

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

+ **FAO(OS) 155/1999**

% Reserved on: May 20th, 2010

Decided on: June 3rd, 2010

M/S.HALDIRAM BHUJIWALA & ANR Appellants
Through: Mr. C.Mukund, Mr. Ashok Jain,
Mr. Amit Kansera, and Ms. Firdous
Qutb Wani, Advocates.

versus

M/S.ANAND KUMAR DEEPAK KR.& ANR Respondents
Through: Mr. Soli Sorabjee, Sr. Advocate with
Mr. Mahender Rana, Advocate for R-1.
Mr. Sandeep Sethi, Sr. Advocate with
Mr. Amarjeet Singh and Mr. Dhruv
Bhagat, Advocate.

CORAM:

HON'BLE MR. JUSTICE MADAN B.LOKUR

HON'BLE MS. JUSTICE MUKTA GUPTA

1. Whether the Reporters of local papers may
be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported
in the Digest? Yes

MUKTA GUPTA, J.

1. The present appeal lays a challenge to the order dated 12th May, 1999
passed in IA No.1675/1992 in CS (OS) No.635/1992 whereby the application

of the Respondents/Plaintiffs under Order XXXIX Rule 1 and 2 CPC was decided in their favour with the following directions:-

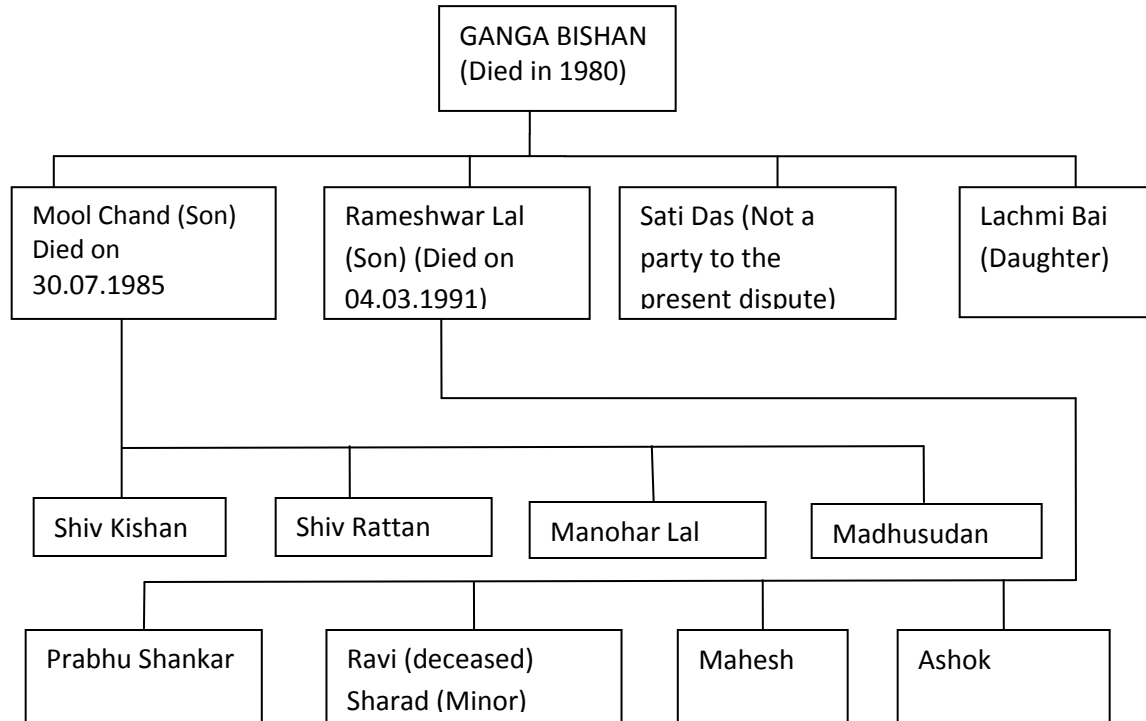
“1. Defendants, their agents/representatives/servants or successors in interest are hereby restrained by means of interim injunction from using the tradename and/or trade mark “Haldiram Bhujawala” with or without the logo, as registered vide registration No. 285062 or any other trade mark identical or deceptively similar thereto, in India except the state of West Bengal;

2. The defendants shall submit within two months, statement of accounts showing the details of the sales made by them in Delhi since 10.12.1991 using this tradename and/or trademark verifying its correctness on affidavit;

3. The defendants shall make discovery on affidavit within one month of all the documents, account books, papers etc. relating to such business since 10.12.1991 and shall file an undertaking that they shall not destroy or part with such documents till further orders of this Court, and

4. They shall make available for inspection by the plaintiffs all such documents, account books, papers, etc. pertaining to the said business, if so required.”

2. The present is a dispute between the grandsons of late Shri Ganga Bishan @ Haldiram. Shri Ganga Bishan commonly known as Haldiram started selling namkeen, papads and bhujia etc. and was trading under the trade name and trade mark “Haldiram Bhujawala”. Subsequently his sons also joined him in the business. The family chart of late Ganga Bishan is as under:-



3. The history of the firm Chand Mal Ganga Bishan of Ganga Bishan @ Haldiram trading under the trade name “Haldiram Bhujiawala” relevant for the present dispute is that after Ganga Bishan’s sons joined him, the firm constituted of Ganga Bishan and his three sons Mool Chand, Satidas and Rameshwar Lal. Thereafter Rameshwar Lal retired from this firm and Shiv Kishan son of Mool Chand joined it. While Ganga Bishan and Mool Chand continued their business at Bikaner, Rameshwar Lal shifted to Calcutta for the business. Rameshwar Lal started the business of namkeen, papads, sweet meat etc. at Calcutta under the name and style of “Haldiram Bhujiawala”. In 1965 Sati Das the other son of Ganga Bishan also left M/s Chand Mal Ganga

Bishan and in his place Smt. Kamla Devi w/o Rameshwar Lal was inducted as a partner. Thus, the two sons of Ganga Bishan, that is, Mool Chand and Rameshwar Lal continued the business in the trade name "Haldiram Bhujawala" from Bikaner and Calcutta respectively. On 29th December, 1972 an application for registration of trade mark "Haldiram Bhujawala" was filed by the four partners of M/s Chand Mal Ganga Bishan. The partners then were Ganga Bishan, Mool Chand, Shiv Kishan and Smt. Kamla Devi, which was registered on 27th January, 1981 vide registration No. 285062. On 2nd November, 1977, even Rameshwar Lal Aggarwal applied for registration of trade mark "Haldiram Bhujawala" which was registered on 11th September, 1980 vide registration No. 330375.

The families were running their business, when after the death of Ganga Bishan and his sons, that is, Mool Chand and Rameshwar Lal, the present dispute arose due to Ashok Kumar s/o Rameshwar Lal opening a shop in the name of M/s Haldiram Bhujia Wala at Arya Samaj Road, Delhi. It is at this stage that M/s Anand Kumar Deepak Kumar, the firm of the sons of late Mool Chand and Shiv Kishan Aggarwal son of late Mool Chand filed the present plaint on 10th December, 1991. On 10th December, 1991 itself an ex parte ad interim injunction was passed against the Appellants herein. On 13th December, 1991 a written statement was filed by the Appellants and on 16th

December, 1991 a replication thereto was filed by the Respondents. After the written statement of the Appellants was filed, an application for amendment of the plaint was filed on 18th January, 1992 and the amended plaint was taken on record on 21st January, 1992. However, for lack of pecuniary jurisdiction the plaint filed was returned back on 14th February, 1992. With the return of the plaint the interim injunction came to an end and thereafter a fresh plaint was filed before this Court being Suit No. 635/1992 in which no interim injunction was granted to the Respondents. I.A. No. 1675/1992 under Order XXXIX Rule 1 and 2 CPC was pending before this Court since February, 1992 and after hearing the parties this application was allowed and an injunction was granted against the Appellants on 12th May, 1999, as reproduced above in the first paragraph, which is the order impugned before us. Thus from 14th February, 1992 till the date of the impugned order, that is, 12th May, 1999 there was no interim injunction in favour of the Plaintiffs/Respondents herein and the Appellants were doing their business in the name and style of Haldiram Bhujawala at Delhi as well.

4. At the time of admission of the appeal, no stay of the impugned order was granted by the Division Bench of this Court and the appeal was pending disposal for regular hearing. The Appellants in the meantime sought for vacation of the stay on the ground that there was additional material for

showing that the impugned order has been obtained as a result of forged and fabricated document, that is, the dissolution deed dated 16th November, 1974 relied upon by the Respondents, hence the same be vacated. As fresh facts were pleaded in the application, this Court vide order dated 6th August, 1999 granted liberty to the Appellants, to approach the learned Single Judge, with regard to this prayer. The application of the Appellants under Order XXXIX Rule 4 CPC, filed before the learned Single Judge was dismissed. The challenge in appeal also met the same fate. On Special Leave Petition being preferred, the Hon'ble Supreme Court vide order dated 1st October, 2008 without going into the rival contentions of the parties, directed expeditious disposal of the suit preferably within a period of six months.

5. Challenging the impugned order, learned counsel for the Appellants submits that the Appellants are the holders of the registered trade mark and claim the right of usage of trade mark 'Haldiram Bhujawala' not only by virtue of their mother Smt. Kamla Devi being the partner in M/s Chandmal Ganga Bishan but also from their father Shri Rameshwar Lal Aggarwal who was permitted to use this trade mark by his father, that is, Shri Ganga Bishan @ Haldiram. According to the Appellants their trade mark No. 330375 is not an issue in this suit, is not disputed and valid all over the country, whereas the

trade mark of the Respondents registered vide No. 285062 is valid all over India except the State of West Bengal.

6. It is contended that after the Appellant No. 2 filed his written statement and claimed user from 1958, the Respondent in the amended plaint changed the stand and claimed user since 1941, instead of 1965. It is contended that even taking the contention of the Respondents to be right, that they are users since 1941, being the successors in interest of Ganga Bishan @ Haldiram, then the Appellants are also users of the same trademark since 1941, being successors in interest of Ganga Bishan @ Haldiram. It is contended that though the Appellants did not dispute the alleged dissolution deed dated 16th November, 1974 in the first written statement, as the Appellant No.2 was in Delhi all alone and he filed the written statement within one day of the service of the interim order, however in his amended written statement filed immediately thereafter, which has been taken on record, the Appellants have disputed the execution of the said document, due to force and coercion and thus being a void document, the learned Single Judge could not have placed reliance on it. According to him since the claim of Appellant's right to use the trade mark is not only from the mother but also from his father Rameshwar Lal, who has been continuously using this trademark, even after he shifted to Calcutta, the learned Single Judge fell in a serious error in

granting injunction vide order dated 12th May, 1999. It is contended that not only was the father of the Appellant using “Haldiram Bhujawala” as the trademark but the same was also the name of his firm. It is stated that when the Appellants took this stand in the written statement, that is, of the inheritance through the father, the Respondents brought the alleged declaration dated 16th November, 1974 (in addition to the dissolution deed dated 16th November, 1974) purported to be signed by the father of Appellant No. 2, Rameshwar Lal Aggarwal which is a forged and fabricated document, which bears no attestation. According to the learned counsel, this forged declaration deed has been deliberately introduced to supplement the case of the Respondents. From a bare perusal of this document, it is visible that the signature of Rameshwar Lal Aggarwal on this forged declaration deed is different from all other documents on record which have been signed by him. It is contended that even if the plea of the Appellant being prior users is not upheld, then also the plea of the Respondents of passing off is non est as both the parties are honest and concurrent users. It is submitted that despite the alleged dissolution deed dated 16th November, 1974, the application for trade mark in 1979 shows Kamla Devi as a partner and till July, 1985, that is, the death of Shri Mool Chand who was the father of the Respondents, this deed was not acted upon. It is submitted that since the suit was filed and on receipt

of the notice a written statement dated 13th December, 1991 was filed within 24 hours undoubtedly the dissolution deed is not denied. However, in the subsequent written statement it is clearly stated that the said dissolution deed has been obtained under force and coercion and cannot be acted upon. It is only subsequently when the Appellants found that this dissolution deed was a forged document that a third written statement was filed wherein this plea of forged and fabrication of the dissolution deed has been taken. It is submitted that however, the stand that declaration deed is a forged document was taken on the first available opportunity. It is stated that though the alleged dissolution deed and the alleged declaration deed are purported to be executed on the same date, however, they do not have the corresponding reference to each other. It is contended that the learned Single Judge has clearly erred in basing its decision as if the dissolution deed and the declaration deed are admitted documents. It is contended that even if it is held that he does not derive any right and title by virtue of the alleged dissolution deed, even then the claim of user being the successor/heir in interest of his father Rameshwar Lal Aggarwal who was permitted to use this trade mark by his father late Shri Ganga Bishan cannot be denied to the Appellant. It is pointed out that after the Appellants raised serious doubts to the veracity of this dissolution deed that the same is a forged document and after this was introduced in the Hon'ble

High Court of Calcutta, it has been lost by the Respondents and is now not traceable.

7. As per the Appellants the contention of the learned counsel for the Respondents that they have derived the trade mark by way of an assignment from their father Moolchand is also untenable. No deed of assignment has been shown. Moreover the right of assignment in 1974, if any in favour of Moolchand expired after six months. Reliance is placed on the decisions in *Uniply Industries Ltd. v. Unicorn Plywood Pvt. Ltd. and others, 2001 (5) SCC 95* and *Warner Bros. Entertainment Inc. & Anr. v. Harinder Kohli and others, ILR 2009 Delhi 722*.

8. It is contended that the Appellants carried on business from 1992 to 1999 at Delhi in name “Haldiram Bhujawala”, when suddenly the business was brought to a halt by the impugned order and in case the suit is dismissed finally, the Appellants cannot be fully compensated as the Respondents have not even been asked to maintain the accounts for this period so that the loss accrued to the Appellants by virtue of this interim order is accounted for. It is contended that the learned Single Judge did not consider any of the contentions raised by the Appellants and proceeded as if the documents i.e. the dissolution deed and the declaration deed are not disputed and hence the judgment of the learned Single Judge is perverse and is liable to be set aside.

9. According to the learned counsel for the Respondents, Haldiram was the nickname of Shri Ganga Bishan. Shri Ganga Bishan was the original and prior inventor and adopter of the name/trademark Haldiram Bhujawala. Shri Ganga Bishan carried on the business as “Haldiram Bhujawala” from his very young age his concern is known as M/s Chandmal Ganga Bishan. On 3rd November, 1956 Shri Ganga Bishan converted the said concern “M/s Chandmal Ganga Bishan” into partnership comprising of four partners, namely, Ganga Bishan, Mool Chand, Sati Dass and Rameshwar Dass. Two years later Rameshwar Dass retired from the partnership. Shri Ganga Bishan brought his trademark “Haldiram Bhujawala’ into the said partnership thereby making it an asset of the partnership. The constitution of the firm changed from time to time and the business of the firm continued. Shri Ganga Bishan permitted Rameshwar Lal to use his trademark “Haldiram Bhujawala” at Calcutta. On 29th December, 1972, the partnership firm applied for registration of the trademark “Haldiram Bhujawala” and ‘V’ shaped logo. In 1974 a territorial division was settled within the family whereunder the family of Kamla Devi/Rameshwar Lal was given exclusive right for user of the trade mark in West Bengal, while family of Mool Chand was given exclusive right for user in rest of the country. This division is reflected in Dissolution Deed of firm M/s Chandmal Ganga Bishan dated 16th November, 1974, Declaration

deed of Rameshwar Lal Aggarwal dated 16th November, 1974 and Dissolution Deed of M/s Rameshwar Lal Shiv Rattan dated 5th November, 1975. Only in 1977, that is, 3 years after the division and 5 years after the application filed by the firm M/s Chandmal Ganga Bishan for registration of the trademark, Rameshwar Lal applied for registration of the trade mark 'Haldiram Bhujawala'.

10. Learned counsel appearing on behalf of the Respondents urges that the interim order was passed on 12th May, 1999 and since then it is in operation. An application for vacation of stay was filed on fresh facts, which was dismissed and no relief was granted to the Appellants in the said proceedings, till the Supreme Court. So the present appeal has become infructuous and the same should not be entertained. It is also contended that the proceedings under Order XXXIX Rule 4 CPC having attained finality in the present case, the present appeal is barred by res judicata, estoppel, doctrine of merger and abuse of process. The order of the Hon'ble Supreme Court has brought about finality to the matter of interim order. Reliance is placed on the decision in ***Barkat Ali and Another v. Badrinarain, 2008(4) SCC 615.***

11. The Respondents contend that the Appellants in the present appeal will not go beyond the issues taken by the Appellants in the Trial Court and the said issues have been dealt with by the learned Single Judge. It is stated that

the trade mark was registered in the name of the firm M/s. Chand Mal Ganga Bishan and Kamla Devi having relinquished the trade mark by virtue of the dissolution deed, she or her successors were not entitled to use the trade mark. The Appellants having not disputed the factum of dissolution deed dated 16th November, 1974, in their first written statement and the said written statement was verified as per knowledge of the Appellants, now the Appellants cannot retrieve back and state that the dissolution deed was either obtained under force and coercion or was a forged document. Learned counsel for the Respondents also rely on the Will of late Ganga Bishan and contend that the Appellants cannot claim user of the trademark beyond Calcutta in terms of the Will. It is contended that in terms of the Will, the reputation and goodwill of the trade name HRB-Haldiram Bhujawala was exclusively and absolutely bequeathed to Mool Chand and thus they being the legal heirs of Mool Chand are the exclusive owners of the trade mark.

12. It is submitted by learned counsel for the Respondents that immediately on coming to know about the opening of shop by the Appellants at Arya Samaj Road, Karol Bagh, they came to the Court and thus were entitled to the injunction in view of the prima facie case and the balance of convenience in their favour. Reliance is placed on *Kaviraj Pandit Durga Dutt Sharma v. Navaratna Pharmaceutical Laboratories, AIR 1965 SC 980* and *Rhizone*

*Distilleries P. Ltd. and others v. Pernod Ricard S.A. France and others,
2009 X Apex Decision (Delhi) 305.*

13. This appeal was admitted on 25th May, 1999 and was on the regular board of this Court for quite some time, when on reaching its turn we have heard the appeal.

14. At the outset we may note that we had heard the learned counsels for the parties at length for number of days and the judgment was reserved on 29th April, 2010. The matter was thereafter mentioned on 4th May, 2010 by learned counsel for the Respondents that he would like to make further submissions. The matter was then further heard. In the meantime, during the course of hearing, the parties also tried to settle the matter and had almost reached a settlement. The same was recorded vide order dated 11th May, 2010 and the matter was adjourned for chalking out the modalities. However, on 20th May, 2010 the parties informed that they could not settle their disputes and hence as the arguments had already been heard at length, the matter was reserved for judgment.

15. We would first like to deal with the submission of learned counsel for the Respondents that since the application for vacation of stay filed by the Appellants under Order XXXIX Rule 4 CPC was dismissed and the said order

has not been interfered even by the Hon'ble Supreme Court, the impugned order dated 12th May, 1999 on the application of the Respondents under Order XXXIX Rule 1 and 2 CPC has attained finality and thus the present appeal has become infructuous. Before we express our view on it, we would like to give the genesis for the application under Order XXXIX Rule 4 CPC filed by the Appellants and the consequences thereof. Pursuant to the impugned order dated 12th May, 1999 the Appellants filed the present appeal which as stated above was admitted on 25th May, 1999. When this appeal was admitted, the application of the Appellants for stay of the impugned order, that is, CM No.1920/1999 was dismissed. Thereafter the Appellants filed CM Nos.2411-2412/1999 seeking recall of the order dated 25th May, 1999 and for rehearing of the application in view of the fresh facts that were found out, that the mother of Appellant No.2 Smt. Kamla Devi had not signed the alleged dissolution deed dated 16th November, 1974 and thus the same was a forged and fabricated document. As fresh facts were pleaded in the said applications, the Division Bench of this Court vide order dated 6th August, 1999, held that in case fresh material has to be considered, the prayer ought to be made before the learned Single Judge, who would be in a better position to appreciate the fresh material and assess the evidentiary value to be attached to it and the same would also provide the Appellate Bench the benefits of the views of the

learned Single Judge. The learned Single Judge was also requested to decide the matter expeditiously. Thus, the Appellants moved two applications in the civil suit, one under Order XXXIX Rule 4 CPC for vacation of injunction and the other under Order VI Rule 17 of CPC for amendment of the written statement, in view of fresh facts. In the meantime, the suit was again transferred to the District Court in view of the change of pecuniary jurisdiction. The Additional District Judge allowed the application for amendment of the written statement, however, the application for vacation of injunction under Order XXXIX Rule 4 CPC was dismissed. The appeal filed by the Respondents against the order in application under Order 6 Rule 17 CPC was allowed thereby not permitting the amendment of the written statement whereas the appeal of the Appellants against the order in application under Order XXXIX Rule 4 CPC was dismissed by the learned Single Judge of this Court. Against these orders, the Appellants herein filed Special Leave Petitions. On leave being granted, the Hon'ble Supreme Court decided the Civil Appeal Nos.6040-6041/2000 vide order dated 1st October, 2008 as under:-

“In S.L.P.(C) Nos.22728-22729/2007:

Leave granted.

In a pending Suit No.188/2003 in the Court of Additional District Judge, Delhi, filed by Anand Kumar Deepak Kumar and others against Haldiram Bhujawala, an application was made by the defendant to amend the written statement. It may be mentioned that in the original written statement, it was stated that the deed of assignment was signed by Kamala Devi out of respect. Later on, by way of amendment, it was stated that the deed of dissolution was signed out of coercion. We are not concerned with the first amendment which was allowed to the written statement. However, on 5th October, 1999, an application for amendment was preferred by the appellants herein under Order 6, Rule 17 of C.P.C., inter alia, seeking permission to amend the written statement in view of subsequent developments set out in the said application.

It is this application dated 5th October, 1999 which is the germ of the present dispute. By this application, the earlier statement made in the written statement that the deed was executed under coercion was sought to be substituted by the statement and plea that "the deed was forged".

The narrow question that arises for determination is whether the trial court was right in allowing the application for amendment dated 5th October, 1999? It may be stated that by the impugned judgment, the High Court has reversed the judgment of the trial court granting the said amendment.

We have gone through the impugned judgments, both of High Court as well as of the trial court, on this point. On going through the judgment of the trial court, we find that while allowing the amendment application, the trial court has relied upon number of documents and has in effect given a finding almost touching upon the merits of the case. Further, we find that in para 49, the trial court has stated that circumstances exist in this case which should allow admission of certain facts to be corrected. In our view, the trial court had erred in allowing the amendment application for the reasons it has given, namely, it has gone into virtually the merits of the case and sought to correct the existing admission vide the impugned

order. In our view, however, we can proceed in this case on the footing that on the relevant date there was a statement in the written statement to the effect that "the deed of dissolution is executed under coercion". If the trial court proceeds on the issue arising from that statement, at the stage of trial, the burden would be on the respondent herein to prove the execution and the contents of the document, namely, deed of dissolution, dated 16th November, 1974. Proving of the document involves proving of execution of the document as well as proving of its contents (see AIR 1983 Bombay 1). At the stage of proving the execution of the document, it would be open to the appellants herein to cross-examine the witness on the question of execution as well as its content. In that regard, they can rely upon material in their possession and if the trial court finds that there is prima facie case of forgery, it can certainly give an opportunity to the defendant-appellants herein to file an additional written statement and it would be open to the trial court also to frame an additional issue at that stage.

We are informed that the trial has not yet commenced.

In the light of what is stated above, we are of the view, therefore, that ends of justice would be subserved if, at the stage of proving of the document in question, the trial court finds that there is a prima facie case of forgery then it may allow the appellants herein to file additional written statement and the court may then frame such additional issue.

Before concluding, we may state that on 29th January, 2005, the appellants herein have filed amended written statement in pursuance of the order of the trial court. The said written statement will be kept on record in a separate file. That written statement will be taken into account only as and when the trial begins and only after the stage of proving the deed of dissolution is reached and as and when the prima facie case of forgery is made out during the trial.

We have been informed that issues have been framed on the basis of the amendment to the written statement which has

been allowed by the trial court. It is, therefore, made clear that issues will have to be recast in the light of this order.

Subject to above, Civil Appeals stand disposed of, with no order as to costs.

In S.L.P.(C) Nos.23268-23269/2007:

In this case, we find that members of a family are fighting with each other from 1991. Interim applications are increasing by the day. To put an end to all this controversy, we direct the trial court to hear and dispose of Suit No.188/2003 as early as possible and preferably within six months from today.

We are informed that issues have been settled. We are also informed that dates have been given for day-to-day trial. We request the trial court not to show any leniency in the matter of adjournment and the trial shall proceed on day-to-day basis.

In view of our above directions, Shri F.S. Nariman, learned senior counsel appearing on behalf of the petitioners, seeks permission to withdraw these Special Leave Petitions. Accordingly, the Special Leave Petitions stand dismissed as withdrawn.”

16. Thus, the Hon’ble Supreme Court did not deem it appropriate to interfere in the matter between the parties at that stage and vide order dated 1st October, 2008 directed early disposal of Suit No.188/2003 preferably within six months from the said date. We have been informed by the parties that the end of the trial is nowhere near. The first witness of the Plaintiffs/Respondents herein is under cross examination and there are

approximately 15 more witnesses to be examined by the Respondents whereafter the Defendant/Appellant's evidence would start. Besides as the Hon'ble Supreme Court vide order dated 1st October, 2008, as reproduced above, had observed that if at the stage of proving of the document in question, the trial court finds that there is a prima facie case of forgery, then it may allow the Appellants herein to file additional written statement and the Court may then frame such additional issue. We are informed by learned counsel for the Appellants that from the testimony of Respondent's witness No.1, which is in progress, sufficient evidence has come on record to show that prima facie, the said document is a forged document and hence he has moved an application for taking the amended written statement on record and arguments thereon are going on. Thus, despite the order of the Hon'ble Supreme Court dated 1st October, 2008 we see no end to the trial in near future and hence as the present appeal had come up for regular hearing in due course, on its own turn, we have heard the matter and are proceeding to decide the same.

17. We are not in agreement with the contention of learned counsel for the Respondents, that in view of the order dated 1st October, 2008 passed by the Hon'ble Supreme Court, the issue of interim injunction has attained finality and the present appeal is barred by res judicata, estoppel, doctrine of merger

etc. In the present case the impugned order relates to the facts which were before the learned Trial Court while passing the impugned order dated 12th May, 1999. As fresh facts were discovered by the Appellants, an application was filed before this Court, for vacation of the injunction which was disposed of with liberty to the Appellants to approach the learned Single Judge with the fresh facts. Thus, the issue for decision by the Trial Court on the application under Order XXXIX Rule 4, the appeal thereon and the decision of the Hon'ble Supreme Court dated 1st October, 2008 in SLP (C) No.23268-23269 is not the issue in the present appeal. Moreover, vide order dated 1st October, 2008, the Hon'ble Supreme Court did not interfere on the merits but to put an end to the controversies, directed early disposal of the suit, preferably within six months, as the case related to members of a family, fighting each other. It may be noted that the decision of the Hon'ble Supreme Court was not on merits and the decision of the learned Single Judge in appeal was confined to fresh fact pleaded and thus it cannot be said to be barred by res judicata. Reliance of learned counsel for the Respondents on *Barkat Ali and Another v. Badrinarain* (supra) is misconceived. In the said decision it was observed that the principle of res judicata applies not only in respect of separate proceedings but also in respect of subsequent stage of the same proceedings. There is no dispute to this proposition. However, in the present case the

issues decided by the learned Single Judge by way of the impugned order dated 12th May, 1999 have not attained finality and there is no decision thereafter by any court on the said issues and hence the present appeal is not barred by res judicata or estoppel or doctrine of merger or abuse of process.

18. We reiterate the decision of the Division Bench of the High Court at Mumbai in *Laxman Shivashankar v. Saraswati and Anr.*, AIR 1961 Bombay 218 wherein it was held:-

“It appears from the decisions mentioned above that it cannot be laid down as a general proposition, that where a previous decision is supported on two or more findings, all the findings will necessarily operate as res judicata. Where the previous suit was dismissed on a technical ground which made the suit untenable, findings recorded on the merits would normally be obiter dicta. Similarly, if the Court which decided the prior suit has itself based the decision on only some of the findings recorded by it, or if under the circumstances of the case its decision can be fairly attributed to only some of the findings so recorded, the other findings would not operate as res judicata. In other cases, where the previous decision is based upon, and is attributable to, several findings, all the findings will have the force of res judicata.”

19. Before dealing the case on merits, we may at this stage clarify that we are not going into the case of the Appellants on the basis that the dissolution deed dated 16th November, 1974 is a forged and fabricated document as that was the issue involved in the subsequent application under Order XXXIX

Rule 4 CPC and are confining the decision in the present appeal only to the pleas that the dissolution deed was got executed as a result of force and coercion and the declaration deed is a forged document i.e. the facts which were before the learned Single Judge till the passing of the impugned order dated 12th May, 1999.

20. The learned Single Judge in the impugned order framed two questions for determination which are as under:-

“(1) Who are the first adopters/users of the trademark; and (2) What is the effect of assignment of the trademark in question to be exclusively used by Mool Chand by virtue of dissolution deed dated 16.11.1974?”

21. It is settled law that when contesting parties hold trademark registrations, their rights are to be determined on the basis of the principles applicable for passing off, the most important component of which is establishing prior user of the trade mark. It may be noted that the relief in the plaint sought is not only of infringement of the trade mark but also of passing off. Both the Appellants and the Respondents are the registered holders of the trade mark ‘Haldiram Bhujawala’ with V logo containing of HRB in a circle and the registration of the Appellants vide No.330375 is valid for all over the country whereas the registration of the Respondents vide No.280562 is valid

all over India except West Bengal. Thus, in view of the fact that the Appellants on the date of impugned order and even today are the holders of a valid registered trademark “Haldiram Bhujawala” with V logo, the only reason they could be enjoined was the demonstration of prior user by the Respondents or a contract to the contrary between the parties.

22. It may be noted that the parties are improving their stands in each subsequent plaint and written statement. In the plaint it is claimed that Shri Mool Chand was the inventor and adopter of the trade mark/trade name “Haldiram Bhujawala” and the Respondents being the successor in interest of Shri Mool Chand are continuously and extensively using the same in the course of their business since 1965 and by Respondent No.1 since 1983 in Delhi whereas Appellants in the written statement claimed that their father Rameshwar Lal Aggarwal was the original inventor, adopter and user of the trade mark from 1958. After the claim of the Appellants in the written statement from 1958, the claim of the Respondents in the amended plaint changed to that of the user by their grandfather Ganga Bishan @ Haldiram since 1941 and thus they being the successor in interest were entitled to use it.

23. The undisputed fact in the present case is that late Ganga Bishan @ Haldiram was the grandfather of both the Appellants and the Respondents. The Appellants are the sons of Rameshwar Lal Aggarwal s/o Ganga Bishan

and the Respondents are sons of Mool Chand s/o Ganga Bishan. There can be no better document than the affidavit of Ganga Bishan himself wherein he has stated that he invented and adopted the trade mark Haldiram Bhujawala as his nick name was Haldiram and his sons are using the same. The affidavit of Ganga Bishan dated 25th June, 1976 before the Registrar of Trade Marks, Delhi in support of the application No.285062 is as under:-

“I, Ganga Bishan alias Haldiram, son of Shri Chand Mal aged 75 years, resident of Bhujia Bazar, Bikaner, Rajasthan do hereby solemnly affirm, declare and say as follows:

1. That ‘HALDIRAM’ is my nick-name and I have been commonly known and called by the name HALDIRAM than my personal name ‘GANGA BISHAN’.
2. That from my very young age I have been in the business of manufacturing and sale of Bhujia, Pappad, Namkeens and sweetmeats and have been trading under the Trade Name ‘HALDIRAM BHUJIWALA at Bikaner. The Trade name HALDIRAM BHUJIWALA is presently being used by my sons at Bikaner and Calcutta.
3. That my cousins and their sons are also in the trade of manufacture and sale of Bhujia, Pappad, Namkins and sweetmeats under different trade names. They have never used and they are not entitled to use my nick-name HALDIRAM or part of their trading style.
4. That HALDIRAM is my nick-name only and is not a name of any family. My cousins and/or their sons are business competitors of my sons and fraudulently intend to use my name HALDIRAM as part of their trade name with a view to trade upon the goodwill and reputation accrued to my name. They have no right whatsoever to use my name in any manner during the course of their business.

5. I produce a few documents which may prove my nick-name HALDIRAM. I am popularly known by nick-name only and not by personal name.

DEPONENT

VERIFICATION:

Verified at Bikaner at this 25th day of June 1976 that the contents of the above paragraphs are true to the best of my knowledge and belief and nothing has been concealed therefrom.

DEPONENT”

24. Though the learned Single Judge has adverted to this affidavit but failed to notice para 2 of the affidavit, wherein it is categorically stated that the trade name 'Haldiram Bhujawala' is presently being used by his sons at Bikaner and Calcutta. From the perusal of the impugned order we find that the learned Single Judge has adverted to disputed documents i.e. the dissolution deed and declaration deed dated 16th November, 1974 as admitted documents without taking note of the contentions raised by the learned counsel for the Appellants.

25. We may note that in paragraph 25 of the reported impugned judgment the learned Single Judge has come to the following conclusions:-

“The following result emerges from the above discussion:-

1. Late Shri Ganga Bishan who was also known as Haldiram Bhujawala was the inventor/first adopter and first user of the

tradename "Haldiram Bhujawala" which he had adopted since his childhood in or before 1941 and he has been doing business in this tradename.

2. He had adopted and used this trademark "Haldiram Bhujawala" with the logo of "HRB" in a particular shape and design since 1965 while doing business in a partnership under the names and style of: (1) Chand Mal Ganga Bishan and (2) Haldiram Bhujawala with four partners, namely, Ganga Bishan (himself), Mool Chand, Shiv Kishan and Smt. Kamla Devi.

3. By means of dissolution deed dated 16.11.1974, the trademark was exclusively assigned to Shri Mool Chand for use in India except the State of West Bengal.

4. Smt. Kamla Devi who was a party to the dissolution deed as a partner is bound by the terms of this dissolution deed.

5. Rameshwar Lal, predecessor-in-interest of the defendants has also bound himself in his simultaneous declaration made on 16.11.1974 confirming/accepting the same.

6. After the dissolution of the firm 16.11.1974 Shri Mool Chand exclusively became entitled to the use of this trademark in India except in the State of West Bengal.

7. After the death of Shri Mool Chand, this trademark was transferred to his four sons, namely, Shiv Kishan Aggarwal, Shiv Rattan Aggarwal, Manohar Lal Aggarwal and Madhu Sudan Aggarwal w.e.f. July 30, 1985.

And they became the registered subsequent proprietor of this trademark.

8. Subsequently, this trademark was assigned/transferred in the name of the company Haldiram (India) Pvt. Ltd. in 1995.

9. Defendants or their predecessor-in-interest - Ramashwar Lal was doing his business only in Calcutta.

10. The plaintiff No.,1 M/s. Anand Kumar, comprising of three sons of Mool Chand had started a shop in Chandni Chowk in the year 1983 and using the said trademark. They are prior used of this trademark in Delhi. They thus are both registered proprietors as well as prior used of this trademark.”

26. In fact after arriving at the conclusion at point No.1 that late Ganga Bishan also known as Haldiram was the first inventor, adopter and user of trade name Haldiram since his childhood on or before 1941 and has been doing the business in this trade name, the learned Single Judge came to the subsequent findings erroneously without taking into consideration the affidavit of Ganga Bishan himself, basing his conclusions on highly disputed documents, that is, the dissolution deed 16th November, 1974 and the declaration deed dated 16th November, 1974 without even considering the contentions raised by the Appellants. In regard to the conclusion No.2 it may be noted that the four partners of Chandmal Ganga Bishan and Haldiram though had applied for the registration of the trade mark “Haldiram Bhujawala” with the logo of HRB but the intention of Ganga Bishan was not to make the trademark an asset of partnership firm M/s. Chandmal Ganga Bishan only. In his affidavit dated 25th June, 1976 reproduced above Ganga Bishan was very clear that his trade mark ‘Haldiram Bhujawala’ is presently being used by his sons at Bikaner and Calcutta. Though the learned Judge has

quoted the affidavit of Ganga Bishan in paragraph 13 of the judgment, however, in sub-para 2 he fell short of reproducing that the trade name 'Haldiram Bhujawala' is presently being used by his sons at Bikaner and Calcutta. It may also be noted that there is yet another affidavit of Ganga Bishan on record which states that he is permitting his son Rameshwar Lal Aggarwal to use the trade mark 'Haldiram Bhujawala'. There is yet another written statement dated 26th June, 1976 on record in a suit filed by Rameshwar Lal Aggarwal wherein Ganga Bishan has categorically stated that the Plaintiff therein, that is, Rameshwar Lal Aggarwal started the aforesaid business at Calcutta somewhere in 1957/1958 when he was also in Calcutta to assist him in setting up the business and that he has authorized his son to use 'Haldiram Bhujawala' as his trading style, as his name has acquired reputation and goodwill among the trade and public in respect of the goods. Prima facie from the affidavit and written statement of Ganga Bishan it was not his intention to make the trade mark "Haldiram Bhujawala" as asset of firm Chandmal Ganga Bishan or permit user only by it. If this was the intention of Ganga Bishan in 1976, then the veracity of the dissolution deed and the declaration deed dated 16th November, 1974 is seriously doubtful.

We may note that from the “Will” of late Ganga Bishan relied upon by the learned counsel for Respondents, it is evident that there is an acknowledgement of the area of user by each party i.e. Calcutta and Bikaner. Even if it is taken that the limits were prescribed, that at best appears to be that the parties will not transgress on each other’s territory i.e. the Appellants will not do business in Bikaner and Respondents in Calcutta. However, it does not state that the parties are precluded from entering the other territories, like Delhi etc. The relevant portion of the ‘Will’ of late Ganga Bishan dated 3rd April, 1979 relied in the amended plaint is as under (as per English translation at page Nos.58 and 59 of the compilation of the Respondents):-

“That my name being Haldiram and our ancestrals acquired fame and good will by this name and that the goodwill and fame acquired by my children at Calcutta, Nagpur and Bikaner and that which will continue to be acquired in future my three sons and grand sons within their limits and for use of the property acquired by them in their shares shall continue to use and enjoy the said goodwill and fame. No one shall interfere in one another business and property. My son Mool Chand shall only be entitled to use and enjoy the goodwill acquired and earned by this name in **Bikaner only** and no other shall be entitled for the same.”

27. With regard to the conclusion Nos.3, 4 and 6, the learned Single Judge has relied on the dissolution deed dated 16th November, 1974. The said document was according to the Appellants in their written statement, a document obtained under force and coercion. The observations of the

Hon'ble Supreme Court in this regard are relevant wherein it has been observed that "even proceeding on the basis as stated in the written statement that "the deed of dissolution is executed under coercion" during the trial, the burden would be on the Respondents herein to prove the execution and the contents of the document. Proving of the document involves proving of the execution of the same as well as proving of its contents. (See AIR 1983 Bombay 1). At the stage of the execution of the document it would be open to the Appellants herein to cross examine the witness on the question of execution as well as its contents." A bare perusal of the impugned order would show that the learned Single Judge has neither noted nor discussed the contentions of the Appellants that this dissolution deed has been obtained under force and coercion. In fact, the impugned order proceeds as if the said document is an admitted document and in view thereof not only the signatories to the document but their successors in interest were also bound.

28. The conclusion No.5 of the learned Single Judge that the predecessor in interest of the Appellants, that is, Rameshwar Lal having bound himself simultaneously by a declaration deed dated 16th November, 1974 is also erroneous. It may be noted that this declaration deed was not adverted to in the plaint or in the replication to the written statement. When the Appellants in the written statement asserted their right of succession not only through

their mother Kamla Devi but also through their father Rameshwar Lal, in the amended plaint this document has been adverted to. In the entire impugned order the contention of the Appellants that this declaration deed dated 16th November, 1974 is a forged document has not even been noted and there is no discussion whatsoever on this aspect. The learned Single Judge has gone on the premise, as if the said document is yet again an admitted document.

29. Though the learned counsel for the Appellants have challenged the conclusions arrived at with regard to transmissions in paragraphs 7 and 8 we are not adverting to them at the moment as the same would be for the Trial Court to look into them in detail. We may also note that on the basis of conclusions arrived at in paragraphs 9 and 10 the learned Single Judge held that the Appellants are not entitled to use the present trade mark in Delhi and has restrained the Appellants from using the said trade mark or any other trade mark identical or deceptively similar in India except the State of West Bengal. As noted above, the Appellant's registration of the trade mark 'Haldiram Bhujiawala' is for the whole of the country. The learned Single Judge on the basis of the dissolution deed and declaration deed, both of which are disputed documents, without considering the contentions of the Appellant has injuncted them from using the said trade mark in India except the State of West Bengal. When the Appellants are registered proprietors of identical marks and also

honest and concurrent users of the said mark, in our view, the order of injunction without even adverting to the contentions raised by the Appellants was erroneous. The interest of justice can be met in such a case by using an identification mark which distinguishes the product of one from that of the other. In a judgment delivered by this Court in *Star Bazaar Pvt. Ltd. v. Trent Ltd. in FAO (OS) No.510/2009* it was had held that if the Respondents therein used the words “A Tata Enterprise” above “Star Bazaar” in its retail departmental store to be opened in Delhi, the purpose would be served.

30. Learned counsel for the Respondent No.1 though did not argue but by way of written submissions urges that in the present appeal M/s. Haldiram (India) Pvt. Ltd. is not impleaded as a party and the same is fatal to the subject matter of appeal, as the subject trademark bearing no.280562 is now registered in favour of the said company. Though during the course of hearing learned counsel for the Appellants filed the amended memo, however, the same is not relevant for the present appeal as M/s. Haldiram (India) Pvt. Ltd. was impleaded as a Plaintiff in the suit only after the impugned order was passed by the learned Single Judge.

31. There is yet another aspect of the matter. The learned Single Judge has arrived at a finding of fraud having been committed by the Appellants in registration of the trade mark ‘Haldiram Bhujawala’ vide registration No.

330375. In this regard certain applications signed by Shri R.N.Prabhakar, Advocate, who happened to be the counsel for both the parties in the various litigations, have been relied upon by learned Single Judge. We may note that the rectification proceeding filed by the Respondents against the said Registration was dismissed, the appeal against the same preferred before the High Court of Calcutta was withdrawn and the appeal filed thereafter is now being heard by the Intellectual Property Appellate Board. A conclusion that the Appellants have obtained the Registration of the trade mark by fraud, arrived at by the learned Single Judge, without taking into consideration the entire documents, in our view is unfounded and perverse.

32. We, therefore, set aside the impugned order dated 12th May, 1999 and remand back the application i.e. IA No.1675/1992 for hearing by the learned Trial Court, who after hearing the parties, shall pass appropriate orders thereon. During the course of hearing learned counsel for the parties have sought to advert to documents which were not part of record of the suit at the time of passing of the impugned order. The scope of hearing of this application would be limited to the facts and averments which were available on the trial court record upto the passing of the impugned order dated 12th May, 1999 and the fresh facts which were the basis of the application under Order XXXIX Rule 4 will not be taken into consideration. We request the

learned trial court to hear this application expeditiously and also expedite the suit pending before it as directed by the Hon'ble Supreme Court. The views expressed by us, hereinabove are only prima facie and are not a final expression on the merits of the matter. The matter will be decided by the learned trial court independently, after taking into consideration the contentions raised by both the parties and documents before it.

33. The appeal is allowed. No order as to costs.

(MUKTA GUPTA)
JUDGE

(MADAN B.LOKUR)
JUDGE

JUNE 03, 2010
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