
(2010) 08 BOM CK 0058

In the Bombay High Court

Case No : Notice of Motion No. 195 of 2010 in Suit No. 117 of 2010

Vanita Dilip Chawla

APPELLANT

Vs

Fresh Meals India Private Ltd. and Others

RESPONDENT

Date of Decision : 25-08-2010

Acts Referred:

Trade Marks Act, 1999 — Section 33, 34, 51, 91, 93

Citation : (2010) 112 BOMLR 4165 : (2010) 44 PTC 655

Hon'ble Judges : R.Y. Ganoo, J

Bench : Single Bench

Advocate : Jimmy Mehta, instructed by H.G. Bhambhani, for the Appellant; Virendra Tulzapurkar, Vinod Bhagat and Punit Jani, instructed by G.S. Hegde and V.A. Bhagat for Defendants 1 to 5 and Virag Tulzapurkar, instructed by D.R. Karania, for Defendant 6, for the Respondent

Judgement

R.Y. Ganoo, J.—The Plaintiff has filed the Suit for a declaration that the Plaintiff is the registered proprietor of the trade name Bhagat Tarachand. By prayer Clause (b) the Plaintiff has sought an order of injunction against Defendant Nos. 1 to 6 restraining them from using the trade name Bhagat Tarachand or any name deceptively similar thereto in Inorbit Mall, near Vashi Railway Station, Vashi, Navi Mumbai or in any of their restaurant/eating house or hotel business. By prayer Clause (c) an order of injunction is sought against Defendant Nos. 5 and 6 restraining them from creating any licence for user of trade name Bhagat Tarachand or any name deceptively similar thereto.

2. The present Notice of Motion is taken out by the Plaintiff keeping in view the reliefs sought in the plaint. By prayer Clause (a), the Plaintiff wants an injunction restraining Defendant Nos. 1 to 6 from using trade name Bhagat Tarachand or any name deceptively similar thereto in connection with their eating house or hotel businesses. The injunction on similar lines is sought against Defendant Nos. 1 to 4 so as to prevent Defendant Nos. 1 to 4 from carrying on hotel business at Inorbit Mall at Vashi. By prayer Clause (c) injunction is sought restraining

Defendant Nos. 5 and 6 from creating licence for user of trade name Bhagat Tarachand or any name deceptively similar thereto.

3. Parties have completed the pleading.

4. The Plaintiff claims that her father in law by name Gopaldas Tarachand Chawla started hotel business in the name of Bhagat Tarachand since about 1952 at Zaveri Bazar, Mumbai. According to her, on account of the family arrangement, her husband Dilip Chawla became the owner of the hotel business and on 13th January 2003, the Plaintiff obtained registration of trade mark Bhagat Tarachand for hotel business in accordance with the provisions of Trade Marks Act, 1999 (hereinafter referred to as the said Act). According to the Plaintiff, she is having a restaurant at Zaveri Bazar and one more restaurant at Navi Mumbai. According to the Plaintiff, the Plaintiff has sole right to carry on business in the name of Bhagat Tarachand. According to the Plaintiff, Defendant No. 5 has been carrying on business in the name of Bhagat Tarachand and Defendant No. 6 is also carrying on business in the name similar to that of the Plaintiff. According to the Plaintiff, on account of the Plaintiff having registered trade mark, Defendant Nos. 5 and 6 cannot carry on business in the name of Bhagat Tarachand or any name similar thereto and that is how the injunction is sought.

5. According to the Plaintiff, the Plaintiff came to know that Defendant No. 1, a limited company is carrying on business at Inorbit Mall, Navi Mumbai in the name and style of Bhagat Tarachand and the Plaintiff took this as violation of her trade mark and that is how the present Suit has been filed.

6. The Plaintiff has relied upon the registration certificate bearing No. 1165987 dated 13th January 2003 in the name and style of Bhagat Tarachand and said registration is in class 30 as set out in the said Act.

7. It is common ground that the Plaintiff wanted to have registration under class 42 for her trade mark and therefore, the Plaintiff had applied for registration under class 42 to the appropriate authority. The said application was opposed by Defendant No. 5. Similarly, Defendant No. 5 applied for registration of the trade name as Bhagat Tarachand under class 42 to the appropriate authority. That application was opposed by the Plaintiff. The proceedings were conducted before the Assistant Registrar of Trade Marks who by his order dated 25th August 2008 granted registration to the Plaintiff under class 42. The application filed by Defendant No. 5 was rejected. Defendant No. 5 has filed appeal proceedings before Intellectual Property Appellate Board, Madras and said proceedings are pending.

8. The Plaintiff by letter dated 28th October 2009 demanded from Defendant Nos. 5 and 6 the particulars of licences issued in favour of Defendant No. 1. Same request was made by the Plaintiff to Defendant Nos. 1 to 4 by letter dated 29th September 2009.

9. Defendant No. 1 replied by their letter dated 7th October 2009. According to

the Plaintiff, by reply dated 7th November 2009, Defendant No. 5 refused to give the particulars of licences.

10. In the course of hearing of the Notice of Motion it is noticed that Defendant No. 5 by agreement dated 1st August 2008 created licence in favour of Defendant No. 1 permitting Defendant No. 1 to carry on hotel business in the name and style of Bhagat Tarachand. Similarly, Defendant No. 6 by agreement dated 1st August 2008 granted licence in favour of Defendant No. 1 to carry on business in the name of Radhomal Bhagat Tarachand. There has been some dispute about creation of a licence by Defendant No. 5 in favour of Defendant No. 1 by document dated 1st August 2008 as according to the Plaintiff the said document has been anti dated, forged and in fact the licence was sought to be created by earlier document dated 14th June 2008. According to learned Counsel for the Plaintiff, Defendant Nos. 5 and 6 had no authority to execute a licence in favour of Defendant No. 1 for the respective trade mark as Defendant Nos. 5 and 6 have no right to use trade mark held by the Plaintiff.

11. Learned Counsel for the Plaintiff had submitted that in the wake of the Plaintiff's registered mark Bhagat Tarachand Defendant Nos. 5 and 6 cannot use said mark and said adoption is not bonafide and said user is illegal. He submitted that trade name used by Defendant Nos. 5 and 6 is deceptively similar to that of the Plaintiff's trade name and that the Plaintiff is entitled to relief in the motion. He had further submitted the user of trade name Bhagat Tarachand by Defendant No. 1 is also illegal. He submitted that Defendant Nos. 5 and 6 had no authority to execute licence in favour of Defendant No. 1 as adoption of trade mark by Defendant Nos. 5 and 6 is illegal and hence the Plaintiff is entitled to injunction asked in Motion.

12. Learned Counsel for the Plaintiff in support of his aforesaid submission had relied upon the Judgment in the case of Poddar Tyres Ltd. Vs. Bedrock Sales Corporation Ltd. and Another, . The learned Counsel for the Plaintiff had prayed for making the Motion absolute. The learned Counsel for the Plaintiff had relied upon the Judgment in the case of Shaw Wallace and Company Ltd. and Another Vs. Mohan Rocky Spring Water Breweries Ltd., to contend that grant of injunction is necessary to protect the rights of the Plaintiff holding registered trade mark as well as to protect the interest of consumers. According to the learned Counsel for the Plaintiff, the customers of Plaintiff would be mislead by use of the Plaintiff's trade mark and it would cause damage to reputation to the Plaintiff's business.

13. Defendant No. 1, Defendant No. 5 and Defendant No. 6 have filed detailed affidavit in reply respectively so as to object to the grant of Notice of Motion. Defendant No. 1 have come out with a stand that they entered into a leave and licence agreement on 21.8.2009 with Inorbit Mall to secure premises to run the hotel business and they are carrying on business in the said premises in the name and style of Bhagat Tarachand pursuant to licence given to them by Defendant No. 5 to run the hotel business in the name of Bhagat Tarachand. Defendant No. 1 is a limited Company and Defendant Nos. 2, 3 and 4 are its

Directors and Defendant No. 3 and Defendant No. 4 are related to Defendant Nos. 5 and 6. In the course of hearing, it is noticed that Defendant No. 6 has executed a licence in favour of Defendant No. 1 by agreement dated 1st August 2010 to run the business in the name and style of Radhomal Bhagat Tarachand. In fact, Defendant No. 1 are not running the business at Inorbit Mall or at any other places in the name of Radhomal Bhagat Tarachand. Defendant No. 1 have contended that they are carrying on business on the basis of licence. Learned Counsel for Defendant Nos. 1 to 5 has submitted that if Defendant No. 5 succeeds in the defence put up by him, Defendant No. 1 would also succeed because Defendant No. 1 is claiming under the license which is granted by Defendant No. 5 in favour of Defendant No. 1. In view of this statement, it is necessary to test the case of Defendant No. 5.

14. Defendant No. 5 has come out with a contention that he has been carrying on business in the name and style of Bhagat Tarachand since 1978 at Zaveri Bazar. According to Defendant No. 5, since he has been carrying on business in the name of Bhagat Tarachand since 1978, he is protected in accordance with the provisions of Section 34 of the said Act and on that account the Plaintiff cannot succeed. Defendant No. 5 has relied upon various documents to show that Defendant No. 5 has been carrying on business in the name of Bhagat Tarachand at Bombay since 1978 and that is how the defence of prior user of the name Bhagat Tarachand Chawla is put up. On behalf of Defendant No. 5 it is submitted that Bhagat Tarachand Chawla had four sons i.e. Radhomal, Khemchand, Kishan and Gopaldas. It is also stated that Khemchand had three son (1) Defendant No. 5, (2) Defendant No. 4 and (3) Ramesh. It is noted that Dilip is the son of Gopaldas and present Plaintiff is his wife. According to Defendant No. 5, the Plaintiff knew that Defendant No. 5 has been carrying on business in the name of Bhagat Tarachand since prior to the Plaintiff coming in the business and in any case institution of the present Suit. Learned Counsel for Defendant No. 5 submitted that there is a delay in filing this Suit and hence, the injunction cannot be granted.

15. Defendant No. 5 has relied upon number of documents in support of his stand that he has been carrying on business since 1978 and he is a user of the trade name Bhagat Tarachand prior to the user of the trade mark by the Plaintiff. It was submitted that he is protected u/s 34 of the said Act. Learned Counsel for the Plaintiff relied upon following Judgments in support of this argument:

(i) Indo Pharma Pharmaceutical Works Pvt. Ltd. v. Pharmaceutical Co. of India (1977) BLR 73.

(ii) Geoffrey Manners & Co. Ltd. v. Mega Pharma Laboratories (1976) IPLR 9.

16. Learned Counsel for Defendant No. 5 submitted that the Plaintiff is carrying on activity under class 30 in accordance with the registration held in the name of Bhagat Tarachand whereas the activity carried out by Defendant No. 5 since about 1978 falls in class 42 and on this ground itself the Plaintiff cannot get

injunction against Defendant No. 5 as the plaintiff can obtain an injunction against a person who is carrying on activity vide class 30. It was sought to be argued by the learned Counsel for Defendant No. 5 that there can be a comparison between same class and a person running activity in one class cannot obtain an injunction against another person running an activity in a different class. In support of this contention, learned Counsel for Defendant No. 5 had relied upon the Judgment in the case of Balkrishna Hatcheries Vs. Nandos International Ltd. and Another, .

17. Defendant No. 5 has also contended that the trade name Bhagat Tarachand used and enjoyed by Defendant No. 5 has acquired a distinctive reputation in the class 42 and there is a different identity with the name Bhagat Tarachand qua Defendant No. 5. It was also contended by Defendant No. 5 that if one reads the affidavit in rejoinder filed by the Plaintiff dated 26th February 2010, the Plaintiff had no objection for Defendant No. 5 carrying on activity in the name and style of Bhagat Tarachand and it appears that it is only when Defendant No. 5 executed a licence in favour of Defendant No. 1, the Plaintiff thought of instituting the present Suit. The relevant portion of the affidavit in rejoinder is as follows:

I say that the reasons why I never took exception or objected to the activities of the Defendants is that the Plaintiffs have been given to understand that the restaurants opened by Defendant Nos. 5 and 6 were for their personal livelihood. It is now apparent that Defendants have their heart set on commercializing the business of Bhagat Tarachand and giving out franchises to that end and for that purpose and in fact in the Bombay Shops and Establishment Licence of Defendant No. 1, Defendant No. 1 has mentioned against the column: "Name of the employer: M/s. Fresh Meals India Private Limited, Mr. Suraj Saraogi, Mr. Manoj Chawla and Mr. Prakash Chawla. Nature of business: Business of Restaurant and Franchising Business.

18. According to learned Counsel for Defendant No. 5 this aforesaid relevant portion in the rejoinder clearly indicates that the Plaintiff had no objection for carrying on business by Defendant No. 5 in the name of Bhagat Tarachand.

19. Learned Counsel for Defendant No. 5 had taken me through the text of the plaint as well as counter statement filed by the Plaintiff in the proceedings before the appropriate authority under the said Act where the Plaintiff has admitted that she has been carrying on business in the name and style of Bhagat Tarachand in her own right since 1999 and has secured registration in the name of Bhagat Tarachand from 2003.

20. My attention was also drawn to the evidence in support of application u/s 51 filed by the Plaintiff before the appropriate authority under the trade Act where the Plaintiff has on affidavit admitted that she started business in the name of Bhagat Tarachand in the year 2000 with the same consent and knowledge of her husband, who is the original proprietor of the business Bhagat Tarachnd.

According to the learned Counsel for Defendant No. 5, these admissions on the part of the Plaintiff clearly indicate that she started business in the name of Bhagat Tarachand in her own name since 1999 and the claim of the Plaintiff that she has taken over the business from her husband, who had taken over the business from his father cannot be accepted. Learned Counsel for Defendant No. 5 had reiterated that if stand of Defendant No. 5 is accepted by the Court, Defendant No. 1, who is carrying on business under licence dated 1st August 2008 requires protection and no order of injunction should be passed. The learned Counsel for Defendant No. 5 had, therefore, prayed for dismissal of the Notice of Motion.

21. The learned Counsel appearing for Defendant No. 6 had submitted that Defendant No. 6 has entered into a licence agreement with Defendant No. 1 and has allowed Defendant No. 1 to run the business in the name and style of Radhomal Bhagat Tarachand. Learned Counsel for Defendant No. 6 had also submitted that there are no specific allegations against Defendant No. 6 and as such, if the plaint is read independent of other papers, it is clear that no cause of action is pleaded against Defendant No. 6 and as such, no injunction should be granted against Defendant No. 6.

22. It was contended that Defendant No. 6 happens to be the son of Radhomal Bhagat Tarachand and Radhomal Bhagat Tarachand was the son of main man Bhagat Tarachand Chawla and heirs of Bhagat Tarachand have been using name Bhagat Tarachand with appropriate combination and that Defendant No. 6 has been running business in the name of Radhomal Bhagat Tarachand Bhojanalaya since 1962 and Defendant No. 6 had relied upon various documents to show that the hotel business is carried out in the name and style of Radhomal Bhagat Tarachand/Radhomal Bhagat Tarachand Bhojanalaya. It was also contended by the learned Counsel for Defendant No. 6 that the Plaintiff have acquiesced the activity of Defendant No. 6 and that Defendant No. 6 is entitled to the benefit of provision of Section 33 of the said Act on the principle of acquiescence. It was also contended by Defendant No. 6 that Defendant No. 6 has succeeded to the hotel business through his grand father and Defendant No. 6 has been carrying on business by using the principles of own name or his predecessor and on that count also Defendant No. 6 activity is protected. Judgment in the case of Sohan Lal and Others Vs. Amin Chand and Sons and Others, was relied upon. It was also contended by the learned Counsel for Defendant No. 6 that registration of the Plaintiff is vide class 30 whereas activity carried out by Defendant No. 6 would fall under class 42 and therefore, Defendant No. 6 cannot be enjoined from carrying on business in the name and style of Radhomal Bhagat Tarachand/Radhomal Bhagat Tarachand Bhojanalaya. Learned Counsel on behalf of Defendant Nos. 5 and 6 had therefore contended that the Plaintiff has failed to make out a prima-facie case for grant of injunction against Defendant No. 6 and as such the Notice of Motion should be dismissed.

23. In reply to the arguments advanced by the learned Counsel for Defendant

Nos. 5 and 6, the learned Counsel for the Plaintiff had submitted that the user of the trade name Bhagat Tarachand or its similar names by Defendant Nos. 5 and 6 respectively is not bonafide and therefore, the Court should not apply the principles of delay and laches in considering the matter. The learned Counsel for the Plaintiff had in support of this proposition relied upon the Judgment in the case of Midas Hygiene Industries P. Ltd. and Another Vs. Sudhir Bhatia and Others, . It was also contended by the learned Counsel for the Plaintiff that it is a well settled principle of law relating to the trade mark that there could be only one mark, one source and one proprietor and it cannot have two origins. In support of this, he had relied upon the Judgment in the case of Power Control Appliances and Others Vs. Sumeet Machines Pvt. Ltd., . It was also argued by the learned Counsel for the Plaintiff that the stand of Defendant No. 6 that Defendant No. 6 is protected under the principles of own name business is not correct and in support of that he had relied upon the Judgment in the case of Bajaj Electricals Limited Vs. Metals and Allied Products and Another, .

24. It was also contended by the learned Counsel for the Plaintiff that the registration of trade mark is prima-facie evidence of its validity and as the Defendants have not challenged the validity of the same injunction must follow in favour of the Plaintiff. In support of this proposition, learned Counsel for the Plaintiff had relied upon the Judgment in the case of Metro Playing Card Co. Vs. Wazir Chand Kapoor, .

25. The learned Counsel for the Plaintiff had taken me through the proceedings which were conducted before the Assistant Registrar appointed under the said Act where the Plaintiff as well as Defendant No. 5 had applied for registration of trade mark in the name and style of Bhagat Tarachand vide class 42. He had also taken me through the order passed by the appropriate authority dated 25th August 2008 by which the request made by Defendant No. 5 for registration in class 42 was rejected and request for registration vide class 42 made by the Plaintiff was accepted. The learned Counsel for the Plaintiff had taken me through the letters dated 20th December 2007 and 14th January 2008 addressed to the Registrar of Trade Marks, Trade Marks Registry, Mumbai concerning the matter regarding registration in class 42 made by the Plaintiff as well as Defendant No. 5 and had submitted that Defendant No. 5 had in turn informed the Registry of Trade Marks that at the stage of the proceedings before the Registrar, Defendant No. 5 would not lead and place before the said Registrar evidence of prior user of trade mark Bhagat Tarachand. According to the learned Counsel for the Plaintiff, if this was the stand of Defendant No. 5 before the Registrar of Trade Mark, it is not open for Defendant No. 5 to contend that user of trade mark by Defendant No. 5 in the name and style of Bhagat Tarachand is protected u/s 34 of the said Act. The learned Counsel for the Plaintiff had therefore submitted that the Court should discard the defence raised by Defendant No. 5 and therefore, the case of the Plaintiff that the Plaintiff's registered trade mark Bhagat Tarachand would stand at a higher pedestal as compared to user of the trade mark by Bhagat Tarachand and that the Court

should grant an order of injunction.

26. The learned Counsel for the Plaintiff had submitted that being aggrieved by the order dated 25th August 2008, Defendant No. 5 has filed the appeal proceedings before the appropriate tribunal established under the said Act and as the proceedings are pending before the said tribunal, it is not open for Defendant No. 5 to raise the stand as regards prior user as trade name Bhagat Tarachand. He had also drawn my attention to Section 34 of the said Act and had submitted that on account of the language of Section 34 and in particular "and the registrar shall not refuse (on such use being proved) to register the second mention trade mark by reason only of the registration of the first mention trade mark" clearly imposed a bar on this Court in entertaining the defence put up by the Plaintiff u/s 34 of the said Act. Learned Counsel for the Plaintiff took me through the provisions of Section 91 of the said Act as well as Section 93 of the said Act. According to him since appeal proceedings are pending before the Appellate Board, it is not open for this Court to entertain the defence taken by Defendant No. 5 as the said defence is raised in the Appeal proceedings. It was also sought to be contended that in the year 2003 class 42 was absent and class 42 was inserted for the first time on 15th September 2003. The learned Counsel for the Plaintiff had by taking me through the relevant Sections contended that the stand of Defendant No. 5 that prior use constitutes a good defence should be rejected. The learned Counsel for the Plaintiff had in support of the proposition relied upon the Judgment in the case of Sona Ana Pana Balraj and Others Vs. S.P. Vadivel Nadar and Sons and Another, and had submitted that the law is well settled that when the proceedings are pending before the Appellate Court, no order should be passed which would have effect on the said appeal proceedings.

27. Without prejudice to the aforesaid submission, learned Counsel for the Plaintiff had submitted that the burden of proof of prior user is on Defendant Nos. 5 and 6 and that Defendant Nos. 5 and 6 have failed to discharge the same. He had in support of this submission relied upon Judgment in the case of Ramdev Food Products Pvt. Ltd. Vs. Arvindbhai Rambhai Patel and Others, .

28. I have considered the rival submissions. I have perused the pleadings and judgments. In the first place it would be necessary to decide whether the Plaintiff is carrying on business in her name since 1999 or much prior to that. The decision on this point will also help the Court in arriving at the appropriate conclusion as regards defence put up by Defendant Nos. 5 and 6 respectively as regards prior user of trade name Bhagat Tarachand.

29. The Plaintiff in the plaint has stated that father in law of the Plaintiff started business in the name of Bhagat Tarachand in the year 1952. The Plaintiff claims that pursuant to the family arrangement, husband of the Plaintiff Dilip Chawla became a owner of his father's hotel business. It must be mentioned that no such family arrangement in terms of a specific document has been pleaded and brought before the Court. It may be that the Plaintiff's father in law was carrying on business from 1952 in the name of Bhagat Tarachand, however, there is

nothing to show that Dilip Chawla could run the business in the name of Bhagat Tarachand as business derived from his father. The Plaintiff in paragraph 2 has further stated that on or about 13th January 2003, her husband Dilip Chawla became the owner of the business Bhagat Tarachand, there is nothing to show as to how the said business came to be transferred in the name of the Plaintiff from her husband. Averments in paragraph 2, show that activity carried on by Dilip Chawla was a proprietary firm. If it is the stand of the Plaintiff that she took over the business from said Dilip Chawla, there ought to have been a document executed between Dilip Chawla and the Plaintiff so as to transfer rights in regard to the business which was said to be carried out by Dilip Chawla. Such a document is absent. There are no pleadings in that behalf. It is pertinent to note that the Plaintiff had an occasion to state the nature of the business or title of the business before the Assistant Registrar who had conducted proceedings as regards the Registration of Trade Mark Bhagat Tarachand vide class 42. The Plaintiff has filed counter statement duly affirmed is in the opposition proceedings No. BOM 2472332, application No. 1397101 in class 42 in the name of M/s. Hotel Bhagat Tarachand. The Plaintiff has in paragraph 2 stated as follows:

The Applicants independently & bonafidely conceived and adopted trade mark/service mark, HOTEL BHAGAT TARACHAND in the year 1999 to the knowledge of opponents and concerned of Chawla family have been using uninterruptedly since then.

This Counter Statement is at Exhibit "A" to the affidavit in reply by Defendant No. 5. Undoubtedly, reading this Counter Statement, the words "applicants" appearing in paragraph 2 will mean the present Plaintiff. The Plaintiff has also filed evidence in support of application under Rule 51 in proceedings viz. Application No. 1397101 in class 42 in the name of M/s. Hotel Bhagat Tarachand, Navi Mumbai and application No. BOM 2472332 filed by M/s. Bhagat Tarachand, Mumbai. Said evidence affidavit, in paragraph 6 deals with the manner in which the Plaintiff commenced the business. The contents of the said paragraph 6 are as under:

I state that I have started the business in the name of Bhagat Tarachand in the year 2000 with the same consent and knowledge of my husband, who is the original proprietor of the business Bhagat Tarachand.

This paragraph is found in Exhibit "B" to the affidavit in reply filed by Defendant No. 5. I am inclined to accept the argument advanced by Defendant No. 5 by which the learned Counsel for Defendant No. 5 had contended that the Plaintiff cannot trace her title to the trade mark Bhagat Tarachand prior to 1999. No doubt the Plaintiff claimed that she is in the business in the name and style Bhagat Tarachand through her husband in the first place and that her husband was in the business through his father. However, the paragraph mentioned aforesaid in the proceedings before the appropriate authorities as well as the paragraph mentioned in the plaint at paragraph 2 will clearly indicate that the Plaintiff commenced her business in the year 1999 in the name of Bhagat

Tarachand and secured Registration vide class 30 with effect from 13th January 2003. Paragraph 6 at Exhibit "B" would clearly indicate that the Plaintiff herself has admitted that she started business in the year 2000 with the consent and knowledge of her husband. This will clearly mean that the Plaintiff has not taken over the business of her husband which may have been going on in the name of Bhagat Tarachand as contended by her. The words "consent and knowledge of my husband" would clearly go to show that there is no transfer of business by Dilip Chawla in favour of the Plaintiff. All this will clearly go to show that the Plaintiff decided to furnish the title to her business as Bhagat Tarachand by calculating that if she starts business in the name of Bhagat Tarachand, she will be able to reap some benefit from the factual situation which was then prevailing, as by that time name Bhagat Tarachand was in the market. With this, I hold that the Plaintiff commenced her business in the name of Bhagat Tarachand from 1999 and that the stand of the Plaintiff that she succeeded to the business of her father in law which was being carried out since 1952 cannot be accepted.

30. The Plaintiff claims that she has registration in the name of Bhagat Tarachand since 13th January 2003. Said stand is clear on the basis of registration certificate and Defendant Nos. 5 and 6 have not disputed the said factual position. The said registration is in class 30. It is true that the Plaintiff has been granted registration in class 42 on the basis of order dated 25th August 2008. However, the present Suit is filed on the basis of the registered trade mark held by the Plaintiff under class 30 and in the plaint there are no averments to show that the present suit is filed by relying upon the registration granted in favour of the Plaintiff vide class 42 by order dated 25th August 2008. It is, in these circumstances, the Court has to test the case of the Plaintiff and decide whether the Plaintiff can be granted injunction restraining Defendant Nos. 1 to 6 from carrying on business under the name and style Bhagat Tarachand which falls in class 30. I am saying this because stand of Defendant Nos. 1 to 6 that their activity in the name and style of Bhagat Tarachand falls vide class 42 is not controverted by the Plaintiff.

31. With the aforesaid discussion, I now propose to deal with the various points which are required to be decided. The learned Counsel for Defendant No. 5 had contended that as the Plaintiff is having registration in class 30, the Plaintiff at the best would be able to get an order of injunction against a person who are carrying on activity in the name Bhagat Tarachand or any other deceptively similar name which activity is falling under class 30 only. It is sought to be contended by the learned Counsel for Defendant No. 5 that if a person is carrying on activity in class 42. Even in the name of Bhagat Tarachand, an injunction cannot be granted. In support of this preposition, learned Counsel for the Plaintiff had relied upon the Judgment in the case of Balkrishna Hat Cheries. He had taken me through the said Judgment. I have perused the said Judgment. In my view, the said Judgment rightly covers the argument advanced by the learned Counsel for Defendant No. 5. I am inclined to observe that the concept of

registration trade mark in classes covering goods available under Schedule IV of the said act and concept of registration of trade mark in classes covering services available under Schedule IV to the said Act is required to be appreciated and there cannot be mixing of registration of trade mark for goods with service or mixing of services with goods. If the legislature intended to mix the said activity, there would not have been distinction as goods and services in Schedule IV. In my view, the stand taken by Defendant No. 5 that activity of Defendant No. 5 falls in class 42 and it cannot be compared with activity falling in class 30 is required to be accepted. On this principle even if the title of business of the Plaintiff, title of Defendant No. 5 is Bhagat Tarachand, injunction sought by the Plaintiff cannot be granted. This point also covers the case of Defendant No. 6.

32. The learned Counsel for Defendant No. 5 had taken the stand that Defendant No. 5 has been carrying on activity in the name of Bhagat Tarachand since 1978. According to the learned Counsel for Defendant No. 5, such an activity would get protected u/s 34 of the said Act. I have perused the provisions of Section 34 of the said Act and I have also considered the arguments advanced by the learned Counsel for the Plaintiff that if certain proceedings are pending before the appropriate authority under the said Act, the Court cannot extend the benefit of Section 34 to the said Act. In my view, reading the provisions of Section 34 as also reading the Judgments relied upon by the learned Counsel for Defendant No. 5 in the case of Indo Pharma Pharmaceuticals Works Pvt. Ltd. and Geoffrey Manners & Co. Ltd. I am inclined to observe that irrespective of the proceedings which may be pending before the appropriate authority, it is open for the Court to consider the defence put up by a party as regards prior user of the trade name as that of the Plaintiff and if the case is made out and injunction can be refused. It was argued advanced by the learned Counsel for the Plaintiff that the words "and the registrar shall not refused" (on such use being proved), the second mentioned name by reasons the registration of the first mentioned trade mark" is a provision of the Section by which defence of prior user cannot accepted.

33. In my view, the aforesaid terminology is a direction given to the registrar of trade marks that the registrar of trade marks will not refuse to register the second mentioned trade mark by reason of the fact that a person is holding a registration in the very name in which the second person has applied for registration. Reading the language of Section 34 as a whole, there is no prohibition on the Court to test the defence of the prior user. In my view, the interpretation which is sought to be placed by the learned Counsel for the Plaintiff to Section 34 cannot be accepted as the said interpretation in my view would make Section 34 of the said Act, nugatory. Provision of Section 34 if read in its proper perspective would clearly go to show that if a person is using the trade mark prior to commencement of the business by a person like Plaintiff such a prior user is required to be protected because the person using the trade mark prior to the user of the trade name like Plaintiff would not know that in future somebody else is going to use his trade mark and start the business. The only condition is such a person who claims the defence of prior user must place before

the Court appropriate documents in support of his stand. It is required to be mentioned that since the Court is testing the defence of prior user at the stage of hearing and disposal of the Notice of Motion, the burden of proof as regard user of the prior name has to be on the basis of proof which may be referred to as prima-facie proof i.e., Defendant who claims prior user should make out the prima-facie case that he has been using the trade name prior to the user of Plaintiff.

34. The arguments advanced by the learned Counsel for the Plaintiff based on Section 91 and Section 93 of the said Act is required to be rejected as in my view those sections deal with a situation as regards proceedings which are pending before the appropriate Appellate Authority and those Sections have no application to proceedings which are filed in the Court. This is so because of specific language of Section 34 of the said Act. This is also because the Plaintiff has approached this Court for a order of injunction and Defendant No. 5 is coming out with a case of prior user, it is the duty of the Court to test such a defence. There is no embargo in testing such a defence. With the aforesaid observations, I turn to the defence put up by the learned Counsel for Defendant No. 5.

35. Defendant No. 5 has come out with a specific case that Defendant No. 5 started business in the name of Bhagat Tarachand in the year 1978. Defendant No. 5 has relied upon following particulars/documents for the purposes of making out the case of prior user since about 1978. They are as under:

1. Sales figures from 1978.
2. Shops and Establishment Licence from 1978.
3. Supply of electricity to Defendant No. 5 from the relevant years.
4. There are sales tax registration and other documents pertaining to compliances with the provision of sales tax.
5. Income tax papers such as income tax returns.
6. Notice received from Income Tax department and papers regarding registration of the Defendant No. 5 in the name of Bhagat Tarachand under the provisions of employees provident fund scheme, etc.

Xerox copies of these documents are annexed to the affidavit in reply filed by Defendant No. 5.

36. A close perusal of these documents would clearly go to show that Defendant No. 5 has been carrying on hotel business since 1978 in the name and style of Bhagat Tarachand. Surely, the documents which have been placed before the Court by Defendant No. 5 cannot be disputed by the Plaintiff and at the stage of hearing and disposal of the Notice of Motion it is required to be seen as the one making out the case by Defendant No. 5 viz. Defendant No. 5 has been carrying on business in the name of Bhagat Tarachand since 1978. All this will clearly

make out the case that stand taken out by Defendant No. 5 that he is entitled to protection u/s 34 is required to be accepted. It is pertinent to note that the Plaintiff has made out the case that the business is in the her name since 1999. It is also the case of the Plaintiff that the registration is in the name of Bhagat Tarachand January 1993. As I have observed that Defendant No. 5 did commence his business in or about 1978, the commencement of the business by Defendant No. 5 in the name of Bhagat Tarachand is prior to 1999 and/or 2003. In my view, these observations would go a long way in accepting the stand of Defendant No. 5 as regards prior user and would constitute a good defence put up by the Plaintiff.

37. At this juncture itself it would be proper to deal with the defence put up by Defendant No. 6 as regards prior user. Defendant No. 6 has come out with a case that Defendant No. 6 is in the business from 1962. Defendant No. 6 has produced before the Court documents viz. (i) sales figures from 1991 as sales figures for the period prior to 1991 are not available, (ii) Pay sheets, (iii) Shops and Establishment Registration Certificate of 1968 onwards, (iv) Various licences issued by Mumbai Municipal Corporation, (v) Income tax documents from 1991. Defendant No. 6 is undoubtedly a partner of firm Radhomal Bhagat Tarachand. One may have to note that in the documents which are produced by Defendant No. 6 certain documents stand in the name of Radhomal Bhagat Tarachand whereas certain documents stand in the name of Radhomal Bhagat Tarachand Bhojanalaya. In my view, the two trade names viz. Radhomal Bhagat Tarachand and Radhomal Bhagat Tarachand Bhojanalaya are practically the same. Hence, I hold that Defendant No. 6 is carrying on business since about 1962 in the trade name Radhomal Bhagat Tarachand. Defendant No. 6 has been able to make out a case that the business is carried on prior to 1999. Hence, Defendant No. 6 is entitled to protection u/s 34 of the said Act.

38. In so far as the use of the name Bhagat Tarachand, the record i.e. the affidavits exchanged by and between the parties clearly indicate that the main man was Bhagat Tarachand and he had four sons and those four sons has sons and daughters. Hence all these persons had kept their nexus with the term Bhagat Tarachand and they started business with different names using the name Bhagat Tarachand. It is noticed on the basis of affidavit filed by Defendant Nos. 5 and 6 that the activities carried on by the descendants of Bhagat Tarachand by keeping nexus with trade name Bhagat Tarachand was well known to each and every person who was in hotel business and parties adhered to the respective user without any hindrance and objection from others. One thing is very clear that when various persons were using name Bhagat Tarachand, the litigation in regard to this name Bhagat Tarachand is initiated by the Plaintiff for the first time and that too in the year 2010 and there is no litigation as regards use of Bhagat Tarachand prior to 2010. The aforesaid observation is fortified on the basis of the contents of affidavit in rejoinder filed by the Plaintiff in terms of rejoinder dated 26th February 2010. Paragraph 19 of the said affidavit in rejoinder which I have quoted earlier is clearly confirmed the fact that the

Plaintiff had no objection whatsoever in Defendant Nos. 5 and 6 using the name Bhagat Tarachand. Looking to the stand of the Plaintiff in the affidavit in rejoinder, it is clear that the Plaintiff knew the user of term Bhagat Tarachand by Defendant No. 5 or Defendant No. 6 prior to the institution of the Suit and the stand taken by the Plaintiff that the Plaintiff is entitled to an order of junction based on the fact of the registration cannot be accepted. In my view, contents of paragraph 19 has the effect of demolishing the case put up by the Plaintiffs that on the strength of registration of trade mark in the name of Bhagat Tarachand, she is exclusively entitled to the trade name Bhagat Tarachand. This is also on the backdrop of the fact that the Court has accepted the stand of Defendant Nos. 5 and 6 as regards prior user.

39. In so far as the stand of Defendant No. 6 as regards using the own name or the name of the predecessor in the title, I am inclined to observe that the Defendant has not been able to make out the case in that behalf because the name used by Defendant No. 6 is Radhomal Bhagat Tarachand. Certainly, word Radhomal has the effect of creating specific distinction between the term Radhomal and Bhagat Tarachand simplicitor. In any case, the defence of prior user put up by Defendant No. 6 is apparent and has been accepted.

40. The defence put up by Defendant No. 6 as regards the acquiescence cannot be accepted inasmuch as the requirement of Section 33 of the said Act are not fulfilled. Defendant No. 6 has not applied for registration in the name of Bhagat Tarachand either under class 30 or class 42. To that extent the stand of Defendant No. 6 is required to be rejected.

41. The pleadings of the respective parties would clearly go to show that the term Bhagat Tarachand has undoubtedly acquired a distinctive name and it has its identity. Learned Counsel for Defendant No. 5 had submitted that if the Court is prepared to accept his contention based on the prior user of the name Bhagat Tarachand from 1978, Defendant No. 5's interest is required to be protected. Since the Court has accepted the stand of Defendant No. 5/Defendant No. 6 that both these persons are using the name Bhagat Tarachand definitely prior to 1999 and from respective years viz. 1978 and 1962, these names have acquired a distinctive entity and identity.

42. I now turn to the question of grant of licences by Defendant Nos. 5 and 6 in favour of Defendant No. 1. I have already indicated that on record Defendant No. 5 has produced a document in the nature of a licence being document dated 1st August 2008 granted in favour of Defendant No. 1 a Limited Company to run the business in the name of Bhagat Tarachand. The reading of the said document would clearly go to show that Defendant Nos. 5 and 1 were at ad-addendum as regards the name held by Defendant No. 5 as Bhagat Tarachand and its second user by Defendant No. 1 as Bhagat Tarachand under the licence granted. Same is the position as regards licence granted by Defendant No. 6 in favour of Defendant No. 1 as regards the name Radhomal Bhagat Tarachand. It is true that the said licence document refers to the trade name as Radhomal Bhagat

Tarachand, I had already indicated that the documents relied upon by Defendant No. 6 has reference to Radhomal Bhagat Tarachand and Radhomal Bhagat Tarachand Bhojanalaya. However, these two names are synonymous. In so far as the licence said to be executed by Defendant No. 5 in favour of Defendant No. 1, a serious challenge was put up by the Plaintiff. The Plaintiff has in the affidavit in rejoinder contended that the said document of 1st August 2009 is a sham and bogus. The Plaintiff has in the said affidavit in rejoinder and in particular paragraph 6 quoted 6 reasons to claim that the document dated 1st August 2008 is a forged document. I have considered the same. It is to be noted that Defendant No. 1 have come out with a contention that they secured a licence to carry on business at Inorbit Mall in regard to the premises vide leave and licence agreement is dated 21st August 2008. In the said leave and licence agreement, it is mentioned as to how licence to run the business in the name of Bhagat Tarachand was granted. The relevant introductory recital is as under:

Proposal Intention:

Clause (e) - The licensee is in need of a unit in the said Mall for a temporary period carrying on business only during mall working hours of "Indian Veg", under the brand/trade name and style of "Bhagat Tarachand" (having the right to carry on the said business in India as the Licensed user of the said brand/trade name as per a agreement dated 14th June, 2008 (the said agreement dated 14th June 2008).

43. Learned Counsel for the Plaintiff had submitted that if in the agreement to secure permission under leave and licence agreement by Defendant No. 1, if Defendant No. 1 had stated that licence to use trade name Bhagat Tarachand was granted by agreement dated 14th June 2008, there is no question of Defendant No. 5 executing a licence in favour of Defendant No. 1 as of 1st August 2008. He had also taken me through the 6 objections which are found in paragraph 6 of the affidavit in rejoinder and had submitted that the stand of Defendant No. 5 that a licence is given to Defendant No. 1 to use the trade name by 1st August 2008 should be rejected. He had submitted that if his submission in this behalf is accepted, the Court should hold that Defendant No. 1 is carrying on activity in the name of Bhagat Tarachand independent of Defendant No. 5 and in that case the Court should hold that the activity of Defendant No. 1 in the name of Bhagat Tarachand is deceptively similar and is in violation of the Plaintiff's trade mark.

44. Defendant No. 1 as well as Defendant No. 5 were asked to file affidavits so as to disclose in the said affidavit as to why a reference to dated 14.6.2008 is found as regards grant of licence by Defendant No. 5 in favour of Defendant No. 1 to carry on activity in Inorbit Mall under the leave and licence agreement. I have perused the said affidavit as also the counter filed by the Plaintiff. It is true that in the course of making a statement before the Court it was indicated that it is a typographical mistake. However, in affidavit, an explanation is provided by Defendant No. 1. Defendant No. 1 has come out with explanation in paragraph 3

of the said affidavit dated 5.8.2010. A reading of the same appears that a Company by name Team India Managers Ltd. was involved in the matter of creation of a licence in favour of Defendant No. 1 and certain document being document at Exhibit "B" annexed to the affidavit of Defendant No. 1 came to be entered into. A reading of the said document would go to show that said company Team India Managers Ltd., Prakash Chawla, Manoj Chawla were the parties to the said document and an arrangement has been arrived at by the said document on 14th June 2008 to grant licence to Defendant No. 1 in regard to name and style of Bhagat Tarachand. However, said arrangement did not materialize and that is how Defendant No. 1 thought of securing a licence in its favour directly from Defendant No. 5 and Defendant No. 6 and that is how the document dated 1st August 2008 came to be executed. After having considered the affidavit dated 5th August 2010 filed by Defendant No. 1 as well as Defendant No. 5 and the counter filed by the Plaintiff dated 26th February 2005, to me it is very clear that at the time of execution of leave and licence agreement dated 21st August 2008, the persons who were concerned with the drafting of the said leave and licence agreement made a wrong reference to the agreement dated 14th June 2008. The document dated 1st August 2008 was undoubtedly executed prior to 21st August 2008. Therefore, in the leave and licence agreement dated 21st August 2008, reference to the licence agreement dated 1st August 2008 should have been made. In my view, no specific benefit is secured by Defendant No. 1 in referring the agreement dated 14th August 2008 in the leave and licence agreement. To my mind it was an unintentional act and no importance can be attached to this date 14th August 2008. If one reads the said document dated 14th June 2008 between Team India Managers, one is really at a loss as to how said document was executed. Certainly, the plaint has been filed in the year 2010. It is inconceivable that Defendant No. 5 and Defendant No. 1 would come out with a forged document dated 1st August 2008 in order to create a defence. This is also on the backdrop that permissions were secured by Defendant No. 1 in Inorbit Mall by leave and licence agreement dated 21st August 2008 and it has been the positive case of the Plaintiff that they came across the running of the business by Defendant No. 1 in Inorbit Mall definitely after 21st August 2008. In my view, whatever confusion which has arisen as a result of use of the terminology "licence agreement dated 14th June 2008" is not significant to the point in dispute.

45. It is true that witnesses to the agreement dated 1st August 2008 are persons who are concerned with Defendant No. 1 and they are related to each other. Those objections are found in paragraph 6 of the affidavit in rejoinder. I am not inclined to accept those objections. One of the objection is that agreement dated 1st August 2008 bears the stamp of notary J.S. Oberoi but his signature is absent. The document dated 1st August 2008 relied upon by the Defendants was annexed to the affidavit in reply. Said affidavit is affirmed before Mr. J.S. Oberoy, Notary and because the copy of the agreement dated 1st August 2008 was annexed to the said affidavit, said Mr. Oberoy, Notary has affixed his rubber

stamp to show that copy of the document dated 1.8.2008 formed part and parcel of affidavit filed by Defendant No. 5. With all this, I am inclined to reject the stand of the Plaintiff that document dated 1st August 2008 between Defendant No. 5 and Defendant No. 1 is a forged.

46. It is pertinent to note that as of today, Defendant No. 1 is not carrying on business in the name of Radhomal Bhagat Tarachand Bhojanalaya though Defendant No. 1 has secured a licence from Defendant No. 6. Having accepted the defence of prior user put up by Defendant Nos. 5 and 6, the licence created by Defendant No. 5 as well as Defendant No. 6 in favour of Defendant No. 1 will assume importance.

47. It has been the stand of Defendant No. 6 that the plaint as a whole does not disclose any cause of action against Defendant No. 6. My attention was drawn by learned Counsel for Defendant No. 6 to the entire plaint and had submitted that reference to Defendant No. 6 is found in paragraphs 8,11,13,15 and 16. He had drawn my attention to these paragraphs and had submitted that according to him, Defendant No. 6 has been joined in the present Suit without any specific reference and there are no allegations levelled against Defendant No. 6 as regards the violation of the trade mark viz. Bhagat Tarachand held by the Plaintiff. After having gone through the relevant paragraphs quoted above, I am inclined to accept the stand of Defendant No. 6 that the plaint does not disclose cause of action against Defendant No. 6. In view of the above, the stand of Defendant No. 6 that Defendant No. 6 has been joined as a party Defendant without any specific purpose is required to be accepted. This is also one more ground to reject the prayer for injunction against Defendant No. 6.

48. It has been the stand of the Defendants that there has been a delay in instituting the present Suit. It is true that the learned Counsel for the Plaintiff had contended that delay should not be a ground to reject the case for an injunction. It is apparent that in the year 1999 when the Plaintiff commenced her activities in class 30 in the name and style of Bhagat Tarachand, Defendant Nos. 5 and 6 were in the hotel business. It cannot be denied by the Plaintiff that she was not aware of the establishments run by Defendant No. 5 and Defendant No. 6 in the various names, using name Bhagat Tarachand. If this is so and if it was the case of the Plaintiff that she has superior right over the term Bhagat Tarachand, she could have instituted the suit immediately when she commenced the business in the year 1999 or in any case after securing a registration of the trade mark in the year 2003. The present Suit has been filed in the year 2010. A reading of the affidavit in rejoinder and in particular, paragraph 19 would clearly go to show that the Plaintiff knew the activities of Defendant Nos. 5 and 6 and had no objection to Defendant Nos. 5 and 6 carrying on the said activities. The Plaintiff that of instituting the present Suit only when she came to know that Defendant No. 1 is carrying on activity in the name and style Bhagat Tarachand. The stand of the Plaintiff that licence dated 1st August 2008 is a forged document will get negated on account of the following language used in

paragraph 19 of the affidavit in reply:

It is now apparent that Defendants have their heard set on commercializing the business of Bhagat Tarachand and giving out franchises to that end and for that purpose and in fact in the Bombay Shops and Establishment Licence of Defendant No. 1, Defendant No. 1 has mentioned against the column:

Name of the employer: M/s. Fresh Meals India Pvt. Ltd., Mr. Suraj Saraogi, Mr. Manoj Chawla and Mr. Prakash Chawla.

Nature of Business :

Business of Restaurant and Franchising Business.

49. Plaintiff came to know about the activity of Defendant No. 1 in or about September 2008 or so soon thereafter and the Plaintiff lodged the plaint only in December 2009. If the stand of the Plaintiff that his trade mark is being violated nothing prevented the Plaintiff to approach this Court for an order of injunction soon after the Plaintiff came to know about it. It is also required to be noted that the Plaintiff is carrying on its activity in Navi Mumbai at premises "No. 6/A, Shatrugan Tower, Near Mafco Market, Sector 18, Vashi, Navi Mumbai." This will also show that the Plaintiff and her representatives were in the hotel business in Navi Mumbai. The Plaintiff has been doing that activity in the year 1999. It is inconceivable that the Plaintiff would not know the running of the activity by Defendant No. 1 at Inorbit Mall from 2008 on the basis of licence granted in its favour from Defendant No. 5 by document dated 1st August 2008. In my view, if the Plaintiff was serious in protecting her trade mark, nothing prevented the Plaintiff from instituting the present Suit at an early date. It is true that normally delay in approaching the Court is no ground to refuse injunction. However, in the present case, there is one more additional factor to hold against the Plaintiff on the ground of delay as Defendant Nos. 5 and 6 have been carrying on their respective activity definitely prior to 1999 and the Plaintiff has approached the Court for injunction against Defendant Nos. 1 to 6. If the Plaintiff would have approached the Court against Defendant No. 1 alone, the question of delay would not have gone against her. The aforesaid discussion would clearly go to show that Defendant No. 5 and Defendant No. 6 were entitled to use the term Bhagat Tarachand, Radhomal Bhagat Tarachand or Rodhomal Bhagat Tarachand Bhojanalaya in accordance with the provision of Section 34 of the said Act. If this is so, Defendant No. 5 and Defendant No. 6 could grant licence as regards said user of the term Bhagat Tarachand in favour of a third party. In view of the licence granted in favour of Defendant No. 1, Defendant No. 1 is justified in using the said trade name and carry on the business. The argument advanced by the learned Counsel for Defendant Nos. 5 and 6 that if an injunction is not granted against Defendant Nos. 5 and 6, injunction cannot be granted against Defendant No. 1 who is carrying on business under the licence from Defendant No. 5 and/or Defendant No. 6 is required to be accepted. Since I have held in favour of Defendant Nos. 5 and 6, the Plaintiff would not be entitled to an order of

injunction against Defendant No. 1.

50. For the reasons mentioned aforesaid, I hold that the Plaintiff has failed to make out the prima-facie case for grant of injunction prayed in Notice of Motion.

51. It is, in these circumstances, the Notice of Motion taken out by the Plaintiff is required to be dismissed. Since parties to the Suit i.e. Plaintiff, Defendant No. 5 and Defendant No. 6 as well as Defendant Nos. 3 and 4 are related to each other, I am not inclined to impose costs on the Plaintiff. For the reasons mentioned aforesaid, I pass the following order:

(i) Notice of Motion is dismissed with no order as to costs.

(ii) Learned Counsels for Defendant Nos. 1 to 5 as well as learned Counsel for Defendant No. 6 waive service of the writ of summons and seek time to file written statement on behalf of the respective Defendants. Request is fair. Time is granted. The Defendants to file written statement on or before 30th October 2010 directly in the office. Suit to come up for hearing in the usual course.

52. After the aforesaid order is passed, the learned Counsel for the Plaintiff submitted that the operation of this order be stayed as the Plaintiff apprehends that the text of this order could be used by the Defendants in the Appeal proceedings pending before the Appellate Board.

53. I have heard learned Counsel Mr. Bhagat, appearing on behalf of Defendant No. 5, who was present at the time of dictation of the order. The learned Counsel submitted that the proceedings before the Appellate Board are pending as regards Defendant Nos. 5 and 6 has not at all applied for registration under class 42 and no proceedings are pending so far as Defendant No. 6 before the Appellate Board. He submitted that proceedings arise out of grant of registration in favour of the Plaintiff vide class 42 and rejection of the application filed by Defendant No. 5 for registration in class 42. He submitted that the order passed by this Court has nothing to do with the Appellate proceedings and those proceedings will have to be attended to by the respective parties independent of this case. He submitted that there is no question of staying this order.

54. I have considered the rival submissions. It is required to be mentioned that observations in this Suit have been made on the basis of the pleadings before this Court and only a reference has been made by this Court to certain statements made by the Plaintiff before the Assistant Registrar where the proceedings were pending as regards registration of the Plaintiff in class 42 and registration of Defendant No. 5 in class 42. That was done for the limited purpose of deciding whether the Plaintiff carried on business in her own name or the Plaintiff succeeded in her business through her husband or father in law. There is no question of Defendant Nos. 5 or 6 using the observations in this order in appeals before Board. In view of the above, the request to stay the operation of the order is rejected.