

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment reserved on: 28th May, 2021.*
Judgment delivered on: 6th July, 2021.

+ **FAO(OS) (COMM) 75/2021**

AMPA CYCLES PRIVATE LIMITED **Appellant**

Through: Ms. Kaadambri, Advocate.

Versus

JAGMOHAN RATRA **Respondent**

Through: Ms. Diva Arora, Advocate.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

HON'BLE MR. JUSTICE AMIT BANSAL

[VIA VIDEO CONFERENCING]

JUDGMENT

AMIT BANSAL, J.

1. This appeal, under Section 13(1A) of the Commercial Courts Act, 2015 read with Order XLIII Rule 1(r) of the Code of Civil Procedure, 1908 (CPC), impugns the Order dated 17th March, 2021 of the learned Single Judge of this Court, confirming the interim injunction granted in favour of the respondent/plaintiff in I.A. No.12625/2020 under Order XXXIX Rules 1&2, CPC and dismissing I.A. No.1394/2020 under Order XXXIX Rule 4, CPC of the appellant/defendant, M/s Ampa Cycles Private Limited (company) in CS(COMM) No.569/2020 filed against the


appellant/defendant company for permanent injunction to restrain passing off of trade mark and for ancillary reliefs.

2. The appeal first came up before this Bench on 18th May, 2021 when the counsel for respondent/plaintiff, appearing on advance notice stated that the complete paper book had not been received, and the matter was adjourned to 28th May, 2021, on which date the counsels were heard and orders were reserved. Both parties were also granted liberty to file notes of arguments along with copies of judgments to be relied upon, which have been duly filed by both sides.


3. It must be noted that initially, the learned Single Judge had granted an ad interim injunction in favour of the respondent/plaintiff vide Order dated 23rd December, 2020 till the next date of hearing, against which the appellant/defendant company had filed FAO(OS)(COMM) 9/2021. On 05th February, 2021 it was brought to the notice of the Division Bench hearing the appeal that an application under Order XXXIX Rule 4, CPC had been filed for modification/vacation of the Order dated 23rd December, 2020. Accordingly, while disposing of the appeal vide Order dated 05th February, 2021, the Division Bench requested the learned Single Judge to hear and decide the said application on the next date of hearing.



4. The suit, from which this appeal arises, was filed by the respondent/plaintiff, *inter alia* pleading that (i) respondent/plaintiff is the sole proprietor of M/s Four Diamonds engaged in manufacturing and selling of bicycles, tricycles, prams, baby rider bicycles and related products; (ii) M/s Four Diamonds, was initially formed as a partnership firm in 1983 with the respondent/plaintiff and one Hari Dutt Sharma as its partners; (iii) the



trade mark 'AMPA' and logo  were coined by the respondent/plaintiff and later adopted by the partnership firm in 1991 in respect of bicycles and tricycles; (iv) the respondent/plaintiff has been using the trade mark 'AMPA' since 1991, first as part of the partnership firm M/s Four Diamonds and later as the sole proprietor of the firm; (v) subsequently, on 30th March, 1992 M/s Ampa Bikes Pvt. Ltd. (ABPL) was established with the respondent/plaintiff and the partnership firm M/s Four Diamonds as shareholders; (vi) Trademark Application No.669861 under Class 12 was filed by ABPL on 21st June, 1995 for the word mark 'AMPA', claiming user since 1st April, 1992. However, the said application was abandoned in 2002; (vii) vide Dissolution Deed dated 1st August, 2003 (Dissolution Deed), the partnership firm M/s Four Diamonds was dissolved with Hari Dutt Sharma exiting/retiring from the partnership and the respondent/plaintiff continuing the business under the trading name and style M/s Four Diamonds as his sole proprietorship concern; (viii) the respondent/plaintiff transferred his shares in the company ABPL to Hari Dutt Sharma towards settling the dues of the exiting/retiring partner; (ix) the respondent/plaintiff was to continue using the trade mark 'AMPA' and all the assets and goodwill were to be transferred to the respondent/plaintiff; (x) use of the 'AMPA' trade mark was to be continued by two entities i.e., (a) by the respondent/plaintiff in respect of cycles up to 14 inches in tyre radius and (b) by the company ABPL in respect of all cycle models of more than 14 inches; (xi) in 2013, the company ABPL was struck off from the Register of Companies thereby ceasing to exist, however, the trade mark 'AMPA' was still being used by the respondent/plaintiff for cycles; (xii) on 22nd March, 2019, the

respondent/plaintiff filed Trademark Application No. 4125674 claiming user since 1st April, 2011 and on 10th November, 2020 the appellant/defendant company filed a notice of opposition against the said application; (xiii) in November, 2020 the respondent/plaintiff was made aware of the usage of

trade mark ‘AMPA’ and logo  by the appellant/defendant company for identical goods, being cycles; (xiv) the appellant/defendant company adopted the use of the impugned trade mark ‘AMPA’ and the logo for benefiting from the goodwill of the respondent/plaintiff, which had been established over a period of almost three decades. A comparison of the trade marks of the appellant/defendant company and the respondent/plaintiff is set out hereinbelow:



PLAINTIFF'S TRADEMARKS	DEFENDANT NO. 1'S TRADEMARKS
AMPA	AMPA
	

(xv) the appellant/defendant company was fully aware of the prior use of trade mark ‘AMPA’ by the respondent/plaintiff since Ajay Kumar Bawa, through his concern M/s Bawa Cycle Store, had a pre-existing commercial relationship with the respondent/plaintiff, having been a buyer/client of ABPL, of which the respondent/plaintiff was a director; and, (xvi) the Deed of Assignment of Trademark dated 03rd January, 2013 (Assignment Deed) between the signatories of ABPL viz. Hari Dutt Sharma, Nishtha Sharma,

and Ajay Kumar Bawa for assignment of the trade mark 'AMPA' to Ajay Kumar Bawa (assignee therein) was a fraudulent document created as an afterthought to justify the use of the trade mark 'AMPA' by the appellant/defendant company.

5. The appellant/defendant company filed a written statement contending *inter alia* that (i) the trade mark 'AMPA' was coined by Hari Dutt Sharma; (ii) as per Clauses 8 (ii) and (iii) of the Dissolution Deed, respondent/plaintiff could use the trade mark 'AMPA' only in respect of cycles for kids i.e., cycle models up to 14 inches in tyre radius, whereas Hari Dutt Sharma was the owner of the trade mark 'AMPA' and could not use the said mark for manufacturing cycles with the model size up to 14 inches for three years, after which it was open for the appellant/defendant company to manufacture cycles of all sizes; (iii) upon dissolution of the partnership firm M/s Four Diamonds, Hari Dutt Sharma continued his business separately under the trade mark 'AMPA'; (iv) Hari Dutt Sharma and his wife established a new company under the name "Concept Bikes"; (v) signatories of ABPL viz. Hari Dutt Sharma, Nishtha Sharma, and Ajay Kumar Bawa entered into the Assignment Deed for assignment of the trade mark 'AMPA' to Ajay Kumar Bawa, the assignee therein against a consideration of Rs. 1,00,000/-; (vi) the appellant/defendant company was incorporated on 05th June, 2018 for manufacturing cycles/tricycles/bikes under the brand name AMPA by Ajay Kumar Bawa, being existing and *bona fide* user of the trade mark 'AMPA', Anmol Bawa, and Pranav Sharma, son of Hari Dutt Sharma, all as directors of the appellant/defendant company; (vii) invoices filed by the respondent/plaintiff are seemingly forged since the respondent/plaintiff could not manufacture cycles above 14 inches as per the Dissolution Deed;

(viii) there was sufficient data to show exclusive use of the trade mark by the appellant/defendant company; and, (ix) Trademark Application Nos. 4661155, 4661156, 3999191 were filed by the appellant/defendant company for the impugned marks under Class 12 on a “proposed to be used basis” only on account of erroneous advice by the erstwhile consultant of the appellant/defendant company. The details of the trade mark registration applications filed by the appellant/defendant company are as under:

TRADEMARK	APPLICATION NUMBER	CLASS	DATE OF APPLICATION
AMPA	4661155	12	17 th September, 2020
	4661156	12	17 th September, 2020
	3999191	12	15 th November, 2018



6. The submissions made by the appellant/defendant company did not find favour with the learned Single Judge and I.A. No.12625/2020 under Order XXXIX Rules 1&2, CPC was allowed and I.A. No.1394/2020 under Order XXXIX Rule 4, CPC was dismissed. The Order dated 23rd December, 2020 granting interim injunction in favour of the respondent/plaintiff was confirmed with the following observations/findings:

- (i) It is the admitted case of the parties that M/s Four Diamonds, the partnership firm of the respondent/plaintiff and Hari Dutt

Sharma was using the trade mark 'AMPA', which was coined by M/s Four Diamonds/one of its partners;


- (ii) The appellant/defendant company claiming that the three trade mark applications dated 15th November, 2018 and 17th September, 2020 were filed on a "proposed to be used basis" only due to imprecise instructions of the erstwhile consultant, appears to be an afterthought;
- (iii) No clarity has been provided as to who was using the trade mark 'AMPA' from 03rd January, 2013 to 05th June, 2018 i.e., from the date on which the Assignment Deed came into effect, to the date of incorporation of the appellant/defendant company. However, the respondent/plaintiff has furnished invoices to show prior user since 2011, which is also claimed in its Trademark Application No.4125674;

7. Ms. Kaadambri, learned counsel appearing on behalf of the appellant/defendant company has contended that (i) the trade marks

'AMPA' /  /  are being used by the appellant/defendant company for manufacturing and selling cycles with tyre radius of 14 inches and above, whereas the respondent/plaintiff, vide the Dissolution Deed had relinquished use of the trade mark 'AMPA'. In this regard, reliance has been placed upon *Li Tse Shi Vs. Pong Tsoi Ching* AIR 1935 PC 208, *Ramdev Food Products Pvt. Ltd. Vs. Arvindbhai Rambhai Patel & Ors.* (2006) 8 SCC 726, *Thayyullathil Kunhikannan & Ors. Vs. Thayyullathil Kalliani & Ors.* AIR 1990 Ker 226, to contend that the respondent/plaintiff is estopped/barred from using trade mark 'AMPA' for its cycles above 14

inches; (ii) the respondent/plaintiff, does not sell cycles for adults or even have the manufacturing capability for the same i.e., for cycles with tyre radius above 14 inches; (iii) none of the products of M/s Four Diamonds



bear the mark **AMPA** and thus, claim of the respondent/plaintiff of being prior user since 1991 cannot hold true; (iv) the respondent/plaintiff has filed fabricated invoices along with the plaint to show sale of tricycles under the brand name 'AMPA'; (v) although the appellant/defendant company denies the use of trade mark 'AMPA' at all by the respondent/plaintiff, even if the respondent/plaintiff used the said trade mark for tricycles, he has not earned any goodwill for the same; (vi) the respondent/plaintiff has admitted that the appellant/defendant company is the user of the trade name and word mark by filing extracts of the active website of appellant/defendant company, which uses the trade mark 'AMPA' and extracts of third party websites, selling/showcasing cycles of the appellant/defendant company with tyre radius of 14 inches and above along with the global rating and reviews of the said products; this amounts to acknowledgement of the goodwill that has been established by the appellant/defendant company; (vii) since the respondent/plaintiff has admitted to the use of trade mark 'AMPA' by the appellant/respondent company, the latter cannot be denied the use of the said trade mark, being the actual user in the category of cycles with tyre radius measuring 14 inches and above, merely on account of the trade mark registration applications being erroneously filed on a "proposed to be used basis"; (viii) the respondent/plaintiff copied the new trade mark  of the

appellant/defendant company after it was posted by the appellant/defendant company on its Facebook page on 06th March, 2019 and filed Trademark



Application No. 4125674 dated 22nd March, 2019 for the trade mark AMPA; (ix) the respondent/plaintiff concealed Search Report dated 03rd May, 2019, the contents of which show prior knowledge of the Trademark Application No.4125674 of the appellant/defendant company; (x) in order to create a basis for filing the suit belatedly, after more than one year of the said search report, the respondent/plaintiff filed another Search Report dated 05th August, 2020 which states that no similar trade mark has been registered or applied for registration under the Trade Marks Act, 1999; (xi) the respondent/plaintiff has filed a fabricated Retail Invoice of Cash Memo/Bill dated 16th February, 2015, to show that Ajay Kumar Bawa had purchased a tricycle with the brand name 'AMPA' from M/s Four Diamonds, which has also been erroneously recorded in paragraph 9 of the impugned Order dated 17th March, 2021 by the learned Single Judge of this Court; not only did such purchase not occur, after filing of the instant appeal, it came to the notice of the appellant/defendant company that the Tax Identification Number mentioned in the buyer details of the same invoice does not belong to the company mentioned therein; (xii) registration of M/s Four Diamonds was done by Hari Dutt Sharma; (xiii) the learned Single Judge, while noting the contention of the respondent/plaintiff that the Assignment Deed was a fraudulent document, failed to take into consideration the statement made by Hari Dutt Sharma as to the transfer of the trade mark 'AMPA' being made in favour of the appellant/defendant company and that the son of Hari Dutt Sharma was a shareholder in the appellant/defendant company; (xiv)

the impugned Order is erroneous insofar as the learned Single Judge has recorded that M/s Four Diamonds coined the trade mark/word mark 'AMPA', since the said trade mark/word mark was coined and designed by Hari Dutt Sharma, as also stated in paragraph 3 of the Written Statement filed on behalf of the appellant/defendant company; and, (xv) the learned Single Judge did not appreciate the distinction made for the use of trade mark 'AMPA' into two categories, viz. (a) kids' cycles/tricycles and (b) cycles for adults i.e., cycles with tyre radius of 14 inches and above.

8. *Per contra*, the submissions of Ms. Diva Arora, learned counsel appearing on behalf of the respondent/plaintiff are that (i) the respondent/plaintiff is the sole proprietor of the firm, M/s Four Diamonds; (ii) the respondent/plaintiff is manufacturing cycles, including tricycles and the end purchaser is likely to get confused by the use of the impugned marks by the appellant/defendant company, since the goods in question i.e., cycles are common to both parties in the present dispute. Reliance is placed on ***Power Sumeet Appliances & Ors. Vs. Sumeet Machines Pvt. Ltd. & Ors.*** [1994] 1 SCR 708 and ***Variety Dry Fruit Stores Vs. Variety Agencies*** 2011 (47) PTC 370 to submit that there can only be one mark, one source and one proprietor and a mark cannot have two origins being used in competition with each other; (iii) the trade mark/word mark 'AMPA' was coined by the respondent/plaintiff and adopted by M/s Four Diamonds for all types of cycles and related products under Class 12; (iv) on dissolution of the partnership in M/s Four Diamonds, all assets and goodwill in the said firm were transferred to the respondent/plaintiff; (v) Clause 8 (iii) of the Dissolution Deed gave ABPL and not Hari Dutt Sharma the right to use the

said trade mark for all cycle models of more than 14 inches for 3 years; (vi) having sold its business premises in 2011, ABPL had stopped carrying out business and hence, stopped using the trade mark 'AMPA' entirely and further, ABPL ceased being associated with the trade mark 'AMPA' since it was struck off in 2013; (vii) the respondent/plaintiff is the sole user of the trade mark 'AMPA'; (viii) as per the dicta in *Hardev Singh Akoi Vs. Jasdev Singh Akoi & Ors.* 2008 (38) PTC 399 (Del), joint owners of a trademark cannot act in a manner that diminishes the right of the co-owner, without consent of the co-owner. Hari Dutt Sharma used the subject trade mark individually/with the appellant/defendant company, without taking consent of the respondent/plaintiff and therefore, the appellant/defendant company is liable to be restrained from using the said trade mark; (ix) the Assignment Deed and the handwritten Affidavit dated 15th July, 2013 (Affidavit), assigning the trade mark 'AMPA' from Hari Dutt Sharma to the appellant/defendant company are forged and fabricated documents, in respect of which respondent/plaintiff has filed an application under Section 340, Code of Criminal Procedure, 1973 and the same is pending adjudication before this Court; (x) the contents of the Affidavit, which was executed seven months after the execution of the Assignment Deed, are contrary to the terms of the Dissolution Deed; (xi) ABPL abandoned the trade mark 'AMPA' as a consequence of non-use and thus, cannot now claim rights on the basis of a forged and fabricated Assignment Deed; (xii) as per the invoice dated 16th February, 2015 the appellant/defendant company had knowledge of prior use of trade mark 'AMPA' by the respondent/plaintiff, since Ajay Kumar Bawa, had been a buyer/client of ABPL; and, (xiii) the appellant/defendant company has failed to produce

any documents showing use of the impugned marks since 2011 and any sales figures, or the amount spent in respect of advertising for promotion of the trade mark 'AMPA'.

9. We have considered the rival submissions.

10. Undisputed facts are that the respondent/plaintiff and Hari Dutt Sharma, started a partnership firm in the name of M/s. Four Diamonds in 1983, dealing with cycles, tricycles and other related products. On 30th March, 1992 ABPL was incorporated, which had the respondent/plaintiff and the firm M/s Four Diamonds as shareholders. The respondent/plaintiff and Hari Dutt Sharma were also the directors of the said company. It was the said company, ABPL that moved an application for registration of the trade mark 'AMPA'. However, the said application was not pursued and was treated as abandoned in 2002 by the Trade Marks Registry. Subsequently, there were disputes between Hari Dutt Sharma and the respondent/plaintiff, which resulted in the Dissolution Deed being executed on 1st August, 2003. Since much turns on the terms of the Dissolution Deed, we have set out the relevant terms of the said deed hereinafter:

“(i) The continuing Partner hereby resigned as Director in M/s Ampa Bikes Pvt. Ltd. and release and renounce all their claims and demands of whatsoever nature in respect of the properties whether movables or immovables including the immovables property at Gurgaon in the name of M/s Ampa Bikes Pvt. Ltd. More particularly described in the schedule (I) hereunder written in the favour of the Retiring Partner.

...

5. ***The retiring partner shall carry on business in the name of M/S AMPA BIKES PVT. LTD. or any other name with in the city of Delhi or any other place either, directly or indirectly, alone or jointly with or as director, manager, agent or employee of any other company, firm, corporation or person.***

...

***NOW IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES
HERE TO AS UNDER:***

...

(ii) That the continuing Partner will use Ampa Bikes Pvt. Ltd. Trade mark for manufacturing all models upto 14” only.

(iii) That the M/s Ampa Bikes Pvt. Ltd. Will not manufacture models upto 14” for 3 years from the date of this Deed.”

11. It is evident from the terms of the Dissolution Deed that Hari Dutt Sharma was given complete rights to run ABPL and the respondent/plaintiff renounced all his claims in respect of movable as well as immovable properties of the said company in favour of Hari Dutt Sharma. Hari Dutt Sharma was free to carry on business in the name of ABPL and use the trade mark ‘AMPA’, which was part of the movable property of ABPL. M/s Four Diamonds became a sole proprietorship to be run and managed by the respondent/plaintiff and Hari Dutt Sharma renounced all his claims in respect of properties of the said firm. The Dissolution Deed categorically provided that the respondent/plaintiff will use trade marks of ABPL for manufacturing all models up to 14 inches only. It was further provided that for a period up to three years, ABPL, which came under the control of Hari Dutt Sharma will not manufacture models up to 14 inches. Axiomatically,

ABPL was free to manufacture all models of cycles after the said period of three years, whereas the limitation of manufacturing models up to 14 inches continued for the respondent/plaintiff. It is an admitted position that the terms of the said Dissolution Deed were never modified/amended/revoked at any point of time. Once, the respondent/plaintiff has given a complete waiver in favour of Hari Dutt Sharma for using the trade mark 'AMPA', in respect of cycles above 14 inches, he is estopped from preventing the usage of the said trade mark by Hari Dutt Sharma or any of his successors/assignees.

12. It is stated that in 2013, there was an Assignment Deed executed between Hari Dutt Sharma, ABPL and Nishtha Sharma in favour of one Ajay Kumar Bawa. Though, the respondent/plaintiff has challenged the validity of the said Assignment Deed, claiming the same to be forged and fabricated, the validity of the said Assignment Deed was duly confirmed by Hari Dutt Sharma in the present suit proceedings and the same is duly recorded in the Order dated 22nd February, 2021.

13. There is no dispute that ABPL was using the trade mark 'AMPA' till 2011. In 2013, ABPL stopped doing business and was struck off from the Register of Companies. In June, 2018, the appellant/defendant company was incorporated with son of Ajay Kumar Bawa, the assignee under the Assignment Deed and son of Hari Dutt Sharma, as shareholders and began to use the trade mark, 'AMPA'.

14. The respondent/plaintiff himself has placed on record various details with regard to the usage of trade mark 'AMPA' and the device mark by the appellant/defendant company including brochures, extracts of the active

website of the appellant/defendant company, which uses the trade mark 'AMPA' and extracts of third party websites, selling/showcasing cycles of the appellant/defendant company with tyre radius of 14 inches and above along with the global rating and reviews of the said products. The appellant/defendant company applied for registration of the trade mark



on 15th November, 2018 and subsequently applied for registration for

the mark 'AMPA' along with device  on 17th September, 2020.

15. The respondent/plaintiff has filed various invoices in support of his contention that he, as sole proprietor of M/s Four Diamonds, has been using the trade mark 'AMPA' continuously from 2013 till date. However, the appellant/defendant company claims that all the aforesaid invoices filed by the respondent/plaintiff pertain to tricycles and cycles below 14 inches, which alone the respondent/plaintiff was entitled to sell in terms of the Dissolution Deed. In our view, the said invoices do not advance the case of the respondent/plaintiff to seek injunction against the appellant/defendant company. In terms of the Dissolution Deed, both the partners, the respondent/plaintiff and Hari Dutt Sharma, were entitled to use the trade mark 'AMPA' for their respective products. The respondent/plaintiff was free to sell cycles below 14 inches with the trade mark 'AMPA' whereas, the appellant/defendant company was free to use 'AMPA' for cycles above 14 inches and in respect of cycles up to 14 inches after three years from the date of the said deed. Admittedly, the appellant/defendant company is not seeking to restrain the respondent/plaintiff from selling models up to 14

inches with the trade mark 'AMPA'. In terms of the Dissolution Deed, the respondent/plaintiff has clearly and unequivocally conceded in favour of the appellant/defendant company, the right to use the trade mark 'AMPA', in respect of models above 14 inches and consented to the appellant/defendant company manufacturing models up to 14 inches after three years from the date of the said deed. That being so, the respondent/plaintiff cannot restrain the appellant/defendant company from usage of the trade mark 'AMPA', unless it is able to show that the terms of the said Dissolution Deed were novated/revoked at a subsequent point of time.

16. Even though doubts have been raised by the respondent/plaintiff with regard to the legality of the Assignment Deed and the Affidavit filed on behalf of Hari Dutt Sharma, the same can only be tested at the stage of trial. It may also be noted here that Hari Dutt Sharma, though not a party to the suit, appeared in person before this Court in suit proceedings and confirmed the execution of the Assignment Deed. At this stage, a *prima facie* view has to be taken and it is clear that ABPL/ Hari Dutt Sharma had been given rights to use the trade mark 'AMPA' in view of the Dissolution Deed. Consequently, the respondent/plaintiff cannot restrain usage of the trade mark 'AMPA' by the appellant/defendant company, who is the successor/assignee of Hari Dutt Sharma/ ABPL, especially when the respondent/plaintiff had himself given up the said right in favour of ABPL/ Hari Dutt Sharma.

17. In this regard, reference may be made to the following observations made by the Supreme Court in ***Ramdev Food Products*** supra:

“73. The matter may be considered from another angle. If the first respondent has expressly waived his right on the trade mark registered in the name of the appellant Company, could he claim the said right indirectly? The answer to the said question must be rendered in the negative. It is well settled that what cannot be done directly cannot be done indirectly.

74. The term “waiver” has been described in the following words:

“1471. Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. ... A person who is entitled to rely on a stipulation, existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted on it is sufficient consideration. ...

It seems that, in general, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, so as to alter his position, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he has himself so introduced, even though it is not supported in point of law by any consideration.”

(See Halsbury's Laws of England, 4th Edn., Vol. 16, para 1471.)

75. *Waiver may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel. [See Halsbury's Laws of England, 4th Edn., Vol. 45, para 1269]*

76. *In Indu Shekhar Singh v. State of U.P., (2006) 8 SCC 129 this Court held: (SCC p. 142, para 26)*

“They, therefore, exercised their right of option. Once they obtained entry on the basis of election, they cannot be allowed to turn round and contend that the conditions are illegal....” ”

18. The said observations are squarely applicable in the facts and circumstances of the present case. Once the respondent/plaintiff has expressly waived his right on the trade mark in favour of the appellant/defendant company, he cannot restrain the appellant/defendant company from exercising the aforesaid rights, even though the said rights have been exercised after passage of substantial time. Therefore, the fact that the appellant/defendant company did not use the trade mark ‘AMPA’ from 2011 to 2018 will not matter.

19. Under the Dissolution Deed, both parties were granted proprietary rights in respect of the trade mark ‘AMPA’. Having consented to this arrangement, the reliance by the respondent/plaintiff on the decisions in *Power Sumeet Appliances* supra, *Variety Dry Fruit Stores* supra, and *Hardev Singh Akoi* supra to the effect that use of a jointly owned trade mark cannot, without consent of the co-owner, be used to the detriment of such co-owner, or that there can only be one mark, one source and one proprietor and a mark cannot have two origins being used in competition, is completely misplaced.

20. The reason within the meaning of *Wander Ltd. & Anr. Vs. Antox India P. Ltd.* 1990 Supp (1) SCC 727 which requires us to interfere with the impugned Order of the Commercial Division, is not merely a different opinion held by us but an error which has crept into the impugned Order. While deciding an application for interim relief, the ingredient of “*prima facie*” case, requires the Court to determine whether the plaintiff seeking the interim relief has a *prima facie* case in its favour. The respondent/plaintiff herein has sought to injunct the appellant/defendant company from using the subject trade mark, by claiming to be the sole proprietor thereof. The claim of the respondent/plaintiff is, that he coined the subject trade mark in the year 1991, when there was a partnership between the present proprietor namely Jagmohan Ratra and the said Hari Dutt Sharma, and is in use thereof since then. However, the respondent/plaintiff himself has further pleaded that Jagmohan Ratra and the said Hari Dutt Sharma, in the year 1992 had incorporated ABPL, of which Jagmohan Ratra, Hari Dutt Sharma and the partnership firm M/s Four Diamonds were the only shareholders, with Jagmohan Ratra and Hari Dutt Sharma as the only Directors. It is further the case of the respondent/plaintiff, that the said ABPL, claiming to be the proprietor of the subject trade mark applied for registration thereof, though did not pursue the said application. Once ABPL acting through Jagmohan Ratra and Hari Dutt Sharma and with the partnership firm M/s Four Diamonds as its shareholder, applied for registration of the subject trade mark claiming to be proprietor thereof, it stands admitted that the partnership firm M/s Four Diamonds was not claiming any rights therein. There is no plea in the plaint, how inspite of such claim of ABPL, the partnership firm M/s Four Diamonds could claim to be the proprietor of the

trade mark, adversely to ABPL. The Commercial Division, in the impugned Order, erred in believing the case of Jagmohan Ratra, now sole proprietor of M/s Four Diamonds, of the said M/s Four Diamonds, being the proprietor of the mark since the year 1991.

21. Moreover, even if Jagmohan Ratra or M/s Four Diamonds had any rights in the subject mark, the said rights, on the signing of the Dissolution Deed in the year 2003, stood surrendered in respect of cycles above 14 inches. The said Dissolution Deed unequivocally vests such rights in the subject mark in Hari Dutt Sharma/ ABPL. The respondent/plaintiff has not explained as to how, inspite of Jagmohan Ratra / M/s Four Diamonds, for receipt of consideration i.e., the share of Hari Dutt Sharma in Four Diamonds, having given up rights in the subject trade mark save to the right of its exclusive use for cycles upto 14 inches for a period of three years, could be the sole proprietor of the trade mark. There is no explanation how the said trade mark, after 2003, came to be vested back in Jagmohan Ratra / M/s Four Diamonds to the exclusion of the appellant/defendant company. The respondent/plaintiff, on its own pleas thus disclosed no *prima facie* title to the subject trade mark, to be in a position to seek restraint against the appellant/defendant company from using so. The Commercial Division, in our view, in the impugned Order, erred in investigating, whether the appellant/defendant company had any right to the trade mark, when the title to be investigated was of the respondent/plaintiff and not of the appellant/defendant company. In this view of the matter, it was irrelevant that the appellant/defendant company, while claiming registration, did not claim the same on the basis of assignment now pleaded from Hari Dutt

Sharma but claimed the same on the “proposed to be used basis”. In this regard, we may mention that the respondent/plaintiff also, though claims rights in the trade mark since the year 1991, while applying for registration, claimed use since 2011. There is however no explanation how, after giving up rights, for consideration as aforesaid, in the trade mark in the year 2003, rights in the trade mark were claimed in the year 2011. Even if Hari Dutt Sharma/ ABPL were not in the use of the subject trade mark, the respondent/plaintiff having for consideration disclaimed rights in the mark in favour of Hari Dutt Sharma/ ABPL, could not claim the same. It is this error in the impugned Order and not merely a different opinion from that held by the Commercial Division, which compels us to set aside the same.

22. From the documents filed by the respondent/plaintiff itself, it is evident that the appellant/defendant company, even though it has started using the trade mark ‘AMPA’ only in 2018, has established substantial sales and customer base and goodwill in the said mark. Therefore, the balance of convenience also dictates that no injunction is passed against the appellant/defendant company.

23. In light of the discussion above, the appeal is allowed and the impugned Order dated 17th March, 2021 is set aside. Interim Order passed on 23rd December, 2020 stands vacated.

C.M. No.16570/2021 (of the appellant for placing additional facts and documents on record)

24. This application has been filed by the appellant/defendant company, seeking to place on record new facts and documents to show actual user,

onwards of 2013, of the trade mark 'AMPA'. In light of the view we have taken, the said additional documents were not required for the adjudication of the present appeal.

25. Accordingly, the application is dismissed.

AMIT BANSAL, J.

RAJIV SAHAI ENDLAW, J.

JULY 06, 2021
sr/at

मात्यमेव जयते