E.A. ABOOBACKER & ORS. A

v.

STATE OF KERALA & ORS.

(Civil Appeal No. 2772 of 2011)

SEPTEMBER 27, 2018 B

[MADAN B. LOKUR AND DEEPAK GUPTA, JJ.]

Land Acquisition Act, 1894 – ss.3(c), 4(1), 17(1) and 17(4) – Special Tahsildar if empowered to perform the functions of the Collector under the Act – State Government acquired land in its district for purpose of the Infopark and invoked the urgency clause u/s.17(1) of the Act – Thereafter, notification was issued u/s.4(1) of the Act – According to appellants their separate land was sought to be acquired along with the land of others – Appellants contended that Special Tahsildar was not entitled to perform the functions of Collector in respect of other acquisitions for which he was not empowered under the Act – Held: A notification dated 21.08.1989 was issued by the State Government appointing Special Tahsildar to perform the functions of a Collector only in respect of any land within his jurisdiction for the acquisition of which a notification under sub-section(1) of s.4 of the Act was published – Special Tahsildar was not empowered by the notification to issue any fresh notification in respect of other land – Notification dated 21.08.1989 was followed by an explanatory note, which resolved the ambiguity – It clearly indicated that notification was issued only to empower the officer to act as Collector in respect for which the notification under sub-section(1) of s.4 had already been issued – If the State wanted him to act as Collector in respect of other acquisitions, nothing prevented the State from issuing a fresh notification in this regard, but relying upon the notification dated 21.08.1989 the Special Tahsildar could not have acted as Collector in respect of other acquisitions. C D E F G

Allowing the appeals, the Court

HELD: 1. On perusal of the notification dated 21.08.1989 it is apparent that by the said notification the Government of Kerala had appointed an officer by the name of Special Tahsildar (LA), K.R.L., to perform the functions of a Collector under the H

A **Act only within the area of Ernakulam District, only in respect of any land within his jurisdiction for the acquisition of which a notification under sub-section (1) of Section 4 of the Land Acquisition Act, 1894 has been published. [Para 8] [268-G]**

2. On a careful analysis of the said notification, the State B **has empowered the specified officer i.e. the Special Tahsildar (LA), K.R.L. only in respect of the land for which the notification under sub-section (1) of Section 4 had already been issued. The Special Tahsildar (LA) K.R.L. was not empowered by the notification of 21.08.1989 to issue any fresh notification in respect of other land. Though the explanatory note may not be part of** C **the notification the same can definitely be used to resolve the ambiguity, in the notification. The explanatory note clearly indicates that the notification has been issued only to empower the officer to act as Collector in respect of 320 acres of land. [Para 9] [269-A-C]**

D **3. The High Court erred in taking the view that since public interest is concerned a liberal view has to be taken and when acquisition proceedings are completed or going on for acquiring large portions of lands required for public purpose, such acquisition cannot be stopped on "cryptic hyper-technical** E **ground". It is a settled position of jurisprudence that when the law prescribes a procedure to be followed for doing any act or thing then that procedure has to be followed and any violation of such procedure would make the act voidable, if not void. There is no doubt that the State is empowered to appoint any officer other than a Collector or Deputy Commissioner to act as** F **Collector. However, the notification should be clear as to for what purpose such Collector is being appointed. As far as the present case is concerned the Special Tahsildar (LA), K.R.L. was appointed as Collector only in respect of the acquisition of land relating to Cochin Refineries Limited within Ernakulam** G **District. If the State wanted him to act as Collector in respect of other acquisitions, nothing prevented the State from issuing a fresh notification in this regard, but relying upon the notification dated 21.08.1989 the Special Tahsildar (LA), K.R.L. cannot act as Collector in respect of other acquisitions. This is not a hyper-technical ground. When the State wants to acquire the property**

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of a citizen which is a constitutional right of any citizen under Article 300(A) of the Constitution of India it must strictly follow the procedure prescribed by law. It cannot urge that because the acquisition is in public interest a more liberal view is to be taken. There is no question of taking a liberal or conservative view. The only view which has to be taken is the legal view. The Special Tahsildar (LA), K.R.L. was not authorized to act as Collector for the entire District of Ernakulam and is empowered only in respect of acquisitions for which notification had already been issued for acquiring land for the Cochin Refineries Limited. [Para 11] [289-D-H; 270-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2772 of 2011.

From the Judgment and Order dated 06.01.2009 of the High Court of Kerala at Ernakulam in W.A. No. 2446 of 2008

WITH

Civil Appeal Nos. 2773-2774 and 2775 of 2011.

R. Venkataramani, Sr. Adv., Ms. Bindu K. Nair, Shinu J. Pillai, Yashraj Bundela, Praveen Vignesh, Sushant Singh, Babby Augustine, V. K. Sidharthan, Ranjith K. C., Mayilsam K, Ninargam R. Maurya (for V. N. Raghupathy), Advs. for the Appellants.

Basant R., K. N. Balgopal, Sr. Advs., Sajith P., Mohd. Monish, G. Prakash, Jishnu M. L., Ms. Priyanka Prakash, Ms. Beena Prakash, Advs. for the Respondents.

The Judgment of the Court was delivered by

DEEPAK GUPTA, J. 1. The short question which arises in these appeals is whether the Special Tahsildar (Land Acquisition), Cochin Refineries Limited, Ernakulam, Vytilla, Cochin-19 [hereinafter referred to as "the Special Tahsildar (LA), K.R.L."] was empowered to act as Collector under the Land Acquisition Act, 1894 (hereinafter referred to as "the Act"), in respect of lands acquired by the State for an Infopark.

2. On 05.12.2005, the Government of Kerala accorded administrative sanction to acquire 177.79 acres of land in Ernakulam district for the purpose of the Infopark. The Government also accorded sanction to invoke the urgency clause under Section 17(1) of the Act. Thereafter, on 15.12.2005, the District Collector, Ernakulam issued a Government Order appointing the Special Tahsildar (LA), K.R.L. as the

A Land Acquisition Officer for the acquisition of land for the Infopark. Thereafter, a notification was issued under Section 4(1) of the Act. In the said notification, it is mentioned that in view of the order of the Government, application of Section 5(A) of the Act has been exempted by invoking the powers under Section 17(4) of the Act. According to the appellants 23.92 acres of land belonging to them was sought to be
B acquired along with the land of others. The appellants filed objections under Section 5A(1) of the Act. According to them no action was taken on their objections and, thereafter, they filed Writ Petition No.9735 of 2008 in the High Court of Kerala seeking various reliefs including quashing of the notification issued under Section 4(1) and 17(4) of the
C Act. The main ground raised was that the Special Tahsildar (LA), K.R.L. was not entitled to perform the functions of Collector under the Act. The stand of the State was that the Special Tahsildar (LA), K.R.L. was entitled to act as Collector for the entire Ernakulam District and was therefore empowered to act as Collector even in relation to land acquired for the Infopark. The writ court dismissed the writ petition in so far as
D this objection was concerned. The appellants filed Writ Appeal No.2446 of 2008 which was also dismissed on 06.01.2009.

3. We have heard Shri R. Venkataramani, learned senior counsel for the appellants, Shri Basant R., learned senior counsel appearing for Infopark and Shri K.N. Balgopal, learned senior counsel appearing for
E the State of Kerala.

4. Collector has been defined under Section 3(c) of the Act as follows :-

> "(c) the expression "Collector" means the Collector of a district, and includes a Deputy Commissioner and any officer specially
F appointed by the appropriate Government to perform the functions of a Collector under this Act;"

A bare reading of the provision makes it amply clear that the Collector and the Deputy Commissioner of a District are, by virtue of their office, deemed to be "Collector" within the meaning of the Act.
G The appropriate Government is also empowered under Section 3(c) to specially appoint any other officer to perform the functions of a Collector. It is obvious that the State has to issue a specific notification to appoint any other officer to perform the duties of Collector. The State may in its wisdom appoint such officer for the entire district or for a special project.

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5. Section 4(1) of the Act reads as follows :-

4. Publication of preliminary notification and powers of officers thereupon.- (1) Whenever it appears to the appropriate Government that land in any locality is needed or is likely to be needed for any public purpose or for a company a notification to that effect shall be published in the Official Gazette and in two daily newspapers circulating in that locality of which at least one shall be in the regional language, and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality (the last of the dates of such publication and the giving of such public notice, being hereinafter referred to as the date of publication of the notification).

6. In the present case, the controversy revolves around the notification dated 21.08.1989, which reads as follows:

Government of Kerala
Revenue (B) Department
NOTIFICATION

No.51590/BI/89/RD Dated, Trivandrum, 21st August, 1989

S.R.O No. 1743/89-In exercise of the powers conferred by clause(c) of Section 3 of the Land Acquisition Act, 1894 (Central Act 1 of 1894) the Government of Kerala hereby appoint the Special Tahsildar (Land Acquisition), Cochin Refineries Limited, Ernakulam Vytilla, Cochin-19 to perform the functions of a collector under the said Act within the area of Ernakulam District and under sub section 2 of section 4 of the said Act, authorize him, his servants and workmen in exercise of the powers conferred under the said sub section in respect of any land within his jurisdiction for the acquisition of which a notification under sub-section (i) of section 4 has been published.

By order of the Governor
T . Sankaran,
Additional Secretary to Government

Explanatory Note

(This does not form part of the notification but is intended to indicate its general purport.)

A As per the Government Order (MS) No. 1/89/ID dated 15.04.1989 Government have sanction creation of new special Land Acquisition Unit with 30 staff for the acquisition of 320 acres of land for the expansion of Cochin Refineries Limited, Ambalamugal. In order to perform the function of a 'Collector' under the Land Acquisition Act, the Land Acquisition Officer has to be authorized under Section 3 (c) of the Land B Acquisition Act. Hence the notification.

It has been urged by the State that the explanatory note not being part of the notification should not be taken into consideration.

7. According to the appellants the language of the notification is C very clear that the Special Tahsildar (LA), K.R.L. has been appointed as Collector only in respect of those lands for which the notification of acquisition under Section 4 has already been published. Therefore, according to the appellants, the Special Tahsildar (LA), K.R.L. has no power to act as Collector in respect of other acquisitions for which he is not empowered under the notification. The appellants also place reliance D on the explanatory note and submit that though it may not be part of the notification but it clearly indicates that the appointment of the Special Tahsildar (LA), K.R.L. was only in respect of 320 acres of land involved in the expansion of Cochin Refineries Limited and not for any other purpose. On the other hand, the stand of the respondents is that by this E notification the Special Tahsildar (LA) K.R.L. has been specifically appointed as "Collector" for Ernakulam District and is, therefore, empowered to act as Collector for all acquisitions of land in Ernakulam District. It has been submitted on behalf of the State that the words "has been" cannot be read only in the past tense and the words "has been" may be read as "is". It is also contended that the District Collector F has distributed the work to the Special Tahsildar (LA), K.R.L. vide order dated 15.12.2005.

8. On perusal of the notification it is apparent that by the said notification the Government of Kerala had appointed an officer by the name of Special Tahsildar (LA), K.R.L., to perform the functions of a G Collector under the Act only within the area of Ernakulam District, only in respect of any land within his jurisdiction for the acquisition of which a notification under sub-section (1) of Section 4 of the Act has been published.

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9. On a careful analysis of the notification, in our opinion, the State has empowered the specified officer i.e. the Special Tahsildar (LA), K.R.L. only in respect of the land for which the notification under sub-section (1) of Section 4 had already been issued. The Special Tahsildar (LA) K.R.L. was not empowered by the notification of 21.08.1989 to issue any fresh notification in respect of other land. Though the explanatory note may not be part of the notification the same can definitely be used to resolve the ambiguity, if any, in the notification. The explanatory note clearly indicates that the notification has been issued only to empower the officer to act as Collector in respect of 320 acres of land.

10. As far as the G.O. dated 15.12.2005 is concerned, all that we need to say is that under Section 3(c) of the Act, it is only the appropriate Government which can specifically appoint any other officer as Collector. The District Collector has no power to do so.

11. The High Court took the view that since public interest is concerned a liberal view has to be taken and when acquisition proceedings are completed or going on for acquiring large portions of lands required for public purpose, such acquisition cannot be stopped on "cryptic hyper technical ground". We are not at all in agreement with this view of the High Court. It is a settled position of jurisprudence that when the law prescribes a procedure to be followed for doing any act or thing then that procedure has to be followed and any violation of such procedure would make the act voidable, if not void. There is no doubt that the State is empowered to appoint any officer other than a Collector or Deputy Commissioner to act as Collector. However, the notification should be clear as to for what purpose such Collector is being appointed. As far as the present case is concerned the Special Tahsildar (LA), K.R.L. was appointed as Collector only in respect of acquisition of land relating to Cochin Refineries Limited within Ernakulam District. If the State wanted him to act as Collector in respect of other acquisitions, nothing prevented the State from issuing a fresh notification in this regard, but relying upon the notification dated 21.08.1989 the Special Tahsildar (LA), K.R.L. cannot act as Collector in respect of other acquisitions. This is not a hyper technical ground. When the State wants to acquire the property of a citizen which is a constitutional right of any citizen

A under Article 300(A) of the Constitution of India it must strictly follow the procedure prescribed by law. It cannot urge that because the acquisition is in public interest a more liberal view is to be taken. There is no question of taking a liberal or conservative view. The only view which has to be taken is the legal view. In our considered opinion the Special Tahsildar (LA), K.R.L. was not authorized to act as Collector for the entire District of Ernakulam and is empowered only in respect of acquisitions for which notification had already been issued for acquiring land for the Cochin Refineries Limited.

12. It has been urged by Shri K.N. Balgopal that Special Tahsildar (LA), K.R.L. has acted as Collector not only in the case of Infopark but in many other cases and many land owners have accepted the award and if we decide the matter against the State many complications may arise. We, therefore, make it clear that if any land owners have, without any objection to the authority of the Special Tahsildar (LA) K.R.L., accepted the award of the Collector or have filed objections with regard to quantum and area only and have not disputed the authority of the Special Tahsildar (LA) K.R.L. to act as Collector, such land owners cannot take benefit of this decision. As far as this decision is concerned it will only enure for the benefit of the appellants before us.

13. The appeals are accordingly allowed. Pending application(s) if any is also allowed. The judgments and orders of the High Court in Writ Appeal No.2446 of 2008 dated 06.01.2009 and Writ Petition No.9735 of 2008 dated 25.11.2008 are set aside in the aforesaid terms. We also make it clear that no other point was raised before us and, therefore, the State can take appropriate action in accordance with law if it still wants to acquire the land.

Ankit Gyan Appeals allowed.

WOCKHARDT LIMITED

v.

TORRENT PHARMACEUTICALS LTD. AND ANR.

(Civil Appeal No. 9844 of 2018)

SEPTEMBER 12, 2018

[R. F. NARIMAN AND INDU MALHOTRA, JJ]

Trademark: Infringement and passing off – Respondent having a trade mark 'CHYMORAL and CHYMORAL FORTE, a drug administered post surgically for swellings/wounds – Expression CHYMO comes from the generic name of drug which is CHYMOTRYPSIN-TRYPSIN – In 2014, the appellant acquired trademark CHYMTRAL with full notice of respondent no 1's registration – Suit for infringement and passing off by respondent – Injunction refused by the Single Judge of the High Court holding that confusion may be assumed, but not deceit or deception and no misrepresentation by appellant as to source, even assuming there is similarity – Division Bench held that the substitution of letter "T' for the letter "O' is the only difference between the two trade names, confusion on the ground of deceptive similarity would ensue, misrepresentation in law also made out, thus granted temporary injunction – On appeal, held: Though passing off is, in essence, an action based on deceit, fraud is not a necessary element of a right of action, and that the appellant's state of mind is wholly irrelevant to the existence of a cause of action for passing off, if otherwise the appellant has imitated or adopted the respondent's mark – On facts, after 17.11.2017, the appellant started to sell the same product under a new trade name, 'CHYMOWOK' and sales figure for the last 10 months under this new trade name amounted to Rs. 2.71 Crores – This trade name was registered in the name of the appellant way back on 14.11.2009 with effect from a date in 2008, but had not been utilized till the Division Bench judgment was passed against the appellant – Remaining stock of material has been disposed of under the trade name "CHYMTRAL", and that material manufactured after the Division Bench judgment is not being sold under the said trade name despite the stay granted in favour of the

A *appellant – In view of the appellant's sale under the "new" trade name being substantial, the discretionary jurisdiction u/Art. 136 is not exercised in favour of the appellant – Constitution of India – Art. 136.*

Wander Limited And Another v. Antox India P. Ltd. **1990 (Supp) SCC 727**; *Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd.* **(2001) 5 SCC 73**; *Laxmikant v. Patel v. Chetanbhai Shah and Another* **(2002) 3 SCC 65**; *S. Syed Mohideen vs. P. Sulochana Bai* **(2016) 2 SCC 683**; *Satyam Infoway Ltd. v. Siffynet Solutions Pvt. Ltd.* **(2004) 6 SCC 145– referred to.**

Case Law Reference

1990 (Supp) SCC 727	**referred to**	**Para 6**
(2001) 5 SCC 73	**referred to**	**Para 7**
(2002) 3 SCC 65	**referred to**	**Para 9**
(2016) 2 SCC 683	**referred to**	**Para 9**
(2004) 6 SCC 145	**referred to**	**Para 9**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 9844 of 2018

From the Judgment and Order dated 17.11.2017 of the High Court of Judicature at Bombay in Commercial Appeal No. 125 of 2017.

Mukul Rohatgi, Guru Krishna Kumar, Dr. A. M. Singhvi, Sr. Advs., Ninad Laud, Ms. Smriti Churiwal, Ivo D'Costa, Aman Varma, Asim Sood, Nandan Pendsey, Ms. Madhavi Khanna, Ms. Bhargavi Kannan, Rythm B., Ms. Aishwarya Modi, Ms. Liz Mathew, Advs. for the appearing parties.

The Judgment of the Court was delivered by

R. F. NARIMAN, J. 1. Leave granted.

2. The present Appeal arises from a Suit that was filed based on both infringement and passing off. However, at the time of the argument on the interim injunction before the learned Single Judge, the arguments were confined to passing off only.

3. The skeletal facts necessary to decide this Appeal are that the Plaintiff/Respondent has a trade mark called "CHYMORAL" and "CHYMORAL FORTE", which is a drug administered post-surgically for swellings that may arise and/or wounds that may arise. It is interesting to note that the expression "CHYMO" comes from the generic name of the drug which is CHYMOTRYPSIN-TRYPSIN. The learned Single Judge ultimately found, after a copious reference to the facts and case law, as follows:-

> "45. In the present case, I am not satisfied that any of these tests are met. Reputation as to source is not sufficiently demonstrated. The rival products have long co-existed and I cannot and will not presume misrepresentation by Wockhardt as to source, even assuming there is similarity. There is no explanation at all for Torrent's past conduct and the inaction with knowledge, or deemed knowledge, of Wockhardt's trade mark registration application, its advertisement and subsequent registration, with not a single objection from Torrent or is predecessor-in-title. There is no answer about the caveats or about the co-existence of other players in the market. There is simply no misrepresentation shown as required by law, at this prima facie stage. There being no prima facie case made out, I cannot grant the injunction. The balance of convenience seems to me to favour entirely the Defendants; after all, to the Plaintiff's knowledge, they have had their product in the market for a very long time, at the very least for five years, possibly more, and an injunction at this stage is far removed from the prima facie status quo that Wander v Antox tells us is the primary objective. There is no injury, let alone an irreparable one, to the Plaintiff that I can tell if an injunction is refused. It has not had one all this time while the Defendants' business has grown into crores. To grant the injunction would be unfairly monopolistic."

4. The Division Bench, in an order of reversal, ultimately found that each one of the triple tests for passing off had been made out on the facts, namely, the establishment of reputation, misrepresentation as understood in law and likelihood of injury or damage caused to the Plaintiff. On the first count, the Division Bench held that the Plaintiff had obtained the mark by way of assignment in the year 2014, from one

A Elder and Company, which, in turn, had obtained the said mark from one Armour Pharmaceutical Company. The user that is claimed on behalf of the Plaintiff is at least from the year 1988 as and when Elder Pharmaceuticals Ltd. actually sold drugs under the two trade names as aforesaid. The Division Bench also referred to the Plaint which, in turn, referred to sales figures of Rs. 59 Crores and Rs. 95 Crores for the years 2014-15 and 2015-16 respectively. Having thus found, the Division Bench then went on to state that it is clear that reputation has been established. When it came to misrepresentation, the Division Bench found that confusion was likely to ensue despite the fact that the purchasers of the drug, which is a Schedule-H Drug, may be persons who are Doctors and other patients who are literate. It found that the substitution of the letter 'T' for the letter 'O' is the only difference between the two trade names, and therefore, found that, in law, since confusion on the ground of deceptive similarity would ensue, misrepresentation in law is also made out. On the third count, it said, undoubtedly, there would be likelihood of damage to the Plaintiff.

5. The Division Bench interfered with the conclusion of the learned Single Judge by ultimately finding that wrong tests had been applied in law as a result of which the judgment was "vitiated by errors of law apparent on the face of the record". It further went on to hold as follows:-

> "102. After referring to the order of the learned single Judge, in the backdrop of the settled principles, we are of the view that it is vitiated by errors of law apparent on the face of the record. The impugned order is, *ex-facie*, erroneous and illegal. It ignores admitted factual materials and settled tests while denying relief to the appellant-plaintiff. For these reasons, it is unsustainable and we have no alternative, but to quash and set aside the same. It is, accordingly, quashed and set aside."

It, therefore, upset the judgment of the learned Single Judge and granted the temporary injunction asked for. It went on to stay the order for a period of 12 weeks, which stay has been continued by this Court till date.

6. Mr. Guru Krishna Kumar, learned Senior Counsel appearing on behalf of the appellant, has vehemently contended that the Division Bench judgment should be set aside as it has disregarded this Court's

judgment in ***Wander Limited And Another*** vs. ***Antox India P. Ltd.*** 1990 (Supp) SCC 727, in particular, para 14 thereon, which reads as under:-

> **"14.** The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the Appellate Court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in *Printers (Mysore) Private Limited* vs. *Pothan Joseph, 1963 SCR 713 at 721:*
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> > "... These principles are well established, but as has been observed by Viscount Simon in Charles Osenton & Co. v. Jhanaton, 1942 AC 130, '….. the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case.'
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> The appellate judgment does not seem to defer to this principle."

According to learned Senior Counsel, the Single Judge Bench summation at para 45 could not have been interfered with by the Division Bench because the law had been looked at threadbare, and ultimately it was found that not only had none of the three tests being satisfied but that

A there was clearly a case of acquiescence made out, for which the Plaintiff has to be denied interim relief. He referred to several judgments to buttress his submissions.

7. On the other hand, Dr. A.M. Singhvi, learned Senior Counsel appearing on behalf of the respondents, has supported the judgment B passed by the Division Bench, also, by copiously referring to various judgments and by stating that the Division Bench judgment, in fact, upset the learned Single Judge because of errors of law and, therefore, interfered on principle and not on fact. He was at pains to point out that reputation had been established by the sales figures from 1988 onwards; "misrepresentation" had been made out in the said sense understood in C law, that is, that absence of an intention to deceive is not a defence in law, and that the defendant's state of mind is wholly irrelevant to the existence of the cause of action in passing off. He stressed the fact that as reputation had been made out, and as the learned Single Judge himself had said that "confusion" had been made out, the learned Single Judge D was wholly wrong in stating that a further requirement was necessary, namely, fraud or deceit. On the third aspect, it was also pointed out that it is obvious that there would be likelihood of damage to the Plaintiff. Assuming that there was no damage caused to the general public, because the drug being sold unlike in ***Cadila Health Care Ltd. vs. Cadila Pharmaceuticals Ltd. (2001) 5 SCC 73*** consisted of the same E formulation, yet this would not deny them the right to interim relief, and that is only a further factor that needs to be taken into account , also to combat the plea of acquiescence.

8. Having heard learned Senior Counsel for some time, we may point out that the learned Single Judge, after referring to the case law, F pointed out in para 27 as follows:- "I think I must accept Mr. Dwarkadas's submission that confusion may be assumed, but not deceit or deception.". In para 45, the learned Single Judge went on to state that he would not presume misrepresentation by Wockhardt as to source, even assuming there is similarity.

G 9. We may indicate, at this juncture, that insofar as the second test is concerned, this Court has in a plethora of judgments held that though passing off is, in essence, an action based on deceit, fraud is not a necessary element of a right of action, and that the defendant's state of mind is wholly irrelevant to the existence of a cause of action for

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passing off, if otherwise the defendant has imitated or adopted the Plaintiff's mark. We need only state the law from one of our judgments, namely, in ***Laxmikant V. Patel*** vs. ***Chetanbhai Shah and Another,*** (2002) 3 SCC 65, which reads as under:-

> "13In an action for passing-off it is usual, rather essential, to seek an injunction, temporary or ad-interim. The principles for the grant of such injunction are the same as in the case of any other action against injury complained of. The plaintiff must prove a *prima facie* case, availability of balance of convenience in his favour and his suffering an irreparable injury in the absence of grant of injunction. According to Kerly (*ibid*, para 16.16) passing-off cases are often cases of deliberate and intentional misrepresentation, but it is well-settled that fraud is not a necessary element of the right of action, and the absence of an intention to deceive is not a defence, though proof of fraudulent intention may materially assist a plaintiff in establishing probability of deception. Christopher Wadlow in Law of Passing-Off (1995 Edition, at p.3.06) states that the plaintiff does not have to prove actual damage in order to succeed in an action for passing-off. Likelihood of damage is sufficient. The same learned author states that the defendant's state of mind is wholly irrelevant to the existence of the cause of action for passing-off (*ibid*, paras 4.20 and 7.15). As to how the injunction granted by the Court would shape depends on the facts and circumstances of each case. Where a defendant has imitated or adopted the plaintiff's distinctive trade mark or business name, the order may be an absolute injunction that he would not use or carry on business under that name. (Kerly, *ibid*, para 16.97)."

This judgment has been followed in ***S. Syed Mohideen*** vs. ***P. Sulochana Bai***, (2016) 2 SCC 683 at 699-700. Also, in ***Satyam Infoway Ltd.*** vs. ***Siffynet Solutions Pvt. Ltd.***, (2004) 6 SCC 145, this Court held:-

> "14The second element that must be established by a plaintiff in a passing-off action is misrepresentation by the defendant to the public. The word misrepresentation does not mean that the plaintiff has to prove any *mala fide* intention on the part of the defendant. Of course, if the misrepresentation is intentional, it might lead to an inference that the reputation of the plaintiff is such that it is worth the defendant's while to cash in on it. An innocent

misrepresentation would be relevant only on the question of the ultimate relief which would be granted to the plaintiff [*Cadbury Schweppes* v. *Pub Squash*, 1981 RPC 429 : (1981) 1 AllER 213 : (1981) 1 WLR 193 (PC); *Erven Warnink* v. *Townend*, 1980 RPC 31 : (1979) 2 AllER 927 : 1979 AC 731 (HL)]….."

10. The Division Bench essentially interfered with the judgment of the learned Single Judge on this score and also found that the learned Single Judge was incorrect in stating that "reputation as to source is not sufficiently demonstrated". It found that reputation was established from the sales figures, and the fact that the Plaintiff was clearly a prior user would make it clear that the first pre-requisite for the action in passing off was made out. Where the Division Bench and the learned Single Judge really locked horns was on the point of acquiescence. The learned Single Judge found that not only was there a lying by for a long period, but that there was positive action on the part of the Plaintiff in leading the defendant to believe that he could build up his business, at which point the Plaintiff swooped in to interdict and throttle that business as it was rising just as sales were rising. On this count, the Division Bench interfered with the learned Single Judge as follows:-

"89. The learned Judge then attributes acquiescence to the plaintiff. The plaintiff's predecessor in title did not object to the trademark registration application. It allowed others to do so and it is the plaintiff's failure to bring a suit on service of a caveat. Thus, there is no objection from the plaintiff. It only means that the plaintiff kept quiet when the application for registration was made by the defendant. They failed to object to the advertisement of the defendant's application or when the defendant brought its project in market. They did not object to other entities introducing their products in the market either. This is enough to assume acquiescence. We do not think this to be the position on facts and in law. A plea of acquiescence to be raised in defence so as to succeed ought to be supported by weighty materials to that effect. Since the learned single Judge has referred to the judgment of the Hon'ble Supreme Court in the case of ***M/s Power Control Appliances and Ors.*** vs. ***Sumeet Machines Pvt. Ltd.,*** (1994) 2 SCC 448, we would refer to it in some details. Paras 4, 5, 7, 11, 12, 13, 14, 15 and 16 of this judgment were heavily relied upon by

Mr. Tulzapurkar. In that, the facts and the submissions are summarised. Then, in para 20, the argument of the respondents before the Hon'ble Supreme Court was set out. In paras 27, 28, 29 and 30, the English judgments were noted and up to para 31. Thereafter, the decisions rendered by our Hon'ble Supreme Court and other courts have been noted.

90. We are in agreement with Mr. Tulzapurkar that even at this *prima facie* stage, there is no positive act which can be attributed to the plaintiff so as to deny the relief. There is no acquiescence which can be culled out. Beyond referring to some general principles, we do not find any material placed before the learned single Judge from which an inference of acquiescence can be drawn. Mr. Dwarkadas has, on this point, relied upon certain judgments and even in the written submissions, there is reference to general principles. All that the first defendant says is as under:-

"(ii) The defence of the acquiescence is available to Respondent No. 1 since the plaintiff was aware of its right and the defendant was ignorant of its own right and despite the same, the plaintiff assents to or lays by in relation to the acts of the defendant and in view of the same, it would be unjust in all circumstances to grant the relief of injunction to the plaintiff. It is submitted that the requirements stand duly fulfilled and on the above set of facts where from 2009/11, the Appellant/its predecessors are duly aware of Respondent No. 1's trademark; the use of Respondent No. 1's mark openly and on an extensive scale; and at no point for over 7 years did the appellant or its predecessors contest the same. On the contrary, the appellant's 2014 acquisition of the trademark is with full notice of the adoption and use and registration of Respondent No. 1's trademark. As such, the principles of acquiescence and waiver apply with full vigour.

(iii) Acquiescence is a species of estoppel and therefore both a rule of evidence and a rule in equity. It is an estoppel in pais: a party is prevented by his own conduct from enforcing a right to the detriment of another who justifiably acted on such conduct.

(iv) The 'positive act' as referred to in the decision of the Hon'ble Apex Court in ***M/s Power Control Appliances and Ors***. vs.

A ***Sumeet Machines Pvt. Ltd.*** reported in (1994) 2 SCC 448 (relied upon by the appellant) cannot mean that the plaintiff 'green lighting' the defendant's action only to later complain of it. The 'positive act' is the 'sitting by' or 'laying by' i.e., not mere silence or inaction but a refusal or failure to act despite knowledge of invasion and opportunity to stop it. In the present case, from 2009, the appellant B and/or its predecessors have been at notice of Respondent No. 1's adoption, use and registration of its trademark and against that there has been a complete failure to register any protest or objection. In 2014, the appellant acquired the trademark with full notice of Respondent No. 1's registration and use of the trademark C "CHYMTRAL". This qualifies for both acquiescence and estoppel defences."

91. Thus, the attempt is to equate delay with acquiescence and which is not correct. We do not think that because the appellants stepped in the year 2014 with notice of the first respondent's D registration and use of the mark that means the appellant-plaintiff has acquiesced in the same. That is not a positive act and which is required to deny the relief on the ground of acquiescence."

11. We are of the view that this is not a case where ***Wander Ltd. (supra)*** has not been heeded. On the contrary, the Division Bench has E interfered on a matter of principle, pointing out errors of law by the learned Single Judge. We may also point out one other significant fact that has occurred in the meanwhile. After 17.11.2017, despite the fact that the Division Bench of the High Court stayed its own order, which stay was continued by this Court till date, the Appellant has started to sell the same product under a new trade name, namely, '*Chymowok'*. F We have been shown sales figures in the last 10 months of sales made by the Appellant under this new trade name which amounts to a figure of Rs. 2.71 Crores from 17.12.2017 till 18.08.2018.

12. We may also state, that this trade name was registered in the name of the Appellant way back on 14.11.2009 with effect from a date G in 2008, but had not been utilized till the Division Bench judgment was passed against the Appellant. We are also told that the remaining stock of material has been disposed of under the trade name "CHYMTRAL", and that material manufactured after the Division Bench judgment is not being sold under the said trade name despite the stay granted in favour

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of the Appellant. Seeing the sales figures of '*Chymowok'* from December, 2017 till August, 2018 and the fact that the Appellant's sales under the "new" trade name are substantial, we do not think that we should exercise our discretionary jurisdiction under Article 136 of the Constitution of India in favour of the Appellant, seeing that the balance of convenience is well served by the judgment under appeal. The Appeal is, therefore, rejected.

Nidhi Jain Appeal rejected.