

(2014) 08 GUJ CK 0051

In the Gujarat High Court

Case No : Special Civil Application No. 410 of 2014

Radhe Krishna Products

APPELLANT

Vs

Parshottambhai Dharamshibhai Lunagriya

RESPONDENT

Date of Decision : 28-08-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 1, Order 2 Rule 2, Order 2 Rule 2(2), Order 2 Rule 2(3), Order 23 Rule 1
Constitution of India, 1950 — Article 227
Copyright Act, 1957 — Section 2(m), 51
Limitation Act, 1963 — Section 22
Trade Marks Act, 1999 — Section 135, 27, 27(1), 28, 29

Citation : (2014) 08 GUJ CK 0051

Hon'ble Judges : K.M. Thaker, J

Bench : Single Bench

Advocate : Tushar Mehta, Senior Counsel with Pratik Y. Jasani, Advocate for the Appellant; Sunit Shah, Counsel and Nehal M. Raval, Advocate for the Respondent

Judgement

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K.M. Thaker, J.—In present petition, the petitioners have prayed, inter alia, that:

"10(A) This Hon"ble Court may be pleased to issue an appropriate writ, order and/or direction, quashing and setting aside the impugned order dated 25.11.2013 passed by the Ld. 6th Additional District & Sessions Judge, Jamnagar below application Ex. 15 in Regular Civil Suit No. 65/2012, and be further pleased to reject plaint of Regular Civil Suit No. 65/2012 filed by the Respondent in the Court of Ld. 6th Additional District & Sessions Judge, Jamnagar."

2. The petitioners are aggrieved by order dated 25.11.2013 passed by the learned trial Court below Exh. 15 in Regular Civil Suit No. 65 of 2012 whereby the learned trial Court rejected present petitioners" (i.e. original defendants) application (Exh. 15) which was filed under Order VII Rule 11(a) and (d) of the Civil Procedure Code (hereinafter referred to as "the Code").

3. The relevant facts involved in and leading to present petition are that:

3.1 The petitioners are the original defendants and the respondent herein is the original plaintiff in Regular Civil Suit No. 65 of 2012.

3.2 According to the details mentioned in the petition, the petitioner No. 1 is a partnership firm which is engaged in the business of processing and selling edible lime ordinarily used in pan masala and/or with beetle nut and tobacco.

3.3 The petitioners claim that they are selling their product under different brand names viz. Babu, New Patel and Shree Bhole Bapa Parcel. The petitioners have further claimed that since 2006 they adopted, and started to use the mark "Babu Chuna" and "Babu Parcel" on the packaging of edible lime and that during the same time they also started using another mark viz. "New Patel Parcel Chuna" and "Shree Bhole Bapa Parcel" hereinafter referred to as "Bhole Bapa").

3.4 The petitioners have claimed that in July 2012, the respondents herein filed a civil suit which came to be registered as Regular Civil Suit No. 4 of 2012 (hereinafter referred to as "the said first suit") at Rajkot against the petitioners on the allegation of (a) infringement of copyright; and (b) passing off. The respondents also filed application for injunction/interim relief (Exh. 5) whereon the learned Court issued notice to the petitioners.

3.5 It is claimed by the petitioners that they have obtained assignment of the trademark "Babu Chuna" from one Mrs. S. Sayali and for that purpose a deed of assignment dated 7.8.2012 (i.e. after the respondents filed the said first suit No. 4 of 2012) has been executed between said Mrs. S. Sayali and the petitioners.

3.6 The petitioners have also claimed that they filed objections against the maintainability of the said first suit (i.e. RCS No. 4 of 2012).

3.7 According to the petitioners, the respondents tendered a purshis (Exh. 16) in the said first suit declaring that the said suit and the injunction application is only for infringement of copyright and accordingly he (i.e. the plaintiff) will delete the averments of passing off in the plaint and injunction application and will submit amended plaint and injunction application.

3.8 The petitioners have also claimed that in September 2012, they have filed a suit for infringement of trademark against present respondent which is registered as Regular Civil Suit No. 7 of 2012.

3.9 The petitioners have alleged that during the pendency of the said first suit, the respondent filed another suit at Jamnagar which is registered as Regular Civil Suit No. 65 of 2012 (hereinafter referred to as "the said second suit").

3.10 In this background, the petitioners herein filed an application (i.e. Exh. 15) dated 19.1.2013 in the said second suit and claimed that the said second suit is not maintainable in light of Order VII Rule 11(a) and (d). After hearing the parties with reference to the said application (Exh. 15), the learned trial Court passed the order dated 25.11.2013 and rejected the said application for the

reasons recorded in the order. Hence present petition.

4. Mr. Mehta, learned senior counsel submitted that after having withdrawn the averments and the claim/relief with reference to alleged "passing off" and after declaring that the relief prayed for in the suit No. 4/2012 is to be restricted to the claim/relief against alleged infringement of copyright, it is not permissible to the plaintiff (i.e. present respondent) to file another suit for similar claim/relief, however, the plaintiff in the said first suit has filed second suit for same claim/relief. According to the learned senior counsel for the petitioners, any permission from the Court to file second suit for same claim/relief was neither prayed for nor granted and therefore also the said second suit (RCS No. 65/2012) is not maintainable. He also submitted that the said second suit is a composite suit and that, therefore also, the said second suit is barred by law. Mr. Mehta relied on the provisions under Order 23 Rule 1(4) and Order 2 Rule 2 of the Code and Section 27 read with Sections 135, 28 and 29 of the Trademarks Act. Mr. Mehta submitted that in light of the said provisions the plaint/suit deserve to be rejected under Rule 11(a) and (d) of Order 7 and the application filed by the petitioners ought to have been allowed however the learned trial Court failed to appreciate the said contentions and erred in rejecting the application. According to Mr. Mehta, learned senior counsel, the impugned order suffers from serious error of non-application of mind and that the impugned order is a non-speaking and unreasoned order and that the second suit deserves to be and ought to have been rejected. In support of his submissions, Mr. Mehta relied on below mentioned decisions:

(a) Ratan Food Products vs. Jasvindersing Harcharansing Madan [LPA No. 877/2010];

(b) T. Arivandandam Vs. T.V. Satyapal and Another, ;

(c) Maharaj Shri Manvendrasinhji Ranjitsinhji Jadeja Vs. Rajmata Vijaykunverba Wd/o Late Maharaja Mahendrasinhji [1998 (2) G.L.H. 823];

(d) Chandrakant Kantilal Jhaveri Vs. Madhuriben Gautambhai G.L.R. 2010(52) 270];

(e) Croft Sales and Distribution Ltd. Vs. M.V. Basil and Others, ;

(f) Gulabchand Makanji Vs. Motapondha Vibhag Tenants" Co-operative, Agricultural Society Ltd., ;

(g) Smt. Sheela Adhikari Vs. Rabindra Nath Adhikari and Others, ;

(h) Bloom Dekor Limited Vs. Subhash Himatlal Desai and Others, ;

(i) A.K. Gupta And Sons Ltd. Vs. Damodar Valley Corpn. [1994 (6) SCC 322]

(j) Dahyabhai Ranabhai Vaghela Vs. Bloom Dekor Ltd. [1995 (1) G.L.H. 865]

(k) Hindustan Zinc Ltd. Vs. Vijaysinh Amarsinh and Co. and Another, ;

- (l) Cadila Health Care Ltd. Vs. Cadila Pharmaceuticals Ltd., ;
- (m) Khoday Distilleries Limited (Now known as Khoday India Limited) Vs. The Scotch Whisky Association and Others, ;
- (n) Virgo Industries (Eng.) P. Ltd. Vs. Venturetech Solutions P. Ltd., ;
- (o) State Bank of India Vs. Gracure Pharmaceuticals Ltd., ;
- (p) Devarapu Narasimharao Vs. Yerrabothula Peda Venkaiah and Others, ;
- (q) Modi Korea Telecommunications Limited Vs. Indus Ind.Bank Limited and others, ;
- (r) Narayan Jethanand and Others Vs. Asapuri Vijay Saw Mill, ;
- (s) N.V. Srinivasa Murthy and Others Vs. Mariyamma (dead) by Proposed LRs. and Others, .

4.1 Per contra, Mr. Shah, learned counsel for Mr. Raval, learned advocate for the respondent opposed the petition and the submissions by Mr. Mehta and submitted that the subsequent suit filed by present respondent is neither barred by Order 2 Rule 2 nor by Order 23 Rule 1(4). Mr. Shah also disputed the contention that the second suit is a composite suit or that it is hit by section 27 of the Act. Mr. Shah submitted that the first suit is filed with reference to and in light of the mark "Bhole Bapa". He also submitted that the relief prayed for/claim in the first suit is against alleged infringement of copyright in artistic work of plaintiff's label and the relief/claim against passing off are raised with reference to mark "Bhole Bapa", whereas the second suit is against and in respect of alleged passing off by using mark "Babu". According to learned advocate for the respondent, the said two suits are based on different subject matter and separate cause of action. According to the respondent, the provisions under Order 2 Rule 2 and/or Order 23 Rule 1(4) are not attracted in respect of the said second suit and the suit is not barred by the said provisions. Mr. Shah, learned advocate for the respondent also contended that the application under Order 7 Rule 11 is based on defence and their contention amounts to going into the defence of the defendants. Mr. Shah, learned advocate for the respondent also claimed that in a petition under Article 227 of the Constitution, the Court would interfere with the order of the learned trial Court only if the reasons are perverse, however, in present case, the reasons recorded by the learned trial Court are not perverse and therefore, the order does not deserve to be and may not be interfered. Mr. Shah, learned counsel relied on following decisions:

- (a) Alka Gupta Vs. Narender Kumar Gupta, ;
- (b) Oriental Bank of Commerce Vs. Naresh Khushaldas Gangtani, ;
- (c) Societe Des Products NESTLE, SA and Others Vs. Essar Industries and Others, ;
- (d) Virgo Industries (Eng.) P. Ltd. Vs. Venturetech Solutions P. Ltd., ;

- (e) Smithkline Beecham Consumer Healthcare GMBH and Others Vs. Hindustan Lever Limited and Another, ;
- (f) Mahendra and Mahendra Paper Mills Ltd. Vs. Mahindra and Mahindra Ltd., ;
- (g) M/s. Bengal Waterproof Limited Vs. M/s. Bombay Waterproof Manufacturing Company and Another,
- (h) Dhara Seeds vs. Gujarat Farm Seeds Pvt. Ltd. [(GJH)-2009-11-43];
- (i) Laxmikant V. Patel Vs. Chetanbhat Shah and Another, ;
- (j) Hindustan Uniliver Limited Vs. Sree Annapoorna Foods and R. Velumani, ;
- (k) Surjit Kaur Gill and Another Vs. Adarsh Kaur Gill and Another, ;
- (l) Dandi Salt Pvt. Ltd. vs. Indo Brine Industries Ltd..

5. Before taking up rival submissions for consideration, it is relevant and necessary to mention that during subsequent submissions by the petitioners and the respondent, a further affidavit dated 30.6.2014 came to be tendered on record by the petitioners whereby it is brought on record that after submitting the above referred purshis dated 9.11.2012 (exhibit 16) in the said first suit, the plaintiff of the said first suit did not take consequential steps until 26.11.2012. It is claimed that sometime after filing the said purshis dated 9.11.2012 the plaintiff, i.e. present respondent submitted an application seeking time to file an application under Order 6 Rule 17. Thereafter on 15.12.2012 the plaintiff presented an application (Exh. 18) and prayed for further time and subsequently, on 29.12.2012, the plaintiff filed an application dated 15.12.2012 (Exh. 22) under Order 6 Rule 17. Thereafter, the proceedings of the said first suit were adjourned and on 19.1.2013 the petitioners filed their reply to the said application dated Exh. 22 under Order 6 Rule 17 of the Code. The petitioners and defendants have clarified that until 9.5.2014 any order below said Exh. 22 is not passed by the Court.

5.1 Meaning thereby, even after filing above mentioned purshis dated 9.11.2012 (Exh. 16), until 29.12.2012 the plaintiff had not deleted the averments related to alleged passing off from the said first suit and/or or had not (until 29.12.2012) amended the said first suit and that when the plaintiff filed said second suit No. 65 of 2012 i.e. on 3.11.2012, the said first suit No. 4/2012 was pending in its original and unamended form and that, therefore, when the learned trial Court heard and considered the defendant's application under Order 7 Rule 11(a) and (d) viz. Exh. 15 the learned trial Court had to consider - i.e. had no option but to consider - (a) the unamended plaint of the first suit; and (b) the purshis Exh. 16; and (c) the defendant's application under Order 7 Rule 11 (in second suit); and (d) the documents placed on record by the parties. Accordingly, after hearing the parties and upon considering the material on record, the Court passed the impugned order dated 25.11.2013.

6. I have heard learned counsel for the contesting parties and also considered

the material on record including the plaint in said three suits and the impugned order as well as the decisions relied on by learned advocates.

Re: Order 7 Rule 11 :

7. It is trite that for deciding an application invoking Order VII Rule 11(a) and (d) averments only in the plaint can be taken into account and the plea/defence raised by the defendant cannot and should not be taken into account. Moreover the plaint must be read as a whole and not in bits and pieces. The pleadings should be read without addition or subtraction of any words and the applicant/defendant cannot selectively pick-up some sentence or passage and read it out of context. It is also pertinent that at the stage of considering an application under Order 7 Rule 11, the learned trial Court is not supposed to examine and test the substance and merits of the allegations and/or to decide as to whether there is enough evidence whereby the plaintiff can prove its claim and the allegations and whether the plaintiff will succeed in the suit or not. The allegations by the plaintiff are matter of proof and evidence. At this stage, the learned trial Court would only examine as to whether the plaint contains appropriate and necessary averments which make out cause of action or not.

8. On this count it would be appropriate to take into consideration following observations by Hon''ble Apex Court in the decision in case between T. Arivandandam Vs. T.V. Satyapal and Another, :

"... .. if on a meaningful - not formal - reading of the plaint it is manifestly vexatious and meritless, in the sense of not disclosing a clear right to sue issued exercise his power under Order 7 Rule 11 CPC. ..."

which explain the circumstances in which the power under Order 7 Rule 11 should be exercised.

8.1 Thereafter, in the decision in case between M/s. Raptakos Brett and Co. Ltd. Vs. Ganesh Property, , Hon''ble Apex Court observed that the averments in the plaint as a whole have to be seen to find out whether clause (d) of Rule 11 of Order 7 was applicable.

8.2 Subsequently in the decision in case between Saleem Bhai and Others Vs. State of Maharashtra and Others, , Hon''ble Apex Court explained and clarified that the power under said provision can be exercised at any stage of the proceedings, Hon''ble Apex Court observed, inter alia, that:

"9. A perusal of Order VII Rule 11 C.P.C. makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power under Order VII Rule 11 C.P.C. at any stage of the suit-before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Rule 11 of Order VII C.P.C. the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that

stage,..."

8.3 In the decision in case between Mayar (H.K.) Ltd. and Others Vs. Owners and Parties, Vessel M.V. Fortune Express and Others, , Hon"ble Apex Court explained the position with regard to Order 7 Rule 11 by following observations:

"12. From the aforesaid, it is apparent that the plaint cannot be rejected on the basis of the allegations made by the defendant in his written statement or in an application for rejection of the plaint. The Court has to read the entire plaint as a whole to find out whether it discloses a cause of action and if it does, then the plaint cannot be rejected by the Court exercising the powers under Order VII Rule 11 of the Code. Essentially, whether the plaint discloses a cause of action, is a question of fact which has to be gathered on the basis of the averments made in the plaint in its entirety taking those averments to be correct. A cause of action is a bundle of facts which are required to be proved for obtaining relief and for the said purpose, the material facts are required to be stated but not the evidence except in certain cases where the pleadings relied on are in regard to misrepresentation, fraud, wilful default, undue influence or of the same nature. So long as the plaint discloses some cause of action which requires determination by the court, mere fact that in the opinion of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaint. In the present case, the averments made in the plaint, as has been noticed by us, do disclose the cause of action and, therefore, the High Court has rightly said that the powers under Order VII Rule 11 of the Code cannot be exercised for rejection of the suit filed by the plaintiff-appellants."

8.4 The issue related to limitation came up for consideration in the decision in the case between C. Natrajan Vs. Ashim Bai and Another, , and Hon"ble Apex Court observed that:

"8. An application for rejection of the plaint can be filed if the allegations made in the plaint even if given face value and taken to be correct in their entirety appear to be barred by any law. The question as to whether a suit is barred by limitation or not would, therefore, depend upon the facts and circumstances of each case. For the said purpose, only the averments made in the plaint are relevant. At this stage, the court would not be entitled to consider the case of the defence.

9. Applicability of one or the other provision of the Limitation Act per se cannot be decisive for the purpose of determining the question as to whether the suit is barred under one or the other article contained in the Schedule appended to the Limitation Act."

8.5 Recently, in the decision in case between Church of Christ Charitable Trust and Educational Charitable Society represented by its Chairman vs. Ponniyamman Educational Trust [(2012) 8 SCC 706], Hon"ble Apex Court explained the position emerging from Order 7 Rule 11 and observed, inter alia, that:

"... It is clear from the above that where the plaint does not disclose a cause of

action, the Court has no other option except to reject the same. A reading of the above provision also makes it clear that power under Order VII Rule 11 of the Code can be exercised at any stage of the suit either before registering the plaint or after the issuance of summons to the defendants or at any time before the conclusion of the trial. ..."

"... It is clear that in order to consider Order VII Rule 11, the Court has to look into the averments in the plaint and the same can be exercised by the trial Court at any stage of the suit. It is also clear that the averments in the written statement are immaterial and it is the duty of the Court to scrutinize the averments/pleas in the plaint. In other words, what needs to be looked into in deciding such an application are the averments in the plaint. At that stage, the pleas taken by the defendant in the written statement are wholly irrelevant and the matter is to be decided only on the plaint averments. ..."

"... While scrutinizing the plaint averments, it is the bounden duty of the trial Court to ascertain the materials for cause of action. The cause of action is a bundle of facts which taken with the law applicable to them gives the plaintiff the right to relief against the defendant. Every fact which is necessary for the plaintiff to prove to enable him to get a decree should be set out in clear terms. It is worthwhile to find out the meaning of the words "cause of action". A cause of action must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. ..."

8.6 Likewise, in the decision in case between Bhau Ram Vs. Janak Singh and Others, , Hon"ble Apex Court again clarified that:

"8. The law has been settled by this Court in various decisions that while considering an application under Order VII Rule 11 CPC, the Court has to examine the averments in the plaint and the pleas taken by the defendants in its written statements would be irrelevant."

8.7 The expression "the plaint should be read as a whole" is further explained by Hon"ble Apex Court in the decision in paragraph No. 19 in case between Popat and Kotecha Property Vs. State Bank of India Staff Association, :

"19. There cannot be any compartmentalization, dissection, segregation and inversions of the language of various paragraphs in the plaint. If such a course is adopted it would run counter to the cardinal canon of interpretation according to which a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. The intention of the party concerned is to be gathered primarily from the tenor and terms of his pleadings taken as a whole. At the same time it should be borne in mind that no pedantic approach should be adopted to defeat justice on hair-splitting technicalities.

(Emphasis supplied)

8.8 Thus, in the matters under Order 7 Rule 11, the plea/defence by the defendant is a foreign territory, wherein the Court should not enter and travel.

Re: Order 7 Rule 11(a) :

9. So as to invoke Rule 11(a), the learned senior counsel for the petitioners claimed that (i) the plaint does not disclose any cause of action; and (ii) any ingredients for passing off. For examining the said objections, the plaint of the said second suit is required to be examined keeping in focus the above-mentioned principles and guidelines laid down by Hon"ble Apex Court.

9.1 When the averments and allegations in the plaint of the said second suit are examined (relevant part of the said second suit is reproduced in the later part of this judgment), it emerges that the plaintiff has claimed that on account of the acts of the defendant and in light of the provisions under the Trade Marks Act, 1999 coupled with its position and status as user of the mark "Babu" certain rights have accrued in its favour and the suit claim is based on the assertion that he is "prior user" of the trademark "Babu" which enjoys "established goodwill and reputation" and that the acts of the defendants amount to passing off and the acts of the defendants have caused and it will cause loss and damages. There are sufficient and specific averments in the plaint which clearly spell out the cause of action which led the plaintiff to institute the said second suit against alleged passing off by using mark "Babu". Thus, in this case it cannot be said that the plaintiff has failed to make out cause of action. The petitioners' contention is not sustainable.

10. Now so far as the allegation that the plaint does not make out any ingredients of passing off, is concerned, it is appropriate to take into account the elements for maintaining action of passing off. The acknowledged and essential elements are viz. (a) reputation of goods; (b) possibility of deception; (c) likelihood of damages to the plaintiff. The averments in the plaint must reflect the said elements. In addition to the said essential elements there are certain other characteristics related to the action of "passing off" viz. degree of resemblance, nature of goods, similarity in nature and character of goods, class of purchasers, the span/period for which the plaintiff is associated with the mark/goods.

10.1 On this count, it emerges from the plaint of second suit that the plaintiff has claimed that due to its very good quality his goods command and enjoy great popularity and has significant presence and his trade name/trade mark "Babu" has acquired rich and high goodwill and that the defendants are selling their products by using mark "Babu" which is identical and deceptively similar to the plaintiff's trade name/trade mark "Babu" and thereby the defendants are "passing off" their goods as that of the plaintiff's and that he has proprietary interest in the goodwill and that it is likely to be damaged due to misrepresentations by the defendants (i.e. the petitioners). It comes out clearly

that the plaint contains proper and sufficient, basic and necessary averments and assertions so as to demonstrate presence of the requisite elements to maintain action against alleged passing off. Thus, second limb of the objection is also not established by the petitioners and it fails.

11. In this view of the matter, the above-mentioned objection, i.e. objection at Sr. No. (i) and (ii) above are not sustainable. Once it is found that the above-mentioned objections against the plaint of the said second suit are not sustainable, then as corollary the objection in light of Rule 11(a) of Order VII fails.

12. So as to invoke Rule 11(d) the learned senior counsel for the petitioners claimed that (iii) the said second suit is barred by law since (a) it is not maintainable in light of Order 2 Rule 2; and (b) it is not maintainable in light of Order 23 Rule 1(4); and (iv) the said second suit is not maintainable because it is a composite suit and also because it is hit by section 27 of the Act because the plaintiff has claimed (a) relief against passing off and copyright; and (b) also because the plaintiff has prayed for damages as well as accounts of profit along with prayer for injunction.

13. For sake of convenience, the contention at Sr. No. (iv) viz. second suit is a composite suit therefore it is not maintainable, may be considered before taking-up the contention at Sr. No. (iii).

Re: Composite suit :

14. On the said count the learned senior counsel Mr. Mehta submitted that in the said second suit the plaintiff has claimed relief against alleged passing off as well as against alleged breach of copyright and also claimed damages and accounts of profit therefore the said second suit is not maintainable and to support first limb of said submission, he relied on the decision dated 7.3.2012 in Letters Patent Appeal No. 877 of 2010, wherein the Division Bench relied on the decisions in the case of Dhodha House Vs. S.K. Maingi, and in the case of Dabur India Ltd. Vs. K.R. Industries, and observed, inter alia, that:

"7. In view of the aforesaid decision of the Hon''ble Supreme Court, since the cause of action with regard to the infringement of Copy Right Act and passing off Trade Mark under Section 27 of the Trade Marks Act are different and distinct cause of action, therefore, separate suits were required to be filed under the aforesaid Acts and composite suit would not be maintainable in view of the aforesaid decision of the Hon''ble Supreme Court in the case of Dabur India (supra)."

14.1 The question which, therefore, arises is whether in his second suit the plaintiff has prayed for the said two relief/s or only against alleged "passing off".

14.2 In this context, it is pertinent that though the plaint should be read as a whole and few paragraphs or few sentences cannot be conveniently picked up and cannot be read out of context or in isolation, the plaintiff has picked up two

paragraphs, or rather few sentences from two paragraphs viz. paragraphs No. 5 and 7 of the plaint and they are sought to be read out of context so as to justify the said contention. The sentences from paragraphs No. 5 and 7 which are picked up by the defendants, read thus:

"5. The plaintiff further submits that the plaintiff is using the said trade mark BABU represented in an artistic manner and to avail statutory protection for its artistic work, applied under the Copyright Act, 1957 on 3.6.2010 and Hon"ble Registrar of Copyright was pleased to register the said label. Therefore, the plaintiff is entitled to statutory protection of the same...."

"7. It is further submitted that the defendant has not only adopted the word BABU but the defendant has also imitated the artistic work of the label and colour scheme of the plaintiff...."

14.3 On plain reading of the plaint, it emerges that the relief prayed for as well as the cause of action and the subject-matter in the said second suit are alleged acts of "passing off" only and not infringement of copyright. In this context it is pertinent that the defendants have conveniently overlooked the relevant parts of said para 7, which read thus:

"7. The plaintiff came to know from the market source that the defendant is selling its products lime under trademark "BABU", which is identical and deceptively similar to the plaintiff's trademark "BABU"..... "

Likewise the defendants have also ignored the later part of said para 7 of second suit which reads thus:

"It is further submitted that the defendant has not only adopted the word "BABU" but the defendant has also imitated the artistic work of the label and color combination of the plaintiff. Such act on the part of the defendant is nothing but a deliberate intention to trade upon the goodwill and reputation of the plaintiff. The plaintiff has filed Regular Civil Suit for the infringement of copyright of his another label under title SHREE BHOLE BAPA bearing Regular Civil Suit No.4 of 2012 in the Hon"ble District court, at Rajkot against the said defendants on 30/7/2012 and as a counterblast to this, the defendant opted for the another Trade Mark BABU of the plaintiff. This clearly discloses the deliberate intention of the defendant. The plaintiff is constrained to file present suit against the defendant for passing off under the trademark BABU. It is submitted that the defendant has been using the said trademark in his products. Therefore, it is required for the plaintiff to file the present suit for passing off action and hence it is not barred under any other provisions of law."

(Emphasis supplied)

14.4 When entire plaint - including the relief prayed for - is read as a whole and without any addition or deletion then it emerges that - (i) alleged passing off is the only subject-matter and cause of action of the said second suit; and (ii) the relief which are prayed for are only against alleged "passing off" and not for

"copyright protection". The petitioners have failed to demonstrate and establish, and it is not possible to hold, that the said second suit is a composite suit against alleged infringement of copyright and also an action against passing off. Thus, the said objection is without merits and it should fail. In this view of the matter, first limb of petitioners' objection (i.e. the ground at serial number (iv) (a) mentioned above) cannot be sustained.

15. The above-discussion leads to, the second limb of the said objection viz. the plaintiff has claimed "damages" and also "account of profit" and since the suit comprises both claims, it is not maintainable in view of section 27 and the suit should be rejected under Rule 11(d) of Order 7. Therefore, section 27 and other relevant provisions may be considered.

Re: Sections 27, 28 and 135 of the Act :

15.1 Section 28 provides, inter alia, that registration of trademark (i.e. a registered trademark) confers certain rights on the proprietor of a trademark which is duly registered in manner prescribed by the Act and section 27(1) provides, inter alia, that no infringement action will lie in respect of an unregistered trademark. Thus, any proceedings to prevent infringement of unregistered trademark or to recover damages on account of infringement of unregistered trademark is not maintainable.

15.2 Sub-section (2) of section 27 carves out an exception by recognizing common law right and it provides, inter alia, that the restriction prescribed by virtue of sub-section (1) of section 27 would not affect the right to institute and maintain action for "passing off".

15.3 Section 135 of the Act provides, inter alia, that in the suit for "passing off" the plaintiff may seek, and the Court may grant, relief of (a) injunction (subject to such conditions as the Court may consider appropriate) and either the relief for (b) damages or account of profits at the option of the plaintiff.

15.4 It emerges from plain reading of the said provision that the Court cannot grant both reliefs (i.e. the damages as well as account of profits). According to section 135 the plaintiff cannot have both the reliefs but can have either one of them, and that too, at his option. When neither of the two reliefs (i.e. the reliefs prayed for in the suit) are barred by law and the Court is competent to grant either of the said two reliefs, then merely because the plaintiff, while seeking injunction against alleged passing off, mentions both claims in the plaint then entire suit will not be rendered unsustainable and/or liable for rejection under Order 7 Rule 11(d). Such position and construction of said provisions, if accepted, will render section 135 meaningless and ineffective or otiose and the plaintiff's right to elect one of the two claims will stand negated.

15.5 In this context, it is necessary to keep in focus that the right of option allowed by law is a substantive right and not a mere formality and that, therefore, it has to be meaningful. A plaintiff cannot be asked or compelled to,

and is not even expected or supposed to speculate completely in dark as to the quantum and/or mode. Thus, such right would also enjoin further right viz. to make informed decision. Obviously, such informed decision can be taken only if sufficient material is available. In this context, it would be appropriate to take into account below quoted passage from Kerly's Law Trade Marks and Trade names:

"Damages are a matter of right; the account of profits is an equitable remedy and the court has a discretion whether or not to grant it. Accordingly, a successful claimant in an infringement action is entitled to an inquiry as to damages (at his own risk as to costs) in any case where there is a prospect that the inquiry would reach a positive result; whilst only in certain cases will the court grant an account of profits. In these cases, the claimant has an option (exercisable at the conclusion of the hearing of the case) to claim Page 2585 either damages or profits; he cannot have both. Accordingly, it is usual in particulars of claim to ask for the two in the alternative. The principle upon which the court grants an account of profits is that where one party owes a duty to another, the person to whom the duty is owed is entitled to recover from the other party every benefit which that other party has received by virtue of his fiduciary position if in fact he has obtained it without the knowledge or consent of the party to whom he owed the duty. An account is generally refused if the defendant had no knowledge of the claimant's mark and, when ordered, is limited to the period during which such knowledge had existed; whilst knowledge or absence of knowledge does not affect the right to damages.

A claimant who has been successful in an action for trade mark infringement or passing off may not have sufficient knowledge of the defendant's activities to make an informed decision as to whether he should seek an inquiry as to damages or an account of profits. In such a case he may seek disclosure before making his election: *Island Records v. Tring*. Disclosure given in such circumstances should be limited to that which is necessary for the claimant to make an informed decision within a reasonable time; he is not entitled to all the disclosure which would be given in the inquiry, and in appropriate circumstances an audited schedule of infringing dealings may be a substitute for documentary disclosure."

15.6 In this view of the matter, ordinarily, a plaintiff who initiates action against passing off, would, initially (i.e. in the plaint) incorporate both the claims and can exercise the option at appropriate stage. The question which, therefore, would arise is about the stage at which the plaintiff should exercise the option and declare the selection.

15.7 So as to have sufficient material and relevant details before him, in light of which he may take informed decision and accordingly exercise option the plaintiff may defer such election until the defendant enters the proceedings and then the plaintiff may seek information in accordance with the provisions of the Code or may defer such election and await the stage of evidence and exercise his option

after the stage of evidence, however, before conclusion of the final hearing. This view is supported by the observations by Chancery Division in case of *Island Records Ltd. vs. Tring International plc and other* [(1995) 3 ALL ER 444], which laid down four principles which, by now, are recognised and are well settled. The relevant part of the decision reads thus:

"Four principles are clear. First, whilst a plaintiff can apply in proceedings in the alternative for damages and an account of profits, he cannot obtain judgment for both: he can only obtain judgment for one or the other (see *Neilson v. Betts* (1871) LR 5 HL 1 and *De Vitre v. Betts* (1873) LR 6 HL 319 at 321). Second, once judgment has been entered either for damages or an account of profits, any right of election is lost: any claim to the remedy other than that for which judgment is entered is forever lost (see *United Australia Ltd. v. Barclays Bank Ltd.* [1940 4 All ER 20 at 38, [1941] AC 1 at 30). Third, a party should in general not be required to elect or be found to have elected between remedies unless and until he is able to make an informed choice. A right of election, if it is to be meaningful and not a mere gamble, must embrace the right to readily available information as to his likely entitlement in case of both the two alternative remedies. It is quite unreasonable to require the plaintiff to speculate totally in the dark as to whether or not the sum recoverable by way of damages will exceed that recoverable under an account of profits. In an analogous situation, it has been held unreasonable to require a plaintiff to speculate whether a payment into court is sufficient to satisfy his claim for damages for infringement of copyright before he has been afforded inspection of the records of sales in the defendant's books (see *Mate & Son v. Samuel Stephen Ltd.* [1928-35] Macg CC 257 at 261). Fourth, the exercise of the right of election should not be unreasonably delayed to the prejudice of the defendant."

15.8 A profitable reference may also be made to the decision in case of *James Neilson vs. William Betts*, wherein it is observed, inter alia, that:

"My Lords, I have only farther to observe that the decree of the Court below directed not only an inquiry as to damages, but also an account of profits. The two things are hardly reconcilable, for if you take an account of profits you condone the infringement. I therefore think, my Lords, that we were right in calling upon the Respondent's Counsel to elect between the two which he would adopt. He has adopted the inquiry as to damages, and the other, the account of profits, must be struck out of the decree. But that ought not to alter the result of this appeal, and I trust, therefore, that your Lordships will concur in the motion I have to make, that this appeal should be dismissed with costs."

The motion will be that the decree of the Vice-chancellor be varied by striking out that portion of it which directs an account of profits, and that, subject to this alteration, the decrees, as well as the orders complained of, be affirmed, and the Appellant's petition of appeal dismissed with costs.

Decrees appealed from varied in one respect, and, subject thereto, the decrees

and orders appealed from affirmed; and appeal dismissed with costs."

(Emphasis supplied)

15.9 In the case of *Lever vs. Goodwin* [1887 (36) Ch. D. 1 : 4 L.R. 1], Appeal Court (Chancery Division) observed, inter alia, that:

"... .. It is well known that, both in trade-mark cases and patent cases, the plaintiff is entitled, if he succeeds in getting an injunction, to take either of two forms of relief; he may either say, "I claim from you the damage I have sustained from your wrongful act," or "I claim from you the profit which you have made by your wrongful act." Mr. Chadwyck Healey contended that the only profit which the Plaintiff could call for was that profit which arose from the sale of this soap where the ultimate purchaser bought it, not as the Defendants", but as the Plaintiff's soap. But, in my opinion, that is mistaking the whole gist of this action. The Defendants, as I understand, do not sell anything to retail purchasers, what they sell they sell to middlemen, that is to say, to people who purchase from them as wholesale merchants, and who are going to sell it by retail; and the complaint against the Defendants is this: "You have dressed up your soap in such a dress that those middlemen to whom you sell it are enabled, by its having that deceptive dress upon it, to sell it the ultimate purchasers as the soap of the Plaintiffs." The profit for which the Defendants must account is the profit which they have made by the sale of soap in that fraudulent dress to the middlemen. It is immaterial how the middlemen deal with it. If they find it for their benefit not to use it fraudulently, but to sell the soap to the purchasers from them as Goodwin's, that cannot affect the question whether the sale by the Defendants to those middlemen of this soap in a fraudulent dress was a wrongful act. It still remains a wrongful act, because it put into the hands of the middlemen the means of committing a fraud on the Plaintiffs by selling the soap of the Defendants as the soap of the Plaintiffs.

In my opinion, therefore, the account of profits is right as it stands."

(Emphasis supplied)

15.10 It follows that inclusion of both the claims in the plaint does not render the entire suit bad in law and the plaintiff has right to exercise option during the proceedings. Thus, the objection raised in light of section 27 of the Act is not sustainable and is not accepted. On such ground entire suit cannot be rejected under Rule 11 of Order 7 of the Code. Hence, the contention mentioned at Sr. No. (iv)(b) fails.

Re: Order 2 Rule 2 :

16. Now the objection raised in light of Order 2 Rule 2 and Order 23 Rule 1 may be considered. The said provision aims at discouraging multiple suits and eliminating harassment with multiple suits for same cause of action. On this count it would be profitable to take into account certain decisions and judicial pronouncements. In case of (a) *Gurbux Singh Vs. Bhooralal*, , Hon"ble Apex

Court observed thus:

"(6) In order that a plea of a bar under O.2. r. 2(3), Civil Procedure Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based, (2) that in respect of that cause of action the plaintiff was entitled to more than one relief, (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court, omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar. No doubt, a relief which is sought in a plaint could ordinarily be traceable to a particular cause of action but this might, by no means, be the universal rule. As the plea is a technical bar it has to be established satisfactorily and cannot be presumed merely on basis of inferential reasoning. It is for this reason that we consider that a plea of a bar under O. 2. r. 2, Civil Procedure Code can be established only if the defendant files in evidence the pleadings in the previous suit and thereby proves to the Court the identity of the cause of action in the two suits...."

(Emphasis supplied)

(b) In case of M/s. Bengal Waterproof Limited Vs. M/s. Bombay Waterproof Manufacturing Company and Another, Hon"ble Apex Court observed that:

"7. A mere look at the said provisions shows that once the plaintiff comes to a court of law for getting any redress basing his case on an existing cause of action he must include in his suit the whole claim pertaining to that cause of action. But if he gives up a part of the claim based on the said cause of action or omits to sue in connection with the same then he cannot subsequently resurrect the said claim based on the same cause of action. So far as sub-rule (3) Rule 2 of Order 2, CPC is concerned, bar of which appealed to both the courts below, before the second suit of the plaintiff can be held to be barred by the same it must be shown that the second suit is based on the same cause of action on which the same in both the suits and if in the earlier suit plaintiff had not sued for any of the reliefs available to it on the basis of that cause of action, the reliefs which it had failed to press in service in that suit cannot be subsequently prayed for except with the leave of the Court. It must, therefore, be shown by the defendants for supporting their plea of bar of Order 2 Rule 2 sub-rule (3) that the second suit of the plain tiff filed in 1982 is based on the dame cause of action on which its earlier suit of 1980 was based and that because it had not prayed for any relief on the ground of passing off action and it had not obtained leave of the court in that connection, it cannot sue for that relief in the present second suit. So far as this plea of the defendants is concerned there is a threshold bar against them for their failure to bring on record the pleadings of the earlier suit

which unfortunately has not been properly appreciated by the courts below...."

10. As seen earlier, Order 2 Rule 2 sub-rule (3) requires that the cause of action in the earlier suit must be the same on which the subsequent suit is based and unless there is identity of causes of action in both the suits the bar of Order 2 Rule 2 sub-rule (3) will not get attracted. The illustration below the said Rule amply brings out this position. A mere look at the said illustration shows that if a landlord sues the tenant in 1008 for the rent due till that year and omits to sue for rent for any of the previous years which had then accrued due he cannot subsequently sue the tenant for the previous rent due, claim for which was given up in the suit, It is obvious that a subsequent suit would not be barred in case of rent falling due after the first suit, say, for the year 1909 or 1910 etc. as that default would give him a fresh cause of action. In the facts of the present case it becomes obvious that when earlier suit was filed in 1980 the plaintiff had a cause of action regarding the alleged illegal use of his trade mark "DACK BACK" by the defendants and had also a grievance regarding the then existing deceitful action of the defendants in trying to pass off its goods "DUCK BACK". Therefore, the cause of action for the first suit of 1980 was based on the infringement of plaintiff's trade mark "DUCK BACK" by the defendants till the date of the suit filed in 1980. The grievance regarding passing off of the defendants' goods as if they were plaintiff's goods was also confined to the situation prevailing on the date of the earlier suit No. 238 of 1980. That suit failed as the plaintiff had not claimed proper relief. Consequently for the alleged acts of infringement of plaintiff's trade mark or the alleged passing off actions on the part of the defendants till the date of the earlier suit no subsequent grievance could be ventilated by the plaintiff's by filing a fresh suit..... "

(Emphasis supplied)

(c) In case between Smithkline Beecham Consumer Healthcare GMBH and Others Vs. Hindustan Lever Limited and Another, wherein High Court of Bombay observed, inter alia, that:

"16. A perusal of Order 2 Rule 2 of the CPC clearly reveals that this provision applies to cases where the plaintiff omits to sue portion of the cause of action on which such a suit is based either by relinquishing the cause of action or by omitting a part of it. The provision has, therefore, no application to cases where the plaintiff bases his suit on separate and distinct causes of action and chooses to relinquish one or the other of them. In such a case, it is always open to the plaintiff to file a fresh suit on the basis of a distinct cause of action which he may have so relinquished."

18. Order 2 Rule 2 requires that the cause of action in the earlier suit must be the same on which the subsequent suit is based and unless there is identity of causes of action in both the suits the bar of Order 2 Rule 2 will not get attracted. If there is recurring cause of action or there is fresh cause of action and if the plaintiff is pursuing the suit on such cause of action the bar under Order 2 Rule 2

would not be attracted.

19. In respect of passing off the evidence to establish the right is advertisements and sale of toothbrushes of the plaintiffs. In a copyright action the evidence will be totally different. In any event every fresh act of importation of a fresh mould would give to the plaintiffs under Section 51 read with Section 2(m) of the Copyright Act, 1957. In the facts of the present case, admittedly the cause of action upon which the plaintiffs have sued is different and distinct from the cause of action in the Delhi proceedings. As observed by the Supreme Court in *Bengal Waterpool Ltd.*'s case whenever and wherever a person commits breach of a registered trademark of another he commits a recurring act of breach of such trademark giving a recurring and fresh cause of action at each time of such infringement to the party aggrieved. The ratio of this judgment is clearly applicable to the facts of the present case. It is, therefore, not possible to sustain the finding of the learned Single Judge that the suit of the plaintiffs was barred by Order 2 Rule 2."

(Emphasis supplied)

(d) In the decision in case of *State Bank of India Vs. Gracure Pharmaceuticals Ltd.*, Hon"ble Apex Court observed, inter alia, that:

"10. In *Sandeep Polymers (P) Ltd.*'s case (*supra*), the above-mentioned principles were reiterated and this Court held as under:

"Under Order 2 Rule 1 of the Code which contains provisions of mandatory nature, the requirement is that the plaintiffs are duty-bound to claim the entire relief. The suit has to be so framed as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them. Rule 2 further enjoins on the plaintiff to include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. If the plaintiff omits to sue or intentionally relinquishes any portion of his claim, it is not permissible for him to sue in respect of the portion so omitted or relinquished afterwards.

11. The above-mentioned decisions categorically lay down the law that if a plaintiff is entitled to seek reliefs against the defendant in respect of the same cause of action, the plaintiff cannot split up the claim so as to omit one part to the claim and sue for the other. If the cause of action is same, the plaintiff has to place all his claims before the Court in one suit, as Order 2 Rule 2, CPC is based on the cardinal principle that defendant should not be vexed twice for the same cause.

12. Order 2 Rule 2, CPC, therefore, requires the unity of all claims based on the same cause of action in one suit, it does not contemplate unity of distinct and separate cause of action. On the above-mentioned legal principle, let us examine whether the High Court has correctly applied the legal principle in the instant case."

(Emphasis supplied)

(e) In the decision in case between Virgo Industries (Eng.) P. Ltd. Vs. Venturetech Solutions P. Ltd., , Apex Court observed:

"9. Order II Rule 1 requires every suit to include the whole of the claim to which the plaintiff is entitled in respect of any particular cause of action. However, the plaintiff has an option to relinquish any part of his claim if he chooses to do so. Order II Rule 2 contemplates a situation where a plaintiff omits to sue or intentionally relinquishes any portion of the claim which he is entitled to make. If the plaintiff so acts, Order II Rule 2 of CPC makes it clear that he shall not, afterwards, sue for the part or portion of the claim that has been omitted or relinquished. It must be noticed that Order II Rule 2(2) does not contemplate omission or relinquishment of any portion of the plaintiff's claim with the leave of the court so as to entitle him to come back later to seek what has been omitted or relinquished. Such leave of the Court is contemplated by Order II Rule 2(3) in situations where a plaintiff being entitled to more than one relief on a particular cause of action, omits to sue for all such reliefs. In such a situation, the plaintiff is precluded from bringing a subsequent suit to claim the relief earlier omitted except in a situation where leave of the Court had been obtained. It is, therefore, clear from a conjoint reading of the provisions of Order II Rule 2(2) and (3) of the CPC that the aforesaid two sub-rules of Order II Rule 2 contemplate two different situations, namely, where a plaintiff omits or relinquishes a part of a claim which he is entitled to make and, secondly, where the plaintiff omits or relinquishes one out of the several reliefs that he could have claimed in the suit. It is only in the latter situations where the plaintiff can file a subsequent suit seeking the relief omitted in the earlier suit provided that at the time of omission to claim the particular relief he had obtained leave of the Court in the first suit."

(Emphasis supplied)

(f) In the said decision Hon"ble Apex Court further observed that:

"The cardinal requirement for application of the provisions contained in Order 2 Rule 2(2) and (3), therefore, is that the cause of action in the later suit must be the same as in the first suit."

(Emphasis supplied)

Thus, irrespective of the difference between sub-clauses (2) and (3) the basic requirement viz. unity and identity of cause of action is applicable in respect of both, i.e. Sub-Rule (2) and (3) of Rule 2.

16.1 The principles which can be deduced from the above-quoted decisions are:-

(a) the cardinal requirement for raising objection against a suit in light of Rule 2 of Order 2 is that the person who raises the objection must establish that the cause of action in the previous suit and the second suit is same;

(b) unless there is similarity and unity of cause of action on which the previous

suit was filed and the cause of action for which the second suit is filed, the prohibition would not be attracted;

(c) similarity and unity of cause of action must be demonstrated and it should be identifiable from the plaint and without aid of and without looking at the written statement or the defence;

(d) if a plaintiff intentionally omits to sue or if he intentionally relinquishes part of the claim which he is entitled to claim, then afterwards he cannot sue for, and in the subsequent suit he cannot resurrect, the same claim which he omitted or relinquished;

(e) in order to establish that the cause of action in both suits is the same, the defendant must also establish that the claim has arisen out of the same transaction;

(f) in case of recurring and/or continuous cause of action, the bar under sub-rule (3) of Rule 2 of Order 2 is not applicable and the said provision cannot be invoked.

16.2 Since the thrust is on the identity and unity of "cause of action" it would be appropriate to consider at this stage the said expression "cause of action". The cause of action, as is well settled, means every fact which will be necessary for the plaintiff to prove, if traversed in order to support his claim for the judgment. The causes of action in the two suits may be considered to be the same if in substance they are identical and the evidence required to be led is similar or identical. In this context, profitable reference may be made to Halsbury's Laws of England, wherein with reference to the said expression "cause of action", it is stated thus:

"'Cause of action' has been defined as meaning simply a factual situation existence of which entitles one person to obtain from the Court a remedy against another person. The phrase has been held from the earliest time to include every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which a defendant would have a right to traverse. 'Cause of action' has also been taken to mean that particular action on the part of the defendant which gives the plaintiff his cause of complaint, or the subject-matter of grievance founding the action, not merely the technical cause of action."

16.3 In this context, Privy Council, in the case of Mohammad Khalik Khan vs. Ali Mian [(1948) 75 Ind App 121] culled out following principles:

"The principles laid down in the cases thus far discussed may be thus summarized : (1) the correct test in cases falling under Order 2 Rule 2 is "whether the claim in the new suit is, in fact, founded on a cause of action distinct from that which was the foundation for the former suit, (Moonshee Buzloor Ruheen V. Shumsoonissa Begum, (1867)11 Moo Ind App 551 (605). The cause of action means every fact which will be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment (Read v. Brown,

(1889) 22 QBD 128, 131). If the evidence to support the two claims is different then the causes of action are also different (Brunsden v. Humphrey, (1884) 14BD141). The causes of action in the two suits may be considered to be the same if in substance they are identical (Brunsden v. Humphrey). The cause of action has no relation whatsoever to the defence that may be set up by the defendant, nor does it depend on the character of the relief prayed for by the defendant, nor does it depend on the character of the relief prayed for by the plaintiff."

(Emphasis supplied)

16.4 Now, before taking in hands the complaints of the said two suits for examining them in juxta-position, it would be appropriate to recall that after present respondent filed the said first suit No. 4/2012 (but before the respondent filed the said second suit, i.e. RCS No. 65/2012 on 3.11.2012), the petitioners herein (i.e. defendants in the first suit No. 4/2012) filed (on 15.9.2012) a suit against present respondent (i.e. against plaintiff of the said first suit No. 4/2012), which came to be registered as Regular Civil Suit No. 7/2012.

16.5 In the said RCS No. 7/2012, the petitioners have expressly and specifically mentioned and described the claim/relief and the subject-matter of the said suit, i.e. RCS No. 4/2012.

16.6 In this view of the matter, what could be better medium than the petitioners' own suit and petitioner's own description of (and admission regarding) the subject-matter of present respondent's first suit (i.e. RCS No. 4/2012) to examine petitioner's said objection raised on the allegation that cause of action in both suits is the same.

16.7 In paragraphs No. 15 and 19 of their suit No. 7/2012 the petitioners herein (i.e. the defendants) themselves have thus described the subject-matter of respondent's said first suit No. 4/2012:

"15. The plaintiffs say and submit that the plaintiffs shocked and surprised much when the defendant herein filed a false and frivolous suit being Civil Suit No. 4 of 2012 in the Court of Hon'ble 11th Addl. District Judge, Rajkot for the alleged infringement of copyright and passing off against the use of the trade mark and packaging of SHREE Bhole Bapa Parcel of the present plaintiffs.

19. the defendant hurriedly and intentionally filed the aforesaid false and frivolous suit against the use of the trade mark label and packaging of SHREE Bhole Bapa Parcel for which otherwise also the defendant was having no cause of action."

(Emphasis supplied)

16.8 From the said averments by the petitioners in their own suit No. 7/2012, it becomes clear that even the petitioners (i.e. the defendants in the said first suit) have, after proper examination, noticed that the cause of action in the said first

suit is alleged infringement of copyright and passing off against the use of trade name and label and packaging "Bhole Bapa" and not against any other packaging or trade name/trade mark being used by the petitioners.

16.9 This aspect also becomes clear from the further observations by the learned Court in the said order dated 31.12.2013 where the learned Court has recorded that:

"26. The plaintiff has filed this suit on 15.9.2012. It is also the case of plaintiff that the plaintiff came to know about illegal act of the defendant only in the first week of August, 2012 when the plaintiff received summons and notice of suit filed by defendant against the plaintiff's trade mark Shri Bhole Bapa Parcel."

(Emphasis supplied)

16.10 In paragraph No. 5 of the said order below Exh. 5 in aforesaid RCS No. 7/2012, the Court has also recorded and observed that:

"5. It is the say of plaintiff that the defendant herein filed CIVIL SUIT No. 4 of 2012 in the District Court, Rajkot against the plaintiff herein for alleged infringement of copyright and passing off against the use of the trade mark and packaging of SHREE BHOLE BAPA PARCEL. It is the say of plaintiff that the said suit filed by defendant herein is false, frivolous and vexatious and it is filed with malafide intention to hide the wrong done by defendants."

(Emphasis supplied)

16.11 Thus, from the averments in their own suit it becomes clear that even the petitioners have understood and perceived the said first suit No. 4/2012 as an action (against alleged infringement of copyright as well as alleged passing off) in respect of and against label and packaging which carries mark "Bhole Bapa" (and not the mark "Babu").

17. Despite such clear and specific description of respondent's said first suit by the petitioners in their own suit, the petitioners, now (i.e. while pursuing their subject application (Exh. 15) under Order VII Rule 11) claim that the said second suit is for the same claim and same cause of action as in the first suit.

17.1 On examination and comparison of the complaints in the said two suits and after taking into account the purshis Exh. 16 and also on taking into account the claim/relief which the plaintiff is said to have relinquished from the first suit, it emerges that the cause of action, the claim/relief prayed for and the subject-matter in the said first suit and second suit are different and the claim/relief and cause of action and the subject-matter in the second suit is not the same as the claim/relief and cause of action and subject-matter in the first suit.

18. So as to invoke the provision under Order 2 Rule 2 the petitioners have also alleged that the first suit in its original form (i.e. when the complaint was submitted) was a composite suit (i.e. as an action against alleged infringement of copyright

and alleged passing off) and subsequently the plaintiff submitted the purshis Exh. 16 whereby the plaintiff abandoned a part of the cause of action and the claim and the second suit is filed for same claim and cause of action.

18.1 However, on this count what is relevant is the vital fact that even in the original form of the said first suit both the actions/claims (i.e. the action against alleged infringement of copyright and the action/claim against passing off) were with reference to and in connection with trade mark/trade name "Bhole Bapa". Thus, when the plaintiff (present respondent) filed the purshis (Exh. 16) declaring that the claim/reliefs with regard to "passing off" will be deleted, then, obviously, it would relate to the said trade mark/trade "Bhole Bapa".

18.2 On this count it is also relevant to note that according to their own claim the petitioners carry on business under various names/marks e.g. New Patel, Shree Bhole Bapa Parcel, Babu Parcel, Babu Chuna, New Patel Parcel Chuna, etc. What is, however, relevant is that said first suit is not filed with reference to and in connection with all of those trade names/trade marks under which the petitioners carry on their business but the said first suit is filed in connection with only one trade name/trade mark, i.e. "Bhole Bapa". In the plaint of their own suit (RCS No. 7/2012) the petitioners themselves have mentioned that:

"... .. the defendant herein filed a false and frivolous suit being Civil Suit No. 4 of 2012 in the Court of Hon'ble 11th Addl. District Judge, Rajkot for the alleged infringement of copyright and passing off against the use of the trade mark and packaging of SHREE BHOLE BAPA PARCEL of the present plaintiff...."

18.3 Thus, in their own suit the petitioners themselves have expressly acknowledged, admitted and mentioned that the use of "Bhole Bapa" is the cause of action for the claim against copyright as well as passing off.

18.4 Thus, when the cause of action and subject-matter of the said first suit is only with reference to mark "Bhole Bapa", then the purshis, i.e. declaration in the purshis Exh. 16 would relate only to the said mark Bhole Bapa. Hence, the claim/relief and the averments said to have been deleted, i.e. the claim said to have been abandoned by said purshis Exh. 16 are also with reference to and in connection with the said mark "Bhole Bapa".

18.5 Whereas the subject matter and the cause of action and the relief prayed for and the claim in the said second suit is the defendant's (i.e. present petitioner's) alleged act of "passing off" their (i.e. defendant's) goods as plaintiff's goods (i.e. goods of present respondent) by using the mark "Babu" (which is different and distinct from the trade name from "Bhole Bapa" which is the subject matter and cause of action in the first suit). It has emerged that the said two suits are filed in respect of two different and distinct trade names/trade marks. The subject-matter and cause of action in the said second suit is mark "Babu". Thus, the claim in the second suit is not the claim which the plaintiff purportedly/is said to have abandoned from the first suit. Merely because the relief which the plaintiff abandoned from the first suit was against

"passing off" and the second suit is filed against "passing off", that single factor is not sufficient to lead to the conclusion that the claim which the plaintiff is said to have relinquished from the first suit and what is prayed for in the second suit are the same. The comparative table - which is part of paragraph No. 20 of the plaint in the first suit - demonstrates and illustrates the said aspect.

19. At this stage, it would be appropriate to take into account the observations and findings recorded by the learned trial Court with reference to the petitioner's objections in light of Order 2 Rule 2. The learned trial Court has observed and recorded, inter alia, that:

"Therefore plaintiff's suit before Rajkot District Court No. 4/12 is for infringement of copy right of artistic lable of BABU against defendants with allegation that defendants has violated plaintiff's copy rights of artistic lable of BABU by reproducing and imitating the colour scheme, get up, lay out and arrangement of features wherein word "BAPA" used in place of "BABU".

(Emphasis supplied)

17. While in this suit plaintiff has stated in plaint para-11 and 12 that,

"The plaintiff further submits that the defendant is residing and carrying on his business and selling his products under the trademark "BABU" from the address shown in the cause title of the plaintiff, which is within the jurisdiction of this Hon"ble Court. Moreover, the goods of the defendant are also available within the territorial limits of this Hon"ble Court. Thus the entire cause of action has arisen within the JAMNAGAR District. Therefore, this Hon"ble Court is having territorial jurisdiction as provided under the Trade Mark Act, 1999 and empowered to try and adjudicate the suit and grant relief as prayed for. Further, this Court is also having the jurisdiction under the provisions of the Trade Marks Act, 1999 and Civil Procedure Code 1908."

"The plaintiff further submits that the defendant is unauthorizedly using the said trademark "BABU","

Thus this suit is pertaining to the unauthorized use by defendants for their product under the trade mark "BABU" and relief is passing off etc.

Hence the facts and even allegation is different in both the suits Nos. 3/12 and 65/12 (present suit). Suit no. 4/12 is for the product of the defendant under lable "BHOLE BABA" while present suit is regarding products of the defendants under the label of "BABU" and the relief in present suit is not on base of copy right of artistic label "BABU" but it is based on the fact that defendants is selling their products LIME under trade mark "BABU" which is identical and deceptively similar to the plaintiff's products under trade mark "BABU". Therefore, I do not agree with the submission of the L.A. for the defendant that this suit is a composite suit of infringement of copyright and infringement of trademark.

(Emphasis supplied)

Thus present suit is for passing off under Trade Mark Act and suit No. 4/12 before Rajkot District Court is for infringement of copy right and therefore unreported judgment of the Hon"ble division bench of Gujarat High Court in L.P.A. No. 877/2010 in Special C.A. No. 38/2010 is not applicable in this case and as per above mention para-7 of present plaint cause of action is clearly disclosed for passing off therefore,"

20. Since for considering the petitioners" objection in light of Order 2 Rule 2 and/or Order 3 Rule 1(4), it would be necessary to examine the plaints of the said two suits the relevant parts therefrom are reproduced below. In the first suit the plaintiff has averred, inter alia, that:

"8. The "BABU artistic label" form a prominent part of the plaintiff. The plaintiff is origiator, bonafide adopter and honest user of "BABU artistic label". The plaintiff at the time of adoption the "BABU artistic label" have taken market search and after getting the positive reply from the competent authority has honestly adopted the "BABU artistic label". The plaintiff state and submit that engage in the business above "BABU artistic label" from the year 2000. The plaintiff has acquired common Law right as the plaintiff is using the said "BABU artistic label" since 2000, but to acquire statutory right under The Copyright Act, the plaintiff applied for registration of the "BABU artistic label". Accordingly, the registration of "BABU artistic label" was granted in favour of the plaintiff and plaintiff acquired statutory right under The Copyright Act, The said Registration of the "BABU artistic label" shall be prima facie evidence of the validity thereof. The said Registration is valid, subsisting and is in force. The Copyright Registry issued the copyright registration in favour of plaintiff. The Photo Copy of the Copyright Registration is produce with the list of documents. The said Copyright Registration is obtained on the basis of honest and prior user. The plaintiff state and submit that as per the provision of The Copyright Act, the plaintiff is the owner of the "BABU artistic label" and have exclusive right to reproduce the same. The plaintiff state and submit that the plaintiff is honest adopter prior user and owner of the artistic work as describe in the plaint and have a right to restrain the other person, firm, company using the same or reproduction in material form of plaintiff artistic label. The plaintiff further says that prior to launching the goods under the Artistic work had obtained Search Report from The Registrar Of Trade Marks as provided under The Copyright Act and the report doesn"t refer to the names of the present defendants which otherwise shows that the defendants are subsequent.

14. In order to maintain distinctive identity the product from the product, manufacture, merchant, traders and service providers, coined conceived and honestly adopted a "BABU artistic lable" in the form of a label containing in an artistic manner (which shall be herein after referred to as the said Label "BABU artistic lable"). The said label is artistic work having distinct colour scheme, getup arrangement and eye-catching appearance for reference for plaintiff product/goods/services the label is annex with a list of documents. The said label

is use by plaintiff openly, extensively and continuously from the year 2000 in respect of plaintiff product/goods/services the said label first printed and publish by the plaintiff and therefore, the plaintiff have exclusive right in the said artistic work of the label and no person, firm, and company is entitle to reproduce in material & substantial form, publish or use the said art work in a substantial and material form OR ANY Essential feature of artistic work/label without prior permission, license, consent of the plaintiff. The plaintiff further says and submit that he has not authorised any other person to reproduce the said Artistic Label.

15. On a bare perusal of the imitation label of the defendant, it is apparent that the same is a colourable imitation of the distinctive package/distinctive label of the plaintiff's and or essential features of the plaintiff's distinctive label. Further cumulative effect, total image and visual impact of the impugned imitation label is substantially identical to and strongly reminiscent of the plaintiff's distinctive label and is a clear attempt by the defendant's to simulate the products/services of the plaintiff's and thereby committing acts of infringement of Copyright that vests in the Plaintiff.

16. "BABU artistic label" by the plaintiff under the distinctive label has acquire valuable reputation and goodwill under the circumstances explain about look & feel, distinctive trade dress layout color scheme and getup of the distinctive label (including combination of colour) are associate by the public and consumer exclusively with the plaintiff label which resemble or closely resemble the distinctive label or which contain essential feature of the plaintiff product/goods/services (including combination of colour), the defendant is misrepresenting there products/goods/services as those of plaintiff products/goods/services, and/or misrepresentatives that their goods have some connection or nexus with the goods of plaintiff causing damage to the plaintiff and to the goodwill and reputation of the plaintiff's business and is also diluting the distinctive of getup, layout looks and colour scheme comprised the distinctively package and label. Such representation has been done deliberately so as to ride upon the reputation and goodwill of the plaintiff. Further, such misrepresentation of is causing/likely conclusion and deception of the trade, public and consumer. The plaintiff submit that such misrepresentation of the defendant is infringing or/and attempting to pass off their products/goods/services as those of plaintiff's products/goods/services. The plaintiff submit that the simulation/are resemblance of the imitation and label with those of the plaintiff's distinctive label with those of the distinctive label is clear evidence of the dishonest and fraudulent intention of the defendant to deceive and confuse the public, customer and traders and thereby earn unauthorised gains. The plaintiff state and submit that such wrongful action of the defendant amount to unfair competition and is actionable civil wrong. The plaintiff craves leave to take appropriate action for the passing off etc., by filing separate suit.

17. The plaintiff is the copyright owner of the copyright work referred in plaint. The plaintiff is also the first publisher of the work. The defendant's labels used

on the impugned imitation products/goods/services is/are a reproduction of or a substantial reproduction of the plaintiff's copyright work comprise in the label used on distinctive "BABU artistic lable" represented at list of documents. The same has been unauthorised copy by the defendant from the plaintiff's label. Further the artistic work represented on the label is a reproduction or a substantial reproduction of the plaintiff's label by the defendant. Hence the defendant have infringed the plaintiff's copyright works.

18. The plaintiff state and submit that by reason of the above fact, products/goods/services under the distinctive artistic label contain the distinctive look and feel, color scheme; get-up and layout have come to associate by the traders, by the public and the consumer exclusively with the plaintiff's products/goods/services, artistic label (including its future referred in plaint) the plaintiff says that any colourable imitation thereof is bound to cause confusion and deception in the minds of the public traders and consumers.

20. Infringement of label and copyright: the use by the defendant/s of a closely similar mark for all types of lime, filter lime, double filter lime (calcium), calcium for betel nut & pan paste is without the consent authorisation license of the plaintiff and infringement of the plaintiff's products/goods/services label. The defendant/s has further reproduced the plaintiff's distinctive label. The colour scheme getup packaging fond plaintiff's product/label where the artistic label appears in a distinctive letter instruction for use printed on the label has been reproduce substantially by the defendant in respect of there products/goods/services, There by amounting to infringement of the copyright of plaintiff's. This is evident from a comparison between plaintiff's artwork and the artwork of the defendant. The plaintiff state and submit that by reproducing and imitating the colour scheme, getup, layout and arrangement of future as well as stylish manner of representing the word, the defendant have violated of the copyright of the plaintiff's said artistic work and liable for infringement of copyright.

The use by the defendant of a closely similar label/mark for all types of lime, filter lime, double filter lime (calcium), calcium for betel nut & pan paste is without the consent, authorisation, or licence of the plaintiffs and amounts to infringement of the plaintiffs copyright.

The defendant serve further reproduce the plaintiffs Blue/Brown and Yellow Colour. The colour scheme and getup of the plaintiffs product packaging wherein the "BABU artistic label" appears in a distinctive letters along with the device the layout of the phrase special fodelo chuno and the other artistic work, in the front the temple and the picture and in the middle word and the white drop and other artistic work reproduce substantially by the defendant in respect of their product and packaging, thereby amounting to infringement the copyright of the plaintiff. This is evident from a comparison between plaintiffs product and the product of defendant as set out below.

28. The plaintiff state and submit that the plaintiff came to know about the

defendant products/goods/services through their salesman on 10th July, 2012, salesman inform that defendant is offering the goods in the market in identical and deceptively similar label. The salesman obtain the packaging of defendant from hawkers of the defendant. After the salesman information and receiving the defendant's packaged goods through the salesman the present plaintiff approach their attorney for advice. The plaintiff attorney search the defendant application from the official website of the trademark registry and inform that the present defendant has file trade mark application. The trade mark search obtain by the plaintiff's attorney is submit with the list of documents. The Cause of action is arose when the plaintiff came to know and the cause of action is recurring cause of action and the plaintiff have no other option, hence file the present suit along with the ad-interim application. The salesman affidavit is submit with the list of documents and collected material are also submit with the list of documents."

"31A. To pass an order of permanent injunction restraining the defendants, his servants, agents, and other persons working under the control of the defendant from

(a) Using packaging similar to plaintiff "BABU" artistic lable including the get up and art work as well as Blue/Brown and Yellow colour scheme, fonts, writing style, placement of futures and use of white drop in relation to it all types of lime, filter lime, double filter lime (calcium), calcium for betel nut & pan paste products or in any other manner amounting to infringement of "BABU ARTISTIC LABLE".

31B. To pass an order of permanent injunction restraining the defendants, his servants, agents, and other persons working under the control of the defendant from using in the course of packaging which is a colorable imitation or substantial reproduction of the plaintiff BABU artistic packaging/label amounting to infringement of copyright thereto.

31C. Restraining the defendants, his servants, agents, and other persons from manufacturing and selling and offering for sale or other allied goods or any other goods bearing label/packaging similar to BABU LABLE and/or packaging and/or any other packaging deceptively similar to the plaintiffs BABU label mark and packaging and/or using a packaging, getup, lay out, colour scheme and arrangement of futures of which resembles the plaintiffs said product packaging and any manner whatsoever or doing any other thing so as to cause confusion or deception amounting to pass off the goods and business of the defendant as and for those of the plaintiff.

31D. To pass an order directing the defendant to submit a true and correct statement of sales effected under the impugned label so as to ascertain the amount of damages accrued to the goodwill and reputation and/or ascertain the amount of profits recoverable from the defendant.

31E. To pass an order directing to submit the true and correct statement of stocks, labels etc., containing the impugned label."

In the said second suit the respondent/plaintiff has averred, inter alia, that:

"4. The plaintiff further submits that the plaintiff is selling the products referred above under brands and names to distinguish his products from the other manufactures. The plaintiff submits that the plaintiff has started, processing, packing and selling his one of the product KATHA i.e. PAN PASTE used in PAAN under the Trade Mark BABU with word "sai" in small letters, wherein the word "BABU" is placed in a prominent way, and therefore the product and business of the plaintiff is known and recognized by the said prominent word "BABU" because of the use of the said Trade Mark since 1995-1996 has become very popular amongst the public at large and in the market and therefore the plaintiff decided to expand his business. Accordingly, the plaintiff started business of manufacturing, processing, packing and selling another product CHUNA i.e. LIME under the Trademark BABU in the year 2000. At this stage, the plaintiff respectfully begs to submit that for the products of CHUNA i.e. LIME, the plaintiff has chosen the name as BABU only and dropped the word "sai". Thus, since the year 2000 the plaintiff has started its business under the name BABU. It is further submitted that the plaintiff to avail better protection, had applied for registration of the trademark "sai BABU" in the year 1999, which is taken on record under No.: 842369 in class: 31 in respect of KATTHA (Pan Paste) claiming user since 01/01/1995, of which the process for registration is yet not completed, still however, the plaintiff is entitled to remedy of passing off under the provisions of common law due to plaintiff's prior, open, continuous, uninterrupted and extensive use of the said trademark BABU since the year 1995-1996.

7. The plaintiff came to know from the market source that the defendant is selling its products lime under trademark "BABU", which is identical and deceptively similar to the plaintiff's trademark, "BABU". It is further submitted that the defendant has not only adopted the word "BABU" but the defendant has also imitated the artistic work of the label and color combination of the plaintiff. Such act on the part of the defendant is nothing but a deliberate intention to trade upon the goodwill and reputation of the plaintiff. The plaintiff has filed Regular Civil Suit for the infringement of Copyright of his another label under title SHREE BHOLE BAPA bearing Regular Civil Suit No. 4 of 2012 in the Hon'ble District Court, at Rajkot against the said defendants on 30/7/2012 and as a counterblast to this, the defendant opted for the another Trade Mark BABU of the plaintiff. This clearly discloses the deliberate intention of the defendant. The plaintiff is constrained to file present suit against the defendant for passing off under the trademark BABU. It is submitted that the defendant has been using the said trademark in his products. Therefore, it is required for the plaintiff to file the present suit for passing off action and hence it is not barred under any other provisions of law. It is further submitted that the plaintiff is not aware of the constitution of the defendants and therefore the plaintiff craves leave to amend the pleadings as and when required.

10. It is further submitted that the defendant never got any permission from the plaintiff for using the said trademark BABU. Therefore, the plaintiff has never permitted the defendants to use its trademark, even though the defendant has been using the same with malafide intention. Therefore, the defendant is required to be restrained by an order of perpetual injunction from this Hon''ble Court.

12. The plaintiff further submits that the defendant is unauthorizedly using the said trademark "BABU", whereby the customers, retailers and public at large are deceived and made to believe that the said product bearing trademark "BABU" sold by the defendants have some relation with the plaintiff. Thereby the defendants are passing off their goods as the goods of the plaintiff and hence the plaintiff is entitled to get remedy under the provision of Common Law as well as Trade Marks Act, 1999. Thus it is clear that the defendants have deliberately, willfully and with malafide intention used trademark "BABU" for its product to misguide the customers, retailers and public at large and make them believe that the defendants products has some connection with the product provided by the plaintiff and/or that the products which is being sold by the defendants have origin from plaintiff. It is submitted that because of such unauthorized use of trademark "BABU" by the defendants, deception has already taken place in the market, and it is damaging the plaintiff's reputation and goodwill. It is submitted that the defendants are in no way connected with the plaintiff's firm and the defendants have not taken any permission from the plaintiff to use the plaintiff's trademark "BABU". Therefore, injunction order as prayed for is required to be granted against the defendants.

15. The present plaintiff submits that the present plaintiff has filed the suit for infringement of copyright on 30/07/2012. Therefore immediately as per the alleged assignment deed dated 07/08/2012, he went to one Ms. S. Sayali, of Maharashtra and purchased the trademark BABU registered under No.: 1494903 as per the above mentioned assignment deed and filed suit against the present plaintiff on 15/09/2012 though knowing fully well about the settled principles of law. The plaintiff at this juncture begs to submit that the Rights conferred by registration are subject to other provisions of the Trade Marks Act, 1999. It is further submitted that the settled law provides better rights to a person who is prior in adoption and use of the disputed Trade Mark. The plaintiff further submits that the plaintiff has filed rectification application against the defendants before the competent authority, which is still under process of adjudication before the competent authority. As per the above mentioned facts and circumstances for sake of argument, it creates a doubt on the defendants pleadings made in plaint and if he is using the said trademark since 2006 and he is the owner of the said trademark as per his own averments than what was the reasons to purchase the said trademark immediately from third party. It is also pertinent to note that the present defendants have not produced any single documentary evidence with respect to partnership deed of firm or any documentary evidence with respect to any proprietorship except alleged

assignment deed supported by an affidavit of the assignor.

18. The plaintiff respectfully submits that the cause of action arose to file this suit against defendant when the plaintiff came to know that the defendant has adopted and used word "BABU", which is ditto-to-ditto same and identical to the plaintiff's trademark "BABU" and filed a Regular Civil Suit under No. : 07/12 against the present plaintiff and when the defendant published caution notice in Akila & AAJKAL daily newspapers published from Rajkot and when the plaintiff says and submits that the cause of action is recurring one and when the defendant has filed a civil suit No. 7/2012 before this Hon"ble District Court of Rajkot for infringement of trademark BABU. Moreover, the defendant is using the said trademark within territorial jurisdiction of this Hon"ble Court.

23. Therefore, plaintiff prays as under:

"(a) The defendants, its directors, its successors, servants, agents, assignees, dealers, sellers, stockiest and/or distributors and/or anybody claiming through the defendant be restrained permanently and perpetually from using the trademark "BABU" and/or any other identical and/or deceptively similar mark of their products and thereby passing off their goods as the goods of the plaintiff.

(b) A decree may be passed against the defendants and in favour of the plaintiff for the declaration that the plaintiff is only the proprietor of the trademark "BABU" and declare that only the plaintiff is entitled to sell product under the trademark "BABU".

(c) The defendants be ordered to produce accounts for selling product to his customers under the trademark "BABU" and be directed to pay the profit whatsoever derived from selling product under the illegal use of trademark "BABU" to the plaintiff with interest @ 18% from the date of filing of this suit till realization. The Hon"ble Court be pleased to direct the defendants to pay the damages for the loss of reputation and goodwill, which may deem fit and proper to this Hon"ble Court in the interest of justice.

(d) Any other and further relief as may be deemed just and proper looking to the facts and circumstances of the case, be granted in the interest of justice.

(e) A heavy exemplary cost of the suit may be awarded to the plaintiff." "

21. In view of the petitioners' objection in light of Order 2 Rule 2 it is relevant to mention with reference to the said first suit that, even according to the petitioners, the plaintiff of the said suit prayed for relief against alleged infringement of copyright as well as alleged passing off, with reference to the trade name Bhole Bapa. Thus, in the said first suit, the plaintiff prayed for entire relief which could have been prayed for so far as the said trade name Bhole Bapa is concerned and that, therefore, it cannot be said that with regard to the said trade name, the plaintiff did not pray for entire relief and/or omitted to claim entire relief which could have been prayed for with regard to the trade name Bhole Bapa.

21.1 Moreover, in the said second suit any relief, in any form or in any manner, is not prayed for with reference to the said trade name "Bhole Bapa". Actually, after having filed the purshis Exh. 16, the plaintiff, according to the submission and statement by learned counsel for the plaintiff, i.e. present respondent, has not filed other suit with reference to or in connection with the very same trade name, i.e. Bhole Bapa.

21.2 Furthermore, the said second suit is an action against passing off by using the trade name/trade mark "Babu" (and not the trade name "Bhole Bapa"). Therefore, in view of the legal position that a composite suit for protection of copyright and against passing off is not maintainable, any relief against passing off with reference to the trade name/trade mark "Babu" (which is the subject-matter of and cause of action for the said second suit) could not have been included and prayed for in the first suit because inclusion of such claim or relief would have turned the said first suit into composite suit.

21.3 From the foregoing discussion, it has emerged that (a) the plaintiff (respondent herein) did not omit to claim any relief which he could have otherwise claimed in and at the time of first suit and/or (b) the plaintiff has not claimed/resurrected, in the second suit, the claim/relief/cause of action which he abandoned from the said first suit; and, above everything (c) the cause of action in the second suit is not the same as in the said first suit and/or the claim and cause of action in the second suit is not the same which the plaintiff is said to have deleted/abandoned from first suit.

21.4 Moreover, the basic and primary requirement (viz. unity and similarity of cause of action and/or claim in the first and the subsequent suits) for invoking and applying the provision under Order 2 Rule 2 is absent and the petitioners have failed to establish that there is unity and similarity of the claim and/or cause of action in the said two suits. Hence, from any perspective and angle and on any ground it cannot be said that the said second suit is hit by Order 2 Rule 2. In this view of the matter, the contention raised in light of Order 2 Rule 2 fails and the objection at earlier mentioned Sr. No. (iii)(a) is not sustainable. In this view of the matter, the objection in light of Order 2 Rule 2 fails.

21.5 There is yet another facet related to this objection. The said second suit by present respondent is an action against alleged passing off by the petitioners. With reference to action against passing off Hon"ble Apex Court has, in the decision in case of M/s. Bengal Waterproof Limited Vs. M/s. Bombay Waterproof Manufacturing Company and Another, , held that act of passing off gives recurring cause of action and whenever and wherever fresh deceitful act is committed, the person deceived will have a fresh cause of action and action against passing off will not be hit by provision under Order 2 Rule 2. In the said decision Hon"ble Apex Court observed:

"11. It is obvious that such infringement of a registered trade mark carried on from time to time would give a recurring cause of action to the

holder of the trade mark to make a grievance about the same and similarly such impugned passing off actions also would give a recurring cause of action to the plaintiff to make a grievance about the same and to seek appropriate relief from the court. It is now well settled that an action for passing off is a common law remedy being an action in substance of deceit under the Law of Torts. Wherever and whenever fresh deceitful act is committed the person deceived would naturally have a fresh cause of action in his favour. Thus every time when a person passes off his goods as those of another he commits the act of such deceit. Similarly whenever and wherever a person commits breach of a registered trade mark of another he commits a recurring act of breach of infringement of such trade mark giving a recurring and fresh cause of action at each time of such infringement to the party aggrieved. It is difficult to agree how in such a case when in historical past earlier suit was disposed of as technically not maintainable in absence of proper reliefs, for all times to come in future defendant of such a suit should be armed with a licence to go on committing fresh acts of infringement and passing off with impunity without being subjected to any legal action against such future acts. We posed a question to the learned counsel for the defendants as to whether after the disposal of the earlier suit if the defendants had suspended their business activities and after a few years had resumed the same and had started selling their goods under the trade mark "DACK BACK" passing them off, the plaintiff could have been prohibited and prevented by the bar of Order 2 Rule 2 sub-rule (3) from filing a fresh suit in future when such future infringement or passing off took place. He rightly and fairly stated that such a suit would not be barred. But his only grievance was that whatever was the infringement or passing off alleged against the defendants in 1980 had, according to the plaintiff, continued uninterrupted and, therefore, in substance the cause of action in both the suits was identical. It is difficult to agree. In cases of continuous causes of action or recurring causes of action bar of Order 2 Rule 2 sub-rule (3) cannot be invoked. In this connection it is profitable to have a look at Section 22 of the Limitation Act, 1963. It lays down that in the case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues". As act of passing off is an act of deceit and tort every time when such tortious act or deceit is committed by the defendant the plaintiff gets a fresh cause of action to come to the court by appropriate proceedings. Similarly infringement of a registered trade mark would also be a continuing wrong so long as infringement continues. Therefore, whether the earlier infringement has continued or a new infringement has taken place cause of action for filing a fresh suit would obviously arise in favour of the plaintiff who is aggrieved by such fresh infringements of trade mark or fresh passing off actions alleged against the defendant. Consequently, in our view even on merits the learned Trial Judge as well as the learned Single Judge were obviously in error in taking the view that the second suit of the plaintiff in the present case was barred by Order 2 Rule 2 sub-rule (3), CPC."

(Emphasis supplied)

Thus, act of passing off gives fresh and recurring cause of action and in case of continuous or recurring causes of action, Order 2 Rule (2) sub-rule (3) is not applicable and cannot be invoked.

Re: Order 23 Rule 1(4) :

22. So far as the provision under Order 23 Rule 1(4) is concerned, (a) the said provision will be attracted and will be applicable only if the "subject matter" of the second/subsequent suit is the same as in the previous/first suit or it is same as part of the claim which he abandoned from first suit; and (b) the said provision comes into play after the institution of a suit; (c) the said provision enables and allows the plaintiff to abandon, subject to and with permission of the Court, entire suit or to abandon part of the claim raised in the suit after the suit is instituted; (d) the restriction or prohibition prescribed under the said provision are (in the event the plaintiff withdraws the suit or part of the claim) mandatory; (e) however, it will be applicable when unity of the parties and of the "subject-matter" and claim is established; (f) when a plaintiff withdraws his suit or part of his claim without Court's permission, he stands disentitled to institute fresh suit in respect of same "subject-matter" or such part of the claim.

22.1 If the defendant establishes relevant factors e.g. institution of second suit after withdrawing previous suit/part of the claim, and also establishes absence of permission by the Court, unity of the parties in both the suits, as well as unity and similarity of the subject-matter and claim in the said two suits, then the said provision would be attracted. But if the person raising objection against the suit fails to establish the said aspects, then the said provision will not be applicable. The obligation to establish relevant aspects is on the person who attacks the suit by invoking this provision.

22.2 Thus, according to the said provision the primary and basic, or cardinal, requirement is similarity and unity of "subject matter". If the "subject matter" of the fresh/subsequent suit is not the same as in the first suit (or is not same as the claim/part of the claim first suit which the plaintiff abandoned) then the said provision will not be applicable and the fresh/second suit will not be hit by said provision.

22.3 At this stage, it is relevant to mention that on examination of the plaints in both the suits, it has emerged that the subject-matter and the cause of action in the said second suit is not the same as in the first suit and the subject matter and/or the claim in the second suit is not in respect of the claim which the plaintiff allegedly relinquished from the said first suit. Therefore, in present case, the said provision viz. Sub-Rule (4) of Rule (Order 23 rule 1) of Order 23 is not attracted and is not applicable.

22.4 The petitioners have opposed the said second suit in light of Order 23 Rule 1(4). On this count, it is claimed that by filing purshis Exh. 16 in the said first

suit, the plaintiff abandoned claim against passing off and since the said claim is abandoned without Court's permission, the said second suit is not maintainable. In this context it is relevant to mention that while examining the objection in light of Order 2 Rule 2 the factual aspects have been examined in detail and those aspects have been discussed at length hereinabove earlier (under heading Order 2 Rule 2). Therefore, repetition is avoided. Suffice it to say that though the said second suit is an action against alleged "passing off" actually the said second suit is in respect of altogether different and distinct subject matter and cause of action viz. trade name/trade mark viz. "Babu". Thus, the basic and primary requirement similarity and unity of subject matter to attract provision under Order 23 Rule 1(4) is absent in the second suit. Consequently, the said provision, i.e. Order 23 Rule 1(4) will not be applicable to the said second suit.

22.5 When it has emerged that the cardinal and primary requirement for applicability of and for attracting the bar under Order 23 Rule 1(4) (viz. similarity and unity of the "subject matter") is absent and it has also emerged that even the cause of action and the relief prayed for in the second suit is different from the subject matter and cause of action in the first suit as well as from the claim said to have been withdrawn, then, as a corollary it would follow that the second suit is not hit by the bar under said provision. Consequently, other aspects and/or other factual details will not survive and will not be relevant and/or would pale into insignificance. Therefore, once the aforesaid facts have emerged and thereby it has also emerged that the second suit is not hit by said provision then other or further sequence and details of events related to said second suit (viz. whether said second suit was filed before and was pending when, the plaintiff submitted the purshis Exh. 16 or not i.e. whether the said purshis was filed/submitted after the second suit was filed) need not detain the Court and they may not be discussed after the above-mentioned facts have emerged. However, so as to complete the record those aspects need to be mentioned and considered.

22.6 In this context, it may be mentioned that first suit was filed on 30.7.2012 and the second suit came to be filed on 3.11.2012 whereas the purshis exhibit 16 was filed on 9.11.2012 i.e. after the second suit was filed. Thus the second suit was already filed and was pending when the plaintiff filed the said purshis and when the second suit came to be filed the said first suit and/or the part of claim in the first suit was not withdrawn/abandoned. By the said purshis exhibit 16 the plaintiff had "declared" that he "will delete" the claim and averments with regard to passing off from the first suit, however, such claim or such averments were actually not deleted from the said first suit. In fact it was only on 29.12.2012 that the plaintiff submitted the application (dated 15.12.2012. Exh. 22) under Order 6 Rule 17. It is also pertinent that final order below the said application is not passed. Consequently actual withdrawal/abandonment of the claim and averments from the first suit has not taken place. However Mr. Shah, learned advocate for petitioner would claim that once the purshis exhibit 16 is filed the declaration contained therein should be deemed to have become effective and the claim and averments from the first suit should be deemed to

have been deleted. Even if the said submission by learned Counsel for petitioner is accepted and submission of purshis (on the record of first suit) is, in itself, considered and construed as withdrawal and abandonment of the claim (related to passing off) from said first suit, then also such withdrawal or abandonment of the claim would be effective from the date of submission of said purshis (Exh. 16). Since the said purshis exhibit 16 was filed on 9.11.2012 (i.e. after the second suit was filed on 3.11.2012) the said part of the claim, even according to the submission by the petitioners would stand deleted on 9.11.2012 when the second suit was already filed and was pending since 3.11.2012.

22.7 In this context, it may be mentioned that the provision under Order 23 rule (1)(4) would be applicable if the second suit is filed, in respect of same subject matter, "after" the previous suit or part of the claim in the previous suit is abandoned/relinquished. On this count, reference may be made to the decision in case of (a) Girdharilal Bansal vs. The Chairman, Bhakra Beas Management Board [AIR 1985 Punjab and Hariyana 219(1)], wherein with reference to Order 23 Rule 1(4) the High Court, in paragraph 2 of the judgment, observed, inter alia, that:-

"4. After hearing the learned counsel for the parties, I give the following findings issue-wise.

Issue No. 1.

This issue relates to the matter whether the second petition filed by the contractor on the same allegations and for the same relief is barred under O.23, R. 1(4) of the Civil P.C. or not in view of the fact that the earlier petition was got dismissed as withdrawn.

The Court below relied on Teja Singh Vs. Union Territory of Chandigarh and Others, and decided the issue against the contractor and held that the present petition was barred. The learned counsel for the appellant has not challenged the dictum laid down in the aforesaid decision but has argued that on the facts of this case that decision is not applicable because here the second application was filed before the first application was withdrawn and to these facts the provisions of Order 23, C.P.C. are not attracted in view of AIR 1928 710 (Lahore) and AIR 1930 599 (Lahore). The earlier application was filed on 6th Oct, 1982 and the present application was fixed on 26th Oct., 1982 and the first application was withdrawn vide order dt. 18-11-1982. The learned counsel for the Board could not show if aforesaid two decisions were ever dissented from or overruled. The aforesaid two Lahore decisions clearly say that if second suit is filed before the first suit is withdrawn then O. 23, C.P.C. is not attracted and the second suit cannot be dismissed under O.23, R. 1(4) of the Civil P.C. Accordingly, I reverse the decision of the trial Court and hold that the present petition was not barred under O. 23, C.P.C."

(b) Similarly in the decision in case of P.A. Muhammed Vs. The Canara Bank and Another, High Court of Kerala, relying on the decision in case of Girdharilal Bansal (supra), has observed, inter alia, that:

"7. No doubt, under O. XXIII, R. 1, C.P.C. "at any time after the institution of a suit, the plaintiff may as against all or any of the defendants, abandon his suit or abandon a part of his claim" (subject of course, to what is contained in the proviso). Under sub-rule (3), where the Court is "satisfied that the suit must fail by reason of some formal defect, or that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant him permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim". Under sub-rule (4), where the plaintiff "abandons any suit or part of claim, or withdraws from a suit or part of a claim, without the permission referred to in sub-rule (3), he shall be liable for such cost as the court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim". The court below held that rule 1(4) applied to the case and therefore, the suit was barred. But, then, the fact that the second suit was pending when the first suit was dismissed as withdrawn, went unnoticed. The question to decide is whether in such a circumstance, the second suit is barred or not.

8. As noticed above, sub-rule(4) of Rule 1 of Order XXIII, C.P.C. precluded the plaintiff from instituting a fresh suit where the earlier suit was withdrawn or abandoned without permission of the Court. It is clear that the prohibition is in regard to the institution of a fresh suit after the earlier suit on the same cause of action had been withdrawn without the leave of court. But, where the subsequent suit was pending when the earlier one was dismissed as withdrawn, abandoned or as not pressed, the provisions of O. XXIII, Rule 1, in terms, would be inapplicable."

22.8 Thus, as observed and held in the said decisions if the second suit is filed before the first suit (or part of the claim in the first suit is abandoned) then the bar under Order 23 Rule 1(4) will not be applicable. However, learned Counsel Mr. Mehul Shah relied on the decision by High Court of Calcutta in case of Prapti Fashions Private Limited and Another Vs. Manoj Kumar Gupta, wherein reliance is placed on Hari Ram Vs. Lichmaniya and Others, . In the decision in Hari Ram Vs. Lichmaniya and Others, (which is referred to in case of Prapti Fashion (supra) relied on by the petitioner) it is observed, inter alia, that:

"16. It is true that the party is required to take permission from the Court under O. 23, R. 1(3) of the C.P.C. only if party wants to institute a fresh suit in respect of the same subject-matter. Order 23, R. 1(3), C.P.C. is not dealing with the situation where before withdrawal of suit, the plaintiff files another suit and thereafter, withdraws earlier suit. The Court can grant permission to file fresh suit only on fulfilment of the requirements under the provisions of O. 23, R. 1(3). When procedure has been given in the Code of Civil Procedure for filing fresh suit after institution of one suit by the plaintiff, then it excludes the procedure by which the parties, on their own whims and wish can file fresh suit and bye-pass the procedure and make the provisions of law nugatory. Not only this but it

appears that the argument of the learned counsel for the petitioner came by ignoring not only above legal position, but has been advanced without noticing true meaning of effect of Ss. 10, 11 and 12 and O. 2, Rr. 1 and 2, C.P.C. and other relevant provisions of C.P.C. Fundamental aim and object is to avoid multiple suits may it be founded on same cause of action or may be relating to same subject-matter."

22.9 Thus, even in the said decision, the legal position viz. (a) permission will be necessary only if the party wants to file fresh suit for same subject matter; and (b) Order 23 Rule 1(4) will not apply to the case where second suit is filed and thereafter the first suit is withdrawn (which is the case in present matter). In the said decision, i.e. Hari Ram Vs. Lichmaniya and Others, , it is observed that such course of action may make the provision nugatory. However, with regard to the said decision what is relevant to note is that on reading of the said decision it appears that the concept of "recurring cause of action" which is laid down and explained by Hon"ble Apex Court in case of M/s. Bengal Waterproof Limited Vs. M/s. Bombay Waterproof Manufacturing Company and Another, did not arise for consideration and, therefore, was not considered in the said decision Hari Ram Vs. Lichmaniya and Others, . In the said decision M/s. Bengal Waterproof Limited Vs. M/s. Bombay Waterproof Manufacturing Company and Another, Hon"ble Apex Court has observed that act of passing off is an act of deceit and tort and every time when such tortious act or deceit is committed by the defendant the plaintiff gets a fresh cause of action to come to the court by appropriate proceedings and that in the case where recurring cause of action arise the provision under Order 2 Rule 2(3) does not apply. Thus, so far as the second suit is concerned (in respect of which the objection is raised) it being an action against alleged passing off the plaintiff has recurring or continuous cause of action.

22.10 It is pertinent that in the case of N.R. Narayan Swamy vs. B. Francis Jagan (supra), Hon"ble Apex Court applied the concept of "recurring cause of action" in respect of eviction suit under Rent Act and observed, inter alia, that in matters of recurring cause the restriction under Order 23 Rule 1(4) is not applicable. In the said decision Hon"ble Apex Court has observed:

"6. In our view, the High Court ought to have considered the fact that in eviction proceedings under the Rent Act the ground of bona fide requirement or non-payment of rent is a recurring cause and, therefore, landlord is not precluded from instituting fresh proceeding. In an eviction suit on the ground of bona fide requirement the genuineness of the said ground is to be decided on the basis of requirement on the date of the suit. Further, even if a suit for eviction on the ground of bona fide requirement is filed and is dismissed it cannot be held that once a question of necessity is decided against the landlord he will not have a bona fide and genuine necessity ever in future. In the subsequent proceedings, if such claim is established by cogent evidence adduced by the landlord, decree for possession could be passed. {Re: K.S. Sundararaju Chettiar Vs. M.R. Ramachandra Naidu, and Surajmal Vs. Radheyshyam, }.

10. The aforesaid rule would have no application in a proceeding initiated for recovering the suit premises on the ground of bona fide requirement which is a recurring cause. Order XXIII rule 1(4)(b) precludes the plaintiff from instituting any fresh suit in respect of such subject matter or such part of the claim which the plaintiff has withdrawn. In a suit for eviction of a tenant under the Rent Act on the ground of bona fide requirement even though the premises remains the same, the subject matter which is cause of action may be different. The ground for eviction in the subsequent proceedings is based upon requirement on the date of the said suit even though it relates to the same property. Dealing with similar contention in Vallabh Das Vs. Madan Lal and Others, , this Court observed thus:-

"The expression subject-matter is not defined in the Civil Procedure Code. It does not mean property. That expression has a reference to a right in the property which the plaintiff seeks to enforce. That expression includes the cause of action and the relief claimed. Unless the cause of action and the relief claimed in the second suit are the same as in the first suit, it cannot be said that the subject-matter of the second suit is the same as that in the previous suit."

11. The Court further observed that the mere identity of some of the issues in two suits would not bring about identity of the subject matter in two suits."

(Emphasis supplied)

22.11 In the decision in Hari Ram Vs. Lichmaniya and Others, the concept of recurring cause of action and the above referred two decisions by Apex Court did not arise for consideration in view of the facts of that case. Therefore, the said decision would not render assistance to the petitioner and so far as the decision in case of Prapti Fashion (supra) is concerned, in the said decision the High Court found that the subject matter in both suits was same, whereas in present case it has emerged, on examination of facts, that the subject matter in case of the said two suits are different.

23. In this view of the matter, even if the submission by learned Counsel for the petitioners in light of the decision in Hari Ram Vs. Lichmaniya and Others, and in case of Prapti Fashion is accepted and even if in present case the Court proceeds on the premise or on assumption that submission of the purshis Exh. 16 in the first suit, in itself, amounts to and should be treated as actual withdrawal of the claim against passing off, then also in view of the fact that in the matter of passing off the plaintiff has recurring cause of action, the bar under Order 23 Rule 1(4) will not be attracted.

23.1 Furthermore, in present case even if one goes a step further and proceeds on the premise or assumption that though the second suit is an action against passing off and though the plaintiff has recurring cause of action (as held by Apex Court in above referred two decisions) but the said concept may not be applied in present case then also the petitioners" contention and objection should fail because the primary and fundamental requirement for attracting Order 23

Rule 1(4) viz. similarity and unity of subject matter of second suit and first suit is absent in present matter, i.e. in second suit.

24. With reference to the said second suit most relevant and important aspect is that the fundamental and basic requirement (for attracting Order 23 Rule 1(4) of the Code) viz. similarity and unity of subject matter and/or similarity and unity of cause of action, is absent in the second suit and that, therefore, even if the above-mentioned submissions by the petitioners are, for the sake of considering the objection, accepted then also, in view of the aforesaid vital fact the said objections against the second suit should fail.

24.1 Since, the subject matter and the cause of action of the second suit is different from the subject matter and cause of action in the first suit as well as from the claim said to have been abandoned (from the said first suit by virtue of the purshis exhibit 16), the provision under Order 23 Rule 1(4) will not be applicable to the said second suit. Thus, the said second suit does not deserve to be rejected in exercise of power under Order 7 Rule 11(d).

25. At this stage, the decisions relied on by learned senior counsel for the petitioners may be considered. So far as the decisions relied on by the petitioners are concerned, learned senior counsel relied on the decision dated 7.3.2012 in Letters Patent Appeal No. 877 of 2010, wherein the Division Bench has observed that the cause of action with regard to infringement of copyright and passing off are different and therefore, a composite suit cannot be filed. In present case, on plain reading of the plaint, it has emerged that the second suit is not based on cause of action related to infringement of copyright. In the decision in the case of T. Arivandandam (supra), the Hon"ble Apex Court observed that where the suit is found to be vexatious and meritless, then the power under Order 7 Rule 11 should be exercised. In present case, after considering facts of the case and the material on record, particularly the plaint of second suit, it is found that the suit cannot be termed as vexatious or abuse of process, as alleged by the petitioners. In the decision in case of Maharaj Shri Manvendrasinhji Ranjitsinhji Jadeja (supra), the Division Bench, on meticulous examination of the facts of the case, the relevant provisions and the averments in the plaint, found that the covenant on which the plaintiff replied did not give out any cause of action and it was not possible to read in the articles of the covenant that rule of primogeniture was guaranteed to the erstwhile rulers of Kathiawar. In present case, it has emerged from the details and averments in the plaint that the petitioners have claimed that on account of prior user of the trademark in question, the plaintiff has acquired certain rights and benefits available under the Trade Marks Act. Thus, the facts of the present case are different from the set of facts in the cited decision. Likewise, the facts of present case are different from the facts involved in the decision in case of Chandrakant Kantilal Jhaveri (supra). In the case of Croft Sales and Distribution Ltd. (supra) the Division Bench, on examination of the plaint, reached to the conclusion that the whole suit was based on hypothesis and not on any liability which could be

identified under Indian Law on date of institution of the suit, whereas in the case on hand, material facts and averments in the suit bring out cause of action as well as averments necessary to maintain action for passing off. In the decision in case of Sheela Adhikari (supra), the Calcutta High Court dealt with the issue wherein the suit comprises some causes of action which lie within the jurisdiction of the Court where it is filed and other do not. In view of such facts the Court observed that if the Court can return the plaint and allow the plaintiff to resubmit the plaint after necessary deletion, then the plaintiff can also be allowed to do the same thing while the plaint is on Court's file. The said decision does help the petitioners. The decision in case of Bloom Dekor Limited (supra) as well as Dahyabhai Ranabhai Vaghela (supra) are materially different on facts as well as in respect of the issue involved in the said cases than the case on hand. The other decisions are also materially different on facts and do not assist the petitioners. In view of the fact that in present case, the Court has, upon examining the facts and the plaint in detail, reached to the conclusion that the second suit is not for the same cause of action as in the first suit, the decision in the case of Hindustan Zinc Limited (supra) does not assist the petitioners inasmuch as in the said case, the Court, on facts observed that "... .. I have no manner of doubt in holding that very contentions are repeated in the second suit...." and that, therefore, the Court held that the suit amounts to abuse of process. So far as the decisions in case of Cadila Health Care Ltd. (supra) as well as in case of Khoday Distilleries Limited (supra) are concerned, when present case is examined in light of the said decision as well as decisions relied on by the plaintiff, it emerges that the plaint contains primary, basic and proper averments necessary to present a suit against alleged passing off. As mentioned earlier, at this stage, the Court would not enter into the issue as to whether the allegations are true or not and whether they are sufficient to establish alleged passing off and/or as to whether the evidence is sufficient to lead the plaintiff to success in his action or not are matters of evidence and therefore, the said decision are not of assistance at this stage (though it might be while trial proceeds on merits). However, at this stage, it cannot be concluded that the plaint is hit by the said decision. In the decision in case of Khoday Distilleries Limited (supra), the suit was opposed on ground of delay. In present case, at this stage, the said issue is not raised by the petitioners/defendants. Besides this, the said issue is a mixed question of fact and law and would otherwise also, if raised, can be and will be decided during the trial. So far as the decisions in cases of Virgo Industries (Eng.) Private Limited, State Bank of India vs. Pharmaceuticals Ltd. (supra) as well as in case of N.V. Srinivass Murthy (supra) are concerned, the Hon'ble Court, in the said decisions, considered the matters in light of Order 2 Rule 2. The said provision would come in picture when the cause of action in both the suits is common. In present case, the subject-matter and cause of action in the said two suits are different. In this view of the matter, the decisions do not help the petitioners. Learned senior counsel for the petitioners also relied on the decision dated 10.10.2013 in Appeal from Order No. 154 of 2013. It is a decision in an appeal under Order 43 Rule 1(r), wherein order below application for

interim relief, whereby the learned trial Court had, in exercise of power under Order 39 Rule 1, granted interim relief against the defendants, was challenged. Moreover, in the said decision, the subject-matter in both the suits was use of trademark "Dandi Namak/Dandi Salt" and both the suits, i.e. subsequent suit, wherein the impugned order under Order 39 was passed and the previous suit which came to be withdrawn, were related to and in connection with the use of the same (i.e. above-mentioned) trademark. Besides this, in the said decision, the Court reached to specific conclusion and finding that the plaintiff had furnished false declaration and both the suits were based on same cause of action and the case suffered from suppression of material facts and the plaintiff did not approach the Court with clean hands. Thus, the said decision also does not render any assistance to the petitioners in light of the facts of second suit.

26. In this view of the matter, the conclusion reached by the learned trial Court cannot be faulted and the impugned order does not warrant interference. The petitioner has failed to make out any ground or justification to convince the Court to set aside the impugned order. Therefore, the petition fails and deserves to be rejected and is accordingly rejected. Notice is discharged.

Learned advocate for the petitioners requested that ad-interim relief granted vide order dated 16.1.2014 against further hearing of Exh. 5 application may be continued. In view of the said request, it is directed that interim relief granted vide order dated 16.1.2014 with regard to further hearing of Exh. 5 application will continue till 4.10.2014.