

Additional District & Sessions Judge 1st Court  
North 24-Parganas, Barasat.

Title Suit No. 2 of 2012 & T.S. No. 3 of 2012

PROSANTA SHILPA PROTISHTHAN PVT. LIMITED .. Plaintiff's

-Vs-

Prosanta Kumar Dutta .. Defendant.

Xerox copy of Judgement  
Assessment filed on 7.2.12.



15-71





Date of application for copy - 6/2/14  
1. Date fixed for notifying the requisites - 7/2/14  
2. Date of receipt of requisites - 7/2/14  
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Both these case records are taken up for passing order concerning the temporary injunction petitions of the Plaintiff-company, which were heard analogously.

At the outset of the discussion, I must mention here that the Defendant of T.S. No. 2/12- is Sri Prosanta Kumar Dutta and Defendant of T.S. No. 3/12 is his son.

Plaintiff-company by its temporary injunction petition U/O 39 R 1 and 2 of the CPC Code prays for a restraining order against the Defendants-Opposite Parties from manufacturing, selling or dealing with sindur under the trade mark "PROSANTA'S MAHATIRTHA , and PROSANTA SHILPA and MAHATIRHA or PRASANTER MAHATIRTHA or any such deceptively similar trade mark.

The gist of the Plaintiff's case is that it deals with the business of manufacturing and marketing of sindur, alta, kumkum and bindi for several years by using those registered trade marks of MAHATIRHA registered vide trade mark No. 424252 under class 3 and the said trade mark consists of devise of bust photo of Monindra Mohan Dutta and words MAHATIRTHA SINDUR, business of insence stick, cones, agarbatis, dhup, camphor, etc. vide registered trade mark No. 524303 under class 3 and that it is also the proprietor of the trade mark PROSANTA SHILPA PROTISHTHAN PVT. LIMITED by virtue of trade mark No. 1442539 in respect of printed matter, stationary, paper, etc. under class 16 and that the validity of those trademarks have been extended from time to time in its favor.

It is further the Plaintiff's case that originally, the trade mark consisting of devise of bust photo of Monindra Mohan Dutta and words MAHATIRTHA SINDUR was originally registered in favor of Monindra Mohan Dutta, Prosanta Kumar Dutta and Monotosh Dutta in the year 1984 and they were trading as a partnership firm under the name of PROSANTA SHILPA PROTISHTHAN and that subsequently the said partnership firm was transformed into a



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private limited company under the name and style of PROSANTA SHILPA PROTISHTHAN PVT. LIMITED on 10.5.1989. It has further been averred that subsequently Monindra Mohan Dutta died on 2.5.2001 and the Defendant resigned from the Directorship of the said company on 16.9.03 and Monotosh Dutta also resigned from Directorship of the company on 24.7.08 and in the meantime Pronabesh Dutta and Maya Dutta were appointed as Directors of the company on 24.7.2008 and accordingly, presently there are three Directors of the said company, namely, Partha Pratim Dutta, Maya Dutta and Pronabesh Dutta.

Plaintiff's further case is that it has recently come to know that the Defendants are illegally using identical trade mark of MAHATIRHA and PROSANTER MAHATIRHA in respect of same goods of sindur and alta by using the name of Prosanta Industry in his products by violating the various provisions of Trade Marks Act. In other words, the Plaintiff's main allegation is that the Defendant are carrying on business of same products by using its identical trade mark in gross violation Section 27 and 29 of the Trade Marks Act, 1999 and accordingly, they are required to be enjoined by an order of temporary injunction from using its registered trade mark.

On the other hand, the Defendants-Opposite Parties contested the instant temporary injunction petition by filing their WO wherein he has categorically disputed and denied the Plaintiff's claim of ownership of those trade marks in its favor. He in his WO admits the Plaintiff's case of initial registration of the trade mark in the name of partnership firm of Prosanta Shilpa Prathisthan and transformation of said partnership business into a private company in the year 1989 under the name and style of Prosanta Shilpa Pratisthan Pvt. Ltd. but it was decided by his father and other partners that the label trade mark "Mahatirtha Sindur" in Bengali script bearing the No. 424252



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for class-3 goods would be retained by the partnership firm and said trade mark together with other trademarks of the firm would be licensed to the company for use on their products.

The other part of Defendant- Prosanta's WO case is that after the demise of his father, his elder brother and his two sons, who are the Directors of the Plaintiff's company denied his share in the asset of the Plaintiff's company and accordingly, he resigned from the company on 13.6.03 and started his independent business of manufacturing, marketing, selling and distributing vermilion, sindur, alta and other products under entirely different set of labels which was being used by the Plaintiff's company and by using the label marks of Mahatirtha Sindur which was used by the partnership firm Prosanta Shilpa Pratisthan and that he is carrying on business under the name and style of M/s Prosanta Industries as sole proprietor thereof by using the trade mark 'PROSANTA'S MAHATIRTHA SINDUR' along with his half bust photograph on the label since more than ten years and accordingly, the Plaintiff's claim of coming into know of his said business recently is far from the truth

The Defendants in their WO clearly claims that they are using the trade mark Mahatirtha Sindur as prior adopter as far back as 1984 and the said trade mark has never been assigned to the Plaintiff's company by erstwhile partnership firm Prosanta Shilpa Pratisthan and that on coming to know about Plaintiff's using the trade mark Mahatirtha sindur together with the half bust photo of Monindra Mohan Dutta on the label without any Assignment Agreement they immediately took steps in January, 2007 by filing a rectification proceeding against such registration and to have the mark restored in the name of the partners of erstwhile firm-Prosanta Shilpa Pratisthan and the same is still pending. Accordingly, it cannot be said that the Plaintiff company had validly acquired the said trade mark from the erstwhile partnership firm. According to



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him the said fact was intentionally suppressed by the Plaintiff in his plaint as well as in its temporary injunction petition.

The Defendant in his WO also categorically stated that the label of his product and the Plaintiff's product is not identical and he being the prior user of the trade mark Mahatirtha sindur and because of non-assignment of trade marks to the Plaintiff company in terms of the Trade Marks Act, it cannot be said that they have violated the provisions of Trade Marks Act and accordingly, pray for rejection of the Plaintiff's prayer.

During the course of hearing of the temporary injunction petition the ld lawyer for the Plaintiff by referring various provisions of the Trade Mark Act contended that since those trade mark stand registered in the name of the Plaintiff, so, the Defendants cannot use them to deceptively market their similar products in open market and they are required to be injuncted. To consolidate his submission regarding the exclusive right of the Plaintiff to use those registered trade mark, the ld lawyer for the Plaintiff referred the following case laws, reported in Meghraj Biscuits Industries Limited, (2007) 3 SCC 780, Skyline Education Limited(2010) 2 SCC 142, M/s Surya Roshni Ltd AIR 1997 Delhi, 321, T.V Venugopal (2011)4 SCC 85, Ramdev Food Products Ltd, (2006) SCC 726, Heinz Italia and another, (2007) 6 SCC 1, Dwarka Industries, 2013 (54) PTC 309(Madras), B.K.Engineering Company, AIR 1985 Delhi 2010, Dhariwal Industries Limited, AIR 2005, 1999 and Ruston & Hornsby Ltd, 1969(2) SCC 727. I will refer about the relevant portions of those case laws while making discussion on relevant fact, as agitated by the parties in the instant case.

On the other hand, the gist of the submission of the ld lawyer for the Defendants of both the suits is that the trade mark Mahatirtha vide No. 424252 has not been properly assigned in terms of assignment as defined in Section 2(1)(b) of the Trade Marks Act and



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that the trade mark Mahatirtha in Bengali has still not been assigned to the Plaintiff-company in accordance with the said provision of law. He contended that it is a fact that previously there was a partnership amongst the brothers of the Defendant and during that time those trade marks were registered in the name of the firm but subsequent to the formation of the Plaintiff-company those two trademarks have not been assigned to the Plaintiff-company according to the provision of law and thus, the Plaintiff cannot claim to be the registered owner of those trademarks.

He further contended that the Defendants being the prior user of those trade marks by virtue of Section 34 of the Act, has the right to use the same for selling the same products by using those trademarks and that by virtue of Section 35 of the Act, the Defendant is entitled to use his own name for conducting business of those products under the name and style as Prosanta Shilpa Pratisthan.

The ld lawyer also assailed the Plaintiff's case by submitting that as the Plaintiff has intentionally suppressed the matter of rectification proceeding as pending before the appropriate forum, so, it is not entitled to get the benefit of Section 124(5) of the Act and also not entitled to get the equitable relief as prayed for. He further submitted that since the rectification proceeding is pending, so, the instant suits are liable to be stayed by virtue of Section 124 of the Act. To consolidate his such submission he relied upon the case of Stokely Van Camp Ins. and another decided by the Hon'ble Delhi High Court (IA No. 10795/2011 in CS(OS) 514/2010 and the case of Puma Stationers Pvt. Ltd., FAO (OS) 296/2009.

To counter such argument, it was argued by the ld lawyer for the Plaintiff that it is although a fact that rectification proceeding is pending but since the Defendants have not pleaded that the registration of those trademarks is invalid or they have not raised a

defence under clause (e) of sub-Section 2 of Section 30 of the Act so



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question of applicability of Section 124 of the Act does not arise at all. It is a fact that Section 124 of the Act speaks about stay of the proceedings where the validity of registration of the trade mark is questioned etc. The said provision lays down two conditions for stay of the proceeding under this Act and according to the said Section the Defendants have to plead that the registration of the Plaintiff's trade mark is invalid or has to take defence under clause (e) of sub-Section 2 of Section 30 of the Act.

In the instant case, so far as the Defendants' WO case is concerned, they have not pleaded either of those two defence. It is all the more pertinent to mention here that the Hon'ble Delhi High Court in those two case laws also reiterated the said provision of law for stay of proceedings under this Act. Apart from that, those two case laws are clearly distinguishable on the factual matrix too. Accordingly, I find no merit in the submission of the ld lawyer for the Defendants.

The ld lawyer for the Defendants also submitted that it is well within the knowledge of the Plaintiff that the Defendant is carrying on business of same products by using the trade mark of Mahatirtha since 2003 but they did not take any action for the same prior to filing of this suit, so, such delay on their part also dis-entitled them to get the relief as prayed for. To fortify his such argument he relied upon the case of White Horse Distillers Ltd, PTC (Suppl) (2) 328 (Del.). In the said case, the delay was considered as one of the prime factor for vacating the exparte temporary injunction order. But the Hon'ble Supreme Court in the case of Ramdev Food Products (Supra) as relied upon by the Plaintiff made elaborate discussion regarding applicability of the theory of acquiescence under this Act and observed that in an infringement of trade mark, the delay by itself may not be a ground for refusing to issue injunction.

Another part of the submission of the ld lawyer for the Plaintiff



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is that registration of those trade marks were initially registered in the name of the partnership firm and subsequently the same have been registered in the name of the Plaintiff-company of which the Defendant Prosanta Kumar Dutta was also one of the Promoter and Director and subsequently he resigned from Directorship of the Plaintiff-company but he still having equity share in the Plaintiff-company, so he cannot claim share in the property of the Plaintiff company by using those registered trade marks. He further argued that Defendant's various letters addressed to the Registrar of Companies and the letters given by the previous director Monotosh Dutta to the Defendant clearly reveals about such factor. Before venturing upon the parties case and the submission made by their ld lawyer, it would be pertinent to look at the object of the Act. In the preamble portion of that it has clearly been mentioned that the instant Act is an Act to amend and consolidate the law relating to trade marks, to provide for registration and better protection of trade marks for goods and services and for the prevention of use of fraudulent marks. The Hon'ble Supreme Court in the case of Meghraj Biscuits Industries (Supra) also reiterated the said object.

Section 28 of the Act speaks about the rights conferred by registration of trade mark under the Act. It provides that

(1) Subject to the other provisions of this Act, the registration of a trade mark shall, if valid, give to the registered proprietor of the trade mark the exclusive right to the use of the trade mark in relation to the goods or services in respect of which the trade mark is registered and to obtain relief in respect of infringement of the trade mark in the manner provided by this Act.

(2) The exclusive right to the use of a trade mark given under sub-section shall be subject to any conditions and limitations to which the registration is subject.

  
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(3).....

From the plain reading of the sub-section (1), it is crystal clear that the same gives to the registered proprietor of the trade mark the exclusive right to use of the trade mark in relation to the goods or services in respect of which the trade mark is registered and to obtain relief in respect of infringement of the trade mark in the manner provided by the Act.

Section 29 of the Act speaks about the circumstances under which a registered trade mark is infringed by another person not being the registered proprietor of the same or a person using by way of permission. According to sub-section (1) of the said Act, " a registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which is identical with, or deceptively similar to, the trade mark in relation to goods or services in respect of which the trade mark is registered and in such manner as to render the use of the mark likely to be taken as being used as a mark." Sub-section (2) also speaks about the circumstances of infringement of a registered trade mark and it provides that :-

(2) A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which because of -----

(a) its identity with the registered trade mark and the similarity of the goods or services covered by such registered trade mark; or

(b) its similarity to the registered trade mark and the identity or similarity of the goods or services covered by such registered trade mark; or


© its identity with the registered trade mark and the identity of the goods or services covered by such registered trade mark, is likely to cause confusion on the part of the public, or which is likely to have an association with the registered trade mark.



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Sub-section (3) of Section 29 clearly provides that court shall presume the causing of confusion on the part of the public if the alleged infringement of the registered trade mark falls under clause(c) of Sub-section (2) of Section 29 of the Act. Thus, in case of infringement of a registered trade mark by virtue of clause(c) of sub-section (2) of Section 29 of the Act, the court shall have no other option but to draw a presumption regarding confusion on the part of the public by such infringement.

In deciding whether a particular trade mark is likely to deceive or cause confusion, it is not sufficient merely to compare it with the trade mark, which is already registered. What is important is to find out what is, the distinguishing or essential feature of the trade mark already registered and what is the main feature of the main idea underlying that trade mark. The real question is as to how a purchaser who must be looked upon as an average man of ordinary intelligence, would react to a particular trade mark and in what respect he would connect the trade mark with the goods, which he would purchasing. It is impossible to accept that a man looking at a trade mark would take in every single feature of the trade mark. The question would be, what would be normally retain in his mind after looking at the trade mark.

In the case of Izuk Chemical Works, 2007 (35) PTC 28 Delhi the court culled out the principles which would apply for deciding whether the trade mark cause confusion or is used in a deceptive manner to confuse the purchaser of the same product or not.

In an action for an alleged infringement of a registered trade mark, it has, first to be seen whether the impugned mark of the defendant is identical with, the registered mark of the plaintiff. If the mark is found to be identical, no, further question arises, and it has to be held that there was infringement. If, the mark of the defendant is not identical, it has to be seen whether the mark, of the defendant

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is deceptively similar in the sense that it is likely to, deceive or cause confusion in relation to goods in respect of which the, plaintiff got his mark registered. For that purpose, the two marks have to be, compared, "not by placing them side by side, but by asking itself whether having, due regard to relevant surrounding circumstances, the defendant's mark as used, is similar to the plaintiff's mark as it would be remembered by persons, possessed of an average memory with its usual imperfections", and it has then to, be determined whether the defendant's mark is likely to deceive or cause, confusion, for such determination, the distinguishing or essential features, ( and not every detail) of the two marks and the main idea, if any, underlying, the two marks which a purchaser of average intelligence and imperfect memory, would retain in his mind after seeing the marks, have to be noticed. It has, then to be seen whether there are broadly the same or there is an overall, similarity or resemblance, and whether the resemblance or similarity is such, that there is a reasonable probability of deception or confusion. In doing so, the approach has to be from the point of view of purchaser of average, intelligence and imperfect memory or recollection, and not an ignorant, thoughtless and incautious purchaser. In an action for passing off, the test, for deceptive similarity, i.e., as to the likelihood of confusion or deception, arising from similarity of the marks of the get up, packing etc. is practically, the same as in an action, for infringement."

From the above discussion, it is crystal clear that the party praying for an injunction order either U/s 135 of the Act or U/O 39 R 1 and 2 of the CPC has to prima-facie satisfy those conditions and the opposite parties are at liberty to rebut the same by taking defence as permitted user or prior user or under the saving clauses U/s 34/35 of the Act. In other words, it is crystal clear that in case of infringement of registered trade mark of its proprietor, it is somewhat mandatory



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to protect the right of the proprietor of the registered trade mark unless and until the other side against whom the allegation is made has very strong case of having the right to use the same under the provisions of the Act.

It is the specific case of the Plaintiff that the Defendants are using its registered trade mark **Mahatirtha** ( 424252), **Mahatirtha in Bengali** ( 524303) and trading name of **Prosanta Shilpa Pratisthan** in deceptive manner in the label of their products of similar nature and thereby causing confusion amongst the average purchaser of the same products.

I have minutely compared both the labels of the Plaintiff and the Defendants and it appears to me that the features of the impugned label of the Defendants are more or less similar and the only basic difference between the two labels is the bust photo. The label of the Defendants is sufficient to create confusion in the mind of average purchaser in believing that those products are actually the products of the Plaintiff-company. It is to be mentioned here that during the course of hearing it was argued by the ld lawyer for the Defendants that the finding of the ld District Judge while rejecting the Plaintiff's interim injunction prayer vide its order dated 19.6.12 has got binding force in this matter but I am of the view that the same has got no binding force upon this court as the ld District Judge made such observation while considering the Plaintiff's prayer of ad-interim temporary injunction and he did not have the opportunity to appreciate the matter in depth after having hearing both the parties and considering the entire documents of the parties.

From the documents, as annexed by the Plaintiff with its temporary injunction petition and plaint it appears that the registration of those trade marks, namely, **Mahatirtha** registered vide trade mark No. 424252 in class-3 stands and **Mahatirtha in Bengali**



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Shilpa Pratisthan registered under class 16 vide trade mark registration No. 1442539 are still valid and the Plaintiff-company is authorized to conduct trade of those products by using those trademarks and the Defendants have not produced any document to show that the same have either been cancelled or modified by the appropriate authority. Besides that, it is also not the case of the Defendants that those are not registered in the name of the Plaintiff-company but they claim their right to use the same by virtue of its prior user and by virtue of Section 35 of the Act.

Now, let us consider the submission of the ld lawyer for the Defendants on this score. He argued that after the merger of the partnership firm with the Plaintiff-company the partnership firm did not assign those trademarks to the Plaintiff-company by executing any assignment deed and accordingly, there was no proper assignment with respect to the trade mark of **Mahatirtha** (424252) and there was no assignment of trade mark **Mahatirtha in Bengali** (524303). The ld lawyer also argued that the alleged merger was not in accordance with the various provisions of the Company Act and accordingly, the Plaintiff-company cannot claim propriety right of those trademarks. To fortify his argument he relied upon a case law of **Reverdale School Society**, 2008 (36) PTC 131 (IPAB). It is a fact that Section 2 sub-section (1)(b) provides that assignment means an assignment in writing by act of the parties concerned. In the said case law, the Intellectual Property Appellate Board, Chennai, also observed that in terms of Section 2(1)(b) to constitute assignment, there has to be an instrument in writing and the expression "by act of the parties concerned" means that both the assignor and assignee must execute the document.

On the other hand, the ld lawyer for the Plaintiff countered such argument by submitting that it is not a fact that the partnership firm was transformed into a private limited company, i.e, the




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Plaintiff-company , but the Plaintiff-company has been separately constituted by the Defendant-Prosanta Kumar Dutta, his father and other brothers in the year 1989 and by virtue of memorandum of association 5% equity shares is still retained by the said Defendant and accordingly, the question of assignment in terms of said provision of law does not arise at all. He further argued that since the said Defendant is one of the beneficiary of the Plaintiff-company, so he cannot question the use of those registered trade marks by the Plaintiff-company or he cannot use those trade marks for his own separate business of same products. The memorandum of Association of the Plaintiff-company supports the contention of the Plaintiff. Apart from that, the letter dated 11.7.03 of the Defendant Prosanta Kumar Dutta and resolution of the Plaintiff company dt. 24.7.03 reveal about the resignation of said Defendant and its acceptance by the Board of Directors of the Plaintiff-company and it has not been disputed by the said Defendant -Prosanta Kumar Dutta, that he has no equity share in the Plaintiff-company, so it cannot be said that the defendants claim of prior user of the said trade mark does not appears to me to be strong enough to rebut plaintiff's claim at least at this stage.

At the time of final hearing of the temporary injunction petition, it was also submitted by the ld lawyer for the Defendants that the Plaintiff's opposition regarding Defendant's application No. 1232829 in class-3 for registration of a trade mark of "Mahatirtha Sindur" has been disallowed and accordingly, the same consolidates the case of the Defendants. After having gone through the copy of the order , it appears that the Deputy Registrar of Trade Mark, Kolkata has been pleased to disallow the opposition of the Plaintiff regarding Defendants application for registration of said trade mark but the fate of the matter of Defendants said application and another application No. 1193407 are yet to be decided. In other words, the

  
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said applied trademarks have not been registered in the name of the Defendants till this date. Besides that, by virtue of the said order it cannot be said that either the same disallows the Plaintiff-company from using those trademarks or it authorizes the user of the same by the Defendants. At the same time, mere pendency of the rectification proceeding also does not dis-entitles the Plaintiff from using those registered trademarks or entitles the Defendants to use the same under any capacity.

Moreover, in view of above discussed provisions of this Act, it has clearly been reflected especially in Section 31 of the Act that in all legal proceedings relating to a trade mark registered under this Act, the same shall be prima-facie evidence of its validity. So, the question of proper and improper alleged assignment of those trade marks to the Plaintiff-company cannot be considered by this court at this stage and the same is to be agitated before the proper forum as per provision of the Act. While considering the temporary injunction petition, this court has to consider the registered trade mark as the prima facie evidence of its valid registration unless the same is rebutted by any order of the appropriate forum.

During the course of hearing, it was also argued by the ld lawyer for the Defendants that the Plaintiff is entitled to get the equitable relief as prayed for as it has not mentioned about pendency of the rectification proceeding before the appropriate forum. On the other hand, the ld lawyer for the Plaintiff also made similar submission by referring the copy of the temporary injunction petition and order of TS No. 199/05 and submitted that as no order has been passed regarding the rectification proceeding, so the same has not been mentioned but the Defendants intentionally suppressed the fact that they previously also filed a suit before the court of the ld Civil Judge (Jr.Div.), 4<sup>th</sup> Court at Sealdah against the Plaintiff-company, his deceased father and one of the present Director-Partha Pratim



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Dutta under the Trade Mark Act praying for an order of temporary injunction restraining those Respondents from taking any action against him (Prosanta Kumar Dutta) from carrying on his business of the same products by using his impugned label in question and the said application was rejected on merit by the ld court. He further argued that since the said order of the said ld court has not been set aside or modified till this day, so, the Defendants have got no right to carry on business of said products by using the impugned label similar to that of the Plaintiff-company's label.

It is a fact that the Defendants in their WO has not mentioned about the said fact of their previous approach to another competent ld court against the Plaintiff-company and the order of rejection of their temporary injunction petition by the said ld court on 30.3.2006. The copy of the temporary injunction petition and order of the said ld court clearly supports the contention of the ld lawyer for the Plaintiff and the same goes against the entire case of the Defendants and the said order has not been cancelled or modified by any other higher forum till this date.

At this juncture, I must mention that during the course of hearing the ld lawyer for the parties also referred some provision of other Act but considering the settled proposition of law that while considering a temporary injunction petition the court cannot conduct a mini trial, I refrain myself from making any discussion on those provision of law. Apart from that, as the other case laws referred by the parties are clearly distinguishable on the facts and circumstances from that of this suits, I am of the view it would not be prudent to give much unnecessary weight in this order.

From my above discussion, I am of the view that the Plaintiff has been able to show that it has got good prima facie case in his favour, balance of convenience and inconvenience lies in its favour and it would be subjected to irreparable loss and injury, if the



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temporary injunction order is not passed in its favor.

In the result both the temporary injunction petitions succeed.


Hence, it is

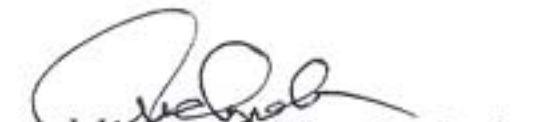
ORDERED

that both the temporary injunction petitions of T.S. 2 of 2012 & T.S No. 3 of 2012 are allowed on contest but without cost and both the defendant's are restrained by an order of temporary injunction from using the trademark of MAHATIRTHA and MAHATIRTHA in Bengali either for the business of manufacturing, selling or dealing with sindur and other products registered under those trade marks or any such deceptively similar trade mark till final disposal of these suits.

To 12.02.2014 for W.S. as last chance.

D/C by me

  
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Additional District Judge

1<sup>st</sup> Court, Barasat.  
Additional District Judge  
1st. Court, Barasat.  
North 24 Parganas.  
03-2-14





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Comparing Clerk  
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