangements. A family arrangement is an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family (a) either by compromising doubtful or disputed rights or by preserving the family property (b) or the peace and security of the family by avoiding litigation (c) or by saving its honour (d). The agreement may be implied from a long course of dealing (e), but it is more usual to embody or to effectuate the agreement in a deed to which the term "family arrangement" is applied.

Principles governing family arrangements. Family arrangements are governed by principles which are not applicable to dealings between strangers(f). The court, when deciding the rights of parties under family arrangements or claims to upset such arrangements, considers what in the broadest view of the matter is most for the interest of families, and has regard to considerations which, in dealing with transactions between persons not members of the same family, would not be taken into account(g). Matters which would be fatal to the validity of similar transactions between strangers are not objections to the binding effect of family arrangements(h).

95. The point of family Settlement came up for consideration before the Hon"ble Supreme Court in Kale and Others Vs. Deputy Director of Consolidation and Others, After reviewing case law on the subject, the Hon"ble Supreme Court inter alia held as under:

10. In other words to put the binding effect and the essentials of a family settlement in a concretised form, the matter may be reduced into the form of the following propositions:

(1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;

(2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence;

(3) The family arrangement may be even oral in which case no registration is necessary;

(4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of Section

17(2) of the Registration Act and is, therefore, not compulsorily registrable;

(5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the courts will find no difficulty in giving assent to the same;

(6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement.

Other relevant excerpts from the judgment being paragraphs 12 to 14, 17 and 18 read as under:

12. In *Lala Khunni Lal v. Kunwar Gobind Krishna Narain* the statement of law regarding the essentials of a valid settlement was fully approved of by their Lordships of the Privy Council. In this connection the High Court made the following observations which were adopted by the Privy Council:

The learned Judges say as follows:

The true character of the transaction appears to us to have been a settlement between the several members of the family of their disputes, each one relinquishing all claim in respect of all property in dispute other than that falling to his share, and recognizing the right of the others as they had previously asserted it to the portion allotted to them respectively. It was in this light, rather than as conferring a new distinct title on each other, that the parties themselves seem to have regarded the arrangement, and we think that it is the duty of the courts to uphold and give full effect to such an arrangement.

Their Lordships have no hesitation in adopting that view.

This decision was fully endorsed by a later decision of the Privy Council in *Mt Hiran Bibi v. Mt. Sohan Bibi*.

13. In *Sahu Madho Das v. Pandit Mukand Ram* this Court appears to have amplified the doctrine of validity of the family arrangement to the farthest possible extent, where Bose, J., speaking for the Court, observed as follows:

It is well settled that a compromise or family arrangement is based on the assumption that there is an antecedent title of some sort in the parties and the agreement acknowledges and defines what that title is, each party relinquishing all claims to property other than that falling to his share and recognising the right of the others, as they had previously asserted it, to the portions allotted to them respectively. That explains why no conveyance is required in these cases to pass the title from the one in whom it resides to the person receiving it under the

family arrangement. It is assumed that the title claimed by the person receiving the property under the arrangement had always resided in him or her so far as the property falling to his or her share is concerned and therefore no conveyance is necessary. But, in our opinion, the principle can be carried further and so strongly do the courts lean in favour of family arrangements that bring about harmony in a family and do justice to its various members and avoid in anticipation, future disputes which might ruin them all, and we have no hesitation in taking the next step (fraud apart) and upholding an arrangement under which one set of members abandons all claim to all title and interest in all the properties in dispute and acknowledges that the sole and absolute title to all the properties resides in only one of their number (provided he or she had claimed the whole and made such an assertion of title) and are content to take such properties as are assigned to their shares as gifts pure and simple from him or her, or as a conveyance for consideration when consideration is present.

14. In *Ram Charan Das v. Girjanandini Devi* this Court observed as follows:

Courts give effect to a family settlement upon the broad and general ground that its object is to settle existing or future disputes regarding property amongst members of a family. The word "family" in the context is not to be understood in a narrow sense of being a group of persons who are recognised in law as having a right of succession or having a claim to a share in the property in dispute.... The consideration for such a settlement, if one may put it that way, is the expectation that such a settlement will result in establishing or ensuring amity and goodwill amongst persons bearing relationship with one another. That consideration having been passed by each of the disputants the settlement consisting of recognition of the right asserted by each other cannot be permitted to be impeached thereafter.

17. In *Krishna Biharilal v. Gulabchand* it was pointed out that the word "family" had a very wide connotation and could not be confined only to a group of persons who were recognised by law as having a right of succession or claiming to have a share. The Court then observed: [SCC p. 843, paras 7-8]

To consider a settlement as a family arrangement, it is not necessary that the parties to the compromise should all belong to one family. As observed by this Court in *Ram Charan Das v. Girjanandini Devi* the word "family" in the context of a family arrangement is not to be understood in a narrow sense of being a group of persons who are recognised in law as having a right of succession or having a claim to a share in the property in dispute. If the dispute which is settled is one between near relations then the settlement of such a dispute can be considered as a family arrangement - see *Ram Charan Das* case.

The courts lean strongly in favour of family arrangements to bring about harmony in a family and do justice to its various members and avoid in anticipation future disputes which might ruin them all.

18. In the recent decision of this Court in *S. Shanmugam Pillai v. K. Shanmugam*

Pillai the entire case law was discussed and this Court observed as follows: [pp. 319, 321-322, paras 12, 24-25]

If in the interest of the family properties or family peace the close relations had settled their disputes amicably, this Court will be reluctant to disturb the same. The courts generally lean in favour of family arrangements.

* * * Now turning to the plea of family arrangement, as observed by this Court in Sahu Madho Das v. Pandit Mukand Ram the courts lean strongly in favour of family arrangements that bring about harmony in a family and do justice to its various members and avoid, in anticipation, future disputes which might ruin them all. As observed in that case the family arrangement can as a matter of law be inferred from a long course of dealings between the parties.

In Maturi Pullaiah v. Maturi Narasimham this Court held that although conflict of legal claims in praesenti or in future is generally a condition for the validity of family arrangements, it is not necessarily so. Even bona fide disputes present or possible, which may not involve legal claims would be sufficient. Members of a joint Hindu family may to maintain peace or to bring about harmony in the family, enter into such a family arrangement. If such an agreement is entered into bona fide and the terms thereto are fair in the circumstances of a particular case, the courts would more readily give assent to such an agreement than to avoid it.

96. Learned Counsel for the plaintiff had heavily relied upon the decision passed by the Single Bench in the case of Jaininder Jain and Others Vs. Arihant Jain and Others, wherein in similar circumstances, according to the plaintiff, the Court has not accepted the concept of family settlement. As a matter of fact the said decision of the Single Bench has been overruled by a Division Bench of this Court reported in Jaininder Jain and Ors. v. Arihant Jain and Ors. 2009 (41) PTC 492 (Delhi) (DB) which has accepted the concept of family settlement arrived between the parties. In that case, similar pleas were raised by the parties.

97. The judgments referred by the plaintiff in support of its contention that the plaintiff company being a different legal entity is not bound by the family settlement do not help the case of the plaintiff. All the plea raised by the plaintiff in this regard are unacceptable on the face of the material produced by the plaintiff itself.

98. As far as the consideration amount of Rs. 1,40,00,000/- as agreed for assignment of trade mark in favour of the defendants is concerned, both the parties have submitted different versions during the course of the argument. According to the defendants, they have made a part payment of Rs. 20,00,000/- (Rupees Twenty Lac only) to the plaintiff by way of cheques dated 14.11.2007, 16.11.2007 and 24.11.1007 being cheque numbers 960291, 960293 and 960297 for Rs. 10 lac, 5 lac and 5 lac respectively drawn on State Bank of Bikaner and Jaipur in view of passing the resolution in extraordinary general meeting for the assignment of trademark in furtherance of family settlement. As regard the

balance amount of Rs. 1,20,00,000/- is concerned, the contention of the defendants is that as per arrangement the plaintiff was to send all the requisite papers of assignment deeds and other related papers but the plaintiff did not send the same despite various personal reminders, therefore, the balance amount was not paid though the defendants had always been ready to pay the same subject to the compliance of signing the assignment papers. In order to show their bona fide, the defendants have deposited the balance consideration in this Court.

99. It is further alleged by the defendants that the said arrangement could not have been terminated as a part of the family settlement had been acted upon by the parties. The defendants have specifically denied having receipt of final draft of deed of assignment/ competition agreement which are allegedly signed by the plaintiff. The defendants have also denied the arrangement of the plaintiff for adjustment of Rs. 20 lac towards the premium of the policies. It is submitted by the defendants that vide letter dated 6.11.2007 sent by Max New York Life to the defendant No. 2 for his request for cash of Surrender Value, the same is worth Rs. 12,28,344.65/- and therefore, the question of adjustment of the said amount of Rs. 20 lacs towards the premium of policy does not arise.

100. On the other hand, learned Counsel for the plaintiff has referred various e-mails exchanged between the parties in order to establish that the draft papers of the assignment deed/agreements were sent to the defendants but there was no response from the defendants' side. As per plaintiff, the said arrangement of assignment of the trademark Kamdhenu was cancelled and the defendants were informed in this regard by way of communication dated 6th November, 2007. It is alleged by the plaintiff that the said alleged amount of Rs. 20 lacs received by the plaintiff was not towards part consideration of assignment but the same was the adjustment of value of the insurance policies.

101. In view of the contradictory stand taken by both the parties and after having considered the material on record, this Court is of the opinion that these issues would be determined after the trial of the matters so that the exact position may be known as to whether part consideration has been made towards consideration of assignment or adjustment of the Keyman insurance policies. The dispute about e-mails also needs trial in view of the specific denial by the defendants.

102. Let me now deal with the alleged letter dated 6.11.2007 written by the plaintiff to the defendants according to which the understanding was interim in nature and subject to the receipt of consideration and since no negotiation had taken place on account of default of requisite consideration the defendants were asked to stop using the intellectual property rights and also to settle the accounts. The plaintiff has also relied upon the resolution passed in the Board meeting on 16.10.2007 in support of the said letter. The defendants have specifically denied the receipt of this letter. The contention of the defendants is that this letter is forged and fabricated and the resolution dated 16.10.2007 has

been manipulated by the plaintiff.

103. After having considered the submissions of the parties on this aspect of the matter, *prima facie*, I agree with the submission of the defendants on the following reasons:

a) In case the submission of the plaintiff is correct then one is failed to understand why the plaintiff has not placed the copy of the letter dated 6.11.2007 as well as copy of the resolution dated 16.10.2007 which is the best evidence lying with the plaintiff when the first suit was filed by the plaintiff against the defendants in February, 2008.

b) When the first suit was filed by the plaintiff in February, 2008, there were no pleadings whatsoever about the cancellation of the arrangement of assignment by virtue of letter dated 6.11.2007 as well as the alleged resolution dated 16.10.2007 in that regard. The defendants admittedly at that time were using the trademark Kamdhenu in relation to cement, PoP, wall putty and water proofing compound.

c) Lastly, in case the consideration was not paid by the defendants, there is no letter/communication on the part of the plaintiff to caution the defendant before sending the letter dated 6.11.2007 about the cancellation of the arrangement of the assignment of the trademark Kamdhenu in relation to the goods mentioned above. *Prima facie*, at this stage I accept the contention of the defendants that they sent the letter dated 2.2.2008 to the plaintiff wherein they raised their protest with regard to the advertisement of the mark Kamdhenu in relation to the business of cement, PoP, wall putty and water proofing compound and first time came to know about the cancellation of the arrangement of assignment by reply dated 22.2.2008 received from the plaintiff.

104. Without forming any final opinion about the said letter, this Court is of the considered view that the plaintiff at this stage is not entitled to take any benefit arising out of this letter. Admittedly, the defendants had been using the trade mark Kamdhenu in respect of cement business extensively from the month of May 2007, within the knowledge of the plaintiff who had not raised any objection. The suit was filed by the plaintiff against the defendants for restraining them from using the mark in respect of cement, PoP, wall putty and water proofing compound after about a year later, when the business of the defendants was considerably established. By this time, the user of the defendants is more than three years. On the other hand, there is no material on record to show that the plaintiff is carrying on business on commercial scale bearing the trade mark Kamdhenu in respect of cement, PoP, wall putty and water proofing compound.

105. The civil court, for the purpose of deciding an application for grant of interim injunction has to take a *prima facie* view on the nature and validity of the documents i.e. family settlements in the present matter.

106. The principles for grant of temporary injunction either under Rule 1 or 2 of

Order 39 or u/s 151 of CPC are now well settled and the Courts are required to see

1. Whether the plaintiff have a prima facie case;
2. Whether the balance of convenience is in favour of the plaintiff; and,
3. Whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is not allowed.

107. In M/s. Gujarat Bottling Co. Ltd. and others Vs. Coca Cola Company and others, the Hon'ble Supreme Court, inter alia, observed as under:

The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the "balance of convenience" lies.

108. "Prima facie case" means that the Court should be satisfied that there is a serious question to be tried at the hearing, and there is a probability of a party obtaining the relief at the conclusion of the trial on the basis of the material placed before the Court. If a fair question is raised for determination, it should be taken that a prima facie case is established. Considering the overall facts and circumstances of the present cases, prima facie this Court is of the opinion that family settlements as already referred are binding on the parties and operate accordingly. The plaintiff has taken advantage of the same and is not entitled to challenge the same at this interim stage. As per arrangement, the defendants are entitled to use the trade mark Kamdhenu in respect of cement, PoP, wall putty, water proofing compound and allied goods. At the same time the plaintiff is to be restrained from using the mark in respect of above mentioned goods.

109. In the present matter the prima facie opinion clearly lies in favour of the defendants as does the balance of convenience in view of the aforesaid reasons. In case relief sought by the defendant company Kamdhenu Cement Ltd. is not granted, it would suffer irreparable loss and injury.

110. In the facts and circumstances of the present cases in hand, I feel that at this stage it will be most appropriate that all the interim applications pending between the parties being IA Nos. 2895/2008, 4012/2008, 10930/2008 and 15452/2008 are disposed of with the following directions:

A. Till the disposal of suit, the defendants are allowed to use the trade mark/ name Kamdhenu in respect of the business of Cement, POP, Water Proofing Compounds and Wall Care putty etc. during the pendency of the suit, subject to deposit of Rs. 1,40,00,000/- with the Registrar General of this Court within four

weeks from today. Liberty is granted to the plaintiff to withdraw the said amount during the pendency of the matters within eight weeks from the date of deposit of the said amount by the defendants without any condition. The said withdrawal would be without prejudice to rights and contentions of the plaintiff to contest the matter on merit. In case the said amount is not withdrawn by the plaintiff, the Registrar General of this Court shall keep the said amount in FDR initially for the period of two years. The earlier amount by way of cheque deposited by the defendants stand cancelled.

B. The defendants, however, shall not be entitled to use the logo of chakra, punch line "SAMPURNA SURAKSHA KI GUARANTEE" as well as similar colour scheme and get up similar as that of the plaintiff.

C. The defendants shall also not give the common advertisement through media or by way of letters, information and publicity of the two set of businesses of the defendants under the mark "PRIME GOLD" with respect to steel bars, saria etc. and cement, PoP and wall putty.

D. Consequently, the plaintiff is restrained from using the trade mark / trade name Kamdhenu in relation to the business of cement, PoP, wall putty and allied goods during the pendency of the suit.

E. The defendants' application I.A. No. 4012/2008 under Order X Rule 2 is disposed of in view of the fact that the matter is fixed for framing of issues and direction for trial of the parties.

CS (OS) No. 302/2008, CS (OS) No. 425/2008, CS (OS) No. 1882/2008 and CS (OS) No. 2616/2008

List for framing of issues on 6th July, 2010 before the Roster Bench.

Dasti.