
(2000) 1 ALLMR 160 : (1999) 2 BomCR 435 : (1999) 2 MhLj 135

Bombay High Court

Case No: Notice of Motion No. of 1999 in Suit No. 576 of 1999

Mahesh Jayalal Dadhia
and Another

APPELLANT

Vs

M/s. Thio Pharma and
Others

RESPONDENT

Date of Decision: Feb. 17, 1999

Acts Referred:

- Bombay High Court (Original Side) Rules, 1980 - Rule 147, 148
- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 1, Order 39 Rule 2
- Trade and Merchandise Marks Act, 1958 - Section 2, 53

Citation: (2000) 1 ALLMR 160 : (1999) 2 BomCR 435 : (1999) 2 MhLj 135

Hon'ble Judges: S.S. Nijjar, J

Bench: Single Bench

Advocate: Ravi Kadam and Rajendra Barot, instructed by Dhruve Liladhar and Co, for the Appellant; J.B. Chinoy and Salil Shah, instructed by Gajria and Co., for the Respondent

Judgement

@JUDGMENTTAG-ORDER

S.S. Nijjar, J.

Leave under Rules 147 and 148 of the High Court of Judicature at Bombay (O.S.) Rules, 1980 is granted to the plaintiffs to take out the Notice of Motion in terms of the draft Notice of Motion handed in Notice of Motion made returnable forthwith. Defendants have been served and affidavits in reply and rejoinder have been filed. By consent of the parties, the Notice of Motion is being disposed of finally at this stage.

2. By this suit, the plaintiffs are seeking an order restraining the defendants from manufacturing, selling and/or trading their pharmaceutical products bearing the trade marks BROSMIN, ACTIZYME, ENERPRO, PRESTIGESIC and/or PRESTIFEN or any other mark identical and/or deceptively similar thereto as, according to the plaintiffs, the

defendants are not entitled to use the same.

3. Plaintiff No. 1, defendant Nos. 2, 3 and 4 are members of the same family. They are partners in the family "partnership firms being plaintiff No. 2 and defendant No. 1. Defendant No. 2 is the brother of the first plaintiff. Defendant No. 3 is the sister-in-law of the first plaintiff and defendant No. 4 is the niece of the first plaintiff. They are members of a family known as Dadhia family. This family owns several firms, companies, properties and plaintiff No. 1 along with his father and his four brothers including defendant No. 2 were carrying on business as a joint family known as "Dadhia group". The business of the Dadhia family is spread over various cities in India, including Mumbai.

4. In the year 1981 when the entire business of the family was being jointly conducted, defendant No. 1 commenced the use of trade mark BROSMIN. At that time, plaintiff No. 1 was one of the partners of defendant No. 1. Since the year 1981 the mark BROSMIN has been in continuous use on an extensive scale. Defendant No. 1 had made an application for registration of the trade mark which was subsequently abandoned. It was decided by the Dadhia family that the products manufactured by defendant No. 1 shall be marketed by a Company viz. Synthiko Formulations Pvt. Ltd., hereinafter referred to as "the Marketing Company". It is the common case that BROSMIN by continuous use on an extensive scale has acquired enviable reputation and goodwill in the market. Differences and disputes arose amongst the members of the Dadhia family. In the year 1995 the dispute came to be resolved at the intervention of the father of plaintiff No. 1 and defendant No. 2. On 29th May, 1995 an agreement was arrived at between all the male members of the Dadhia family including plaintiff No. 1 and defendant No. 2. This agreement" shall hereinafter be referred to as "the family arrangement." By this family arrangement, various businesses and properties of the Dadhia family have been separated. By Clause 1 of the family arrangement it is provided that M/s. Syrup Thio-kof Mfg. Com. (India), Bombay is a manufacturing concern of pharmaceutical formulations and products. All the products are marketed by the marketing Company. Both these Companies were looked after by the plaintiff. It provides that whatever patent or proprietary medicines, registered or not registered, under the Trade Mark Act and marketed by the marketing Company, those all products belonged to the plaintiff. It further stipulates that with effect from 1-4-1994 the plaintiff has full right and responsibility for profits and losses for manufacturing the product under the label of Syrup Thio-kof Mfg. Com. (India). This clause also provides that the aforesaid Company is not provided or given to any single partner of the firm. Thus all the trade marks have been given to plaintiff No. 1. The entity of the firm continues to hold the assets of the said firm. The partnership continues. Clause 2 of the agreement pertains to defendant No. 1. This clause provides that the products manufactured by defendant No. 1 and marketed by the marketing Company belonged to the plaintiff. It also provides that from 1-4-94 plaintiffs will be the proprietor of these products whether registered or not registered under the Trade Mark Act.

5. On 22nd April, 1996 defendant No. 1 entered into a job work agreement with the plaintiff. This document is executed by defendant No. 2 on behalf of defendant No. 1. The terms and conditions of this agreement provides that defendant No. 1 will manufacture drugs on behalf of the plaintiff on certain terms and conditions. Clause 5 of this agreement provides that one of the qualified persons of the plaintiffs will remain in the factory of defendant No. 1 to supervise the production process. This job work agreement was subsequently varied on 1st May, 1997. Disputes having arisen, plaintiff was constrained to terminate the job work agreement on 20th June, 1997. Mr. Kadam, learned Counsel appearing for the plaintiffs, therefore, submitted that the execution of this job work agreement indicates that the transfer of the title in the trade marks in favour of the plaintiff is accepted. After termination of the agreement the defendants continued to illegally use the trade mark belonging to the plaintiff. In fact, defendant No. 1 also filed a suit in the Court of District Judge, Bali, Rajasthan being Suit No. 24 of 1998 against the plaintiffs alleging infringement and passing of the trade mark. In that suit an application for ad-interim and interim relief was made by the plaintiff. This was dismissed as the plaintiff was an unregistered firm. Subsequently the firm has been registered and the suit is continuing. It is also stated by Mr. Kadam that at the instance of defendant No. 1 a show cause notice was issued by the Drug Controller, Konkan Division, as to why the manufacturing licence of the plaintiffs be not cancelled. The licence was in fact cancelled. Since the order had been passed without hearing the plaintiffs, the same was quashed by the High Court on 28th September, 1998 in Writ Petition No. 986 of 1998 filed by the plaintiffs.

6. Notice of Motion has been taken out for an injunction restraining the defendants from passing off the trade marks belonging to the plaintiff. An affidavit in support of the Notice of Motion has been filed.

7. Mr. Kadam submits that the plaintiff is clearly entitled to the interim relief. He submits that the proprietorship of the plaintiff in the trade marks is confirmed by the subsequent job manufacturing agreement. Admittedly the defendants were manufacturing the medicines for the plaintiff. He further submits that even if it is assumed that the family arrangement has been given a go by the trade mark would not revert to the defendants. The trade mark has to go back to the joint ownership. Thus he submits either the trade mark can be used jointly by all the members of the partnership as it existed in the year 1981, or not at all. He submits that the extensive sales of the drugs are well indicated by the invoices Exhibits C-1 to C-26. He submits that after the family arrangement the defendants have no title in the trade mark. He submits that the defences put forward in the affidavit in reply are not of any consequence. Anticipating the arguments of the Counsel for defendant No. 1 he submits that the execution of so-called subsequent agreements dated 1-5-97 and 12-9-97 will have no effect on the family arrangement. It may be noticed here that both the sides are agreed that the document dated 12th September, 1997 was actually executed on 24th October, 1997. He submits that the plea put forward in these documents that the plaintiffs had agreed to comply with certain

additional conditions are erroneous. He submits that the document dated 1-5-97 was in fact executed contemporaneously with the modification of the job work agreement dated 22nd April, 1996. He further submits that these two documents cannot have the effect of varying the family arrangement without the consent of all the signatories. He submits that a multi-lateral agreement cannot be varied by the bilateral agreement of plaintiff No. 1 and defendants No. 1 and 2. He therefore, submits that document dated 1-5-97 is wholly irrelevant for the decision of the controversy in the suit. With regard to the document dated 12th September, 1997 he submits that defendant No. 1 has rescinded the said agreement. That being so, it can again have no relevance to the controversy involved in the present suit. In fact he submits that a reading of this document would show that the same contemplates that the defendants will not use the trade mark which has been transferred to the plaintiffs. Further anticipating the arguments of the Counsel for the defendants, Mr. Kadam submits that although the plaintiff has not suppressed any material facts, the defendants themselves cannot be said to be wholly innocent. He submits that at best both the parties had made only selective disclosure of the documents. He submits that the letter dated 1-5-97 has not even been alluded to at any earlier stages. Letter dated 30th October, 1997 written by defendant No. 1 to Vijay Shah, Advocate, talks only about the document dated 12th September, 1997. He further submits that the case which is sought to be put forward now is not pleaded in the letter dated 30th October, 1997. He submits that there is no mention of tampering with the document dated 12th September, 1997 at Clause 1.3. The addition of the line at the end of the document in hand-writing is also not mentioned in the letter dated 30th October, 1997. That being so it is submitted by Mr. Kadam that much has been made out of a non-existing situation. On merits he submits that defendants having accepted the benefit under the family arrangement cannot now be permitted to say that the said family arrangement has been given a go by. He further submits that in situations like this the grant of ad-interim as well as interim relief is most necessary. He submits that this is so because Notice of Motion take such a long time in being decided. Furthermore, in the case of passing off it is not only the balance of convenience and irretrievable loss which has to be seen, but the Court has to take into consideration the public interest. He submits that the public deserve to be protected from the sale of the goods which are not emanating from the Proprietor of the trade mark. Defendant No. 1 not having any title in the trade marks, the plaintiff is clearly entitled to an injunction. In support of the proposition with regard to delay, learned Counsel has relied on a judgment of this Court reported in 1998 18 P.T.C. 692 Anglo-French Drugs & Industries Ltd. v. Eisen Pharmaceutical Com. Put. Ltd. There is absolutely no dispute with the proposition laid down in the aforesaid judgment to the effect that Notices of Motion do not reach hearing for years. In the present case, however, the said dicta will not be applicable as the Notice of Motion is being finally disposed of at this stage. So far as the grant of injunction to the plaintiff in view of the fact that the plaintiffs and defendants are joint proprietors, the learned Counsel has relied upon [Power Control Appliances and Others Vs. Sumeet Machines Pvt. Ltd.,](#) . In the aforesaid judgment it is clearly held that it is a settled principle of law relating to trade mark that there can be only one mark, one source and one proprietor. It cannot have two origins.

Where therefore, the first defendant-respondent proclaimed himself as a rival of the plaintiffs and as joint owner it is impermissible in law. Even the joint proprietors must use the trade mark jointly for the benefit of all. It cannot be used in rivalry and in competition with each other.

8. Mr. Chinoy, learned Counsel appearing for the defendants, has laid much stress on the fact that there is suppression of material facts and documents by the plaintiffs. He submits that not only there is suppression of facts and documents but there is also tampering of one of the documents i.e. dated 12th September, 1997. He further submits that plaintiff is claiming his right in the suit under the family arrangement which has been given a go by. The family arrangement cannot be enforced in view of the fact that plaintiff has committed breaches under the agreement. Thus the agreement cannot at all be enforced at the hands of the plaintiff. He further submits that the plaintiff is not a registered proprietor of the trade mark. Therefore, no claim can be made on the basis of the infringement or even passing off. He further submits that the proprietor of the trade mark is admittedly M/s. Syrup Thio-kof Mfg. Com. (India), Mumbai. This partnership firm has not made a party. He submits that the suit, if any, could only have been filed by the aforesaid firm. He further submits that although the claim is for passing off, yet the same is based on the pleading that the plaintiff is the owner of the registered trade mark. He further submits that the suit for enforcement of the family arrangement can only proceed if all the signatories to the family arrangement are before the Court and have been impleaded as parties. Lastly he submits that the plaintiffs claim is delayed and, therefore, no relief can be granted. Mr. Chinoy also submits that the cause of action has not actually arisen in favour of the plaintiffs in view of the averments made in paragraph 18 of the plaint. He submits that in the said paragraph it is categorically stated that the application of the plaintiff for registration of the mark BROSMIN is still pending. He submits that in paragraph 20 of the plaint the plaintiff has made out a case of ownership of the trade mark BROSMIN on the basis of the family arrangement dated 29th May, 1995. However, in the said paragraph no mention is made of the writings dated 1st May, 1997 and 12th Sept., 1997 whereby certain other liabilities were agreed to be discharged by the plaintiff. Learned Counsel also relies on averments contained in paragraphs 7, 8, 9, 10 and 11 of the plaint to show that the correct state of affairs has not been placed before the Court. In paragraph 14, plaintiff has sought to explain the delay. No mention whatsoever is made of the documents dated 1-5-97 and 12-9-97. He submits nowhere in the plaint has it been stated that even in the original family arrangement the liabilities of the plaintiff were to be discharged within a period of six months. That would mean that the plaintiffs have to discharge their liabilities by November, 1995. The plaintiff has not paid up any of the statutory dues. He submits that as a consequence of that property of the defendant firm has been attached by the authorities. He submits that the meeting on 1-5-97 took place as the defendant No. 1 was not complying with the obligations which he had undertaken to discharge. He submits that this meeting had been convened by the father of plaintiff No. 1 and defendant No. 2. On the agreement having been reached, defendant No. 1 has undertaken certain liabilities. He submits that in Clause 4 it was specifically provided that

SYNTHIKO brand name products will be transferred against completion of Bank work and P.P. work. By Clause 6 plaintiff No. 1 had agreed that gratuity and salary dues will be settled in the month of May itself. It is clarified that SYNTHIKO brand name means all product of Synthiko line, Brosmin Group Tablets and Syrup, Actizyme, Enerpro plus and existing products. In the face of these commitments it is submitted by the learned Counsel that plaintiff can hardly claim any title in the trade marks. He submits that it was very necessary to bring these minutes of the meeting to the notice of this Court as the plaintiff would only succeed if the aforesaid minute did not exist. A perusal of these minutes, according to Mr. Chinoy, makes it abundantly clear that the trade marks were to be transferred to the plaintiff on his fulfillment of the obligations. Thus it is submitted by Mr. Chinoy that the document cannot be said to be irrelevant for the purposes of the controversy. He thereafter refers to a letter dated 2nd April, 1997 wherein it is brought to the notice of the plaintiff that he had not cleared the liabilities pending against the firms. It is stated that the defendants have repeatedly requested the plaintiff many times and he had assured to settle one by one but no assurance has yet been fulfilled. In this letter it is requested that the liabilities be cleared within a period of six months failing which all consequences will be at the plaintiffs risk. According to Mr. Chinoy, the liabilities outstanding at that time were something in the region of Rs. 50 lakhs. It was keeping these facts in view that the agreement dated 1-5-97 was executed. He submits that these facts having not been pleaded in the plaint, the plaintiff does not deserve any discretionary relief. With regard to the agreement dated 12th Sept., 1997, it is stated that the same has been tampered with. Learned Counsel also submits that a perusal of this agreement would show that the original family arrangement was for consideration. The aforesaid agreement sets out briefly the history leading upto the execution of the agreement dated 12th Sept., 1997. He submits that in Clause 1.3 the plaintiff No. 1 has changed the original date with regard to settling the dues of the workers. This according to Mr. Chinoy has been done by the plaintiff No. 1 with ulterior motives. That is why the clause does not bear the signature of defendant No. 2. Wherever the changes have been made with the consent of defendant No. 2, the signature is appended. He further submits that the clause at the end of the agreement to the effect that "This agreement to be effective from the date of clearance of bank dues" has been added by the plaintiff No. 1 for ulterior motives. This, he submits, was not part and parcel of the original agreement. This document, according to Mr. Chinoy ought to have been disclosed by the plaintiff. After the changes were noticed, defendant No. 1 recorded the objections by letter dated 30th October, 1997 to the Advocate Mr. Vijay Shah. In this letter it is clearly stated that the trade mark of products will be transferred to the plaintiff after completion of all liabilities i.e. Central excise demands. State Excise, Income tax and other liabilities which were earlier explained to the plaintiff. It is also stated that if any changes are required in the agreement, then signatures of both the parties are required. It is pointed out that the date has been changed at 1.1 of the agreement and 2.2 of the agreement. As point No. 1.1 it is signed by both the parties. Mr. Chinoy has not made any grievance of the same. With point 2.2. he has stated that the date has been deliberately changed. He submits that even then letter has been deliberately suppressed by the plaintiff. It cannot be said to

be irrelevant as is sought to be projected by the learned Counsel for the plaintiffs. In another letter dated 2nd Feb. 1998 it is again reiterated that the agreement signed on 24th October, 1997 has not been complied with. Therefore, it is stated that the aforesaid agreement stands cancelled. Mr. Chinoy further submits that not only the plaintiffs are guilty of suppressing material facts but they have also come to Court with a false case. He points to para 3 of the affidavit in support of the Notice of Motion wherein the plaintiff No. 1 claims to be the registered proprietor of the marks. This accordingly to Mr. Chinoy is a false statement made on oath. He submits that in view of the provisions of section 2(q) of the Trade and Merchandise Act. 1958, plaintiff No. 1 could not possibly describe himself as the registered proprietor in relation to a trade mark which means the person for the time being entered in the register as proprietor of the trade mark. He submits that in view of section 44 of the Act, if there was a change in ownership or assignment it was incumbent on the plaintiff to make an application to the Registrar of Trade Mark. No such application has been made to the Registrar. Thus plaintiff No. 1 can hardly claim himself to be the registered proprietor of the trade mark. On merits he submits that since the consideration under the original family arrangement has totally failed there can be no agreement which can be enforced by the plaintiff No. 1.

9. I have considered the arguments put forward by the learned Counsel. It is agreed between the parties that there was a family arrangement between the parties on 29th May, 1995. It is also agreed between the parties that by virtue of Clauses 1 and 2, all the trade marks mentioned above were sought to be transferred to the plaintiff No. 1. The controversy arises as to whether or not the trade marks stood transferred on the execution of the family arrangement. It is the case of the plaintiff, as vehemently argued by Mr. Kadam, that the vesting of the trade marks in the plaintiff were unconditional. He has sought to find support of the aforesaid argument by relying on Clause 2 of the family arrangement which provides that all liabilities of creditors and loans (other than bank loan) will be settled and paid by the plaintiff. Similarly all the receivables from debtors will also belong to the plaintiff which includes raw materials, packing materials, machinery parts, goods on or after 1-4-94. He also relied on the Job work agreement dated 22nd April, 1996 whereby the plaintiff had given the job work of manufacturing medicines to defendant Nos. 1 and 2 for the plaintiff. This agreement fell through and was ultimately terminated on 20th June, 1997. I am unable to agree with the aforesaid submission as accepting the same would amount to not reading the document as a whole. In the family arrangement it is clearly mentioned that the trade marks which belonged to M/s. Syrup Thio-kof Mfg. Com. (India) are transferred to the plaintiff. It is clearly mentioned that from 1-4-94 the plaintiff shall have full right and responsibility for profits and losses for manufacturing the product under the label of Syrup Thio-kof Mfg. Co. (India). But the partnership of the aforesaid firm did not give to any single partner. The partnership remains the same w.e.f. 1-4-94. Thereafter the details of the interest of the various partners have given. Thereafter follow the stipulation that whatever liabilities of Government e.g. provident fund, E.S.I.C., B.S.E.S., Sales tax, Income tax, Factories and Court cases etc. will be handled by the plaintiff and expenses will be borne by the plaintiff.

It is further clarified that the statutory payment of Government dues are liable to be paid by the plaintiff. No other partner is and would be responsible for these payments. The arrangement further provides that whatever liabilities of creditors and loans (other than Bank loan) have to be settled and paid by the plaintiff. The arrangement further goes on to say that the matters of income tax and sales tax are to be settled immediately as the cases are lying pending before the departmental authorities. The family arrangement further states that the liabilities of Thio-Pharma have to be completed within a stipulated time fixed as six months from this date and the progress report of payments made to creditors and Government dues will be informed to each partner every month along with monthly creditors statement. The bank loan of S.B. B.J. Falna which amounts to Rs. 5 lakh approx. will be paid by the plaintiff and he will be responsible for the same. All this would show that the trade marks did not vest in the plaintiffs unconditionally. It has been argued by Mr. Chinoy that the family arrangement has been given a go by because the plaintiff had failed to comply with reciprocal obligations. The family arrangement having been given a go by the suit would not be maintainable at the instance of the plaintiff. He has referred to two subsequent agreements to support the submission that the plaintiff has been avoiding the commitments under the family arrangement. A perusal of the agreement dated 1st May, 1997 shows that a meeting had taken place under the supervision of the father of plaintiff No. 1 and defendant No. 2. In this agreement it is agreed by the defendant No. 1 that production will be given in time. This is so provided because the job work agreement was still subsisting. Plaintiff No. 1 in turn had agreed that the product manufactured by defendant No. 1 on behalf of plaintiff No. 1 will be cleared against the central excise amount by the plaintiff. In Clause 3 the plaintiff had agreed that the bank work will be cleared before 25th May, 1997. It will be finalised before 16th May, 1997, if the production is given smoothly in time. Clause 4 is of some importance which provides that Synthiko brand products will be transferred against completion of bank work and P.F. work. Clause 6 is a further clarification of Clause 4 which provides gratuity and salary will be settled in this month only. It is clarified that this clause relates to Clause No. 4. This clause further provides that Synthiko brand name means all product of Synthiko like Brosmin group tablets and syrup. Actizyme, Enerpro plus and existing products. In the face of the aforesaid Clauses it would be difficult for the Court to accept the submission of Mr. Kadam that the family arrangement had vested the title of the trade marks in the plaintiff No. 1 unconditionally. This agreement is followed by a protest in the form of a letter written by the Advocate of defendant No. 1 to the plaintiff on 4th August, 1997. It is pointed out that the plaintiff had agreed that all current liabilities of Income Tax, sales tax, central excises, Employees Provident Fund, Employees State Insurance, Salary, Bonus, Gratuity of employees and State Bank of Bikaner and Jaipur etc. would be discharged by the plaintiff. The letter states that this was further made clear in the Deed of Family settlement executed on 29th May, 1995 by all the members of the family including the plaintiff. In paragraph 2 it is stated that according to the above undertaking the plaintiff was required to discharge all the aforesaid liabilities so that defendant No. 1 may not be put to unnecessary hardship and the continuance of day to day affairs of the firm may not be jeopardised. It is also stated that the plaintiff is not

attending to the Court cases effectively. It is stated that because of the non-attendance of the cases decisions are given against the firm ex-parte. It is stated that the plaintiff is exhibiting negligence of the highest order. This notice also refers to an earlier letter dated 2nd April, 1997 wherein the plaintiff had been asked to clear all the liabilities within a period of six months and that of the Bank by 30th April, 1997. It is recorded in the notice that no steps have been taken by the plaintiffs in discharging the liabilities despite lapse of four months. The notice ends with the following request.

"(a) To discharge the liabilities of S.B.B. & J. and clear the entire dues on or before 16th August, 1997, positively;

(b) conduct and defend the various cases pending before the Taxation authorities effectively, and

(c) clear all other dues as per the terms and conditions of retirement deed."

The notice records that a detailed list of dues has already been sent to the plaintiff along with the letter dated 2nd April, 1997. However, another list of liabilities has been forwarded. According to Mr. Chinoy, these liabilities are approximately in the region of Rs. 50 lakhs. These have not been discharged by the plaintiff.

10. Thereafter we have the agreement dated 12th September, 1997. This agreement records that parties are related to one another as brothers and were together in several business ventures. By virtue of family settlement arrived at between the parties, the business were agreed to be divided amongst them more particularly described in the agreement dated 29th May, 1995. It is further provided that the aforesaid family arrangement provided that the trade marks registered or unregistered belonging to several business shall belong to the plaintiff absolutely and in consideration of such transfer plaintiff agreed to discharge various liabilities incurred in the course of business. In my view, this recital by itself is sufficient to dislodge the claim of the plaintiff that the trade marks had been vested in the plaintiff unconditionally. Admittedly the agreement is signed by the plaintiffs as well as the defendants. In my view, at this prima facie stage, plaintiffs cannot be permitted to say that the aforesaid agreement had no legal effect on the original family arrangement. This is more so as it is further recited that the aforesaid family settlement has been given effect to subject to some adjustments between the parties. It states that the parties resolved their differences through the intermediary Mr. Vijay F. Shah, Advocate whereby the parties have extended understanding, covenants and assurances to one another to complete the family settlement arrived at and are now desirous of recording the said covenants, understanding and assurances in writing. By Clause 1.1, the plaintiff agreed to settle the liability to the bankers, State Bank of Bikaner and Jaipur by or before 10th November, 1997. This covenant is agreed to between the parties. By Clause 1.3 the plaintiff agreed to settle the workers dues such as salary, bonus, provident fund, E.S.I.C. and gratuity on his account by or before 30th November, 1997 and produce N.O.C. from the workers in satisfaction of the claims. Clause 6.1

provides that the parties have agreed that plaintiff be granted time upto 28-2-1998 to perform substantial part of his obligations incurred or agreed to therein. The handwriting portion which has been referred to above states that this agreement is to be effective from the date of clearance of bank dues. Plaintiff, however, relies on Clauses 5.1 and 5.2. Clause 5.1 provides that the defendants agree to account for the preparations manufactured and sold by Thio-Pharma bearing the Trade marks mentioned therein after 30th June, 1997 and till the date of the agreement. The amount found due on such account will be handed over to or credited to the account of Synthiko Formulations by or before 31st January, 1998. Clause 5.2 provides that defendant agrees to discontinue manufacture goods bearing the mark BROSMIN, ACTIZYME and ENERPRO immediately on signing of this agreement and undertook not to manufacture such goods hereafter. Each side is claiming a breach of this agreement. The defendant No. 1, as noticed earlier, wrote a letter to the plaintiff on 2nd February, 1998, captioned as Reg. cancellation of agreement signed on 24th October, 1997. Parties are agreed that although the agreement is dated 12th September, 1997 but it was actually executed on 24th October, 1997. In this letter after referring to the aforesaid agreement it is stated that the plaintiff had agreed to comply with the liability of Thio-Pharma within a period of two months. It is noted that the plaintiff has not complied with the undertaking. Not a single condition has been fulfilled by the plaintiff. Therefore, the agreement signed on 24th October, 1997 stands cancelled. This agreement having been cancelled, according to Mr. Kadam, puts a situation back between the parties as it stood prior to the signing of the family arrangement. He, therefore, submits that all the partners who were partners prior to the family arrangement are joint proprietors of all the trade marks. Plaintiff being one of the joint proprietors is certainly entitled to seek the relief of injunction from this Court. I do not find much substance in this submission of Mr. Kadam also. Even if it is accepted that the plaintiff is a joint proprietor of the trade names it would not entitle the plaintiff to an injunction. If the trade name is a joint proprietorship and if there is no partition of the business it cannot be said that defendant No. 1 is acting as a rival to the plaintiff. All the erstwhile partners would be deemed to be utilising the trade mark. As it is, it is the case of both the sides that both the groups to the family arrangement are utilising the trade mark. Voluminous evidence has been placed on record both by the plaintiffs as well as the defendants showing the manufacture of various medicines during the period in dispute. Mr. Kadam, however, has placed strong reliance on the judgment of the Supreme Court in the case of Power Control Appliances (supra). A perusal of the aforesaid judgment shows that the trade mark "Sumeet" stood registered in the name of the second plaintiff therein. The first defendant had started using the trade mark without the permission of the registered owner of the trade mark openly. In the present case the situation is not such. The plaintiff is not the registered owner of the trade marks. The application of the plaintiff for registration is pending. The fate of that application can well be imagined ! In the Power Control Appliances case the learned Single Judge had refused the relief of injunction. In appeal the Division Bench also held that the Single Judge was not wrong in holding that the plaintiffs have acquiesced in the use of the trade literature and the trade mark by the first defendant. Thus, it was held that the relief in equity of injunction, if granted, will affect

the interest of not only the first defendant but also the members of the family who are shareholders of the first defendant Company. It was under these circumstances that the matter was taken to the Supreme Court. The Supreme Court examined the question as to whether there was acquiescence by the plaintiff. The aforesaid plea was negatived. Whilst noticing the principles in relation to the grant of interim injunction it was held that the plaintiff must make out a prima facie case in support of his application for ad-interim injunction and must satisfy the Court that his legal right has been infringed and in all probability will succeed ultimately in the action. This does not mean, however, that the Court should examine in detail the facts of the case and anticipate or prejudice the verdict which might be pronounced after the hearing of the suit or that the plaintiff should make out a case which would entitle him at all events to relief at the hearing. Here, in the present case it is not the case of the plaintiff that they have spent huge amounts of money in developing the market of the trade mark. It is the common case of the parties that all the concerns of the family had been actively engaged in developing the market for the trade marks. In these circumstances I find that the aforesaid judgment is of no assistance to the case put forward by the plaintiff. Mr. Kadam had placed strong reliance on para 41 of the judgment wherein it is held that it is a settled principle of law relating to trade mark that there can be only one mark, one source and one proprietor. It cannot have two origins. Where, therefore, the first defendant has proclaimed himself as a rival of the plaintiffs and as joint owner it is impermissible in law. Even then, the joint proprietors must use the trade mark jointly for the benefit of all. It cannot be used in rivalry and in competition with each other. These observations are of no avail to the plaintiff. If the family arrangement has been given a go by then there is only one mark. There is only one source and there is only one proprietor. That proprietor happens to be neither the plaintiff nor the defendants exclusively. Brozmine and Enerpro belong to Thio-Pharma and Actizyme, Prestigesic and Prestifen belong to M/s. Syrup Thio-kof Mfg. Com. Owner of some of the trade marks, as noticed above, is impleaded as defendant No. 1. Owner of the other products is not impleaded at all. Justification sought to be given by learned Counsel Mr. Kadam is that since the plaintiff is the partner in all the firms the plaintiff is competent to the the present suit and seek the relief of injunction. It is the common case between the parties that if the family arrangement does not exist or is given a go by then all the partners are joint proprietors of the trade mark. If that be so, it can hardly be accepted that defendant No. 1 is proclaiming himself as a rival of the plaintiffs. All that is sought to be argued by defendant No. 1 is that all the partners being joint proprietors, the plaintiff cannot possibly complain of any infringement especially in view of the fact that he has singularly failed to carry out the obligations under the family arrangement. All partners being joint proprietor must use the trade mark jointly for the benefit of all.

11. In my view, the circumstances narrated above make it abundantly clear that the suit for infringement of the trade mark or for passing of is merely being used as a tool for bargaining in the division of the family property. It is accepted by the parties and in fact it is pleaded in the plaint that defendant No. 1 had filed a suit in the District Court at Bali, Rajasthan, claiming similar reliefs against the plaintiffs herein. That suit is said to be

pending. In the aforesaid suit the plaintiffs therein and defendant No. 1 herein are claiming to be exclusive owners of the trade marks of the Dadhia family. In such circumstances, in my view, it would be wholly inequitable to grant the relief of injunction to the plaintiff.

12. Mr. Chinoy, with great deal of vehemence, has argued that the injunction ought not to be granted on the ground that the plaintiffs have not come to Court with clean hands. He has submitted that the plaintiffs having not disclosed to this Court the subsequent agreements dated 1st May, 1997 and 12th September, 1997 are guilty of suppression *van* and *suggestio falsi*. He submits that if the aforesaid agreements had been brought to the notice of the Court, the plaintiffs would have been immediately non-suited. He submits that the plaintiffs did not make a true disclosure of the facts before this Court. Mr. Kadam had, however, as earlier noticed submitted that in view of the cancellation of the agreement dated 12th September, 1997 by defendant No. 1 themselves the aforesaid documents had lost all relevance. He further submitted that the defendants themselves have not mentioned these agreements in the letters as stated above. He submits that this kind of argument is usually put forward by a party which has no case on merits. The position with regard to the duty of the parties to make a true and full disclosure of all relevant facts is well settled in law. Here, however, the Court finds that the conduct of both the parties is not such as to non-suit one side or the other on the ground of misrepresentation. Fact of the matter remains that after the termination of the agreement dated 12th September, 1997 the family settlement has been given a go by. Therefore, rights of the parties had to be adjudicated on the basis of the situation as it existed prior the execution of the family arrangement. Although it may not be possible to non-suit the plaintiff on the ground of misrepresentation yet the conduct of the plaintiff in not complying with the obligations contained in the family arrangement and the subsequent two agreements would have a bearing on the question as to whether the plaintiff is entitled to equitable relief. From a perusal of the facts narrated above it would become abundantly clear that the plaintiff had been given the title in the trade marks on his fulfilling certain obligations which have been noticed above. The agreement dated 12th September, 1997 clearly states that the trade marks had been given in consideration for the obligations taken by the plaintiff. None of these obligations have been fulfilled by the plaintiff. Yet the plaintiff claims that the trade marks vested in the plaintiff. A perusal of paragraph 14 of the plaint shows even, according to the plaintiff, that the defendants had started manufacturing the products bearing the trade mark BROSMIN in August, 1997. Thereafter, according to the plaintiff there were efforts at mediation. It is sought to be projected that mediation was being done in the presence of a mediator. It is however not mentioned that the mediator was none other than the father of the plaintiff No. 1 and defendant No. 2. From the month of August, 1997, in para 15 of the plaint the plaintiffs straightaway jump to month of November, 1997. Both the agreements dated 5th May, 1997 and 12th September, 1997, find no mention in the plaint. These meetings had in fact been held to resolve the disputes between the parties. In this view of the matter, the plaintiff has not been absolutely candid whilst stating his case in the plaint. However, as

noticed earlier, the suit of the plaintiff cannot be dismissed on this ground alone in view of the subsequent termination of the agreement dated 12th September, 1997, by letter dated 2-2-1998. This conduct would however, have to be taken into account whilst deciding the question as to whether the plaintiff is entitled to the relief of injunction. It has been repeated and reiterated by the courts that it is the bounden duty of the parties to disclose all the facts which may be relevant for the decision on the issues involved in the case. Even the facts that may be apparently against the party have to be stated. After stating the facts it can certainly be pleaded that the facts pleaded do not have any effect on the merits of the case put forward by the parties. But the parties are bound to state all the facts which may have a bearing on the decision of the case.

13. Keeping these facts and circumstances in view I find no merit in the Notice of Motion. The same is hereby dismissed with no order as to costs.

Certified copy expedited.

14. Notice of motion dismissed.