

**(2021) 09 DEL CK 0002**

**In the Delhi High Court**

**Case No : Civil Suit (COMM) No. 108 Of 2021**

Victoria Foods Private Limited

APPELLANT

Vs

Rajdhani Masala Co. & Anr

RESPONDENT

**Date of Decision : 01-09-2021**

**Acts Referred:**

Code Of Civil Procedure, 1908 — Order 39 Rule 1, Order 39 Rule 2  
Trade Marks Act, 1999 — Section 29(2)(c), 29(3), 31, 103, 104, 135(2)(c)  
Copyright Act, 1957 — Section 63  
Indian Penal Code, 1860 — Section 419, 420, 468, 471

**Citation : (2021) 09 DEL CK 0002**

**Hon'ble Judges : Jayant Nath, J**

**Bench : Single Bench**

**Advocate : Dayan Krishnan, Rohit Gandhi, Manish Singhal, Adish Srivastava, Sukrit Seth, Kapil Sibal, Chander Lall, Ankur Singhal, Sajad Sultan, Nancy Roy**

**Final Decision : Disposed Of**

## Judgement

Jayant Nath, J

IA.No.3527/2021

1. This application is filed under Order 39 Rules 1 and 2 CPC seeking the following reliefs:

"a. Issue an ad-interim injunction restraining the Defendant its directors, proprietors, partners, subsidiaries, affiliates, franchisees, officers, employees, agents and all others in capacity of principal or agent acting for and on their behalf, or anyone claiming through, by or under them from manufacturing, selling, soliciting, exporting, displaying, advertising or by any other mode or manner its products / goods under the deceptively similar or identical trademark/ labels "Rajdhani, (Device of Rajdhani in English) , (Device of Rajdhani in Hindi) of the Plaintiff directly or indirectly and doing any other act that may lead to confusion, deception amounting to infringement of Plaintiffs trademark;

b. restrain the Defendant its directors, proprietors, partners, subsidiaries, affiliates, franchisees, officers, employees, agents and all others in capacity of principal or agent acting for and on their behalf, or anyone claiming through, by or under them, by or under them during pendency of the proceedings from using the domain name "rajdhanigroup.com" or any other domain name/trademark which is identical or deceptively similar to that of the plaintiff; and

c. Restrain the defendants its directors, proprietors, partners, subsidiaries, affiliates, franchisees, officers, employees, agents and all others in capacity of principal or agent acting for and on their behalf, or anyone claiming through, by or under them from disposing off or dealing with their assets including their premises at the addresses mentioned in the Memo of Parties and their stock-in-trade or any other assets as may be brought to the notice of the Hon'ble court during the course of proceedings and on the defendant disclosure thereof and which the defendant is called upon to disclose and / or on its ascertainment by the plaintiff as the Plaintiff is not aware of the same as per section 135 (2) (c) of the Trade Marks Act, 1999 as it could adversely affect the Plaintiff's ability to recover the costs and preliminary reliefs thereon."

2. It is the case of the plaintiff that in 1966 late Shri Sundar Lal Jain (father of Shri R.K. Jain and Director of the plaintiff company) originally conceived and adopted the trademark / label 'Rajdhani' (device of Rajdhani in English) , (device of Rajdhani in hindi) for products like Pulses, Rice, Aata, Maida, Sooji, Rawa, Tea, Coffee, Cocoa, Sugar, Salt, Spices, Basmati Rice, Vinegar, Flavors, Essence for Food, Glucose, Chewing & Bubble Gum, Baking and Custard Powder, Honey, Sauces, Bakery Products, Confectionary, Sweets, Namkeen, Biscuits, Pastry, Cakes, Ice Cream, Peanut Paper, Noodles, roasted Edible Products, Potato Wafers And Chips, Rusk, Bakery Products, Flakes, Tapioca, Yeast, Pepper, Sabudana, Mustard, Sattu, and Corn. Subsequently, the plaintiff company was formed in 1983 and carried forward the said business under the said trademark / label 'Rajdhani'. It is clarified that the said trademarks / labels are owned by the plaintiff company and 'Rajdhani Flour Mills Limited' a sister concern of the plaintiff company vide settlement agreement between the legal heirs of late Shri Sundar Lal Jain executed on 31.03.2009. As per the said settlement agreement, the plaintiff company has ownership rights for the brand Rajdhani for manufacturing, trading and marketing of Aata, Maida, Sooji and other wheat products (bulk or retail and in any pack) and all kinds of pulses in pack of half and one kg only excluding Chana Dal. The sister concern M/s Rajdhani Flour Mills Limited has ownership rights in the brand 'Rajdhani' in respect of manufacturing, trading and marketing of besan, Chana dal and other gram related products in both wholesale and in consumer packs. The plaintiff and Rajdhani Flour Mills have co-existing rights in the trademark / labels in question.

3. It is pleaded that the plaintiff company is owner and proprietor of its said trademark / label on account of its honest, bona fide and prior adoption and continuous commercial use. It is claimed that the plaintiff company's trademark/

label has gained tremendous reputation and goodwill and the general public associates the trademark/label and sources its origin only with the plaintiff company.

4. It is claimed by the plaintiff that it is the only Indian food industry which ranks among the top hundred in the world. It is also one of India's largest producer and exporter of food products such as cereals, grains, besan, sooji, pulses, aata, dalia, basmati rice, pulses etc.

5. The plaintiff has also applied and obtained trademark and copyright registration pertaining to its trademark / labels. The list of registered trademarks of the plaintiff company with International Basic WIPO (World Intellectual Property Organization) are also stated and explained. It is further pleaded that the artistic features involved in the said trademark / label are original in character and the plaintiff company is the owner thereof. The details of the plaintiff company's copyrights are also elaborated in para 8 of the plaint. It is further pleaded that the plaintiff's goods have gained popularity and recognition on account of the extensive advertisements and huge investment of the plaintiff company. The gross income of the plaintiff company from the plaintiff's trademark / label as pleaded in the plaint for the year 2019-20 was Rs.9.25 crore. The turnover of the plaintiff company is said to be Rs.780 crores for the year 2019-20. The amount invested for advertisement of the trademark / label is also stated in the plaint. In 2019-20 it is stated that more than Rs.10 lacs was spent on the same.

6. Defendant No.1 is said to be the proprietorship of Ms.Asha Rani Kohli and Mr.Pawan Kohli. Defendant No.2 is said to be proprietorship of Mr.Ravi Kohli. On 25.01.2021 it is stated that the plaintiff company got knowledge of the infringing acts of the defendant from social media wherein it was found that the defendants are engaging in the business of manufacturing and selling of spices including Indian cooking spice, blended spice, turmeric powder, coriander powder chilli powder etc. in the name and style of "Rajdhani Masale Co." and also in the name of "New Rajdhani Masala Co.". The said defendants are slavishly and blatantly applying the plaintiff's trademark and labels on its products. It is stated that the defendants have wilfully and malafidely copied the artistic work, the trade dress, colour scheme, colour combination, writing pattern etc. on the packs to pass it off as the goods of the plaintiff.

7. A chart comparing the defendants impugned mark / label and the plaintiff company's registered trademark / labels have been reproduced in para 18 of the plaint. Some relevant portion is reproduced as follows:

Defendants Impugned Trademark/ Label/ Trade name

Plaintiff Company's registered Trademark / labels

8. It is pleaded that the impugned trademark / label of the defendants and the trade name of the defendants is identical and deceptively similar to the

trademark/ labels of the plaintiff company. It is claimed that the modus operandi of the defendants is that the defendants manufactures, trades and is selling inferior quality spices under the trade mark / label / trade name / packaging of the plaintiff company. Defendants have exactly copied the trademark / labels Rajdhani in English and Rajdhani in Hindi of the plaintiff company and have given its packaging, similar appearance as that of the plaintiff company's famous and popular trade mark / labels. It is stated that the plaintiff company on coming to know of the said infringement sent a cease and desist notice on 28.01.2021. No reply was received. On 27.01.2021 plaintiff filed a complaint in Police Station, Keshav Puram, Delhi under Section 63 of the Copyright Act, 103 and 104 of the Trade Marks Act and Section 419, 420, 468 and 471 of the IPC. An FIR was registered against defendant no.1.

9. The defendants have filed the written statement.

10. At the outset, the defendants deny that the plaintiff is the owner of the composite mark 'Rajdhani'. It is pleaded that the plaintiff refers to some settlement agreements entered into with 'Rajdhani Flour Mills Limited' a sister concern by virtue of which the plaintiff claims to have derived its right to the impugned trademark 'Rajdhani'. However, it is stated that the plaintiff has not provided the settlement agreement or the terms thereof. It is stated that the plaintiff came into existence in 1983. Therefore, there is no question of plaintiff using the composite trade mark 'Rajdhani' since 1966 as claimed. It is further stated that even if for some reason it is assumed that the plaintiff has been using the trademark since inception, the defendants have been continuously using the trademark 'Rajdhani' and its variants since 1965.

11. It is further stated that the cause of action as stated by the plaintiff in the plaint is wrong and denied. It is a blatant lie that the plaintiff came to know of the existence of defendant No.1 only in January, 2021. The plaintiff and defendants are admittedly operating from the same industrial area for the last 27 years. They are immediate neighbours separated by a single plot of land for the last 16 years. Further, the plaintiff and defendant No.1 are members of the Keshav Puram Industrial Area (KESPIA) CETP Society and it is headed by Shri Satinder Kumar Jain who is the longest serving Director of Rajdhani Flour Mills Limited (a sister concern of the plaintiff) and also happens to be real uncle of Shri Udit Jain, Director of the plaintiff company. It is hence pleaded that it is unthinkable that plaintiff was not aware of the existence of the Defendant No.1, since defendant No.1 has been a member of the said society since 2005.

It is further pointed out that the sister concern of the plaintiff Rajdhani Flour Mills Limited had issued a cease and desist legal notice to defendant No.1 on 18.07.2008. This was replied and refuted by the defendant on 09.08.2008. However no action was taken by the plaintiff against defendant No.1 pursuant to the said legal notice. The family settlement was allegedly arrived in 2009. The plaintiff cannot claim ignorance of existence of defendant No.1 and of the fact that the legal notice was issued by the sister concern of the plaintiff. It is

stressed that the plaintiff has acquiesced to the existence and business of defendants and usage of the impugned trademark by the defendants and hence the suit is not maintainable.

12. It is further stated that the plaintiff and defendants deal in different products altogether. While defendants are dealing with all kinds of spices and masalas, on the other hand, the plaintiffs trade in Atta, Besan, Maida etc. Clearly, the products do not overlap. However, in any case, it is reiterated that the defendants have a better right to the trademark/brand name 'Rajdhani'.

13. It is further stated that the plaintiff has claimed to be using the composite trademark 'Rajdhani' since 1966. However, the earliest documents filed by the plaintiff at best prove that they are using the said mark since 2006. Further, it is pointed out that the alleged trademark registration certificate dated 02.08.1988 of the plaintiff has been filed on a proposed to be used basis by the plaintiff. Hence, plaintiff had yet to commence use of the impugned trademark till 1988. The records maintained by the Trade Marks Registrar show that the trademark still continues to be under the "proposed to be used" category.

14. It is further stated that late Shri Madan Lal the husband of the present proprietor of defendant No.1, Smt.Asha Rani established the proprietorship firm under the name and style of "Rajdhani Masala Co." (defendant No.1) in 1965. Details are given of various documents executed by the said "Rajdhani Masala Co." namely:

i) Declaration was filed before the Sub Registrar of Assurances, Calcutta stating that Rajdhani Masala Co. is dealing and manufacturing in all kinds of masala and condiments since 1969. The declaration is said to be duly registered with the Sub Registrar Assurance Calcutta.

ii) It is further stated that the defendant No.1 is registered with office of Central Sales Tax since 1969. Defendant No.1 was registered under the Delhi sales Tax rules with effect from 16.04.1986. Subsequently due to change in tax regime defendant No.1 is presently registered under GST since 01.07.2017.

iii) Defendant No.1 is also registered with the Directorate of Agricultural Marketing, Government of India for gradation of ground spices and curry powder. Defendant No.1 is the dealer of AGMARK certified products since 1986. The AGMARK certification of the products manufactured and traded by the defendant guarantee superior quality of defendants products.

iv) On 23.04.1981, a criminal case of food adulteration was registered against Shri Madan Lal the founder of defendant No.1 under the Prevention of Food Adulteration Act. The High Court by its judgment dated 05.02.1986 was pleased to acquit the said Late Shri Madan Lal.

It is pleaded based on the above that there is use of the said trademark by the defendants continuously for a long time.

15. It is further stated that a simple search of "Rajdhani" on the official website of the Registrar of Trademarks in Class 30 reports 70 marks with stand alone and composite trade mark Rajdhani. Similar is the position under Class 29, Class 31 and Class 30.

16. It is further stressed that the plaintiff and defendants are in different businesses and there is no question of riding upon the goodwill of the plaintiff. While the plaintiff is in the business of wheat flour, Atta, sooji etc. defendants are into spices and masalas. The two categories cannot be confused, being neither the same nor similar.

17. I have heard learned senior counsel for the plaintiff and learned senior counsel for the defendants. I have also perused the written submissions filed by both the parties.

18. Learned senior counsel for the plaintiff has submitted as follows to press for an injunction in favour of the plaintiff:

i) It is pleaded that it was in 1966 that Sh.S.L.Jain (father of Sh.R.K.Jain, founder and director of the plaintiff) conceived and adopted the trademark "Rajdhani" in respect of several edible products/goods, including, besan, atta, maida, sooji, rawa, pulses(broken) etc. The said trademark 'Rajdhani' formed the primary, essential and distinctive part of the trade name/trading style and was also the 'House-mark'. Subsequently, different entities were created, namely, 'Rajdhani Flour Mills Limited' and the plaintiff in 1983. Rajdhani Flour Mills Limited and the plaintiff have obtained registration of the word 'Rajdhani'. The plaintiff obtained registration of the mark "Rajdhani Atta" in 1988 under class 30 for wheat flour. Hence, it is stressed that the trademark has been used since 1966.

ii) It is further stated that in 2006 by virtue of an oral family settlement between the legal heirs of late Sh.S.L.Jain, which was reduced in writing on 31.03.2009 and registered, the plaintiff company was allocated the proprietary and ownership rights over the trademark 'RAJDHANI' in respect of atta, maida, suji and other wheat products and all kind of pulses, half and one kg only, excluding channa dal, with proportionate goodwill of the trademark. The sister entity 'Rajdhani Flour Mills Limited' was allocated the proprietorship and ownership of the trademark and labels 'RAJDHANI' in respect of besan, channa dal and other gram related products.

iii) It is stressed that the plaintiff is also the registered proprietor of the trademark/label 'Rajdhani' in classes 29,30,31,32 and registered owner of the copyrights within India and also abroad including several countries. The registration of the plaintiff granted in class 30 of the trademark 'Rajdhani' on 05.09.2013 duly include all cognate and allied goods including condiments and spices.

iv) It has been stressed that the sale invoices regarding goods sold under

trademark/label 'Rajdhani' since 2007 have been placed on record. Similarly, a CA's certificate certifying turnover for the last 10 year has also been placed on record.

v) It is stated that the trademark used by the defendant 'Rajdhani' is phonetically identical to that of the plaintiff. The plaintiff is the registered proprietor of the trademark 'Rajdhani' and registered owner of the copyright title 'Rajdhani'. The defendants do not have any trademark/copyright registration. In fact, the application of the defendants for trademark registration was rejected on 19.10.2019 on the ground of there being a similar trademark already in existence. Hence, the defendants have no right in the said trademark.

vi) It is further stressed that there is a presumption of validity of the trademark in view of section 31 read with section 29(2) (c) and 29(3) of the Trademarks Act. The use of a virtually identical trademark by the defendant infringes the rights of the plaintiff.

vii) It is further stated that the claim of the defendant that there is a delay in moving this court by the plaintiff seeking an injunction is misplaced. It is pleaded that there is no delay as the plaintiff got knowledge about the acts of the defendant only recently. It has been further urged that even if there is a delay that would not be a ground for this court to not grant necessary injunction. Reliance is placed on the judgment of this court in the case of Crayons Advertising Limited. v. Crayon Advertising, 2014 SCC OnLine Del 218 to support the above plea that delay per se will not prevent this court from passing an appropriate interim injunction in favour of the plaintiff.

viii) It has further been urged that except for bald averments claiming user of the said trademark since 1965, the defendants have failed to produce a single document showing such user of the trademark. It is being pointed out that the defendants have not filed a single invoice showing user of the mark 'Rajdhani'. Certain invoices have been filed which are third party invoices in relation to raw material, dry chilli etc. supplied to the defendant. The documents relied upon by the defendants are documents that at best show a firm by the name of Rajdhani Masala Company existed, which is entirely unconnected and an irrelevant matter for the present case. There is clearly no prior usage since 1965 by the defendants of the said trademark as has been wrongly and falsely claimed.

ix) It is stressed that the defendants have also failed to show their turnover or continuous usage of the mark. On the other hand, the plaintiff over the years had a turnover of several crore Rupees. In the financial year 2019-2020, the plaintiff had a turnover of Rs.780 crores. Reliance is also placed on the judgment of a Co-ordinate Bench of this court in the Pioneer Nuts & Bolts Pvt. Ltd v. M/s.Goodwill Enterprises, ILR (2010) 1 Del 738.

x) It is further stated that the defendant on their own profiles have created hyperlinks leading to the plaintiff's website so as to portray that the plaintiff's and the defendants are one and the same. This clearly shows the malafide intent

of the defendant.

19. Learned senior counsel for the defendants has pleaded as follows opposing the injunction application:-

(i) It has been vehemently pleaded that the defendant has been continuously using the trade mark RAJDHANI with its variants since 1965. On the other hand, the plaintiff, though admittedly came in existence in 1983, claims user of the trade mark RAJDHANI since 1966. Reliance is placed on the following documents to substantiate the stated user by the defendant:-

a. It is stated that the sole proprietor-Late Sh.Madan Lal submitted a declaration before the Sub-Registrar of Assurances, Calcutta stating that RAJDHANI MASALA CO. is dealing in manufacturing of all kinds of masalas and condiments.

b. The said RAJDHANI MASALA CO. got registered with the office of Central Sale Tax in 1969 and with office of Delhi Sales Tax Rules in 1986. It is currently registered under GST from 01.07.2017.

c. RAJDHANI MASALA CO. has been registered with Directorate of Agricultural Marketing, Government of India, for gradation of ground spices and curry powder and is also a dealer of AGMARK certified products since 1974.

d. In 1981, a food adulteration criminal case was registered against the then proprietor and founder of the firm Sh. Madan Lal under the Prevention of Food Adulteration Act, 1954. Sh.Madan Lal was wrongly convicted by the trial court. This court in Criminal Revision No. 201/1984 was pleased to acquit Sh.Madan Lal vide judgment dated 05.02.1986. The judgment mentions the existence of RAJDHANI MASALA CO.

e. The plaintiff group's company, namely, Rajdhani Flour Mills Ltd. had issued a legal notice dated 18.07.2008 for cease and desist against RAJDHANI MASALA CO, the defendant alleging infringement of their trade mark RAJDHANI. The defendant/RAJDHANI MASALA CO. vide its reply dated 09.08.2008 through their counsel denied and rebutted the claims made in the legal notice.

f. RAJDHANI MASALA CO./the defendant is duly registered with www.indiamart.com and the firm is advertising and promoting its business through the website since 2010. The label/logo of the defendant was also uploaded on the website in 2010 itself.

(ii) It has also been strenuously urged by the learned senior counsel for the defendants that the plaintiff had full knowledge about the activities of the defendant for long and have chosen to ignore the same. Reliance is placed on the legal notice dated 18.07.2008 issued by the sister concern of the plaintiff-Rajdhani Flour Mills Ltd. claiming infringement of their trade mark RAJDHANI by the defendants. It is also stressed that the plaintiff and the defendants are admittedly operating from the same industrial area for the last 27 years and are immediate neighbours separated merely by a single plot of land for the last 16

years. The plaintiff and defendant No. 1 are also members of the Keshavpuram Industrial Area (KESPIA) CETP Society (Registered). The said Society, it is claimed, is headed by Sh.Satender Kumar Jain who is the longest serving director of the Sister Concern of the plaintiff-Rajdhani Flour Mills Ltd. He is also the real uncle of Sh.Udit Jain, Director of the plaintiff company. In these circumstances, it is pleaded that the stated acts of the defendant in trading in the impugned trade mark were fully known to the plaintiff since long. The plaintiff has chosen now after a lapse of substantial time to approach this court seeking a relief which ought not to be granted.

(iii) It is further pleaded that in the plaint, no details of the alleged settlement with the sister concern-Rajdhani Flour Mills Ltd. have been given. In the rejoinder, now the said family settlement has been placed on record. It is stressed that there is no assignment of the trade mark in favour of the plaintiff. Hence, the plaintiff cannot claim user of the said trademark since 1960's. Further, the Trade Mark Registry has not been informed of the assignment. Hence, the plaintiff has no title to the said trade mark. It is further pleaded that in any case, Rajdhani Flour Mills Ltd. is a necessary and proper party to these proceedings.

(iv) It is further urged that the plaintiff and defendant deal in different products. While the defendants are dealing in all kinds of spices and masalas, the plaintiff is in the trade of Atta, Suji, Maida, etc. Clearly, the products do not overlap and there can be no confusion.

(v) It is further pleaded that though the plaintiff claims to be using the composite trade mark RAJDHANI since 1966, however, the earliest documents relied upon by the plaintiff prove user only from 2006. There is not a single document to show actual user prior to 2006.

(vi) It has further been stressed that the plaintiff is not registered for masala, so section 29(2)(c) and 29(3) of the Trade Marks Act will not apply to the present facts.

20. I may first deal with the issue as to whether the plaintiff has any rights to the trade mark RAJDHANI keeping into account the alleged memorandum of family settlement. It is claimed that the origin of the trade mark in question RAJDHANI was in 1966 when Late Sh. Sunder Lal Jain, father of Sh.R.K.Jain, present director of the plaintiff conceived and adopted the trade mark/label and . The plaintiff company was formed in 1983 and has carried forward the said business under the said trademark/label RADHANI. It is further stated the trademark/label is owned by the plaintiff Company and the sister concern-Rajdhani Flour Mills Ltd. Reliance is placed on the family settlement agreement between the legal heirs of Late Sh. Sunder Lal Jain executed on 31.03.2009 wherein the plaintiff company has been given the ownership of the rights of the brand RADHANI for manufacturing, trading and marketing of Atta, Maida, Suji and other wheat products and all kinds of pulses, half and one kg only, excluding

Chana Dal. The sister Company Rajdhani Flour Mills Ltd. has been given the said ownership rights for the brand RADHANI in respect of manufacturing, trading and marketing of Besan, Chana Dal and other gram related products.

21. I may now look at the memorandum of family settlement dated 31.03.2009. It is a registered document. Para 11 of the said family settlement reads as follows:-

"11. Group-III shall have the ownership right in respect of Brand RAJDHANI for manufacturing, trading and marketing of Atta, Maida, Suji and other Wheat Products (bulk or retail and in any pack ) and all kind of pulses in pack of ½ and 1 kg only and excluding Chana Dal. Group I and Group II hereby agrees that they will not enter into these products either through their group members or legal heirs, successors in future. However if they require any of these products they will buy it only from Group III."

22. I may note that Group-III comprises of Sh.Rakesh Kumar Jain who is the Director of the plaintiff. Hence, as per the said settlement, Group-III, namely, the plaintiff/Director of the plaintiff has ownership rights in respect of the Brand Rajdhani for manufacturing, trading and marketing of Atta, Maida, Suji and other Wheat Products (bulk or retail and in any pack ) and all kind of pulses in pack of ½ and 1 kg only and excluding Chana Dal.

23. Hence, prima facie it appears that the plea of the defendants that pursuant to the family settlement, no rights flow to the plaintiff is without merits. The said settlement confers rights on the trade mark RADHANI in favour of the plaintiff/director of the plaintiff. The mark has also been registered in the name of the plaintiff. Admittedly, no steps have been taken by the plaintiff for registration of the assignment of the trade mark in favour of the plaintiff. However, it was not urged before the court that it was mandatory to register the assignment in favour of the plaintiff under the Trade Marks Act.

24. I will now deal with next submission of learned senior counsel for the defendant, namely, that the defendant has been using the said mark since 1965 whereas the user of the plaintiff at best is since 1983, when the plaintiff came into existence. Based on the above, it is submitted that merely because the defendant's trademark is not registered would not entitle the plaintiff to any interim injunction. In this context reliance is placed on the judgment of the Supreme Court in the case of Neon Laboratories Ltd. v. Medical Technologies Ltd. & Ors., (2016) 6 SCC 672

25. I may first look at the said judgment of the Supreme Court in Neon Laboratories Ltd. v. Medical Technologies Ltd. & Ors.(supra), where the court held as follows:

"11. We must hasten to clarify that had the Defendant-Appellant commenced user of its trademark ROFOL prior to or even simultaneous with or even shortly after the Plaintiff-Respondents' marketing of their products under the trademark

PROFOL, on the Defendant-Appellant being accorded registration in respect of ROFOL which registration would retrospectively have efficacy from 19.10.1992, the situation would have been unassailably favourable to it. What has actually transpired is that after applying for registration of its trademark ROFOL in 1992, the Defendant-Appellant took no steps whatsoever in placing its product in the market till 2004. It also was legally lethargic in not seeking a curial restraint against the Plaintiff-Respondents. This reluctance to protect its mark could well be interpreted as an indication that the Defendant -Appellant had abandoned its mark at some point during the twelve year interregnum between its application and the commencement of its user, and that in 2004 it sought to exercise its rights afresh. It would not be unfair or fanciful to favour the view that the Defendant-Appellant's delayed user was to exploit the niche already created and built-up by the Plaintiff-Respondents for themselves in the market. The 'first in the market' test has always enjoyed pre-eminence. We shall not burden this Judgment by referring to the several precedents that can be found apposite to the subject. In the interest of prolixity we may mention only *N.R. Dongre v. Whirlpool Corporation* [(1996) 5 SCC 714] and *Milmet Oftho Industries v. Allergan Inc.* [(2004) 12 SCC 624]. In *Whirlpool*, the worldwide prior user was given preference nay predominance over the registered trademark in India of the defendant. In *Milmet*, the marks of pharmaceutical preparation were similar but the prior user worldwide had not registered its mark in India whereas its adversary had done so. This Court approved the grant of an injunction in favour of the prior user. Additionally, in the recent decision in *S. Syed Mohiden v. P. Sulochana Bai* [(2015) 7 SCALE 136], this Court has pithily underscored that the rights in a passing-off action emanate from common law and not from statutory provisions, nevertheless the prior user's rights will override those of a subsequent user even though it had been accorded registration of its trademark. Learned counsel for the Defendant-Appellant has endeavoured to minimise the relevance of *Whirlpool* as well as *Milmet* by drawing the distinction that those trademarks had attained worldwide reputation. However, we think that as world shrinks almost to global village, the relevance of the transnational nature of a trademark will progressively diminish into insignificance. In other words, the attainment of valuable goodwill will have ever increasing importance. At the present stage, the argument in favour of the Defendant -Appellant that we find holds more water is that in both *Milmet* and *Whirlpool*, as distinct from the case before us, the prior user of the successful party predated the date of application for registration of the competing party. The question to examine, then, would be whether prior user would have to be anterior to the date of application or prior to the user by the Defendant-Appellant. In other words, the question before the Court would remain whether the situation on the date of application for registration alone would be relevant, or whether the developments in the period between this date and the date of grant of registration would have any bearing on the rights of the parties. All these considerations will be cast into a curial cauldron to be appreciated by the Court before which the suit is being contested. In these premises, we cannot conclude that a *prima facie* case has not been

disclosed by the Plaintiff-Respondents.

26. Hence, what follows is that the 'first in the market' test has always enjoyed pre-eminence. The rights of a prior user will normally override those of the subsequent user even though it had been accorded registration of its trademark.

27. I will now look at the evidence placed on record by the defendants to substantiate its plea of being the prior user. Heavy reliance is placed on a declaration executed by the defendant. The date of the declaration is not clear. Reliance is also placed on the sale tax registration done by the defendant on 16.04.1969; on the registration under Delhi Sale Tax Rules done on 13.06.1986. Reliance is also placed on the registration of the defendants with the Govt. of India for the AGMARK Registration. The date of this document is also not clear. Reliance is also placed on the judgment of a Co-ordinate Bench of this court in the case of Madan Lal v. State, Criminal Revision No.201/1984, decided on 05.02.1986. Sh.Madan Lal was the original proprietor of the defendant. The said judgment notes that the petitioner (the defendant herein) is carrying on business under the name and style of RAJDHANI MASALA CO. LTD.

It is clear from the above documents that they do show that the defendant has been in business since 1960's. However, none of the documents show that the defendant has been using the trademark 'Rajdhani' for its products in any manner whatsoever. Prima facie the reliance of the defendant on the above noted documents to show the date of user of the trademark is misplaced.

28. Learned senior counsel for the defendants also took the court through some of the invoices placed on record by the defendant. A perusal of the invoices shows that they suffer from the same problem, namely, do not reflect or show that the defendant has been dealing in products with the trademark 'Rajdhani'. As an example, one can look at some of the invoices. The invoice dated 17.06.2006 issued by one Sh.Hem Chand & Sons on the defendant whereby some sale of chilli powder has been made by the said company to the defendant. Another invoice is on record dated March, 2006 issued by Ram Kishore Pankaj Kumar in favour of RAJDHANI MASALA CO. Again this invoice relates to sale of red chilli by the said Ram Kishore Pankaj Kumar to the defendant. Several such invoices are on record, which only demonstrate goods bought by the defendant. It does not show sale of products using the trademark 'Rajdhani' by the defendant.

29. No doubt, there is an advertisement in Vyapar Bharti dated 12.06.2014 which relates to user of the trademark RAJDHANI MASALA by the defendant. Similarly a brochure placed on record which shows user of the trademark 'Rajdhani'. However, the date of the brochure is not clear.

30. In the light of the documents on record, it is difficult to, at this stage, prima facie without leading further evidence to accept the plea of the defendant that it has been using the trademark 'Rajdhani' since 1965 as alleged.

31. In contrast, a perusal of the documents of the plaintiff shows that it has categorically claimed user of the trademark 'Rajdhani' since 1966. The trademark 'Rajdhani Atta' was also registered on 02.08.1988 in class 30 for wheat flour. Further, invoices showing user of the trademark since 2006 by the plaintiff are on record.

32. Much arguments were also advanced by the learned senior counsel for the defendant based on the legal notice dated 18.07.2008 said to have been sent by the sister concern of the plaintiff- Rajdhani Flour Mills Ltd. which was duly replied on 09.08.2008 by the defendants. This is a solitary document based on which a claim is made by the defendant that it has been using the trademark 'Rajdhani' in relation to spices and condiments continuously since 1965. Based on this document, it has also been pleaded that the plaintiff is well aware about said user of the trademark by the defendant way back in 2008. Now belatedly before this court the plaintiff is seeking interim relief.

33. I may note that firstly the document in question i.e. the legal notice does not pertain to the plaintiff but pertains to a different company. The defendant will have to prove this document in evidence. Further this document does not demonstrate actual user of the said trademark 'Rajdhani' since 1965. Prima facie the defendant has failed to show prior user of the trademark in question.

34. Next plea raised by the defendant pertains to alleged delay in approaching this court by the plaintiff. The plaintiff denies any delay. Delay per se may not be enough for this court to deny interim relief to the plaintiff. In this context reference may be had to the judgment of this court in the case of Crayons Advertising Limited. v. Crayon Advertising(supra) where the court held as follows:

"21.The defendant has broadly made three submissions i.e. firstly that there is inordinate delay in filing of the Suit inasmuch as it is stated that the domain name of the defendant has been in existence for 10 years without any objection or even a single instance of confusion. Hence, it is averred that the plaintiff cannot claim to injunct the defendant from using the said domain name after such a long lapse of time. Secondly, it is averred that the business of the parties is in a totally different sphere inasmuch as it is stated that the plaintiff books spots and conceptualizes for its clients whereas the defendant manufactures and executes advertising concepts. Hence, it is stated that the fields being different there can be no question of any confusion being created. Thirdly, it is urged that the adoption of the domain name by the defendant cannot be said to be dishonest. The parties have been using their respective domain names for nearly 10 years without any confusion.

22. The legal position on delay may be seen. Reference may be had to the judgment of the Hon'ble Supreme Court in the case of Midas Hygiene Industries (P) Ltd. versus Sudhir Bhatai and Others, [(2004) 3 SCC 90] where in paragraph 5 the Hon'ble Supreme Court held as follows:-

"5. The law on the subject is well settled. In cases of infringement either of Trade

Mark or of Copyright, normally an injunction must follow. Mere delay in bringing action is not sufficient to defeat grant of injunction in such cases. The grant of injunction also becomes necessary if it prima facie appears that the adoption of the Mark was itself dishonest."

23. Similarly, in the case of Heinz Italia and Another versus Dabur India Ltd. [(2007) 6 SCC 1] this Court in paragraph 16 started as follows:-

"16. Likewise, it has been repeatedly held that before the use of a particular mark can be appropriated it is for the plaintiff to prove that the product that he is representing had earned a reputation in the market and that this reputation had been sought to be violated by the opposite party....."

This Court in the case of Cable News Network LP.LLP (CNN) versus Cam News Network Limited [(2008) 36 PTC 255 (Del)], in paragraphs 25 and 26 held as follows:-

"25....Mere failure to sue, without some positive act of encouragement, is not in general enough to give a defense. A defendant who infringes knowing of the plaintiff's mark can hardly complain if he is not later sued upon it, nor is a defendant who starts to infringe without searching the Register of Trade Marks in any better position than if he had searched and so learned of the plaintiff's mark. Acts of the proprietor done in ignorance of the infringement, or even done without his own registration in mind, will not amount to acquiescence. A defense of estoppel by acquiescence is to be distinguished from a defense that by delay the mark has become publici juris...."

"26.It is trite that the onus is on the defendant to show that there has been prejudice caused by reason of the delay and that it would be unfair to restrain the latter from carrying out its activities. Learned Counsel for the defendant has vehemently argued that the present action, besides being malicious, misconceived and not tenable in law, is actuated by delay, laches and acquiescence, as a result of which no relief, interim or final, can be granted to the plaintiff...."

24. Similarly, this Court in the case of Hindustan Pencils Pvt. Ltd. versus India Stationary Products Co. and another [1989 SCC OnLine Del 34] in paragraph 29 held as follows:-"29. It would appear to be difficult to accept that relief of temporary injunction should not be granted, because of the delay on the part of the plaintiff, even though the court feels, at that point of time, that, ultimately permanent injunction will have to be granted."

25. In view of the above the legal position what follows is that delay per se would not suffice to deny relief to the plaintiff. Hence, there is no merit in the said contention of the defendant that on account of delay the plaintiff would not be entitled to interim relief. No fact had been brought on record to show that any prejudice would be caused to the defendant on account of delay in approaching this Court by the plaintiff. For the present no relief is being sought regarding the

trading name used by the defendant."

Hence, this court held that delay per se may not always be sufficient to disentitle the plaintiff to grant of an interim order.

35. It follows from above that prima facie in view of the registered Memorandum of Family Settlement dated 31.03.2009 filed by the plaintiff, the plaintiff traces its user of the trademark since 1966. The plaintiff has also placed on record invoices starting from the year 2006 pertaining to the said products with the trademark in question.

36. It is also a matter of fact that the plaintiff is the registered owner of the said trademarks details of which are as follows:-

Prima facie the plaintiff is the first in the market with the trademark 'Rajdhani'. The plaintiff is the registered owner of the said trademark.

37. I may compare the two trademarks being used by the plaintiff and the defendant. Clearly, the defendant is using the trademark 'Rajdhani' for allied and cognate goods which is identical as that of the trademark of the plaintiff and prima facie infringing the rights of the plaintiff.

38. The plaintiff has made out a prima facie case. In view of the above, an interim injunction is passed in favour of the plaintiff and against the defendants restraining the defendants its directors, proprietors, etc. from using in any manner the trademark 'Rajdhani' or any other trademark which is deceptively similar to the trademark of the plaintiff.

39. The application stands disposed of.