

(1992) 04 MAD CK 0037

In the Madras High Court

Case No : Original Application No's. 226 and 227 of 1992

Power Control and Appliances Co. and another

APPELLANT

Vs

Sumeet Machines Pvt. Ltd. and another

RESPONDENT

Date of Decision : 29-04-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 19 Rule 3, Order 39 Rule 1, Order 39 Rule 2
Copyright Act, 1957 — Section 12, 14, 16, 17, 22
Evidence Act, 1872 — Section 115
Trade and Merchandise Marks Act, 1958 — Section 2, 79

Citation : AIR 1993 Mad 120

Hon'ble Judges : Arumugham, J

Bench : Single Bench

Judgement

1. The above applications are filed by the applicant/plaintiff, viz., the Power Control and Appliances Company, against both the respondents

herein, under Order 14, Rule-8 of the Original Side Rules, read with Order 39, Rules-1 and 2 of Civil Procedure Code, seeking the relief of

adinterim injunction to be passed against both the respondents herein, their servants, agents and men from manufacturing selling and advertising for

sale of any electric mixer machine for kitchen use, using the trade mark of the applicant, "SUMEET" in any way adopting such design deceptively

similar in phonetic and visual aspects of the registered trade mark, "SUMEET" by way of committing the infringement of the copyright of the

plaintiff in their artistic work, containing in Document Nos. 1 to 3 filed along with the plaint by distributing, printing or causing to be printed the

work as found in Document Nos. 4, 5 and 6 or printing, distributing and selling in any other manner infringing plaintiff's copyright; and from

committing infringement of the copy right, the second plaintiff has in the artistic

work shown in Document No. 7, Trade Mark Registration No.

263836 filed along with the plaint by printing, causing to be printed and distributing material containing the plaintiff's artistic style of writing,

"SUMEET" as found on defendants' mixies, Document No. 4, 5 and 6 and other trade literature and stationery of the defendants, till the disposal

of the suit.

2. The short facts as culled out from the affidavits, filed in support of all the applications are as follows:--

The first applicant is a proprietorship concern, having adopted its registered trade name, "SUMEET" engaged in manufacturing the power

operated kitchen machine during 1963 and registered it subsequently under the relevant provisions of Trade and Merchandise Act, developed its

business in manufacturing the said mixies by getting the business of the said product well established and having registered the same under the

Designs Act by obtaining the necessary certificates, improved the said designs as the exclusive owner of the said trade mark, "SUMEET" and that

in the said sojourn, the proprietrix has innovated lot of methods to be followed by the consumers, who purchased the said mixies, in printing and

caused to be printed so many modes through the said power operated mixies in the form of the operational instructions of "Sumeet Mixies" as well

as the trade literature along with the guarantee card in such a way to make all the general public identified with reference to the particular mode,

design and pattern of the applicants' product, "SUMEET" power operated mixies and that by doing so, since 1973 onwards she has introduced

so many technical changes in the operation of the said product and thereby acquired a very vast market within and outside the country and earned

a very good reputation and market in the country and abroad by receiving awards for the good product and so on for being manufactured and

marketed in the power operated kitchenware mixies technology.

3. It was the claim in brief being made by the applicants that in extending its business in vast area like manufacturing not only the power operated

kitchenware like mixies, but also washing machines, vacuum cleaners and so on with the collaboration by way of entering into agreement with the

newly developed companies and started the factories and through the appointed distributors for their products, under the trade name, "SUMEET"

floated the business area to several crore as on today.

4. While that being so, in or about the month of March 1992, the applicants/ plaintiffs came to know through the advertisements caused in the

newspaper, "The Hindu", both the respondents herein claimed that they were the manufacturers of SUMEET power operated kitchen machines

and claimed that they are the manufacturers. They caused the publications by adopting the same pattern, design, colour and trade mark of the

plaintiff and called for the distributorship as well as the advertisement displayed in several parts of this country and that on finding the same and

after giving legal notices to the respondents and having found no fruitful results, the applicants have come forward with the above three suits and

applications for the relevant reliefs being asked for, viz., for the interim injunction restraining the respondents from manufacturing any product,

deceptively similar in phonetic and visual aspects with that of the applicants by way of infringing the plaintiffs' trade mark, "SUMEET" and printing

the trade literature and guarantee card by adopting the same with that of the applicants in its entirety and so as to avoid the confusion to be caused

in the minds of the common public and to avoid the heavy and irreparable damages being incurred by the applicants herein.

5. On finding a prima facie case inherent with the applicants, on 25-3-1992 and on 9-4-1992, when all the applications were moved urgently, this

Court has granted the ad interim injunction order against the respondents, as prayed for.

6. A common counter-affidavit was filed on behalf of the respondents as being sworn by one Mr. Ajay Prakash Mathur, claiming to be the

Managing Director of the first respondent, it was contended inter alia while repudiating each and every one of the averments made in the affidavit,

mainly that the suit as well as the applications are liable to be dismissed for the simple reason that the material facts, viz., the relationship among the

parties herein and their respective participation in the business of the applicants as well as their sister concerns including the first respondent, have

not been referred to either in the plaint or in the affidavit and that so much so, it amounts to the suppression of the material facts disentitling the

applicants to get any relief of interim injunction as contemplated by law; and that secondly, that though the name, "SUMEET" was registered by

the applicants originally by the mother of the first respondent by name, Tmt. Madhuri Mathur and that she has commenced the manufacturing of the power operated kitchen machine by name, SUMEET "Electrical SP-16 Mixer" though with the different capacity of the motor to be used, but with the actual aid, collaboration and support of the first applicant/first plaintiff as well as this respondent, he became the permitted user of the trade mark, carried on the business and manufactured the same "SUMEET" mixer and kitchenware of the different types with the consent of the applicant for the last more than seven years; and that thirdly by giving actual aid and help and the technical knowhow in manufacturing the said power operated mixie and other kitchenwares and home appliances of the applicants' name "SUMEET" and marketed through the same distributor for all the applicants and their sister concerns and the first respondent is carrying on the business transactions and the accounts are being audited by one and the same chartered accountant and that by giving security to the running capital secured from the Bank of Hyderabad by the first applicant as well as her husband to the extent of Rs. 2,00,00000/-being operated by the first respondent and that accordingly, as the first respondent since engaged in manufacturing the SP-16 Sumeet Mixies and other home appliances like Washing Machines, Vacuum Cleaners and so on marketed through the same distributors of the applicants by name, "Reprographers and Engineers Private Limited" at Madras and others and that so much so, having allowed the first respondent to engage in manufacturing and marketing the different type of SUMEET Kitchenwares and other home appliances under the same trade mark, by claiming the interim injunction against this respondent by filing the suits and applications, the applicant has absolutely acquiesced with the business of the respondent and that lastly, that in view of the allowing the first respondent by the applicant to manufacture and market "SUMEET" power operated mixie since 1984 onwards, this respondent has been engaged in the business by investing heavy amounts and marketed the same product with the same trade litcratue and guarantee card. But taking advantage of the family bickerings erupted recently about two months back or so, by suppressing the entire facts, coming forward with the suits and applications and obtaining injunction against the respondents caused great havoc, serious prejudice and irreparable loss to the business transaction of this

respondent and that in this context, the balance of convenience as well as the irreparable damages are being caused to this respondent and that

therefore, the order of interim injunctions granted in all the above applications are to be cancelled forthwith.

7. A combined reply affidavit on behalf of the applicants/plaintiffs sworn by Mr. Vivek Prakash Mathur, one of the sons of the first applicant and

the younger brother of the first respondent Mr. Ajay Prakash, was filed in all the above applications and in which he repudiates each and everyone

of the contentions raised by the first respondent in his counter-affidavit, further pleaded that the affidavit sworn on behalf of the first respondent by

one Mr. Anand P. Iyer describing himself as a Commercial Adviser of the Chairman of the first respondent, cannot be accepted in law in view of

the fact that it was barred by the legal norms laid down under Order 19, Rule 3 of CPC and that in reiterating the stand taken by the applicant

through her affidavit, it has been claimed that his mother by name, Tmt. Madhuri Mathur was the founder of this Sumeet products being

manufactured and marketed by adopting the latest technology to capture the entire market within and outside the country which followed the result

of establishing four sister concerns in manufacturing the various components which are required to complete the Sumeet kitchenware, originally by

entering into several agreements with them and that so much so, it was reiterated in this reply affidavit that though the first respondent company was

started by Mr. Ajay Prakash Mathur who was engaged by putting in charge of the company, which did not manufacture any kitchenware mixies till

1988 and that in fact everything was manufactured and the other respondent company was dealing with the same by doing the business of

distribution of mixies, manufactured by the sister concerns of the applicant by name, "Power Control and Appliances, Bombay and that the first

product, viz., Washing Machine by name, Sumeet A-200 was able to produce by the first respondent and that subsequently, he admits that he was

with the actual help and aid of the mother and father, able to produce the Sumeet S. P.-16 mixies. He admits the actual help and collaboration of

the Power Control and Appliances, Bombay by means of entering into separate agreements and that further, he admits the security given by his

father and mother for the amount secured by the first respondent by way of loan to the bank to the extent of Rs. 2,00,00,000/- arising out of

several invoices and that further just to help their first son, his mother and father were kind enough and more affectionate in giving the security as well as commencing the first respondent business company by having the considerable shares and that therefore, it is not for the first respondent to take advantage of the same in claiming the absolute proprietorship or the so-call permissive user with the consent or the acquiescence as pleaded in the counter affidavit. He reiterates further that the first respondent suddenly started to manufacture the "SUMEET" power operated mixie during the month of February or March 1992 by causing the publication in the English daily, "The Hindu" by adopting the trade mark of the applicant and adopting the same literature regarding the power operational method and the guarantee card of the applicants, has committed the act of infringement of the copyright and the trade mark of the applicant and thereby causing every confusion in the minds of the consumers and caused heavy damages to the first applicant and its sister concerns. In other respects, he reiterates each and every one of the averments raised in the affidavits filed in support of the above applications.

8. Upon the above rival pleadings, the questions that arise for consideration are the following.

1) Whether the applicants in all the above applications have established and made out a prima facie case against the respondents in seeking the order of injunction as prayed for?

2) Whether the applicants are barred by Doctrine of acquiescence, as pleaded by the respondents?

3) Whether the first respondent has been engaged in producing the power operated kitchenware and home appliances by using the trade mark

"SUMEET" since 1984 onwards?

4) Whether the balance of convenience is in favour of the applicants?

9. POINTS 1 to 4: The relief asked for in all the three suits are for perpetual injunction against the respondents herein from committing the

infringement of the applicants' trade mark "SUMEET" and the applicants' copyright in following the trade literature and the guarantee card by the

respondents in manufacturing and marketing the identical products, deceptively similar in phonetic and visual aspects, i.e., the power operated

kitchenwares and home appliances of the applicants as well as for damages and

so on. The second respondent is supposed to be the sole distributor of the first respondent for all the products being manufactured and marketed by the first respondent, but he has not filed any objections in the above applications.

10. In support of the case of the applicants, as many as 71 documents have been filed and relied on by the applicants in support of their case, as against 37 documents filed on behalf of the first respondent and relied on.

11. In substantiating the applicants' case, the learned senior counsel, Thiru U.N.R. Rao, has relied on the following case laws:--

1) M/s. R.P. Locks Company v. M/s. Sehgal Locks Company, reported in 1988 PTC 10;

2) Ruston and Hornsby Ltd. Vs. The Zamindara Engineering Co., ;

3) Standard Pharmaceuticals Limited v. U.P. Drug House Private Limited (1980 (1) PLR 129;

4) National Garments Vs. National Apparels, ;

5) Glaxo Orthopedic U.K. Ltd. Vs. Samrat Pharma, ;

6) An unreported judgment held by the learned brother, Justice K.M. Natarajan, in application Nos. 790 of 1986 in C.S. No. 87 of 1986;

7) Another judgment held by the same learned Judge in Application Nos. 4304 of 1986 and 171 of 1987 in C.S. No. 707 of 1986;

8) And one more case law cited is the Order passed in Application Nos. 3036 to 3038 of 1981 in C. S. No. 410 of 1981 (unreported).

12. While placing the reliance on the above referred case laws to substantiate the case on behalf of the applicant, the learned senior counsel drew

my attention to the definition provided u/s 2 that various sub-clauses of the Trade and Merchandise Marks Act 1958 as well as the definition u/s 2

of the Copyright Act 1957, and Section 12 sub-clauses 13, 28, 29, 34, 77 to 79, Sections 81 and 96 of the Trade and Merchandise Marks Act

with regard to the alleged trade mark of the applicants by name, "SUMEET" with reference to the alleged infringement of the copyright pertaining

to the trade literature to be sold along with the "SUMEET" mixie of the applicant and the guarantee card for having reproduced in its entirety

amounting to infringement of the copyright along with Section 2 and its various sub-sections pertaining to the definition of the copyright, the learned

senior counsel relied on Sections 14, 16, 17, 22, 23 and 51 to 55 of the Copyright Act 1957.

13. Then for substantiating the exclusive right and proprietorship over the trade marks and the copyright for the Sumeet trade mark and the trade

literature and the guarantee card as was shown in all the documents, Exs. A1 to A4, the learned senior counsel drew my attention to the

registration certificate of the designs under the Patents and Designs Act 1911 issued by the authorities constituted under the Act over five designs

being adopted and followed by the applicants in producing the power operated Sumeet kitchen mixie and other home appliances by the applicants

company as well as its other four sister concerns. While emphasizing the absolute right over the designs and pattern over the various components

and the design of Sumeet mixie, the learned senior counsel has frankly admitted that the validity period for the registration of the said designs over

four articles were elapsed.

14. Therefore, basing on the above-referred case laws and the various provisions of the Trade and Merchandize Marks Act, Copyright Act and

the Patent and Designs Act, importing to the facts of the instant case, the learned senior counsel, Thiru U.N.R. Rao, vehemently contends that in

the context of the business turn over of the first applicant company and its sister concerns exceeds several crores and the established market for

their product within or outside the country was ranging to a higher level and even captured the international market, there cannot be any suspicion

or difficulty in ascribing that the applicant is the exclusive owner of the Trade Mark of the SUMEET under the relevant provisions of the Trade and

Merchandize Marks Acts and that the various recipes invented and caused to be printed in the trade literature by the strenuous effort and outcome

of the applicants with the guarantee card to be supplied to the consumers in marketing their product, viz., SUMEET mechanical operators and that

its design, pattern and everything have been registered under the relevant provisions of the Act, as borne out by the certificates issued by the

authorities concerned, the applicants are to be deemed to be the absolute and sole owner and proprietrix of the trade mark by name, "SUMEET"

and she is the copyright holder of the trade literature as well as the guarantee card and that inasmuch as no document of any kind nor any materials

provided or placed by the first respondent to disprove the same in this case, the presumption under the various provisions of the Trade and

Merchandise Marks Act as well as the Copyright Act is that the first respondent is infringing the Trade Mark and the copyright in manufacturing

the "SUMEET" kitchenware of various categories by following and adopting the same trade literature and guarantee card and thereby causing not

only confusion in the minds of the common public, but also causing very serious damage and irreparable loss to the applicant herein with the

consequence that the first respondent along with its distributors render themselves liable to be restrained by means of interim injunction as prayed

for till the disposal of the suit.

15. Per contra, Mr. R. Thyagarajan, the learned senior counsel appearing for the respondents emphasized his argument on the basis of the main

contentions raised in the counter-affidavit, viz., that the applications are bereft of all material particulars, viz., the inter-related business transactions

among the applicants/plaintiffs and the respondents since 1984 till today, the present applications for getting equitable reliefs are not all

maintainable; that by the consent and permission of the applicants and a sister concern, since the first respondent was allowed to engage in

marketing SUMEET power operated kitchenwares till today, the applicants have safely landed within the Doctrine of Acquiescence and that

nextly, having allowed the first respondent to start the said category of SUMEET S.P. 16 power mixie and other home appliances like Washing

Machines, vacuum cleaners and so on by using the trade name SUMEET since 1984 onwards marketed through the same distributors of the

applicant and by supplying the components required for the said product since manufactured by the sister concerns of the applicant and that

suppressing the said fact coming forward with the above applications for the relief of injunction in view of the recent bickerings happened among

the parties herein, the order of interim injunction obtained by the applicant is really causing great havoc and irreparable loss for the first respondent

and its business transaction and that therefore, the learned senior counsel contends that the very conduct of the applicants as well as their actual

support and aid to the first respondent rendered so far clearly disentitled the applicant not to sustain the interim injunction passed already.

16. In support of the above contentions, the learned senior counsel, Thiru R. Thyaga-rajn, drew my attention to the following case laws:

1) Amritdhara Pharmacy Vs. Satyadeo Gupta, , wherein it is stated as follows at page 454:--

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 market. But even long user by another, if fraudulent, does not affect the plaintiff's right to a final injunction; on the other hand, prompt warning or action before the defendant has built up any goodwill may materially assist the plaintiff's case.

2) The Andhra Perfumery Works joint family Concerns Vs. Karupakula Suryanarayaniah and Others, . This case law was cited for the proof of acquiescence, wherein it was held, following the observation made by Fry, J., in the case law Willmott v. Barber 1880 15 Ch D 96 as follows at

page AIR Mad 131:

To support a plea of acquiescence in trade mark case, it must be shown that the plaintiff has stood by for a substantial period and thus

encouraged the defendant to expend money in building up a business associated with the mark,

3) K. E. Mohammed Aboobacker v. Nanikram Maherchand 1957 MLJ 573, for the position that as the grant of temporary injunction is governed

by equitable principles, the Court will refuse to interfere summarily by such relief notwithstanding the plaintiff's legal rights unless his conduct in the

matter is free from blame and there is no acquiescence or other estoppel and the test of acquiescence required to disentitle the plaintiff to an interim

injunction need not be strong as is necessary for the refusal of perpetual injunction at the hearing and it is necessary that an application for

interlocutory injunction should be made immediately after the plaintiff becomes aware of the infringement of the mark and that the improper and

unexplained delay is fatal to an application for interlocutory injunction and that the interim injunction will not be granted if the plaintiff has delayed

interfering until the defendant has built up a large trade in which he has notoriously used the mark.

4) Then lastly, a case law reported in Devidoss and Co., a Firm of cloth

merchants Vs. Alathur Abboyee Chetty and Co., a Firm of piecegoods

merchants, held by the Bench of this Court by His Lordship Mr. Justice Sir Aired Henry Lionel Leach along with His Lordship Mr. Justice Horwill,

wherein it was held as follows at page 34:--

Delay simplicitor may be no defence to a suit for infringement of a trade mark, but where a trader allows a rival trader to expend money over a

considerable period in building up a business with the aid of a mark similar to his own, he will not be allowed to stop his rival's business. What

amounts to acquiescence must depend on the circumstances of each case.

Where a plea of acquiescence or abandonment succeeds especially where the defendant has taken the trade mark or another in ignorance, it

would be wrong to deprive him of his costs.

17. I have carefully perused almost all the documents filed on behalf of the applicants herein and relied on in substantiating their case for sustaining

the interim injunction granted already more particularly with reference to the trade literature covered under Ex. A1, and A2, the colour get-up and

design of SUMEET mixie claimed to have been printed in the guarantee card covered under Ex. A2 and the latest receipt covered under Ex. A.3

as well as Ex. A.4 and the copy of the Registration Certificate given under the Trade and Merchandise Marks Act covered under Ex. A.5 and the

publication made in the Trade Mark Journal, covered under Exs. A.6 and A.7 and the pattern of one of the components of the SUMEET mixie

pertaining to the Whipper Blade covered under Ex. A.8 and the certificate given by the Controller of Patent dated 22-9-1991 for their design and

Patent of the suit trade mark, marked as Ex. A.9. The next important relevant document is Ex. A. 15 in which it has to be seen that the company

Sumeet Machines Private Limited was being made involved since 1984 by M/s. Sumeet Research and Holdings Private Limited, to whom, Smt.

Madhuri Mathur assigned the right. From this document, it has to be seen that the first respondent company has been incorporated under the

Company Law on 5-9-1984 and that the various domestic appliances like Sumeet K. 30 Fully Automatic Washing Machine, Sumeet "sports"

Fully Automatic Washing Machine, Sumeet SP 16 Electronic Food Preparation Machine, Sumeet 842-INT Food Processor, Sumeet 842-1

Domestic Mixer, Sumeet PT-20, Aqua Vac Wet and Dry Vacuum Cleaner, Sumeet

V-19 centrifuge Juicer attachment to fit all "Sumeet" mixers

and so on are being manufactured and that their corporate name is managed by M/s. Sumeet Research and Holdings Private Limited, a sister

concern of the applicant's company under the corporate name of the first respondent. Paragraphs 1 to 7 of this printed caution notice assumes

very significance in the present case to show that the five sister concerns of the applicants' company along with the first respondent company are

all being owned and managed by the plaintiff's family including the first respondent company are all being owned and managed by the plaintiff's

family including the first Respondent since 1984 onwards and that they have been involved in manufacturing and selling their automatic kitchen

operative mixies and other domestic appliances through the trade mark and name, "SUMEET" in various categories. The next important document

is Ex. A.22 supposed to be the photo copy of the chronology of events which took place in the family of the applicant herein followed by Ex.

A.23, a letter addressed by the first respondent company during December 1985 to one of the dealers, viz., Vivek Agencies, Madras and Ex.

A.24 is another letter addressed to the said dealer. Ex. A.43, is a letter addressed by the father of the applicant as well as the first respondent Mr.

Ajay Prakash Mathur as well as the husband of Smt. Madhuri Mathur to his son the Managing Director of the first respondent on 28-12-1991.

Ex. A.45 is the official letter of acceptance and confirmation in printed form being circulated to all the dealers by the first respondent for placing the

orders of "Sumeet" appliances.

18. A careful perusal of the abovereferred documents in particular along with the other voluminous documents, clinch the fact that Smt. Madhuri

Mathur, the mother of the deponents in the affidavits filed in support of the applications, as well as the counter-affidavit, got the trade mark

"SUMEET" registered long back as early as 1964 and that by the very strenuous efforts, hard work, skill, exertion, devised so many designs and

improved the appliances on par with the modern technology and along with other members of the family, viz., husband, sons and daughters were

able to start different business concerns as specifically pleaded in the affidavit and reply affidavit and by entering into various agreements among

themselves and by remaining as share-holders and directors in the companies

engaged in manufacturing the various domestic power operated machines like mixies, washing machines and so on by using the trade name and marketed SUMEET mixies in various categories and numbers. It has to be seen that during the said sojourn, Thiru Ajay Prakash Mathur, the present Managing Director of the first respondent was also the director of the plaintiffs company previously and still continuing as shareholder and that during 1984, the first defendant company was incorporated as private limited company under the Companies Act and in adopting the name "SUMEET", his mother Smt. Madhuri Mathur as well as his father gave written consent to the authority constituted under the Companies Act and that the several number of documents produced on behalf of the applicant as well as the respondents, clearly demonstrate the fact that Smt. Madhuri Mathur family including her husband, daughter, two sons and the other family members were all directly concerned and involved in all of their sister concern including the first respondent company and have been engaged in manufacturing the various types of Sumeet home appliances and power operation machines and being marketed through a common distributor, viz., M/s. Reprographers and Engineers, Madras and all of their accounts were being audited by one and the same auditors concerned and that even to provide the working capital to the first respondent company being run by Thiru Ajay Prakash Mathur it appears that in the company of the first respondent, both the mother and the father stood guarantee for a sum of Rs.2,00,00,000/- in the Bank of Hyderabad. All virtually go to show that each and everyone in the family of Tmt. Madhuri Mathur having involved in almost all the companies incorporated in the Companies Act by entering into agreement or otherwise and having the directorship and shares in almost all the companies and deeply involved in manufacturing either the components, motors and other accessories for their companies' products under the registered trade name and mark, SUMEET and that accordingly, they are being marketed the same through the company distributor.

19. Ex. R.1, the undisputed trade literature and Recipe along with Ex. R.1, a letter dated 6-2-1982 addressed to the first respondent by Sumeet

Research Holdings Limited requesting the first respondent to submit "C" forms in respect of the invoices pertaining to the bill numbers to various

amounts asked for the purpose of settling the sales tax assumes every importance and significance in this case. Ex. R.3 is also another letter dated

27-1-1992 addressed to the first respondent reminding the previous demand made under Ex. R.1. Then comes to Ex. R.4 series, the various

printed irrevocable order forms placed before the first respondent for the supply of Sumeet power operating mixies, viz., SP-16, 842-INT, K30

W/M and so on were being brought to and relied on behalf of the first respondent. But all these order forms related to 1989 and 1991 onwards. A

similar correspondence covered under Ex. R.5 also assumes significance. Ex. R.6 clinches the fact that M/s. Reprographers and Engineers,

Madras is the common dealer for the applicants as well as the first respondent. Further documents Exs. R.7 and R.8 also substantiate the

contention of the respondents. Ex. R.9 is the copy of the liability certificate given by the State Industrial and Investment Corporation of Maha-

rashtra Limited for the first respondent company.

20. As many as 27 copies of documents have been relied on behalf of the first respondent as per the type set copies of the documents filed on

behalf of the first respondent to show that from May, 1984 onwards till today, the first respondent company was actually being engaged in

manufacturing several power operating mixies and other home appliances under the trade name, "SUMEET" in different categories, types and

designs through the same distributors of the applicants herein, till today.

21. Having perused the catena of case laws referred by the learned counsel, Thiru U.N.R. Rao, to substantiate the contention made by the

applicant in the affidavit, plaint as well as the reply-affidavit and the voluminous documents relied on by himself, I am so satisfied to accept the case

of the applicant that with regard to the trade mark of "SUMEET", the trade literature, operating instructions and recipe along with the guarantee

card are concerned being followed by the applicant pursuant to the registration of the trade mark under the relevant provisions of the Trade and

Merchandise Marks Act and the Copyright Act having evolved a particular design and mode and patent for their product and that upon which the

original owner Smt. Madhuri Mathur is deemed to have the exclusive and proprietary right to the registered trade mark and the copyright over all

the components and design, colour scheme and the patent being evolved and

adopted by herself contained in the trade literature and the guarantee card and that in consequence thereof, she has been able to develop a first-hand commercial market within and outside the country as evident from the various documents and statistics provided by the applicant herein.

22. It may be remembered at this stage that in so far as the registered trade mark and copyright of the long user is concerned, there is no challenge

or controversy of any kind being prostrated on behalf of the first respondent. In fact, the counter affidavit filed in all the applications are so silent

about the proprietary, exclusive and absolute right of Thiru Madhuri Mathur over her registered trade mark and her assignment of the security in

favour of applicability 1984 and the long user. In the context of no dispute or controversy about the registered trade mark in the name of Thiru

Madhuri Mathur, by the contesting respondents, on perusing the various provisions of the Trade Merchandize and Marks Act and Copyright Act,

as relied on by the learned senior counsel Thiru U.N.R. Rao, with the support of the various case laws cited by him, I have absolutely no

discontent or difficulty in holding that the word, "Sumeet" is the registered trade mark absolutely and exclusively being owned by the first owner,

Tmt. Madhuri Mathur, and that the copyright acquired therefrom through the printed literature of the guarantee card with reference to its particular

design, colour scheme and get-up, she along with her sons and daughters, husband and family members was able to expand the said manufacturing

of the power operated mixie machines and other home appliances by using the trade name, "SUMEET" through the means of various companies

started as sister concern including the first respondent, they were able to earn a good reputation and market within and outside the country all

through.

23. In view of the abovesaid admitted facts, there exists no need for me to traverse each and every one of the case laws referred by the learned

senior counsel referred by the applicant one by one, though the facts are different in its entirety from the instant case and I have no quarrel over the

legal ratios enunciated therein and I have come to the conclusion that in so far as the trade mark "SUMEET" is concerned, the first owner is Mrs.

Madhuri Mathur, mother of the first respondent and she has assigned the same to his 1st applicant subsequently.

24. It will be worth noticing at this stage to note that the contention of the first respondent through the counter-affidavit is resting on the different footing from that of the arguments advanced on his behalf by the learned senior counsel. The peculiarity of this case is that the contesting defendants are not disputing the registration of the trade mark SUMEET, but adopting the same that the first respondent in manufacturing and marketing the same power operated kitchen mixies as well as other home appliances under the same trade name and mark and the trade literature, guarantee card on the ground that since 1984 onwards, this respondent was allowed to do so, by having given the written consent to incorporate the first respondent company and that further having given the actual financial help and guidance, through the same distributors by means of furnishing guarantee to the extent of two crores and allowed his son Thiru Ajay Prakash Mathur to run this first respondent company as one of the sister concerns till the date of filing this suit and allowed him to engage in manufacturing the same type of mixies under the registered trade mark SUMEET and having marketed through the same distributor by name, M/s. Repro-rashgraphers and Engineers and so on will clearly amount to honest, concurrent and permissive owner and that the applicants have completely acquiesced fully in initiating the present legal proceedings against him.

25. The next contention advanced by Thiru R. Thiagarajan, the learned senior counsel on behalf of the first respondent is that though all the companies incorporated by the applicants' family including the first respondent numbering about five as has been referred in the affidavit and incorporated the first respondent company under the same name during the year 1984 till the year 1992 for a period of about eight years, the first respondent has been allowed to manufacture the same power operated kitchen mixies and other household appliances by adopting the same literature and name, guarantee card and that inasmuch as the said aspect has been suppressed wantonly and deliberately, the applicant is not entitled to have the relief of interim injunction all on a sudden as if the first respondent has started the manufacturing of his products by infringing the trade mark and copyright, all on a sudden and that this amounts to a clear suppression of the very important material aspects which ought to have

been brought in the affidavit as well as in the plaint. Then the learned senior counsel, Thiru R. Thiagarajan contends that having allowed the first respondent to start the same business transaction since 1984 onwards and allowed him to spend huge sums to the tune of several crores in manufacturing and marketing the SUMEET product of the automatic power operated home appliances obtaining the order of interim injunction in all the above applications during the month of March 1992, clearly causes every obstacle and serious prejudice and damage to the first respondent and that therefore, the balance of convenience rests only with the first respondent and that with a view to avoid irretrievable damage being caused to the first respondent, the order of injunction passed in the above applications are to be vacated forthwith. At this juncture, it may be very useful for me to advert the specific pleadings taken in the reply-affidavit filed and deposed by Thiru Vivek Prakash Mathur, younger brother of the first respondent as well as the other son of the original owner of the trade mark at page-5 of the reply-affidavit in para-9, viz., O. A. Nos. 226 and 227 of 1992 in C. S. No. 343 of 1992, which is as follows:

As it was found that deponent could not get on and co-operate with the others in "SUMEET" business, at the instance of S. P. Mathur, a new company came to be incorporated in 1984 for the manufacture of larger electrical appliances like washing machines, vacuu cleaners, industrial mixies etc., to be managed by deponent independently although 1 was also a joint promoter of this company

Then in Para-10, it is averred as follows:

The agenda of this company did not include manufacture of domestic mixie, but only larger electrical appliances as would be evident from deponent's circular letter dated December 27, 1985 written in his capacity as Managing Director of defendant-1 to various dealers inviting deposits and term loans.

Then in para-11, it is averred as follows:

It is significant that his projection for the next 5 years did not include domestic mixers at all, and indeed no domestic mixer was manufactured by defendant-1 till 1989. His claim that since 1986, defendant-1 SMPL started manufacturing kitchen appliances and mixers under the trade name, "SUMEET" is false. Although defendant-1 company was started with great

fanfare, deponent as its Managing Director, made no progress in the matter of the projected manufacture of washing machines etc. Instead defendant-1 was engaged solely in the business of marketing SUMEET SP-

16 Mixers manufactured by PCA (B). This was all their business for six long years till 1989 from time of incorporation.

Then in para-12, it is averred as follows:--

The first washing machine emerged out of the factory of defendant-1 only in November 1988. Thereafter, in or about June 1989, defendant-1

commenced manufacture of Mixer model 842-INT. Ajay Mathur represented that this model is meant only for export to Russia and requested

plaintiff-2 to supply a different type of motor, viz., 550 Watts motor for the said mixer. This product was not meant to be marketed in India.

However, Ajay Mathur did not keep his word and defendant-1 started marketing this product in India despite the objections of plaintiff-2.

Then in para-15, he has pleaded as follows :--

It is true that the printing of the matter was done by M/s, Conway Printers and art work was done by the Advertising Agency, M/s. Ogilvy

Benson and Mather Private Limited, Bombay.

In the combined reply affidavit filed in O.A. No. 271 and 272 of 1992, the same deponent on behalf of the applicant has pleaded in para-6 of the

affidavit which reads as follows:--

Taking advantage of his position in the family and the fact that he was a Director of PCA(B) Limited, till 12-3-1992, Ajay Prakash Mathur did

not pay fully for the supplies of SP-16 mixies made by PCA (B) Limited, to SMPL. For the supplies made during the period from 31-7-1989 till

31-3-1990, there is an outstanding sum of Rs. 1.73 and odd crores. For the period from 1st April 1990 to 30th June 1990, there is a further

amount of Rs. 18.61 lakhs outstanding. In all as on date, SMPL under the control of Ajay Prakash Mathur owes PCA (B) Limited, belonging to

the other members of the family, a sum of about Rs. 2 Crores apart from an equal amount of Rs. 2 crores siphoned off by Ajay Prakash Mathur

from other concerns of the family, and this is the subject matter of correspondence and exchange of notices among the parties. The details of

indebtedness with voucher numbers, date of supplies etc., from 31-7-1989 to 31-3-1990 are set out in the documents filed by me.

Then in para-11 at the end of page-7 of the reply-affidavit, he has specifically pleaded as follows:--

It is true that my father S. P. Mathur and my mother Mrs. Madhuri Mathur stood guarantee for the borrowings of Ajay Prakash Mathur of SMPL

to the tune of over Rs. 2 crores. They are paying very heavily for their kind and considerate gesture.

Then in para-13 at page-8, he avers as here-under:

Since we do not have presses suitable for the manufacture of this component in our concerns, the manufacturing of Whipper Blade is entrusted to stainless steel fabricators.

The names of the said steel fabricators were given at the end of the same paragraph.

26. A careful consideration of the above specific pleadings taken and sworn by the younger brother of Mr. Ajay Prakash, the Managing Director

of the first respondent in the context of the voluminous number of documents relied on both parties, clearly demonstrate the fact that the trade

name, "SUMEET" as registered by the original owner under the relevant provisions of Trade and Merchandise Marks Act and as assigned

subsequently and the Copyright acquired over the trade literature and the guarantee card by Tmt. Madhuri Mathur family were freely allowed to be

used by her sister concerns numbering five inclusive of the first respondent and the plaintiffs-2 to 5 started subsequently and that in all, each and

every member of Tmt, Madhuri Mathur family having and holding shares in different quantities and holding directorship posts and that accordingly,

all were engaged in producing the power operated kitchen machines and other home appliances by using the trade name, "SUMEET" and that in

manufacturing such power appliances and marketing the same through the common distributors, all were found engaged jointly in following and

adopting the trade literature schemed out and innovated and that was the reason why all were engaged in expanding the business by starting several

companies and established their market for their various products.

27. In this context, I am able to see that there is every force in the arguments advanced on behalf of the first respondent by Thiru R. Thyagarajan,

the learned senior counsel that the applicants/plaintiffs having allowed the first respondent to start the manufacturing of SP-16 electronic mixies with

550 Watts of specific motor and component of the same either for the purpose of exporting to Russia or for marketing within the country, the same was allowed by all including the original owner of the trade mark and the copyright holder to adopt, follow and market their product under the registered brand name of "SUMEET" and thereby allowed the first respondent to manufacture the abovesaid kitchenware for a long period and this aspect has been proved clearly by almost all the prescribed irrevocable order form placed by various distributors and retail sellers from the year 1988 onwards.

28. On the basis of the above established factual aspects, Thiru R. Thiagarajan, the learned senior counsel persuaded me to accept that this is a

peculiar case in which the entire family of Thiru Madhuri Mathur was all along engaged in manufacturing and marketing the various power operated

home appliances under the registered trade mark and name, "SUMEET" by following the trade literature printed with the third party, M/s. Conway

Printers and they were able to establish their business jointly though in the name of different sister concerns and in the context of Doctrine of

Acquiescence which is in favour of the first respondent and the legal norm of honest and concurrent user of the registered trade mark as clearly

envisaged by the case laws referred to by me already, virtually prevent the applicants from getting the interim injunctions sustained, passed already.

29. Having cogitated the rival pleadings and the undisputed facts with reference to the various case laws placed before me in the context of the

admitted facts, I am fully satisfied to hold that because Thiru Ajay Prakash Mathur, a qualified man having passed M.B.A. in abroad, was inducted

by the Mathurs' family to be acting as the Director and shareholder of almost all of their family concerns and if that was the position, I am able to

gauge for at least to some extent, that he would have contributed his labour and skill followed by the event of starting a new concern during 1984

and that in which it was represented by the learned senior counsel that the first respondent's mother as well as the father has considerable shares

even today and further as was admitted that their another son Mr, Vivek Prakash Mathur was also the director of the first respondent for some

time in the past. As was rightly pointed out by the learned senior counsel, Thiru R. Thiagarajan, that this factum though assumes much significance

and importance in this case has not been referred to or averred either in the affidavit or in the plaint for the obvious reasons known to the applicants and the other members of their family.

30. Thiru U. N. Rao, the learned senior counsel made a strenuous effort in persuading me not to accept the contention that the material facts

abovereferred have been suppressed, but he tried to persuade me that the said facts are not relevant for the purpose of this case. Having

considered very meticulously, I feel totally unable to accept the contention of the learned senior counsel appearing for the applicant. Then another

contention was advanced on behalf of the applicant that the counter-affidavit sworn by one Thiru Anand. P. Iyer in the capacity of the Commercial

Adviser to the Managing Director, Thiru Ajay Prakash Mathur is not competent to swear the affidavit as was specifically provided under Order

19, Rule 3 of Civil Procedure Code. In view of this specific claim made by the said deponent in para-3 that he in the capacity of the Commercial

Adviser to the Managing Director of the first respondent knows the facts of the case and having perused the legal norms provided in the

procedural law, I am not able to accept the contentions advanced on behalf of the applicants. It is pertinent at this stage to note that the bickerings

among the family more particularly between the son, the Managing Director of the first respondent and the applicants' family, started recently as

evident from the photo copies of the letters addressed by the first respondent as well as the minutes of the companies arrayed in the category of the

plaintiffs 2 to 5. A careful perusal of all these documents relied on reveals the fact that only recently in March 1992, the bickerings went so deep

among the members of the applicants' family and that in consequence of the same, compelled the applicants and the other family members to

approach this Court by way of filing these suits and applications by suppressing the very relationship and the factum of allowing the first respondent

to manufacture SP-16, 1NT 842 mixers by adopting the same trade mark copyright design, colour scheme, get-up and so on. and to expand his

business by involving huge money into the same since 1986 onwards as the applicant had admitted the same in the reply affidavit.

31. In considering the gamut of Section 96 of the Trade and Merchandise Marks Act and its applicability to the facts of the instant case or as to

whether the respondent is entitled to claim honest and concurrent user as was envisaged in Section 12, Clause-3 of the Trade and Merchandise

Marks Act, in my firm view, has to be gone into during the time of trial only and cannot be totally adjudicated over the same in the present

applications. Ofcourse, it is always open for the parties to vindicate their rights during the trial and having considered very meticulously every rival

pleadings and the case laws referred to and the established circumstances on the basis of the established factual aspects, I am fully satisfied to hold

that the dispute in the present case is a family affair and as long as the bickerings simmered among themselves till the end of 1991, no infringement

of either trade mark, or copyright or other allegations dominated in the minds of the applicants. But, on the other hand, the affectionate mother the

applicant herein, the father S.P. Mathur and the younger brother who sworn the reply affidavit on behalf of the mother have allowed the first

respondent to be one among themselves in manufacturing and marketing the power operated household mixies and other home appliances, by

adopting the same trade mark and copyright since 1984 onwards and that only after the bickerings erupted, I am able to see that the same forced

the applicant to drag other family members to file several suits and applications, under the pretext of the infringement of trade mark and copyright.

Under these circumstances, I am fully satisfied to hold that in view of the peculiarity of the instant case and special circumstances which transpired

exclusively among the family members of Mrs. Madhuri Mathur, the doctrine of acquiescence and the honest and concurrent user will attract

directly and that therefore, I am inclined to hold that the first respondent has clearly proved his case and the points-2 to 4 are in favour of the first

respondent. In this context, since I have given my finding, on points 2 to 4 that the first respondent has succeeded, then in consequence thereof,

naturally, there is no prima facie case proved by the applicant under Point No. 1 and that therefore, I answer this point against the applicant and in

favour of the first respondent. I answer the points-2 to 4 in favour of the first respondent and against the applicants.

32. May be the applicant is the original first owner of the trade mark by name, "SUMEET" and acquired the exclusive proprietary trade literature

and the guarantee card on the basis of the designs registered. But, it is significant to note that she has assigned the said rights in favour of M/s.

Sumeet Research and Holdings Limited. In the context of no dispute with regard to the said process by the said mother and the case of the first respondent rests on different footing, viz., on the basis of concurrent user and acquiescence for a period of almost 7 1/2 years, i.e., from 1984 till the date of filing the action, I am so clear in my mind that the first respondent has been allowed to invest huge money in the development of the said company and having allowed him to spend such an enormous amount to adopt the same trade mark, colour scheme, trade literature in the product manufactured by him and marketed the same through the company and therefore, taking action all of a sudden in the context of the legal norm and thereby stopped the first respondent from the said activities by the operation of Order 39, Rules 1 and 2 of CPC is not justifiable nor reasonable in any extent. In this context, I am able to see that if the order of ad-interim is vacated, no prejudice will be caused to the applicants, because as a joint collaborator and son and member of the family, he has to run the business as was done previously. Stopping the business of the first respondent by way of interim injunction, involved already huge money in establishing the market will totally ruin the business of the first respondent and make it to a standstill and to this extent, I see that the balance of convenience is in favour of the first respondent, and not with the applicants herein. It was one of the contentions advanced on behalf of the applicants is that in a clear case of infringement of trade mark and copyright, the only criterion that has to be seen is whether the applicants have established a prima facie case and it would follow that the question of balance of convenience and irrevocable damages are not to be considered at all. But, in the context of the reply-affidavit and the pleadings, raised therein, I am not in a position to countenance the arguments advanced on behalf of the arguments.

33. Having identified the honest and concurrent user of the registered trade mark and copyright by the first respondent with the actual aid, help and financial assistance by the applicants and their family members for a period of more than 7 1/2 years, the doctrine of acquiescence and the honest and concurrent user would certainly be made applicable to the facts of the present case. It is always open for the applicants to work out their remedy only in the suit, but in so far as the relief claimed in the applications are concerned, since I am able to see that the strong prima facie case is

inherent only with the respondents, and I am not able to countenance the ad interim injunction passed already.

34. In the result, O.A. Nos. 226, 227, 271 and 272 in all the above three suits are dismissed. Consequently, the order of interim injunctions

passed against the respondents already by this Court are hereby vacated forthwith. There will be no order as to costs, under the circumstances.

35. Order accordingly.