

(2006) 04 DEL CK 0026

In the Delhi High Court

Case No : IA 1329 of 2005 in CS (OS) 217 of 2005

Mother Dairy Fruit and Vegetables P. Ltd. and Another

APPELLANT

Vs

Gujarat Cooperative Milk Marketing Federation Ltd. and
Others

RESPONDENT

Date of Decision : 27-04-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 7 Rule 11, 151

Trade Marks Act, 1999 — Section 2, 25, 31

Citation : (2006) 04 DEL CK 0026

Hon'ble Judges : Swatanter Kumar, J

Bench : Single Bench

Advocate : Ashok Desai and V.P. Singh, Pravin Anand, Ameet Datta, Dinkar and Neha Ahuja, for the Appellant; Rajiv Nayyar Manmohan Singh, Abhishek Saket and J. Satarawara, for the Respondent

Final Decision : Allowed

Judgement

Swatanter Kumar, J.—The plaintiffs filed the present suit for permanent injunction praying for grant of a decree of injunction restraining the defendants from manufacturing, stocking, selling, offering for sale, advertising, directly or indirectly dealing with milk and milk products including but not limited to Ice Creams and Frozen Desserts or any other goods under the trademark identical or deceptively similar to the plaintiffs' "Mother Dairy" trademark. They also prayed for grant of a decree for delivery up of all the materials including labels, blocks, dies, wrappers and cartons etc. Further prayer for passing off a decree for rendition of accounts and recovery of Rs. 20 lacs on account of damages was also made in the suit.

2. Along with the suit, the plaintiffs filed an application being is No. 1329/2005 under the provisions of Order 39 Rules 1 and 2 read with Section 151 of the CPC for grant of ad interim ex parte injunction in the same terms particularly the injunctive relief for use and sale of milk and milk products under the trade name

"Mother Dairy".

3. It is contended on behalf of the applicants that "Mother Dairy" is a concept and the plaintiffs/applicants having adopted "Mother Dairy" as their trade name and trade mark since 1974 particularly in Delhi, have acquired a distinctive status and right in the said trademark. The adoption and use of the said mark vests the plaintiff with legal and rights in common law to bring an action for infringement. They have been operating in milk and milk products under the said name to the knowledge and acquiescence of the defendants and as such, the defendants are liable to be restrained from infringing the said trademark by its adoption in relation to their products.

4. The defendants/non-applicants strongly contended that they are dealing with milk and milk products under the trademark "Amul " since 1946. Their various items though sold under the name "Amul" but clearly describe mother dairy as the source. They have a preferential right to use the said name not only in regard to milk and milk products but even food products. According to the defendants, there is no infringement of trademark and question of passing off does not arise and "Mother Dairy" being a generic word requires no registration and the applicants cannot create a monopoly and defeat the very basis of such generic term. Besides these issues, it is also argued that there is acquiescence on the part of the plaintiffs and that they have not approached the court with clean hands and true facts. According to the non-applicants, neither the plaint nor the suit has been signed and verified by a duly authorized person. The use of corporate name "Mother Dairy" also tantamounts to use of a trade name of similar nature and as such the action for infringement, passing off or damages with the interim prayer for injunctive relief is not even maintainable.

5. It would be appropriate to make a reference to the facts pleaded by the parties in their respective pleadings. plaintiffs are companies duly registered under the provisions of the Companies Act, 1956. Mr. B.D. Chatterjee is stated to be authorized signatory on behalf of plaintiff No. 1 while Mr. Adarsh Kumar is stated to be authorized signatory on behalf of plaintiff No. 2. The National Dairy Development Board (in short "NDDB") was initially registered as a society under the Societies Act, 1860. Subsequently, it was merged with the erstwhile Indian Dairy Corporation, a company formed and registered under the Companies Act. The NDDB under its operation flood programme set up Mother Dairy Delhi in 1974 and later on in the year 1990, Mother Dairy Fruit and Vegetable Project was also set up. It is the case of the plaintiffs that with the operations becoming larger and requiring increased focus on the aforesaid projects, plaintiff No. 1 subsequently established plaintiff No. 2 as its 100% subsidiary on 24th May, 2002. While the ownership and title in the "Mother Dairy" brand remained with plaintiff No. 1, the same was licensed to plaintiff No. 2 for the purposes of manufacturing and marketing activities. The plaintiffs claim to be proprietor of various well-known trademarks including the trademark and trade name "Mother Dairy". It was adopted by them in the year 1974 and had been used by the

plaintiffs on every packaging material, invoices and/or advertisement that they have released and promotional material inter alia handouts, POP materials, displays, banners, billboards etc., so much so that the consuming public and members of trade associate the said trademark and the goods under it to be emanating from the business of the plaintiffs alone. The plaintiffs claim to have spent huge amounts of several crores towards promoting the said trademark and their sales under the trademark "Mother Dairy". The plaintiffs market and sell products including liquid milk, dahi, ice creams, dairy whitener and butter under the said trademark or trade name. The plaintiffs in paragraphs 12 to 14 stated as under:

12. The word "Mother Dairy" is a fanciful and arbitrary mark in relation to milk and milk products including interalia Ice creams and frozen desserts. This fact, coupled with the long and continuous user of the trademark "Mother Dairy" by the plaintiffs have resulted in vesting unto the plaintiffs the exclusive rights over the use and exploitation of the said trademark.

13. Thus the plaintiffs have the exclusive right to use the said trademarks under common law due to honest and prior adoption, long, continuous and extensive use as is spread geographically across the country and across several other countries of the world, extensive advertisement, marketing and promotional activities conducted under the said trademark and in respect of the products sold under the same. Apart from the common law rights the plaintiffs for further protection of their trademark has also sought its registrations in various classes.

14. The plaintiff No. 1 is the registered proprietor of the mark MOTHER DAIRY and variations thereof as detailed herein below:

S. No. Trademark Registration No. Class Date 1 MOTHER DAIRY (Word Per Se) 956474 30 18-09-2000 2 MOTHER DAIRY FRUIT AND VEGETABLE 947721 30 14-08-2000 PRIVATE LTD. Along with Drop Device

The above registration covers all goods falling under class 30 including Ice Cream and other frozen desserts. The subsistence of the registration constitutes prima facie evidence of the validity of the mark u/s 31 of the Trade Marks Act, 1999. Apart from the aforesaid Registrations the plaintiffs have several other pending applications for the trademark MOTHER DAIRY and several other variations thereof in various classes and the plaintiffs crave leave to produce the said applications at later stage. The plaintiffs also have copyright in several artistic works interalia including "MOTHER DAIRY (Blue Logo) as replicated below:

MOTHER DAIRY

6. The above paragraphs are the basis of the plaintiffs' case. The defendant No. 1 was also given financial and technical assistance by the NDDDB and said defendant No. 1 had also started as a Co-Operative Milk Federation and was working and using the phrase "Mother Dairy" as its dairy name at Gandhinagar which resulted in the incorporation of defendant No. 2. The defendants,

according to the plaintiffs, had never used the word "Mother Dairy" as a trademark in Gujarat or any other part of India in any of its advertisements, pamphlets, banners or any other manner. They were, in fact, trading and operating under the name "Amul". The defendants are stated to have consciously adopted and used marks such as Amul, Sagar and Snowcap and had never used the "Mother Dairy" as their mark particularly in relation to milk and milk products. The defendants are stated to have now started using the word "Mother Dairy" with an obvious motive to create confusion and deception among the members of the trade in the public at large. The defendants have, in fact, conspired to enter into the plaintiffs' domain and dilute and later usurp the plaintiffs' valuable intellectual property rights. In November, 2004, a representative of the plaintiffs sighted the defendants' advertisement under the trademark "Mother Dairy" in the newspaper "Gujarat Samachar" dated 25.11.2004 and pamphlets of products bearing the mark "Mother Dairy" started appearing in the market. These acts amounted to clear infringements of the rights of the plaintiffs as afore-referred and having failed to stop the defendants from carrying on the infringing activities, the present suit was filed by the plaintiffs.

7. Detailed written statement was filed on behalf of the defendants as well as reply to the application. Besides taking certain preliminary objections in regard to maintainability of the suit as notice u/s 167 of the Gujarat Cooperative Societies Act, 1961 was not served upon the defendants and that the suit has not been instituted by a duly authorized person, it was also stated that the present suit is an abuse of the process of law. The defendants submitted that the genesis of the word "Mother Dairy", the creation of Mother Dairies and the model and structure of Mother Dairy was created with the efforts of GCOMMFL/Amul and the claim of the plaintiffs on the trademark "Mother Dairy" is malicious and without any substance. "Mother Dairy" is an expression which other states are also using with prefix or suffix added to it in order to identify the origin of the goods and characters. It is submitted that the plaintiffs cannot claim prior user nor does they have a national and international presence in relation to Mother Dairy. Again according to the defendants, "Mother Dairy" is a concept and an organizational structure created to ensure supply of good quality milk to the Metro cities by procuring the same from the cooperative dairies. Mother Dairy has been used as a trademark/organisation name and brand and the said name is used by different cooperative organizations since their inception and each one of the above have their own distinct logo style for Mother Dairy Mark. It is stated by the defendants in their written statement as under:

9. It is further submitted that Mother Dairy is a concept and an organizational structure created to ensure supply of good quality milk to the Metro cities by procuring the same from the co-operative dairies. "Mother Dairy" has been used as a trade mark/organization name and brand the said name is used by different co-operative organizations since their inception and each one of the above have their own distinct logo style for "Mother Dairy" Mark. It is submitted that the

above referred organizations have used Mother Dairy trade name/ brand name in all their communications, promotional materials, advertisements, POP materials, banners, bill boards, packing materials, invoices and invested huge amounts to make this brand famous in their respective markets all over the country and abroad also. These organizations are owned by the millions of milk producers, farmers of this country. Therefore, Mother Dairy brand or trademark cannot be owned by a single organization as it has been used by more than one organizations and all these organizations have contributed a lot to make this brand popular and well known. Mother Dairies have been formed to meet the liquid milk demand of metro cities by procuring milk from Cooperative Societies. The farmer members of Cooperative Societies of the country have Therefore indirectly contributed to Mother Dairy in different forms by above mentioned various organizations, no single organization can claim ownership of this brand as it belongs to millions of farmers of the country. However, the above organizations should be allowed to use Mother Dairy brand distinctively to sell their products. Since Mother Dairy brand/trade has been continuously and extensively used by more than one organizations as mentioned above which are owned by millions of milk producers, farmers, plaintiffs cannot claim to be the owner of this brand. It is generic name, common to the trade and no monopoly can be granted to anyone.

8. The defendants have specifically raised the plea of long delay, laches, estoppels and acquiescence. According to them, the defendants adopted the concept of "Mother Dairy" prior to the user of the plaintiffs. There were many meetings on the concept of "Mother Dairy" during the period 1965-74. The defendants started selling milk products under the name "Mother Dairy" as a mark as well as unit of defendant No. 1 to the knowledge of the plaintiffs since 1993. In the year 2004, the defendant No. 1 introduced the mark "Mother Dairy" with different logos in Ahmedabad in respect of frozen milk products where the plaintiffs have no business activity under the name and style of "Mother Dairy". The exclusive right of the plaintiffs to use the trademark due to common law, due to honest and prior adoption, long, continuous and extensive use has spread geographically across the country is specifically denied and disputed in the written statement filed by the defendants.

9. Replication to the written statement was filed. Besides elaborating certain legal issues, the averments made in the plaint were reiterated.

10. On the basis of the above referred pleadings and the affidavit filed in support thereof, according to the plaintiffs, the plaintiffs had conceived, created, used and publicized entirely the mark "Mother Dairy" as a trademark on their products. The trademark u/s 2(z)(b) of the Trade Marks Act (hereinafter referred to as "the Act") is to be considered along with the definition of Mark as given in Section 2(m). Trademark refers to a mark capable of distinguishing the goods or services of one person from those of others and to a mark which indicates the connection between the goods and the person who produces it. It is a mark or a

brand which has been established by the plaintiffs as their own mark in contra-distinction to the word "Amul" or "Sagar" as prominent trademarks used by the defendants who have more than 8 factories. The use of the word "Mother Dairy" on the packings of the defendants is mere description of a manufacturer unit. It also indicates the place like Mother Dairy, GandhiNagar. This is not a trademark but is mere disclosure of essential features like where the good is manufactured.

11. During the course of arguments, it was argued that the plaintiffs have a registration under Class 30 for "Mother Dairy" dated 21.1.2004 which relates to the date of the application user dt. 14th August, 2000. This trademark user by the plaintiffs is claimed since 1974. Under Class 29, the application was made on 5.5.2003 which was granted on 12.12.2005 during the pendency of the present suit. The sale of plaintiffs' goods is stated to be over Rs. 700 crores per year under the trademark "Mother Dairy" and the defendants main sales are under the trade name of "Amul" and "Sagar". The other argument raised on behalf of the plaintiffs while relying upon the judgments in the cases of Parker-Knoll Ltd. v. Knoll International Ltd. (1962) 10 RPC 265 and Bajaj Electricals Limited Vs. Metals and Allied Products and Another, is that a person cannot use even his own name to identify his goods if it leads to infringement and passing off. The "Mother Dairy" as a trademark has been used by the plaintiffs since 1974 and on a very wide platform since 2000, in any case, while the defendants have started prominently using the said mark as a trademark for sale of their milk and milk products only w.e.f. Nov. 2004 As such, keeping in view the prior user, the intent of the defendants by such infringement is to poach into existing reputation of the plaintiffs. Reliance in this regard is placed on Laxmikant V. Patel Vs. Chetanbhat Shah and Another, , Info Edge (India) Pvt. Ltd. And anr. v. Shailesh Gupta and Anr. 2002 (24) PTC 355, Daimler Benz Aktiegesellschaft and Anr. v. Hybo Hindustan 1994 PTC 287, Tosiba Appliances Co. v. Kabushiki Kaisha Toshiba 2002 (24) PTC 654. Besides these legal submissions, while relying upon N.R. Dongre v. Whirlpool Corporation 1996 PTC (16), it is also the contention that the balance of convenience is clearly in favor of the plaintiffs for grant of an injunction as the plaintiffs would suffer an irreparable loss if the defendants are not enjoined for infringing the established and reputed trademark of the plaintiffs "Mother Dairy" which the defendants had not even remotely used on their milk and milk products particularly prior to November, 2004 On the argument of the defendants that the plaint has not been signed by a duly authorized person, it is stated that the plaint cannot be dismissed nor injunction refused on the ground of inadequate resolution particularly when it is ratified. Reliance in this regard is placed on United Bank of India Vs. Naresh Kumar and others,

12. During the course of hearing of the application, affidavit of one Sh. Kishore Kumar S. Mehta on behalf of the plaintiffs was also filed. Besides referring to the above averments, original packs of Amul Gold, Amul Taaza and Amul Slim N Trim milk packets being manufactured by the defendants and their samples, were placed on record. Till Nov. 2004, even the trademark "Snow Cap" for ice cream was being used by the defendants. All of a sudden while persisting with these

marks, the defendants have started Snow Cap- Mother Dairy ice cream. The samples of the said packings have been placed on record. While looking into these various packings which have been placed on record by the plaintiffs, it is clear that the defendants were manufacturing, selling, offering for sale pasteurised toned milk under the name "Amul Taaza" and "Amul Gold". The pasteurised double toned milk with fat of 1.5% is being sold under the name "Amul Slim N Trim". These packings besides carrying the trademark Amul, carry different colour scheme with buffaloes, sun and flower being shown on the packings in different colours. On the other hand, the plaintiffs are selling pasteurised full cream/half cream milk under the trade name of "Mother Dairy" and has a different colour scheme and packings relatable to the extent of fat in the milk. Pre-November 2004, the defendants were also manufacturing Snow Cap-ice cream with a distinct mark, design and colour scheme. All the milk products produced by the defendants on the back of their packings had described manufactured by Mother Dairy, a unit of GCMMF Ltd. District GandhiNagar." After November 2004, the defendants have started showing on their milk product as well as on the Snow Cap Frozen Dessert, Mother Dairy as the main feature of their packing in apparent variation to their original packings. On their milk packings also "Mother Dairy" has been described most prominently with figure of buffaloes and the word "Amul" is completely missing from those packings. The "Gold Milk" is still maintained. This is the main grievance of the plaintiffs that it is an attempt and malafide act on the part of the defendants who are infringing and transgressing into the protective field of the plaintiffs on the basis of prior user having wide publicity and reputation. The milk and milk products manufactured by the plaintiffs under the trade name "Mother Dairy" clearly identify the link between the manufacturer and the goods. It is the specific case that in many part of the countries including Delhi, the defendants have never operated much less manufactured and offered for sale milk and milk products under the trade name "Mother Dairy". The basic plea of the defendants is that "Mother Dairy" is a concept, it is a generic term and is incapable of registration in accordance with the terms of the Act. That being so and this concept having been adopted by the defendants for all this period and they have a manufacturing unit at Gujrat called "Mother Dairy," unit of GCMMF Ltd., would justify the user of the said trademark by the defendants. The argument in regard to knowledge and acquiescence of the plaintiffs is sought to be inferred on the basis that the unit of "Mother Dairy" was being used on the packings of the defendants for all this time and as such they are entitled to even use the said corporate or manufacturing unit name as their trade name and the plaintiffs in fact and in law cannot raise any grievance in that regard. While making this submission, the counsel for the defendants have relied upon the judgment of the Supreme Court in the case of Amritdhara Pharmacy Vs. Satyadeo Gupta, and QRG Enterprises and Another Vs. Surendra Electricals and Others, to state that on the basis of delay, laches, estoppel and acquiescence not only the application for injunction is liable to be dismissed but even the suit of the plaintiffs has to be dismissed. In the case of Amritdhara Pharmacy (Supra), the Court held as

under:-

If a trader allows another person who is acting in good faith to build up a reputation under a trade name or mark to which he has rights, he may lose his right to complain and may even be debarred from himself using such name or mark.

13. In the case of QRG Enterprises (supra), the court held as under:- As this Court understands, acquiescence, implied consent and estoppel in the filed of law of trademark are based on the premise that where a plaintiff stood by knowingly and let defendant built up a trade reputation until it has become necessary to crush it, would disentitle such plaintiff to relief against defendant for such a defendant has invested its time, labour and money to build for himself his own reputation.

14. While referring to Sections 2(m) and Section 25 of the Act, it is argued that use of a particular mark as a trade mark or a corporate or a manufacturing name is the same thing as use of a trademark. The trade name and trademark is one and the same thing and the plaintiffs were aware of the user of the trademark "Mother Dairy" by the defendants since 1991 and even meetings between the parties were held and the suit of the plaintiff is based on wrong facts and no relief can be granted particularly as on the date of institution of the suit, the Registration under Class 30 was inconsequential as it deals with coffee, tea, coco, sugar and other items but does not deal with milk and milk products. From the documents filed on record by the defendants including the invoices and packings etc., it is also contended that the plaintiffs had complete knowledge of the use of said trade/corporate name by the defendants. They in fact intentionally and consciously acquiescence to the use of the said trademark and the statements made in the plaint now, are afterthought which disentitle the plaintiffs from claiming the relief of injunction. Reliance in this regard has been placed upon the judgment of the Supreme Court in the case of Laxmikant V. Patel Vs. Chetanbhat Shah and Another, and the judgment of this Court in the case of Montari Industries Ltd. v. M/s. Montari Overseas Ltd. 1995 PTC (15).

15. The basic principles of grant or refusal of injunction i.e. balance of convenience, prima facie case and irreparable loss and injury are to be applied in comity to the provisions of the Act and settled criterion governing the trademark law. From their production and manufacturing of pasteurized milk and milk products under the trade name and trademark "Amul" with different expressions prefixed or suffixed, the defendants have been carrying on the business admittedly for a very long time. Even their milk products like ice creams were particularly titled with a definite colour scheme and design as "Snow Cap" ice cream. The invoices and bills placed on record by the defendants and even by the plaintiffs show that "Mother Dairy" was printed upon them and they read Mother Dairy A Gujrat Cooperative Milk Market- In Federation Ltd. Amul Milk Sale Invoices. Mother Dairy has also been described as a unit of GCMMF Ltd which is the proprietor's name. There can be no doubt and in fact even the plaintiffs are

not in a position to deny this aspect that "Amul" had wide ranged business in its said trade name and "Mother Dairy" was its manufacturing unit for certain items as even printed upon the back of the packings produced by the parties. In November, 2004, a sudden change to extinguish the word "Amul" and sell their milk and milk products like ice cream and others under the pre- dominant name and style of "Mother Dairy" completely eclipsing their years reputation and trademark of "Amul", certainly is an act which at least prima facie lacks bonafide adoption of the mark. It is hardly in dispute between the parties that "Mother Dairy" was a concept or can even be said to be somewhat a generic term with its own exceptions but it has been bonafidely adopted and used in relation to manufacturing or sale with a particular colour scheme and design by the plaintiffs for a considerable time and particularly in Delhi. "Mother Dairy" in relation to milk and milk products is relatable to the plaintiffs and the action of the defendants to some extent infringes their rights in law.

16. The plaintiffs also supported the plea of infringement on the basis that they were duly registered for Class 30 which includes ice cream but in any case with the aid of the provisions of Section 29(4), the concept of trademark protection would be extended and includes trademarks which are used for such similar goods. Not only this, the plaintiffs claimed a distinctive character in relation to their trademark which is a reputed trademark. In this regard, reliance is also placed upon the judgment of the Supreme Court in the case of Corn Products Refining Co. v. Shangrila Food Products Ltd. AIR 1960 AC 142. According to the plaintiffs, the defendants cannot trade under the name of "Mother Dairy" on the ground that their manufacturing unit or Mother Dairy is a concept because manufacturing and sale of such goods would result in passing off the goods of the plaintiffs which is again impermissible. Strong reliance in this regard was placed upon the judgment of the Bombay High Court in the case of Bajaj Electricals Limited Vs. Metals and Allied Products and Another, where the plaintiffs were granted injunction sought for and plea of the defendants that they were using their family name not as a trading style but as a trade name or trade sign was not accepted and the fact that the plaintiffs would suffer damages was noticed. The use of "Mother Dairy" as an establishment name by the defendants is ex facie evident from the documents filed by both the parties. But whether such user would give protection to the defendants to enable them to use the same as a trademark or a trade sign in face of the fact that the plaintiffs have been in manufacturing and sale of milk and milk products for number of years, they have huge sales, have spent much money on advertising and have number of establishments and sale outlets The Supreme Court in the case of Laxmikant V. Patel Vs. Chetanbhat Shah and Another, while outlining the principles for grant and refusal of injunction in such cases held as under:

8. ...Independently of question of trade or service mark, however, the name of a business (a trading business or any other) will normally have attached to it a goodwill that the courts will protect. An action for passing-off will then lie wherever the defendant company's name, or its intended name, is calculated to

deceive, and so to divert business from the plaintiff, or to occasion a confusion between the two businesses. If this is not made out there is no case. The ground is not to be limited to the date of the proceedings; the court will have regard to the way in which the business may be carried on in the future, and to its not being carried on precisely as carried on at the date of the proceedings. Where there is probability of confusion in business, an injunction will be granted even though the defendants adopted the name innocently.

9. It will be useful to have a general view of certain statutory definitions are incorporated in the Trade Marks Act, 1999. The definition of trade mark is very wide and means, *inter alia*, a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others. Mark includes amongst other things name or word also. Name includes any abbreviation of a name.

10. A person may sell his goods or deliver his services such as in case of a profession under a trading name or style. With the lapse of time such business or services associated with a person acquire a reputation or goodwill which becomes a property which is protected by courts. A competitor initiating sale of goods or services in the same name or by imitating that name results in injury to the business of one who has the property in that name. The law does not permit any one to carry on his business in such a way as would persuade the customers or clients in believing that the goods or services belonging to someone else are his or are associated therewith. It does not matter whether the latter person does so fraudulently or otherwise. The reasons are two. Firstly, honesty and fair play are, and ought to be, the basic policies in the world of business. Secondly, when a person adopts or intends to adopt a name in connection with his business or services which already belongs to someone else it results in confusion and has propensity of diverting the customers and clients of someone else to himself and thereby resulting in injury.

11. Saimond and Heuston in Law of torts (Twentieth Edition, at p. 395) call this form of injury as "injurious falsehood" and observe the same having been "awkwardly termed" as "passing off" and state:

The legal and economic basis of this tort is to provide protection for the right of property which exists not in a particular name, mark or style but in an established business, commercial or professional reputation or goodwill. So to sell merchandise or carry on business under such a name, mark, description, or otherwise in such a manner as to mislead the public into believing that the merchandise or business is that of another person is a wrong actionable at the suit of that other person. This form of injury is commonly, though awkwardly, termed that of passing off one's goods or business as the goods or business of another and is the most important example of the wrong of injurious falsehood. The gist of the conception of passing off is that the goods are in effect telling a falsehood about themselves, are saying something about themselves which is calculated to mislead. The law on this matter is designed to protect traders

against that form of unfair competition which consists in acquiring for oneself. By means of false or misleading devices, the benefit of the reputation already achieved by rival traders.

12. In *Oertli v. Bowman*, (1957) RPC 388 the gist of passing off action was defined by stating that it was essential to the success of any claim to passing off based on the use of given mark or get-up has become by user in the country distinctive of the plaintiff's goods so that the use in relation to any goods of the kind dealt in by the plaintiff of that mark or get up will be understood by the trade and the public in that country as meaning that the goods are the plaintiff's goods. It is in the nature of acquisition of a quasi- proprietary right to the exclusive use of the mark or get-up in relation to goods of that kind because of the plaintiff having used or made it known that the mark or get-up has relation to his goods. Such right is invaded by anyone using the same or some deceptively similar mark, get-up or name in relation to goods not of plaintiff. The three elements of passing off action are the reputation of goods, possibility of deception and likelihood of damages to the plaintiff. In our opinion, the same principle, which applies to trade mark, is applicable to trade name.

17. Applying the above principles to the present case and keeping in mind the fact that the parties have still to go into the trial of the suit and lead evidence in support of their contentions, the court is to make a prima facie assessment of the merit or otherwise of the contentions raised in relation to interim application. The balance of convenience is that the defendants have been carrying on their own business in relation to milk and milk products and have registrations under the trademark "Amul" which even otherwise is a well- known manufacturing and trading name in that business. Apparently and admittedly, they have altered and introduced the trade name "Mother Dairy" only in November, 2004 and the present suit was filed in February, 2005. The mere fact that their manufacturing unit was a "Mother Dairy" to which the plaintiffs never had an objection as it may be in compliance to other statutory provisions of mentioning manufacturing unit, content and quality of the product they even have no objection if the said informative print continues. But if the injunction is not granted at this stage, the plaintiffs are bound to suffer tremendous loss and in fact their established business for years can be eroded by an impermissible activity of the defendants. The plea of delay and laches taken up by the defendants really does not hold good in the facts and circumstances of the case. The defendants have just commenced this activity and even if they succeed tomorrow, they can always restart the same activity as their business under the name of "Amul" in relation to milk and milk products is no way being hampered by the order of injunction and they could spread by metes and bounds in that field if they so desire. But an intrusion into the business of the plaintiffs by violating and infringing their trademark, which they are using for years together now would not be just and fair. It is a settled principle of law that registration of the trademark is not a condition precedent to grant of an injunction.

18. Learned counsel appearing for the defendants while relying upon Kerly's Law of Trade Marks, 12th Edition contended that the business, trade and trademark in the facts of the present case would be similar. He emphatically relied upon following passage from that book:

The name under which a bus trades will almost always be a trade mark (Or if the business provides services, a service mark, or both). Independently of questions of trade or service mark, however, the name of a business (a trading business or any other) will normally have attached to it a goodwill that the courts will protect. An action for passing-off will then lie wherever the defendant company's name, or its intended name, is calculated to deceive, and so to divert business from the plaintiff, or to occasion a confusion between the two businesses. If this is not made out there is no case. The ground is not to be limited to the date of the proceedings; the court will have regard to the way in which the business may be carried on in the future, and to its not being carried on precisely as carried on at the date of the proceedings. Where there is probability of confusion in business, an injunction will be granted though the defendants adopted the name innocently.

19. It was also the contention of the defendants that the plaintiffs have put forward different cases in the plaint. During arguments, it is specifically mentioned that registration of the trademark of the plaintiffs is in Class 30 and they have been dealing with such goods. The registration certificate was filed later. In arguments, it was stated that they have a valid and subsisting registration both in Classes 29 and 30 and they have been dealing in Class 29 as well. These arguments also do not further the case of the defendants. The plaintiffs had a registration under Class 30 at the time of institution of the suit and they had claimed that on the basis of similarity of products on the strength of the reputed trademark they were claiming a protection and had also moved an application under Class 29. The registration has been granted to the applicants only on 13.12.2005, during the pendency of the suit. Registration of a trademark has certain beneficial consequences favorable to the party claiming registration particularly when the other party has no such registration. But registration or non-registration of a trademark by itself cannot be a sole ground for declining or granting an injunction. The plaintiffs have to prove their case during the pendency of the suit. The voluminous documents have been filed by the parties which need to be proved in accordance with law. Then alone, the court can examine their correctness or otherwise.

20. It may also be noticed here that along with their written statement, the defendants had filed an affidavit of Sh. Vipul Mittal as well as certain documents were annexed to the said affidavit. The registration certificate indicates the holder of the certificate as "Gujarat Cooperative Milk Market-in Federation" and this was a certificate issued in relation to milk and milk products. In form 3 annexed to the application, even for renewal, the name of the factory was described as "Mother Dairy, A Unit of GCMMF Ltd." which clearly shows that

"Mother Dairy" was a name of an establishment and not a trading activity, as far as the defendants are concerned. Obviously this is reflected on the bare reading of the documents and the defendants would be able to prove anything to the contrary during the course of the trial. In relation to action of passing off, reliance by the plaintiffs was also placed upon the following lines of Clerk and Lindsell on torts 18th Edition :

By the tort of passing off it is an actionable wrong for a trader so to conduct his business as to lead to the belief that his goods, services or business are the goods, services or business of another. The claimant must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public. That goodwill may arise from a brand name, features of labelling or packaging, or trade description. Secondly, he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading to or likely to lead the public to believe that the goods or services offered by him are the goods or services of the claimant. Thirdly, he must demonstrate that he suffers (or that he is likely to suffer) damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the claimant.

21. It is obviously not possible to provide an exhaustive statement of the circumstances in which infringement or passing off action would lie and succeed. It is hardly possible for a judicial process to provide a straight-jacket formula to deal with cases for infringement and passing off in a uniform way and without exceptions. The grant or refusal of injunction would normally depend upon facts and circumstances of the cases. On the cumulative perusal of the records before the court, the equity tilts greater in favor of the plaintiffs. For balance of convenience and to avoid irreparable loss, the plaintiffs would be entitled to grant of some limited injunction. The grant of relief to the plaintiffs is not frustrated on the plea of delay and laches or acquiescence as none of these principles on their true interpretation would squarely apply to the facts of the present case. Both these undertakings have been floated under the national schemes and they are more expected to work in harmony with each other without causing avoidable loss and infringement into the business of each other. Not filing/signing of the suit by a duly authorized person is again a plea which in terms of the judgment of the Supreme Court in the case of Union Bank of India v. Naresh Kumar and Ors. (supra) is a mere irregularity and can be cured. Even if, this fact is taken to be correct, the plaint would not be liable to be rejected under the provisions of Order 7 Rule 11 of the Code and the plaintiffs would be entitled to an opportunity to correct the same. The plaintiffs have already filed a resolution on record which according to the plaintiffs ratifies the said defect. But as already said, this is not the stage for the court to hear the suit on the basis of the provisions of Order 7 Rule 11 of the Code particularly when the defect pointed out is a curable defect and is not an incurable, illegal or a bar to the maintainability of the suit.

22. The main emphasis of the counsel appearing for the parties was in relation to the business carried out by the plaintiffs in Delhi. The documents placed by the parties are more relatable to Delhi than all over the country. At this stage, there is not much documents on record to show that the plaintiffs are carrying on their activity all over India with same statistics and standards as in Delhi. It appears that their business is mainly concentrated in Delhi.

23. For the reasons afore-stated, this application is allowed. By an ad interim injunction, the defendants are restrained from manufacturing, selling, offering for sale, advertising and supplying, the milk and milk products and frozen desserts under the pre-dominated trademark "Mother Dairy" particularly in Delhi. The application contains only prayer for grant of this injunction which is granted in the above limited terms while leaving the parties to bear their own costs.

24. Any observations made in this order, whether based on documents or otherwise, would be of no consequence during the trial of the suit and are without prejudice to the rights and contentions of the parties.