

(2011) 08 CAL CK 0058

Calcutta High Court

Case No: G.A. No.1631 of 2011, A.P.O.T. No.245 of 2011 and C.S. No.250 of 2010

Tea Board

APPELLANT

Vs

I.T.C. Limited

RESPONDENT

Date of Decision: Aug. 24, 2011**Acts Referred:**

- Constitution of India, 1950 - Article 24
- Trade Marks Act, 1999 - Section 107, 18, 20, 21, 28

Citation: (2011) 5 CHN 1 : (2011) 48 PTC 169**Hon'ble Judges:** Sambuddha Chakrabarti, J; Bhaskar Bhattacharya, J**Bench:** Division Bench

Advocate: S.K. Kapoor, Ranjan Bachawat, Vipul Kundalia, Rajashree Kundalia, Ravi Kapoor, Pithiraj Sinha, Sonal Shah and Kushagra Shah, for the Appellant; Anindya Kr. Mitra, Abhrajit Mitra, Sarbopriya Mukherjee, Soumya Sen, Shaunak Mitra, Debamitra Adhikari and Siddique Parveen, for the Respondent

Final Decision: Dismissed

Judgement

Bhaskar Bhattacharya, J.

This appeal is at the instance of a Plaintiff in a suit for permanent injunction and is directed against order dated April 20, 2011 passed by a learned Single Judge of this Court by which His Lordship rejected an application for interlocutory injunction in such a suit by which the Plaintiff prayed for restraining the Defendant from using or conducting or marketing in any manner or in any way carrying on its business at the hotel situated in Kolkata by using in any manner whatsoever the name "DARJEELING LOUNGE" or any other name or mark or word which is phonetically or structurally similar or identical or deceptively similar to the registered geographical indications "DARJEELING", the name and logo in the name of the Plaintiff in any manner whatsoever and/or passing off or attempting to pass off its business or services so as to discredit the fame of DARJEELING tea as a geographical indication and/or to mislead persons as to the nature of the beverages sold at the said premises of the

Defendant so as to allude a nexus with the registered geographical indications for the name DARJEELING or logo and to confuse persons in any manner.

2. Being dissatisfied, the unsuccessful Plaintiff has come up with the present appeal.

The case made out by the Plaintiff in the plaint may be summed up thus:

1. The Plaintiff is an autonomous, non-profit making statutory body created under the Tea Act, 1953 and a part of the Ministry of Commerce and Industry, Government of India and was established by the Government of India in the year, 1953 for the purpose of controlling the Indian Tea Industry. The Constitution of the Plaintiff is varied and its members include members of the Indian Parliament, owners of tea estates, growers of tea, the Government of the principal tea growing State of India, employees of tea estates and gardens, exporters and internal traders of tea, tea manufacturers and tea consumers

2. Objects of the Plaintiffs are, inter alia, to regulate the production, cultivation, marketing, sale and export of tea, encourage research, and other numerous statutory duties and functions under the Tea Act.

3. In order to preserve the integrity of tea sold under the name DARJEELING, the Plaintiff has developed a distinctive DARJEELING logo which consists of the image of a woman holding two tea leaves and a bud in a roundel with the name DARJEELING prominently displayed along the top of the logo as indicated in the plaint.

4. On October 9, 1986 the Plaintiff duly applied to be registered as the proprietor of the DARJEELING logo, while on December 10, 1998 the Plaintiff duly applied to be registered as the proprietor of the name DARJEELING both as certification trade marks under Chapter IX of the Trade and Merchandise Marks Act, 1958 and the same were duly registered under the said Act in class 30 in the name of the Plaintiff as the owner thereof. With the enactment of the new Trade Marks Act, 1999 ("Act") these registrations continued under the new Act

5. By virtue of these registrations, the Plaintiff has the sole authority to certify that any tea marked by the said name DARJEELING or logo is guaranteed to be 100% DARJEELING tea originating from the 87 tea gardens in the Darjeeling District of West Bengal and possesses certain organoleptic qualities and characteristics. The certification trademark registrations of the DARJEELING name and logo have been duly renewed from time to time.

6. The Geographical Indications of Goods (Registration and Protection) Act, 1999 ("G.I. Act") was promulgated in order, inter alia, to comply with India's international obligations under the TRIPS Agreement to provide legal means for the protection of geographical indications and with the further object that under Article 24.9 of the TRIPS Agreement, the geographical indications from India may not be refused protection in other member countries of the WTO on the ground of lack of protection at home

7. The name DARJEELING and the logo were the very first geographical indications to be registered under the G.I. Act with numbers 1 and 2 respectively in Class 30 in respect of tea
8. The Defendant is a company incorporated under the Companies Act, 1956 having its registered office at 37, Jawaharlal Nehru Road, Kolkata 700071 and the Defendant carries on business and describes itself as an industrial conglomerate with a presence in various commercial enterprises including the hospitality industry and owns and operates several hotels and resorts.
9. One of the hotels owned and operated by the Defendant is a hotel named ITC Sonar Bangla (hereinafter referred to as the "hotel"). In April, 2005 the plaintiff became aware of the Defendant's impugned trademark application for DARJEELING LOUNGE in Class 41 when the same was advertised in the Trademarks Journal.
10. Immediately upon coming to know of the purported attempted registration of the mark DARJEELING by the Defendant, the Plaintiff made an enquiry into the matter and came to know that a portion of the hotel at the ground floor with the name DARJEELING LOUNGE had been made available for use by all customers/patrons having access to the hotel, in the said lounge, which is for practical purpose like a restaurant on its premises, the said hotel was serving food, beverages and providing other varieties of consumables to its consumers.
11. The Plaintiff objected to the said registration and ultimately came to know that by operation of Section 21(2) of the Act, the said application for registration DARJEELING LOUNGE was abandoned.
12. The Plaintiff, however, came to know from subsequent enquiry that though the Defendant was not pursuing its application for registration, it was wrongfully and fraudulently pursuing and had not discontinued the use of the said proprietary name of the Plaintiff by using name DARJEELING LOUNGE.
13. The edible commodities and beverages sold and served in the said lounge by the Defendant indisputably have No. connection whatsoever with Darjeeling region or the geographical indication DARJEELING and the intention of the Defendant to convey a nexus therewith is false and fraudulent. By the use of the impugned name DARJEELING for the purposes of its lounge and for all purposes connecting therewith the Defendant has willfully and deliberately falsified a geographical indication registered and owned by the Plaintiff, and has also falsely applied the same to goods sold in the said lounge which have nothing whatsoever to do with the Darjeeling District or Darjeeling tea.
14. The Lounge which the Defendant is using as the impugned mark DARJEELING LOUNGE catered to a wide range of beverages and thus such use in connection with beverages other than Darjeeling teas is an act of unfair competition inasmuch as it discredits the famous Darjeeling tea and misleads the Defendant's patrons as to the

nature of the beverages served there.

Hence the suit.

3. In connection with the aforesaid suit, the Plaintiff prayed for an interlocutory injunction in terms of the main prayer made in the suit so that during the pendency of the suit, the Defendant was restrained from using the lounge of the said hotel by describing the same as "DARJEELING LOUNGE" in violation of the registered mark of the Plaintiff or by passing off.

4. The aforesaid application was opposed by the Defendant thereby contending, in substance, that by virtue of the Registration of the Plaintiff under Act or G.I. Act, the Plaintiff had not obtained any right to restrain the Defendant from rendering its service to its customers in the Lounge named DARJEELING LOUNGE and adoption of such a name by the Defendant had not violated any of the rights created in favour of the Plaintiff by virtue of its Registration either under the Act or under the G.I. Act. The Defendant, thus, prayed for dismissal of the said application for interlocutory relief.

5. As indicated earlier, the learned Single Judge, by the order impugned in this appeal, has rejected the prayer of the Plaintiff with a detailed finding that the Plaintiff failed to prove a strong prima facie case to have an order of injunction. The learned Single Judge has also taken into account the question of balance of convenience and inconvenience and has further held that delay is a factor in the present case which should weigh with the Court in rejecting the application for interlocutory relief. The learned Single Judge, thus, dismissed the application.

6. Being dissatisfied, the Plaintiff has come up with the present appeal.

7. Mr. Kapoor, the learned Senior Advocate appearing on behalf of the Appellant, has vehemently attacked the findings recorded by the learned Single Judge against his client about the prima facie case. Mr. Kapoor contends that the learned Single Judge failed to appreciate the scope of right conferred upon his client by virtue of registration either under the Act or under the G.I. Act. Mr. Kapoor further contends that the learned Single Judge also failed to appreciate the scope of the doctrine of passing off which is equally applicable in the facts of the present case. Mr. Kapoor further contends that his client having alleged both the infringement of Registered trademark and passing off, the learned Single Judge should have restrained the Defendant from using the word "DARJEELING" as any part of the name of the lounge adopted by it. Mr. Kapoor, therefore, prays for setting aside of the order of the learned Single Judge and granting the injunction during the pendency of the proceeding. In support of his contention, Mr. Kapoor relies upon the following decisions:

1. Strassenburg Pharmaceuticals Limited v. Himalyan Drug Company, reported in 24 PTC 441;

2. Century Plyboard (India) Limited v. Allied Products, reported in 30 PTC 609;

3 [Corn Products Refining Co. Vs. Shangrila Food Products Ltd.,](#) .

8. Mr. Mitra, the learned Advocate-General appearing on behalf of the Defendant, has, however, opposed the aforesaid contentions of Mr. Kapoor and has contended that by virtue of the certification registration of the Plaintiff under the Act or the registration under the G.I. Act in respect of DARGEELING in connection with Tea, No. right has accrued in its favour in restraining his client from naming one of its lounges in the hotel as DARJEELING LOUNGE. Mr. Mitra contends that the registration given in favour of the Plaintiff was in respect of Certification Trade Marks and thus, there was No. scope of alleging infringements under Sections 28-29 of the Act and consequently, No. right accrued in favour of the Plaintiff also in complaining the alleged violation of passing off as the Plaintiff is neither trading with any goods nor is carrying on any business in the name of Darjeeling. Mr. Mitra contends that the learned Single Judge on consideration of the entire materials on record rightly found that the right created under the G.I. Act related to the goods only and not in respect of services and that the Plaintiff failed to prove a prima facie case to go for trial and as such, this Court should not interfere with the discretion exercised by the learned Single Judge in favour of his client. Mr. Mitra contends that in the matter of grant of temporary injunction, delay is a vital factor which should weigh with the Court in considering an application for injunction and in the case before us, although the Plaintiff was well aware of the existence of the DARJEELING LOUNGE in the hotel of the Defendant, it never thought of filing a suit in course of the next six years from the date of knowledge. Mr. Mitra further contends that the balance of convenience and inconvenience in this case is in favour of refusing the prayer of injunction and as such, we should dismiss the appeal filed by the Plaintiff.

9. Therefore, the only question that arises for determination in this appeal is whether the learned Single Judge in the facts of the present case was justified in refusing the prayer of interim relief in favour of the Plaintiff during the pendency of the suit.

10. Before deciding the said question, we should bear in mind the scope of investigation at the instance of an appellate Court dealing with an appeal against a discretionary order like temporary injunction. It is now settled law that in such an appeal, the appellate Court generally does not interfere with the discretion exercised by the Trial Court unless it appears that while exercising such discretion, the learned Trial Judge has wrongly applied the principles for grant of such discretion or unless it is established that such discretion has been unreasonably or capriciously exercised. In dealing with such an appeal, the appellate Court would not be justified in interfering with the discretion under the appeal solely on the ground that if it considered the matter at the trial stage, it might have come to a contrary conclusion. (See [Uttar Pradesh Co-operative Federation Ltd. Vs. Sunder Brothers of Delhi,](#)). In a subsequent case of [Manjunath Anandappa Urf. Shivappa Hanasi Vs.](#)

[Tammanasa and Others,](#) the Apex Court reiterated the aforesaid principles which are required to be followed while hearing an appeal against a discretionary order by observing that "an appellate power interferes not when the order appealed is not right but only when it is clearly wrong. The difference is real, though fine."

11. Bearing in mind the aforesaid principle, we now propose to consider whether in the facts of the present case, the learned Single Judge was justified in refusing the prayer of the Plaintiff.

12. After hearing the learned Counsel for the parties and after going through the materials on record, we find that the Appellant has registered its name for the word mark "DARJEELING (DEVICE of WOMEN)" under the goods and description "tea" and such registration has been made under Chapter IX relating to Certification Trade Marks under the Act. There is also no dispute that the Plaintiff is not a trader dealing with tea but according to its own statements made in the plaint, it has the right of certification in India and other jurisdiction governing the use of the geographical indication "DARJEELING", by its LOGO which guarantees that the tea sold under the same is produced in the defined region and district of Darjeeling and meets the criteria laid down by the Plaintiff.

13. Therefore, the first question that arises for determination is whether by virtue of such registration, the Plaintiff can restrain the Defendant who is carrying on a business of hospitality from naming one of its lounges in the hotel as "DARJEELING LOUNGE" where among the beverages and foods served to its customers, tea is also one of the items which is not necessarily restricted to the one grown only in the district of Darjeeling.

14. The grievance of the Plaintiff is that because of the name of the lounge containing DARJEELING, its Trademark, the people at large will be under an impression that the tea that is served in the said lounge is grown in the region of Darjeeling although according to the admission of the Defendant in the written objection to the application for injunction, tea of other regions is also served in the said lounge.

15. This, according to Mr. Kapoor, amounts to violation of the registered trademark and also amounts to passing off.

16. In order to appreciate the aforesaid question, it will be profitable to refer to the provisions conferred in Section 69 of the Act which specifically says that the provisions contained in Clauses (a) and (c) of Sub-section (1) of Section 9, Sections 18, 20 and 21 except as expressly applied by Chapter IX and Sections 28 to 30, 41, 42, 47, 48, 49, 50, 52, 54 and Sub-section (2) of Section 56 and Chapter IX except Section 107 shall not apply to Certification Trade Mark.

17. The various decisions cited by Mr. Kapoor relate to the violation of the trade marks granted u/s 18 of the Act and infringement of those types of trade marks is

protected by Sections 28 and 29 of the Act. We have already pointed out that protection conferred u/s 29 of the Act is not available to the Plaintiff being holder of a Certification Trade Mark.

18. As pointed out in Chapter IX of the Act by virtue of registered certifications, the holder thereof is entitled to protect its right conferred u/s 78 of the Act as provided in Section 75 of the said Act.

19. In order to consider the nature of rights conferred u/s 78 and the nature of infringement mentioned in Section 75 of the Act, we propose to consider Sections 75 and 78 of the Act which are quoted below:

75. Infringement of certification trade marks. - The right conferred Section 78 is infringed by any person who, not being the registered proprietor of the certification trade mark or a person authorized by him in that behalf under the Regulations filed u/s 74, using it in accordance therewith, uses in the course of trade, a mark, which is identical with, or deceptively similar to the certification trade mark in relation to any goods or services in respect of which it is registered, and in such manner as to render the use of the mark likely to be taken as being a use as a trade mark. "78. Rights conferred by registration of certification trade marks. -

(1) Subject to the provisions of Sections 34, 35 and 76, the registration of a person as a proprietor of certification trade mark in respect of any goods or services shall, if valid, give to that person the exclusive right to the use of the mark in relation to those goods or services.

(2) The exclusive right to the use of a certification trade mark given under Sub-section (1) shall be subject to any conditions and limitations to which the registration is subject.

(Emphasis supplied by us).

20. Along with the aforesaid provisions, we also quote below Sections 28 and 29 for the purpose of comparing of nature of rights accrued and the infringement mentioned therein with those provided in Sections 75 and 78 of the Act.

28. Rights conferred by registration.-(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 (1) shall be subject to any conditions and limitations to which the registration is subject.

(3) Where two or more persons are registered proprietors of trade marks, which are identical with or nearly resemble each other, the exclusive right to the use of any of those trade marks shall not (except so far as their respective rights are subject to

any conditions or limitations entered on the register) be deemed to have been acquired by any one of those persons as against any other of those persons merely by registration of the trade marks but each of those persons has otherwise the same rights as against other persons (not being registered users using by way of permitted use) as he would have if he were the sole registered proprietor. "29. Infringement of registered trade marks. - (1) 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 trade mark.

(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 (c) 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.

(3) In any case falling under Clause (c) of Sub-section (2), the court shall presume that it is likely to cause confusion on the part of the public.

(4) A registered trade mark is infringed by 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 -

(a) is identical with or similar to the registered trade mark; and (b) is used in relation to goods or services which are not similar to those for which the trade mark is registered; and (c) the registered trade mark has a reputation in India and the use of the mark without due cause takes unfair advantage of or is detrimental to, the distinctive character or repute of the registered trade mark.

(5) A registered trade mark is infringed by a person if he uses such registered trade mark, as his trade name or part of his trade name, or name of his business concern or part of the name, of his business concern dealing in goods or services in respect of which the trade mark is registered.

(6) For the purpose of this section, a person uses a registered mark, if, in particular, he -

(a) affixes it to goods or the packaging thereof;

(b) offers or exposes goods for sale, puts them on the market, or stocks them for those purposes under the registered trade mark, or offers or supplies services under the registered trade mark;

(c) imports or exports goods under the mark; or

(d) uses the registered trade mark on business papers or in advertising.

(7) A registered trade mark is infringed by a person who applies such registered trade mark to a material intended to be used for labelling or packaging goods, as a business paper, or for advertising goods or services, provided such person, when he applied the mark, knew or had reason to believe that the application of the mark was not duly authorized by the proprietor or a licensee.

(8) A registered trade mark is infringed by any advertising of that trade mark if such advertising -

(a) takes unfair advantage of and is contrary to honest practices in industrial or commercial matters; or (b) is detrimental to its distinctive character; or (c) is against the reputation of the trademark.

(9) Where the distinctive elements of a registered trade mark consist of or include words, the trade mark may be infringed by the spoken use of those words as well as by their visual representation and reference in this section to the use of a mark shall be construed accordingly."

(Emphasis supplied by us).

21. If we consider the rights conferred on obtaining a trademark as provided in Section 28 and the nature of infringements provided in Section 29 and compare those with Sections 78 and 75 respectively, it will appear that in Sub-section (1) of Section 28, there exists a positive right to "obtain relief in respect of infringement of the trade marks in the manner provided by this Act" which is conspicuously absent in Section 78 of the Act. Similarly, while in Section 75, the right conferred u/s 78 is infringed by a person who, not being the registered proprietor of the certification trademark or a person authorized by him in that behalf under the Regulations filed u/s 74, using it in accordance therewith, uses in the course of trade, a mark, which is identical with, or deceptively similar to the certification trade mark in relation to any goods or services in respect of which it is registered, and in such manner as to render the use of the mark likely to be taken as being a use as a trademark, in Section 29, the list of infringements of the rights conferred u/s 28 is far more extensive as detailed in nine different Sub-sections quoted above including the act of use without permission by a person if he uses such registered trade mark, as his trade name or part of his trade name, or name of his business concern or part of the name, of his business concern dealing in goods or services in respect of which the trade mark is registered as provided in Sub-section (5) thereof, which is the allegation against the Defendant by the Plaintiff in substance. The above phrase

indicated in Section 29 is noticeably absent in Section 75 of the Act.

22. Therefore, the decisions cited by Mr. Kapoor mentioned above based on infringement of the right conferred u/s 18 of the Act cannot have any application while alleging infringement of the rights conferred u/s 78 of the Act.

23. Apart from the decisions indicated by us above, Mr. Kapoor also placed before us some foreign decisions showing that in foreign courts his client has succeeded to prevent some foreign traders who are using the word "Darjeeling" in their trade name from so doing. In those decisions, those foreign courts had No. occasion to deal with the provisions contained in the Trademarks Act or the G.I. Act of this country. Since we are not finally deciding the matter but are dealing with an appeal preferred against an order of interlocutory injunction where the main matter is yet to be decided on merit, we are concerned with the existence of a prima facie case of the Plaintiff based on the abovementioned two Indian Statutes and as such, we do not intend to deal with those foreign decisions based on the law prevailing in those countries at this stage.

24. As regards the allegation of passing off, as the phrase "passing off" itself suggests, the object of such a doctrine is to restrain the Defendant from passing off its goods or services to the public as that of the Plaintiff's. In the case before us, the Plaintiff is neither a trader of tea nor is it in the service of rendering hospitality to the public. It is a creature of a statute who has obtained registration of its Certification Trademarks for protecting its authority to certify that a particular type of tea is connected with the Darjeeling region to protect its interest. It is not the case of the Plaintiff that the Defendant is trying to pose before the public that it has also the authority of such certification or that it has proclaimed by naming one of its lounges in a hotel as that of DARJEELING LOUNGE that it is the authority to give such certificate or that it is an agent or authorized representative of the Plaintiff. Thus, the averments made in the plaint do not make out any prima facie case of passing off.

25. As regards the right conferred upon Plaintiff by the G.I. Act, we find that the following statements of the object and reason of enacting the said Act has been given by the legislature:

Statement of Objects and Reasons.-1. At present there is No. specific law governing geographical indications of goods in the country which could adequately protect the interests of producers of such goods. Exclusion of unauthorised persons from misusing geographical indications would serve to protect consumers from deception, add to the economic prosperity of the producers of such goods and also promote goods bearing Indian geographical indications in the export market. Unless a geographical indication is protected in the country of its origin, there is No. obligation under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) for other countries to extend reciprocal protection. India would, on

the other hand, be required to extend protection to goods imported from other countries which provide for such protection. In view of the above circumstances, it is considered necessary to have a comprehensive legislation for registration and for providing adequate protection for geographical indications. Hence the Bill.

2. The Bill has the following salient features:-

- (a) definitions of several important terms like "geographical indication", "goods", "producers", "package", "registered proprietor", "authorised user", etc.;
- (b) provision for the establishment of a Geographical Indications Registry;
- (c) provisions for the maintenance of a Register of Geographical Indications in two Parts-Part A and Part B and use of computers, etc., for maintenance of such registers. While Part A will contain all registered geographical indications, Part B will contain particulars of registered authorised users;
- (d) registration of geographical indications of goods in specified classes;
- (e) prohibition of registration of certain geographical indications;
- (f) provisions for framing of rules by Central Government for filing of application, its contents and matters relating to substantive examination of geographical indication applications;
- (g) compulsory advertisement of all accepted geographical indication applications and for inviting objections;
- (h) registration of authorised users of registered geographical indications and providing infringement action either by a registered proprietor or an authorised user;
- (i) provisions for the renewal, rectification and restoration of geographical indications and authorised user;
- (j) provisions for higher level of protection for notified goods;
- (k) prohibition of assignment, etc., of a geographical indication as it is a public property;
- (l) prohibition of registration of geographical indication as a trade mark;
- (m) appeal against Registrar's decisions would lie to the Intellectual Property Appellate Board established under the Trade Marks legislation;
- (n) provision relating to offences and penalties;
- (o) provision detailing the effects of registration and the rights conferred by registration;

(p) provisions for reciprocity, powers of the Registrar, maintenance of index, protection of homonymous geographical indications, etc.

3. The Bill seeks to achieve the above objects. The notes on clauses explain the various provisions of the Bill.

26. Based on the above object, in the preamble of the said Act, it has described as an Act to provide for the registration and better protection of geographical indications relating to goods and has defined "Geographical Indications, goods and indications as follows:

e) "geographical indication", in relation to goods, means an indication which identifies such goods as agricultural goods, natural goods or manufactured goods as originating, or manufactured in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of such goods is essentially attributable to its geographical origin and in case where such goods are manufactured goods one of the activities of either the production or of processing or preparation of the goods concerned takes place in such territory, region or locality, as the case may be.

Explanation.-For the purposes of this clause, any name which is not the name of a country, region or locality of that country shall also be considered as the geographical indication if it relates to a specific geographical area and is used upon or in relation to particular goods originating from that country, region or locality, as the case may be;

(f) "goods" means any agricultural, natural or manufactured goods or any goods of handicraft or of industry and includes foodstuff;

(g) "indication" includes any name, geographical or figurative representation or any combination of them conveying or suggesting the geographical origin of goods to which it applies;"

27. In our opinion, in the context of the G.I. Act, the learned Single Judge was right in prima facie holding that the right conferred on registration under the above Act in respect of the goods "tea", does not confer any right over the word "Darjeeling", a geographical name, so as to prevent the Defendant from rendering its services of hospitality to the public by naming one of the lounges of its hotel as "Darjeeling Lounge" as the object of the G.I. Act is to give better protection of geographical indications relating to goods.

28. It is not the case of the Plaintiff that the Defendant is using the word "DARJEELING" for the purpose of falsely asserting that it has the right to certify that the tea served in the lounge is grown in the region of district Darjeeling nor has the Defendant used the logo of the Plaintiff. We must not lose sight of the fact that the protection given in respect of certification trademarks relates to any goods or services in respect of which it is registered and the Plaintiff has not registered its

name as holder of the mark DARJEELING in respect of hotel business but for the purpose of certification of tea as one grown in Darjeeling district where benefit of Sections 28 and 29 of the Act is not available. At the same time, the protection under the G.I. Act is also not available against the Defendant as indicated above.

29. We, thus, find that the Plaintiff has prima facie failed to prove that there was any violation of the registered certification trademark at the instance of the Defendant in terms of Section 75 of the Act or under the G.I. Act.

30. We are quite conscious of the position of law that in case of violation of infringement of trademark as provided in Section 29 of the Act, delay is immaterial unless it amounts to acquiescence. However, in a case alleging violation of rights either in terms of Section 29 or Section 75 of the Act or under the G.I. Act, where the Plaintiff has failed to prove even prima facie case, the factor of delay is not at all required to be considered as a relevant one.

31. Once we hold that Plaintiff has failed to establish a prima facie case, the other two essential requirements for the grant of temporary injunction become insignificant.

32. As regards the plea of passing off, we endorse the view of the learned Single Judge that it was never the intention of the Defendant to pass off the right of certification conferred in favour of the Plaintiff as its own right by naming one of its lounges as DARJEELING LOUNGE and thus, even in respect of the allegation of passing off, No. prima facie case has been established.

33. The fact the Defendant applied u/s 18 of the Act for registering its lounge as "Darjeeling Lounge" u/s 18 and such application was abandoned in terms of the provisions of the Act is also inconsequential for the purpose of dealing with an application for injunction at the instance of a person whose right is not based on a valid right of registration applied u/s 18 of the Act or passing off claiming to have acquired prior right based on similar type of business done by the Defendant.

34. On consideration of the entire materials on record, we, thus, find that in the facts of the present case, the learned Single Judge rightly refused the prayer for interim order and we do not find any reason to arrive at a different conclusion than the one arrived at by the learned Single Judge in view of our reasons disclosed above. At any rate, the finding of the learned Single Judge cannot be set to be wrong so as to interfere with the discretion exercised by His Lordship within the narrow scope of interference indicated earlier. The learned Single Judge has also followed the well-accepted principles which are required to be followed in disposing of an application of injunction of this nature. The appeal is, thus, devoid of any merit and is consequently dismissed.

35. In the facts and circumstances, there will be, however, No. order as to costs.

I agree.

Sambuddha Chakrabarti, J.

Later:

Urgent xerox certified copy of this judgment be supplied to the parties, if applied for, within a week upon compliance of all other requisite formalities.