IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER (STAMP) NO.3938 OF 2020

WITH

INTERIM APPLICATION NO.2694 OF 2020

IN

APPEAL FROM ORDER (STAMP) NO.3938 OF 2020

Chitali Bottling Limited
[CIN No. U15549PN2010PLC137134]
O/at: D-1/4, Liberty Society, Phase-II,
North Main Road, Koregaon Park,
Pune – 411 001
Through its Authorized Representative
Mr. Mohan Parmanand Chug,
Age 56 years, Occupation : Service,
O/at: D-1/4, Liberty Society, Phase-II,
North Main Road, Koregaon Park,
Pune – 411 001
Email: accounts@chuggroup.in ....Appellant
(Original Plaintiff)

Vs.

1 Brihan Karan Sugar Syndicate
Private Limited,
[CIN No.U15425MH2008PTC178959]
O/at : B-102, Daffodils, Wing-B,
Hiranandani Gardens, A. S. Road,
Powai, Mumbai – 400 076.
O/at : 2nd Floor, Office No.5, Star Zone Mall,
E-1 Building, Nashik Pune Highway
Nashik Road, Nashik – 422 101.
Email: accounts@tangoindia.co.in

2 Karan Liquors Private Limited
[CIN No.U15512MH1999PTC123333]
R/at : Plot No.-05-A, Opp. Police Force
Training Centre, Nashik Pune Road,

Nashik 422 101.
Email: accounts@tangoindia.co.in
O/at : 2nd Floor, Office No.5, Star Zone Mall,
E-1 Building, Nashik Pune Highway
Nashik Road, Nashik – 422 101.
Email: accounts@tangoindia.co.in

3 Dharampal Kimatram Kalani,
Age : Adult, Occupation : Business
R/at : B-102, Daffodils, Wing-B,
Hiranandani Gardens, A.S. Road,
Powai, Mumbai – 400 076.
Mob. No. 9673005200
Email: dharamkalani@gmail.com

4 Kanyalal Kimatram Kalani,
Age : Adult, Occupation Business,
R/at : B-102, Daffodils, Wing-B,
Hiranandani Gardens, A.S. Road,
Powai, Mumbai – 400 076.
Mob. No.9822037420
Email: kanukalani@gmail.com

5 Hiralal Kimatram Kalani,
Age: Adult, Occupation : Business,
R/at : B-102, Daffodils, Wing-B,
Hiranandani Gardens, A.S. Road,
Powai, Mumbai – 400 076. ....Respondents
(Original Defendant Nos.1 to 5)

Dr. Abhinav D. Chandrachud a/w. Mr. Bernardo Reis a/w. Mr. Lalit Jhunjhunwala and Mr. P.S. Patil i/b. Triyama Legal for Appellant.

Mr. Sanjeev Gorwadkar, Senior Counsel a/w. Mr. H.W. Kane, Mr. Rohan Kadam, Mr. Rahul Kadam, Mr. A.H. Kane, Ms. Apurva Gupte, Mr. N. Sharma Mr. A. Bagwe, Ms. Merin Mathew and Ms. S. Vaze i/b. W.S. Kane & Co. for Respondent No.1.

CORAM : A.S. GADKARI, J.
RESERVED ON : 30th August, 2021
PRONOUNCED ON : 6th JUNE, 2022.

JUDGMENT:-

1 Appellant, Original Plaintiff, has preferred present Appeal under Order 43 Rule 1 of the Code of Civil Procedure, 1908 (for short, `CPC') impugning the Order dated 25th February, 2020 passed by 19th Joint Civil Judge, Senior Division, Pune, below Exh-5 in Special Civil Suit No.95 of 2020, rejecting the said Application filed under Order 39 Rule 1 and 2 of CPC by Appellant for temporary injunction.

2 Heard Dr. Abhinav Chandrachud, learned counsel for the Appellant and Mr. Sanjiv Gorwadkar, learned senior counsel for Respondents. Perused entire record and Summary of Propositions filed by learned counsel for the respective parties.

3 Appellant is the original Plaintiff in Special Civil Suit No. 95 of 2020 filed by it for declaration that, the Appellant's company has the right to manufacture, supply and sale of the three country liquor products i.e. (i) Sakhu Santra Tango Premium (ii) Tango Punch and (iii) Tango Punch Santra; a decree of permanent injunction against Respondents thereby restraining them, either by themselves or through their agents, servants, assignees, attorneys or any other person acting on behalf of the Respondents from distributing, interfering with in any manner, the production, marketing and supply of the said three country liquor products by the Appellant company; for interim injunction and for other consequential reliefs as more specifically mentioned in paragraph No.37 of the plaint.

4 It is the case of the Appellant that, it is engaged into the business of manufacturing and trading of liquors in the State of Maharashtra since 2010. That, the Respondent No.1 is also engaged in the business of manufacturing of liquor in the State. Respondent Nos.4 and 5 are the Directors of Respondent No.1. Respondent No.2 is also a company engaged into the business of manufacturing of liquor in the State and Respondent Nos.3 and 4 are the Directors of Respondent No.2.

It is stated that, the Respondent No.1 is the owner, manufacturer and promoter of country made liquor by name and style (i) Sakhu Santra Tango Premium (ii) Tango Punch and (iii) Tango Panch Santra. That, the Respondents, with a view to expand their business and promote their products in the District of Pune approached the Appellant in the beginning of 2014 through Respondent No.4 and proposed a business arrangement. It was proposed that, the Respondent No.2 would buy 33.34% shares of the Appellant company so as to become part of the Appellant at a nominal cost and share the profits from the business of the Appellant company. It is the case of Appellant that, the terms and conditions, more specifically mentioned in para No.5 of the plaint was an oral agreement which was concluded at the office of the Appellant at Pune. That, in furtherance of Oral Agreement between the parties, a 'Share Purchase And Share Holders Agreement of Chitali Bottling Ltd.' (herein after referred to as *'Share Purchase Agreement'*) was executed on 2nd

August, 2014, by which 33.34% of Appellant Company's shares i.e. 1667 equity shares were sold in favour of the Respondent No.2 at a nominal cost of Rs.1,66,700/- only, by the shareholders of Appellant company. It is the further case of Appellant that, the said agreement was given effect limited to the transfer of shares and other provisions of the said agreement were neither given effect to, nor enumerated in the Articles of Association of the Appellant company. That, subsequent to the agreement dated 2nd August, 2014, the Appellant company with the express consent and concurrence of the Respondents, applied for permission to manufacture and sale of Country Liquor label marks to the Commissioner, State Excise Department, Government of Maharashtra, for manufacturing and sale of country made liquor. The Commissioner, State Excise Department, vide its letter dated 18th November, 2014 granted approval to the Country Liquor label marks alongwith maximum label price for (i) Sakhu Santra Tango Premium (ii) Tango Punch and (iii) Tango Panch Santra, in the name of Appellant company. That, after approval of labels, manufacturing and sale of said three country liquor products was started and continued by the Appellant. That, at the time of legal due diligence by the legal experts of the entire structuring of the business of the Appellant, a question arose, as to the exploitation of the labels of the above stated three brands of Respondent No.1 which were permitted to be used in the name of the Appellant company by the State Excise Department. To avoid any hassles with the various Government Departments and as per the advice of the Legal Experts, a License Agreement was executed on 6th December, 2014. That, in view of the execution of the Share Purchase Agreement for actual business arrangement, the said License Agreement was never intended to be acted upon nor was acted upon, as the yearly license fees of Rs.1 Lakh was never paid under the said agreement, neither it was signed by all the parties nor even by the Directors of Respondent No.1. That, the said License Agreement was never acted upon, as the said License was for a period of 2 years from the date of its execution, however it was never renewed and yet the Appellant with active participation of Respondents continued to manufacture and market products till the date of filing of the suit. That, the profits made out of business under the oral agreement reached between the Appellant and Respondents, was to be distributed and disbursed to the shareholders of the Appellant company in the ratio of their share-holding. However, the disbursement was never done according to the share holding. It is alleged by the Appellant that, the Respondents on one or the other pretext kept on withdrawing large sums of money from the Appellant company. That, the Respondents collectively withdrew a sum of Rs.7,33,43,562/-, which amounts to 78.33% of the total withdrawals from the Appellant company as against shareholding of 33.34% of the Respondents. That, after starting operations of business in the year 2014, the Appellant company started to make profits in the year 2016. Due to efforts put in by the Directors of the Appellant the sale of products manufactured by Appellant company grew by 350% between 2013-2014 and 2016-2017 and later on it reduced. That, as per the suggestion of Respondent No.4, his son Mr. Rahul Kalani was released Rs.5 Lakhs per month as salary from the Appellant company and Respondent No.4 Kanayalal Kalani was released a monthly payment of Rs.10 Lakhs towards profit distribution so as to structure the taxes application to the business of the Applicant. The total withdrawals by Rahul Kalani and Respondent No.4 Kanayalal Kalani up to 30th September, 2019 were the said amount as noted above. It is stated that, at the end of financial year 2017-18, the Respondents called for a meeting with Mr. Mohan Chug and asked for increase in the money being paid to the Respondents out of the business profits of the Appellant. Appellant resisted the said suggestion and told Respondents that, it was not justified for them to ask for increase in the share of profit of the company as the Respondents have already withdrawn about 78.33% of total profits in the last 5 years. This proposition by Appellant did not get well with the Respondents and to its utter shock and surprise, on 3rd May 2018, the Respondent No.1 sent a letter stating that, the License Agreement dated 6th December, 2014 stood expired by efflux of time and the Appellant should not further manufacture the said three products. That, due to timely intervention of leading businessmen from the liquor industry, the dispute came to be resolved and the production of said three country made liquor brands was never stopped by the Appellant. That, by letter dated 30th November, 2018, Respondent No.1 extended the agreement for three years i.e. between 1st December, 2019 to 30th November, 2021. It is stated that till 15th October, 2019, the functioning of the Appellant was being conducted smoothly however the Commissioner of Excise, State of Maharashtra claimed a sum of Rs.57,09,990/- from the Appellant which was paid by it and asked the Respondents to reimburse the same. The money paid to the State Excise which was attributable to the Respondents did not get well with the Respondents and by their letter dated 3rd November, 2019 once again, Respondent No.1 called upon the Appellant to suspend production and dispatch of country liquor products for which the Appellant has perpetual right to manufacture and distribute. It is the case of the Appellant that, the said letter/notice was nothing but another arm-twisting act on the part of the Respondents to force the Appellant to bear the defendants' share of penalty also. That, the Respondents are part of a powerful liquor lobby and are competent to tilt the enforcing agencies to suit the needs of the Respondents. The Appellant apprehended that, the Respondents would use the Government machinery/non-Governmental machinery such as physical force and coercion to stop the production of aforesaid three products and will further try to stop/disrupt the distribution thereof, by the Appellant company and hence they filed the present suit for the said cause of action.

The Appellant also filed an Application below Exh-5 for temporary injunction.

5 Respondent No.1 filed its reply/say below Exh-15 to the said Application filed by Appellant below Exh-5. Respondent No.1 raised objection that, the dispute in the present suit is a `commercial dispute' within the meaning of Section 2(1)(c) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 and therefore same is liable to be dismissed on that count alone. It is stated by Respondent No.1 that, License Agreement dated 6th December, 2014 and extended by letter dated 30th November, 2018 was and is in its nature determinable and therefore the Appellant is not entitled to file and maintain the present suit for specific performance of the said License Agreement. That, the Appellant has claimed an alternative relief of liquidated damages to the tune of Rs.70 Crores and therefore also the present suit for injunction is not maintainable. Appellant is having equally efficacious remedy by way of liquidated damages. That, by letter dated 3rd November, 2019, Respondents called upon Appellant to suspend the production and dispatch of country liquor product of the above mentioned three trade marks and brought the said license for use of the said trade marks to an end. Respondents denied the case of Appellant that, it is arm-twisting tactics adopted by them. Assuming that the Respondent No.1 has wrongfully suspended and/or brought the said License Agreement to an

end, the only relief to which Appellant may be entitled for, is damages and in any event the Appellant is not entitled to compel the Respondents to continue with the said License. That, under the License Agreement dated 6th December, 2014, which was extended by letter dated 30th November, 2018, the Appellant had very limited right to use the trade marks in question. Under the said license, the Appellant had accepted and recognized the Respondent No.1's title, statutory and common law rights, interest and benefit in the subject trade marks as also validity thereof and has agreed not to do or suffer to do any act or thing which may impair the rights of the Respondent No.1 to the subject trade marks. Appellant had agreed that, it shall not have any claim or right title or interest in the subject trade marks and the said trade marks shall always vest solely and belong to the Respondent No.1. That, Respondent No.1 having suspended the said license and having brought it to an end, the Appellant is dis-entitled to claim a right to continue to use the subject trade marks and in any event by the said reply Respondent No.1 has brought to an end and/or terminated it with immediate effect.

The Respondent No.1 is the present registered proprietor as also proprietor under common law of the subject trade marks. The Respondent No.1 has in detail narrated, how it acquired/owned the said trade marks and copyrights for the labels of the said trade marks and their exclusive ownership over it. It is the case of Respondent No.1 that, some time prior to September, 2014, the Appellant was desirous of manufacturing and trading in country liquor under the Respondents' abovementioned trade mark labels and requested Respondent No.1 to grant to the Appellant, license/permission to use the same. That, after having initial agreement in principle to grant to Appellant, the license to use the said trade marks/ labels, the Appellant on 17th September, 2014 made Application to the Commissioner, State Excise, Maharashtra State, for approval of the said labels for use by the Appellant and by its letters dated 13th October, 2014 and 18th November, 2014, the Commissioner, State Excise approved the use of the said labels subject to certain terms and conditions which have been particularly mentioned in the said two letters. That, the Commissioner, State Excise, had made it clear to the Appellant that, approval of the said labels was/is subject to the Appellant's obtaining appropriate permissions/licenses to use the said labels from Respondent No.1. It is contended by the Respondents that, the Appellant was/is fully aware and conscious of the fact that before the Appellant could use subject trademark labels it ought to obtain permission/license from Respondent No.1 to use the said labels. That, after settling terms and conditions in the case to use the said trade mark labels by a License Agreement dated 6th December, 2014, Respondent No.1 granted permission to the Appellant for non-exclusive license to use the subject trade mark labels on the terms and conditions more particularly mentioned in the said agreement dated 6th

December, 2014. That, as per the License Agreement, the Appellant failed and neglected to pay license fee of Rs.1 Lakh per annum to the Respondents. It is specifically contended that, the Appellant also failed and neglected to maintain quality of country made liquor sold under the subject trade mark labels resulting into complaints from the office of the Commissioner, State Excise. That, though the License Agreement came to an end on 5th December 2016, Appellant continued to use said labels without seeking extension of earlier right from the Respondent No.1. Respondents therefore by letter dated 3rd May, 2016, called upon the Appellant to immediately cease and desist the use of the subject trademark labels in respect of its country liquor. That, accordingly, the Appellant discontinued and ceased to use Respondent No.1's said trade mark labels. The said situation continued from May 2018 till November 2018. The Appellant in the meantime, requested Respondent No.1 to renew the License Agreement dated 6th December, 2014 and assured the Respondent No.1 that, it will maintain the superior quality goods as per its directions and would fulfill all other terms and conditions of the said License Agreement. The Respondent No.1 therefore renewed the said license for the period from 1st December, 2018 to 30th November, 2021 on the same terms and conditions as contained in the License Agreement dated 6th December, 2014. Appellant, pursuant to the extension of License Agreement in or about December 2018, started manufacturing and selling country liquor under the Respondent No.1's said trade mark labels. However, the Appellant's country liquor sold under the Respondent No.1's trade mark labels was found to be of inferior quality. The Respondent No.1 by various e-mails drew attention of the Appellant to the complaints/deficiencies in the product sold by Appellant under the Respondent No.1's trademark labels and called upon the Appellant to attend said complaints. As it appeared to Respondent No.1 that, the Appellant was unable to maintain quality of country liquor sold under the subject trade marks and taking strict note of the said complaints, the Respondent No.1 asked Appellant either to improve quality of the country liquor manufactured and sold by it under the subject trade mark labels or stop using the same. Respondent No.1 by its letter/notice dated 3rd November, 2019 also called upon the Appellant to suspend production and dispatch of country liquor bearing Respondent No.1's trade mark labels. Since then, the Appellant discontinued production and dispatch of country liquor being Respondent No.1's trade mark labels. That, by the said notice dated 3rd November, 2019, the License Agreement dated 6th December, 2014 and extended by letter dated 30th November, 2018 has been brought to an end by the Respondent No.1. Respondent No.1 has categorically denied that, the Appellant would suffer any loss much less loss of money or loss or disruption of supply or disruption of its distribution network or the alleged disruption will have everlasting impact on the business of the Appellant.

Respondent No.1 denied that, it will not suffer any loss for reasons alleged or at all. Respondent No.1 contended that, on the contrary if the injunction sought by the Appellant is granted, the Appellant may sell inferior quality country liquor under Respondent No.1's trade mark labels resulting into permanent damage to the reputation and goodwill of the trade mark labels of Respondent No.1. Respondent No.1 therefore contended that, no *prima facie* case, balance of convenience or irreparable loss tilts in favour of the Appellant and prayed that, the said Application may be dismissed with costs.

6 As noted earlier, the Trial Court by its impugned Order dated 25th February, 2020 passed below Exh-5 has rejected the said Application filed by the Appellant.

7 Dr. Chandrachud, learned counsel for the Appellant submitted that, there is no dispute that Respondents are the owners of aforestated three trade marks. He submitted that, the question is whether the Appellant is entitled to use the said trade marks for perpetuity in pursuance of Share Purchase Agreement dated 2nd August, 2014 and the conduct of the parties. He submitted that, the License Agreement dated 6th December, 2014 which is at page No.208 was signed by the Appellant only and not by the Respondent No.2. That, however with a letter/notice dated 3rd November, 2019 for termination of license, the said License Agreement dated 6th December, 2014 signed by both the parties was annexed and it

was for the first time the Appellant realized that, there is a duly signed Agreement by both the parties is in existence, annexed at page No.233. He submitted that, except a letter issued by the State Excise Department to the Superintendent of Excise stating that, the product manufactured by the Appellant is of inferior quality, annexed at page No.256 to the plaint in the Commercial IP Suit No.309 of 2020 filed by the Respondent No.1, there is no other material on record to show that the Appellant's product was in fact of inferior quality.

By placing reliance on para No.9 in the case of *Surat Goods Transport P. Ltd. & Ors. Vs. Total Logistics India Pvt. Ltd. & Ors. reported in (2011) 5 Mh. LJ 53,* he submitted that, the Trial Court has failed to appreciate that, while 'verbal assignment' of trade marks is not permissible, the 'verbal license' of trade marks is certainly permissible. He submitted that, in view of the amended Section 14 of the Specific Relief Act, 1963 interim relief cannot be denied if monitory compensation has been claimed. He submitted that, the Trial Court has erred in rejecting the Appellant's Application on the ground that, there is an 'equally efficacious remedy for claiming damages' as has been observed by it in paragraph Nos.9 and 12 of the impugned Order. That, the said view is contrary to the 2018 amendment to the Specific Relief Act, 1963, by virtue of which Section 14 of the said Act was amended. That, prior to the amendment under Section 14(1)(a) of the said Act, specific performance of a contract could be refused for 'a contract for the non-performance of which compensation in terms of money is an adequate relief.' However, after the 2018 amendment to the said Act, this is no longer a ground to refuse specific performance of a contract. The mere fact that, the Appellant has a remedy in damages does not mean that, the Appellant is not entitled for an injunction restraining the Respondents from interfering with the Appellant's lawful use of the trade marks.

Dr. Chandrachud submitted that, the Trial Court has erred in not properly appreciating true nature of the Share Purchase Agreement dated 2nd August, 2014 between the parties. By the said Agreement, the parties herein had entered into a partnership on 2nd August, 2014. That, under the Share Purchase Agreement, the Respondent No.2 purchased 33.34 % of the shares of the Appellant and in return thereof, the Appellant cannot hold a board meeting or shareholders meeting without the presence of Respondent No.2 nor can it acquire any trade mark from a third party in order to sell the goods of some third party. That, the Respondent No.2 was given the right to participate in day-to-day management of the Appellant Company and to appoint two Directors in it. That, the Shareholders Agreement has no fixed term and was meant for perpetual partnership between the parties. That, the parties entered into a Shareholders Agreement only for the purpose of jointly manufacturing and selling country liquor using the Respondents' trade mark. That, if the Appellant loses the right to use the Respondents' trade mark, the entire purpose of Shareholders Agreement would be defeated and the Appellant would become a defunct company. He submitted that, the Shareholders Agreement is co-terminus with manufacture of goods and the use of the said three trade marks. The Trial Court failed to appreciate that, the License Agreement dated 6th December, 2014 was a 'sham document' which was only drawn up to be kept in the records of the Respondents for bureaucratic reasons i.e. in case the Excise Department ever requested a copy of the said Agreement and was never acted upon or meant to be acted upon. He submitted that, the said Agreement purportedly expired by efflux of time in December, 2016. However, the Appellant admittedly continued using the three trade marks of the Respondents even thereafter. That, it was only by a letter dated 3rd May, 2018, i.e. around a year and a half later the Respondent No.1 for the first time suggested that, the said Agreement was expired by efflux of time. He submitted that, it is highly unlikely that the Respondent No.1 would part with the right to use its said three trade marks for the negligible sum of Rs.1 lakh, while the Appellant Company was earning several crores of rupees in revenue by using the Respondents' trade marks. He submitted that, in reality, between the year 2015 to 2019, the Respondents withdrew a sum of about Rs.9 crores from the Appellant company towards salary, interest and other amounts which revenue was earned by the Appellant from using the trade marks of the Respondents.

He submitted that, in the case of *Roop Kumar Vs. Mohan Thedani reported in (2003) 6 SCC 595*, the Hon'ble Supreme Court has held that, under Section 92 of the Indian Evidence Act 1872, oral evidence is admissible to show that, a document executed was never intended to operate as an Agreement but that some other Agreement altogether, not recorded in the document, was entered into between the parties. That, in the said provision, it is admissible for a party to a deed to contend that the deed was not intended to be acted upon, but was only a 'sham document'. He submitted that, in the instant case, the License Agreement dated 6th December, 2014 was a 'sham document' as it was never acted upon or meant to be acted upon and was only to be kept in the records of the Respondents, in the event it was required for any official reasons. He submitted that, though the License Agreement was entered into with Respondent No.1 and the Shareholders Agreement was entered with Respondent No.2, both the Respondent Nos.1 and 2 are group companies under the control and Management of Kalani family and are in that sense alter-egos of each other. Dr. Chandrachud submitted that, the Sharesholders Agreement dated 2nd August, 2014 and the 'Oral License' of the Respondents trade marks in favour of the Appellant was not determinable and therefore, the Trial Court has erred in rejecting the Appellant's Application filed below Exh-5 on the ground that, the said License Agreement dated 6th December, 2014 is a determinable. He, however fairly conceded to the legal proposition that, under Section 14 (d) of the Specific Reliefs Act, specific performance of a contract which is *'determinable'* must be refused. He submitted that, the Shareholders Agreement in clause 9.1, 9.2 thereof clearly does not give any party the right to terminate the contract at Will. He submitted that, therefore, the true agreement/understanding of the parties was not in its nature determinable.

He submitted that, the Trial Court in paragraph No.13 of the impugned Order erred in holding that, the goods manufactured by the Appellant are of inferior quality and that there is therefore an element of public interest in rejecting the Appellant's Application below Exh-5. That, in the reply filed by the Respondent No.1 to the Application below Exh-5 of the Appellant, the Respondent No.1 has stated that, the reason it terminated the License Agreement on 3rd November, 2019 was because of allegations that the Appellant's products were of inferior quality. It shows that the purported termination of the License Agreement itself was wrongful.

In support of his various contentions, he relied on the following decisions.

i) *Roop Kumar Vs. Mohan Thedani, reported in (2003) 6 SCC 595;*

ii) *Surat Goods Transport P. Ltd. & Ors. Vs. Total Logistics India Pvt. Ltd. & Ors. reported in (2011) 5 Mh. LJ 53;*

iii) *Vidyut Metallics Limited Vs. Malhotra International Private Limited & Another in Appeal No.888 of 1997 (sic 883 of 1997) in Notice of Motion No.1337 of 1997 in Suit No.1084 of 1997, dated 10th October, 1997 and 27th April, 1998, by the Division Bench of this Court;*

iv) *Indian Shaving Products Ltd. & Anr. Vs. Gift Pack & Anr. reported in 1998 SCC OnLine Del 829;*

v) *Ram Sarup Gupta (Dead) by LRs Vs. Bishun Narain Inter College & Ors. reported in (1987) 2 SCC 555;*

vi) *S.B. Noronah Vs. Prem Kumari Khanna reported in (1980) 1 SCC 52;*

vii) *Shankarlal Narayandas Mundade Vs. New Mofussil Company Ltd. (In Liquidation) & Ors. reported in (1946) Indian Law Reports 694 (Bom.) Privy Council and;*

viii) *Union of India & Anr. Vs. Meghmani Organics Ltd. & Ors. reported in (2016) 10 SCC 28.*

He therefore, prayed that impugned Order dated 25th February, 2020 may be set aside and the Appeal may be allowed.

8 Mr. Gorwadkar, learned senior counsel for the Respondents submitted that, the right to use trade marks of the Respondents and as per the pleadings of the Appellant itself emanates from paragraph 5(e) thereof only. It is the case of 'vesting of non-exclusive right to use trade marks' of Respondents by the Appellant and not 'Oral License' as per the submissions advanced by the learned counsel for the Appellant. He submitted that, in para 6 of the plaint, no material particulars are given by the Appellant about alleged 'Oral License' as claimed by the Appellant. That, the plaint as submitted before the Trial Court is as vague as possible and what is pleaded

in the plaint is totally contrary than what has been argued before this Court in the present Appeal. He submitted that, there is no whisper about the use/vesting/Oral License to use the said three trade marks of the Respondents in the Share Purchase Agreement dated 2nd August, 2014. That, the case of 'Oral License' is pleaded orally only for the first time before this Court and has not been pleaded in the plaint and/or in the memo of Appeal.

He submitted that, before execution of 'License Agreement' dated 9th December, 2014, the Appellant Company and Respondent No.1 Company had passed necessary resolutions in that behalf and therefore the contention of Appellant that, the Trade marks were permitted to be used by the Appellant under an 'Oral Agreement' is a sham and moonshine defence adopted by it. He submitted that, by notice dated 3rd May, 2018, the Respondents had called upon the Appellant to cease and desist from using the trade marks of Respondents. That, the said notice in fact was the notice of termination of 'License Agreement' dated 6th December, 2014 executed between the parties. That, the Appellant neither replied to the said notice nor denied the case of the Respondents. That, in response to the said notice, the Appellant did not raise the contention of 'Oral Agreement' at first instance. That, it is the specific case of the Respondents that, despite termination of notice, the Appellant continued to use its trade marks. That, the Respondents in their reply filed below Exh-15 to the Application below

Exh-5 has categorically contended the same. He submitted that, the Supreme Court in the case of *Maria Margarida Sequeira Fernandes & Ors. Vs. Erasmo Jack De Sequeira (Dead) through Lrs. reported in (2012) 5 SCC 370* has held that, pleadings are the foundation of litigation and in pleadings, only the necessary and relevant material must be included and unnecessary and irrelevant material must be excluded. He submitted that, a license to use a trade mark in common law can only be granted subject to certain limitations which are akin to the requirements for an agreement for registered user under the Act. He placed reliance on the decision of the Supreme Court in the case of *Gujarat Bottling Co. Ltd. & Ors. Vs. Coca Cola Co. & Ors. reported in (1995) 5 SCC 545* to buttress his contentions. He submitted that, Section 2(b) of the Trade Marks Act defines "assignment" and "verbal assignment" as contended by the Appellant, has not been reckoned by the Act. That, Section 25 of the Trade Marks Act postulates that, the registration of a trade mark shall be for a period of ten years, but may be renewed from time to time in accordance with the provisions of the said Section. He submitted that, there cannot be any perpetual license or assignment or vesting of a trade mark. That, the thing which under the law the Respondent No1 cannot have, it cannot give it to the Appellant.

Mr. Gorwadkar submitted that, Section 14(d) of the Specific Relief Act prescribes that, a contract which is in its nature determinable cannot be specifically enforced. That, Section 41 of the Specific Relief Act provides when injunction can be refused and Section 41(e) prescribes that, to prevent the breach of a contract, the performance of which would not be specifically enforced, injunction can be refused. He submitted that, the Trial Court has rightly taken into consideration and applied both the said sections to the present case while refusing to grant injunction in favour of the Appellant. He submitted that, if now injunction is granted, the determinable contract would be revived, which is not permissible under the law. That, clause No. 19 of the License Agreement provides for termination of the said License Agreement. He submitted that, a license cannot be equated with a lease and a license can any time be terminated by following necessary procedure. That, Clause No. 18 of the License Agreement would not amount to waiver of contract to permit the use of trade marks. That, not availing royalty would not amount to waiver of contract by Respondent No.1. He submitted that, the finding of the Trial Court in para No.9 of the impugned Order is correct and no interference of this Court is therefore necessary.

He submitted that, an interim relief can be granted only in aid of and as ancillary to the main relief which may be available to the parties on final determination of its rights in a suit or proceedings. That, in the matter of company affairs, the Directors act as a body and collectively as Board. Any Director acting individually has no power to act on behalf of the company in respect of any matter except to the extent to which any power or powers of the Board have been delegated to him by the Board within the limit permitted by the Companies Act or any other law. He submitted that, 'Oral Agreement' of company is not permissible. At the cost of repetition he submitted that, before executing the License Agreement dated 6th December, 2014, the Appellant and Respondent company had passed necessary resolutions (page 773 and 775 to the Appeal) and therefore, contention of the Appellant that there was an 'Oral License' for perpetuity to use trade marks of Respondent is contrary to the provisions of law and therefore, the plea of 'Oral Agreement' in the present case cannot be accepted.

He submitted that, in the present case, the 'License Agreement' dated 6th December, 2014 between the parties, was a written agreement and therefore, the parties are bound by the terms and conditions of the said agreement. That, once a contract is reduced to writing by operation of Section 91 of the Evidence Act, it is not open to any of the parties to seek to prove the terms of the contract with reference to some 'oral or other' documentary evidence to find out the intention of the parties. He placed reliance on para No.7 of the decision of Hon'ble Supreme Court in the case of *Tamil Nadu Electricity Board & Anr. Vs. N. Raju Reddiar & Anr. reported in (1996) 4 SCC 551 and;* in support of his contention.

He submitted that, this Court in the case of *Malhotra International Pvt. Ltd. & Anr. Vs. Vidyut Metallics Ltd. reported in 1998(1)*

Bom.C.R.351 has held that, there can be no perpetual user license. That, owner of the trade mark must keep control over the trade mark with regard to quality and misuse. In view of above, he prayed that, no injunction be granted in favour of the Appellant and the Appeal may be dismissed.

Mr. Gorwadkar, learned counsel for the Respondent No.1 in support of his submissions relied on the following decisions-

i) Maria Margarida Sequeira Fernandes & Ors. Vs. Erasmo Jack De Sequeira (Dead) through LRs. reported in (2012) 5 SCC 370;

ii) Gujarat Bottling Co. Ltd. & Ors. Vs. Coca Cola Co. & Ors. reported in (1995) 5 SCC 545;

iii) Spice Digital Ltd. Vs. Vistaas Digital Media Pvt. Ltd., reported in 2012 SCC OnLine Bom 1536: (2012) 114 (6) Bom LR 3696;

iv) Indian Oil Corporation Ltd. Vs. Amritsar Gas Service & Ors. reported in (1991) 1 SCC 533;

v) Cotton Corporation of India Ltd. Vs. United Industrial Bank Limited & Ors. reported in (1983) 4 SCC 625;

vi) Shubh Shanti Services Ltd. Vs. Manjula S. Agarwalla & Ors., reported in (2005) 5 SCC 30;

vii) Tamil Nadu Electricity Board & Anr. Vs. N. Raju Reddiar & Anr. reported in (1996) 4 SCC 551;

viii) Malhotra International Pvt. Ltd. & Anr. Vs. Vidyut Metallics Ltd. reported in 1998(1) Bom.C.R.351

9 In rejoinder to the arguments advanced by the learned counsel for the Respondent, Dr. Chandrachud, learned counsel for the Appellant submitted that, in the case of *Ram Sarup Gupta (Dead) by LRs Vs. Bishun Narain Inter College & Ors. (Supra)*, the Supreme Court has held that, the

pleadings should receive a liberal construction and no pedantic approach should be adopted to defeat justice on hair splitting technicalities.

That some times, pleadings are expressed in words which may not expressly make out a case in accordance with strict approach of law. He submitted that, the view adopted by the learned Single Judge in the case of *Malhotra International Pvt. Ltd. & Anr. Vs. Vidyut Metallics Ltd. (Supra)* is not a correct view. He submitted that, in the case of *Gujarat Bottling Co. Ltd. & Ors. Vs.Coca Cola Co. & Ors. (Supra)* the Supreme Court has held that, 'Oral License' of trade mark is permissible.

Dr. Chandrachud submitted that, the word 'assignment' or 'vesting' used in the plaint is a mistake by the Appellant and it ought to be "License". He submitted that, in reply to the Interim Application No.897 of 2020 in Commercial IP Suit No.309 of 2020, a proper plea to that effect contending that use of trade marks by the Appellant in furtherance of perpetual *'Oral License'* has been adopted. He submitted that, usage of word 'vesting' in the plaint by Appellant is a mistake in pleading. That, in the case of *S.B. Noronah Vs. Prem Kumari Khanna (Supra)* the Hon'ble Supreme Court has held that, common sense approach should be taken to technical defects in the pleadings and that, the pleadings are not statutes and legalism is not verbalism. He submitted that, substantive pleadings in para Nos.5e, 6 and 7 of the plaint has been taken and no defect in the pleadings of the Appellant as per the said two Judgments be inferred. He submitted that, in para Nos. 6, 13A and 13E of the reply to the Interim Application No.897 of 2020, the plea of 'Oral License' has been properly taken by the Appellant. He submitted that, Companies can enter into 'Oral Contract'. He placed reliance on a decision in the case of *Shankarlal Narayandas Mundade Vs. New Mofussil Company Ltd. & Ors. (Supra)* in support of his case. He submitted that, in the present case, the Respondents' companies are closely held and the Directors and the companies is one and the same.

While reiterating his contention he submitted that, the License Agreement dated 6th December, 2014 was and is a sham document, which was not to be acted upon. He submitted that, if the License Agreement dated 6th December, 2014 had come to an end in the year 2016 itself, then why the Respondents waited for more than one and a half year to send a notice dated 3rd May, 2018 of termination of the said License Agreement. He submitted that, it therefore can be inferred that the said License Agreement was executed only to, not to act upon it and not otherwise. He therefore, prayed that, the present Appeal may be allowed in its entirety.

10 A bare perusal of the Share Purchase Agreement dated 2nd August, 2014 executed between the Appellant and Respondent No.2 (Purchaser), by which the Respondents purchased 33.34% shares of Appellant company and in particular para No.(D) on internal page No.3 thereof would reveal that, the Appellant has admitted that the Respondents

are in the similar business i.e. of manufacturing and bottling of Country Liquor since 40 years and have expertise in marketing, manufacturing and management of Country Liquor business all over Maharashtra and also has multiple units under its operations. That, both the parties therein had discussion about doing the business together under the running business of Appellant and in pursuance thereof, the parties who were desirous of entering into the said Share Purchase Agreement on the terms and conditions agreed between them and has more elaborately specified therein.

It is to be noted here that, there is no clause or covenant in the said entire agreement permitting the Appellant to use the said three trade marks and copy rights of the said three labels which are admittedly owned by the Respondents. There is no clause of oral license or even oral assignment or verbal assignment in the said agreement. It is to be further noted here that, during the course of his arguments on 11th August, 2021, Dr. Chandrachud, learned counsel for the Appellant, in response to the query by this Court, with his usual fairness at his command, conceded to the fact that, there is no clause in Share Purchase Agreement to use the trade marks of Respondent No.1 and it is only by way of License Agreement dated 6th December, 2014. It is thus an admitted fact on record that, the Share Purchase Agreement does not give any right to use trade marks owned and labels owned by Respondents, by the Appellant.

11 The document which had given right to the Appellant to use the said three trade marks and labels owned by Respondents, is the License Agreement dated 6th December, 2014 (Page 233). Perusal of the said Agreement would reveal that, it was for specific period of two years from the date of execution of it. By the said Agreement, the Respondent No.1 licensor had given *'non-exclusive license'* to use the trade marks and labels in respect of the said goods to the Appellant licensee. That, the licensee had agreed to accept *'non-exclusive license'* to use the said trade marks and labels in relation to the said goods on the terms and conditions more specifically agreed by and between the parties and more specifically set out in the said Agreement. Clause No.17 to the said Agreement categorically specifies that, the licensee (Appellant) shall not use the said labels/trade marks/ copyrights after the expiry or the termination of the said Agreement. Clause No.19 provides that, the licensor may without assigning reason thereof and without being liable in any way for payment of damages or other compensation whatsoever, terminate the said Agreement upon giving not less than thirty days prior notice in writing in that behalf to the licensee. In Clause No.22 the licensee had agreed that, upon the expiry or termination of the said Agreement for any reason whatsoever, the licensee (Appellant) shall discontinue any and every use whatsoever of the said labels/trade marks/copyrights in connection with the said goods or business or trade or as a trade mark, corporate name or as a part of trade name or as

also of any other word, name, logo, devise in any alphabet, script or language which may resemble the said labels so as to cause deception or adversely affect right, title or interest of the licensor (Respondents) in the said labels/trade marks/copyrights. Clause No.26 thereof categorically mentions that, the said Agreement constitutes the entire agreement of the parties on the subject mentioned therein and supersedes all prior understanding and instructions on such subject. That, the said agreement shall not be modified other than by a written instrument duly executed by the parties herein. It is thus abundantly clear that, the parties herein to the present Appeal are governed by the said License Agreement dated 6th December, 2014 and not otherwise.

12 In this background, it is to be noted here that, by a notice/letter dated 3rd November, 2019 the Respondent No.1 called upon the Appellant to suspend the production of the said three products and its dispatch with immediate effect. It was a cease and desist notice to the Appellant by the Respondent No.1. It is the said notice/letter dated 3rd November, 2019 which gave rise for a cause of action for the Appellant to file the present suit bearing Special Civil Suit No.95 of 2020. In para No.5(e) of the plaint, the Appellant has specifically pleaded that, after acquisition of shares by the Respondents of Appellant company, the labels will *'vest'* non-exclusively with the Appellant along with the Respondent No.1. In para No.7 of rejoinder affidavit to the reply filed by Respondents

below Exh-5, the Appellant has claimed perpetual right to manufacture and use the trade marks and labels in question, upon a *'verbal assignment'*. In the Appeal memo before this Court, in ground Nos.(d), (eee) and (fff) a case of assignment of labels/verbal assignment has been put forth. It is to be noted here that, no case for *'oral license'* is pleaded in the plaint either before the Trial Court or in Appeal memo before this Court. It clearly appears that, it is for the first time the case of *'oral license'* is pleaded orally before this Court in this Appeal and in reply to the Interim Application No.897 of 2020, only to overcome the disability in the pleadings in the plaint before the Trial Court and in defence to the Suit filed by the Respondents and to defeat the arguments of Respondents herein and none else.

13 The Supreme Court in the case of *Maria M. Sequeira Fernandes & Ors. (Supra)* has categorically held that, pleadings are the foundation of litigation. In pleadings, only the necessary and relevant material must be included and unnecessary and irrelevant material must be excluded. Pleadings are given utmost importance in similar systems of adjudication, such as, the United Kingdom and the United States of America. It is further held that, in civil cases, pleadings are extremely important for ascertaining the title and possession of the property in question. In the case of *Roop Kumar Vs. Mohan Thedani (Supra)* the Hon'ble Supreme Court has held that, it is likewise a general and most inflexible rule that wherever written

instruments are appointed, either by the requirement of law, or by the contract of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter them. This is a matter both of principle and policy. It is of principle because such instruments are in their own nature and origin, entitled to a much higher degree of credit than parol evidence. It is of policy because it would be attended with great mischief if those instruments, upon which men's rights depended, were liable to be impeached by loose collateral evidence.

In the case of *Tamil Nadu Electricity Board & Anr. Vs. N. Raju Reddiar & Anr. (Supra)*, the Supreme Court in para No.7 has held as under:-

> *"7. At the outset it must be borne in mind that the agreement between the parties was a written agreement and therefore the parties are bound by the terms and conditions of the agreement. Once a contract is reduced to writing, by operation of Section 91 of the Evidence Act, 1872 it is not open to any of the parties to seek to prove the terms of the contract with reference to some oral or other documentary evidence to find out the intention of the parties. Under Section 92 of the Evidence Act where the written instrument appears to contain the whole terms of the contract then parties to the contract are not entitled to lead any oral evidence to ascertain the terms of the contract. It is only when the written contract does not contain the whole of the agreement between the parties and there is any ambiguity then oral evidence is permissible to*

prove the other conditions which also must not be inconsistent with the written contract."

14 In the present case, it is the precise case of the Appellant in para No.12 of the plaint itself that, at the time of execution of Share Purchase Agreement and License Agreement, legal due-diligence by the legal experts of the entire structing of the business of the Appellant was taken when a question as to the exploitation of the labels of the said three brands arose. In para No.13, it is specifically pleaded that, as per the advice of the legal advisors, the present License Agreement came to be prepared in the month of December 2014. It is thus absolutely clear that, the documents in question and more particularly the License Agreement has been drafted after taking necessary legal advice in that behalf. It is to be further noted here that, plaint of the present suit has been drafted by an Advocate an expert in the field of intellectual property and not by a layman and therefore liberal construction of pleadings in the plaint as contended by the learned counsel for the Appellant cannot be given to it. In view thereof, the extensive and elaborate arguments about *'oral license'* and lack of pleading to that effect in the plaint and Appeal Memo including the decisions cited by the learned counsel for the Appellant in cases of *Ram Sarup Gupta Vs. Bishun Narain Inter College & Ors. (Supra)* and *S.B. Noronah Vs. Prem Kumari Khanna (Supra)* are of no avail to it.

15 Even otherwise, the plea of *'oral license'* was not taken and

argued before the Trial Court at the first instance and therefore the Trial Court did not get an opportunity to test it on the basis of the documents/material produced before it. Appellant will have to prove the case of *'oral agreement'* by leading cogent evidence at the time of trial. In the presence of written agreement i.e. License Agreement dated 6th December, 2014 duly executed by and between the parties herein, it is very difficult to even infer such an *'oral agreement'*. As noted earlier, except only the statements/arguments before this Court and in reply to the Interim Application, the entire record is absolutely silent about existence of any *'oral agreement'* between the parties herein. The conduct of parties herein *prima facie* shows that, they were acting in furtherance of License Agreement dated 6th December, 2014. It is important to note here that, before execution of the License Agreement, the Board of Directors of Respondent No.1 so also the Appellant had passed necessary resolutions on 3rd December, 2014 for executing the said agreement. The said resolutions are on record at page Nos.773 and 775 respectively. As noted earlier, in the present case, the agreement between the parties is reduced in writing and therefore there is no need to even consider the plea of 'oral license' which has been adopted at a belated stage only to overcome the disability of the basic pleadings. According to this Court, the plea of 'oral license' adopted by Appellant is a totally sham plea, contrary to its basic pleadings.

16 By the said License Agreement dated 6th December, 2014, the

Appellant was granted a non-exclusive license to use the said labels and trade marks by the Respondent No.1 for the said goods. The said agreement was for a period of 2 years from the date of its execution. Clause No.19 of the said agreement specifically provides for termination of it at the behest of Respondents without assigning any reasons thereof. Though as per Clause No.19 of the said License Agreement the Respondent No.1 was not obliged to give any reason for termination of the said Agreement, according to this Court perusal of pleadings, would clearly indicate that, the Respondents have given not only a valid but genuine reason of production of inferior quality of goods by the Appellant, for termination of said Agreement. Thus, the said agreement was and is a determinable contract and therefore Section 14(d) of the Specific Relief Act is squarely applicable to the present case.

It prima facie appears to this Court that, the License Agreement dated 6th December, 2014 is not a 'sham document', but a true and genuine document, under which the right to use trade marks and labels of Respondents was given to the Appellant. The said Agreement has been acted upon by the Appellant for production of said goods by using the trademarks of Respondent No.1. There is no other document, least to say 'Oral Agreement/License' given by the Respondents to the Appellant as contended by it and the said contention has no legal sanctity at least as of today.

17 A useful reference at this stage can be made to the decision of the Hon'ble Supreme Court in the case of *Mumbai International Airport Private Limited Vs. Golden Chariot Airport & Anr., reported in (2010) 10 SCC 422.* The Hon'ble Supreme Court while considering an issue that, can a litigant change and choose its stand to suit its convenience and prolong a civil litigation on such prevaricated pleas?; Is an action at law a game of chess?, has held that, the common law doctrine prohibiting approbation and reprobation is a facet of the law of estoppel and well established in our jurisprudence also. That, the doctrine of election was discussed by Lord Blackburn in the decision of the House of Lords in *Scarf Vs. Jardine* has been referred too in the said decision. That, the rule of estoppel was founded on a well-known principle that one cannot approbate and reprobate. The Supreme Court has referred to a decision of the Division Bench of Calcutta High Court in *Dwijendra Narain Roy v. Joges Chandra De reported in AIR 1924 Cal. 600,* wherein it is held that, it is an elementary rule that a party litigant cannot be permitted to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold, to approbate and reprobate to the detriment of his opponent. This wholesome doctrine, applies not only to successive stages of the same suit, but also to another suit than the one in which the position was taken up, provided the second suit grows out of the judgment in the first.

In paragraph Nos.43, 44, 45, 47, 48, 49, 50 and 54 in the case of *Mumbai International Airport Private Limited (Supra),* it is observed and held by the Supreme Court as under:-

43. Now the question is whether the contesting respondent on a complete volte-face of its previous stand can urge its case of irrevocable licence before the Estate Officer and now before this Court? The answer has to be firmly in the negative.

44. Is an action at law a game of chess? Can a litigant change and choose its stand to suit its convenience and prolong a civil litigation on such prevaricated pleas?

45. The common law doctrine prohibiting approbation and reprobation is a facet of the law of estoppel and well established in our jurisprudence also. The doctrine of election was discussed by Lord Blackburn in the decision of the House of Lords in Scarf v. Jardine (1882) 7 AC 345 : (1881-85), All ER Rep 651 (HL) wherein the learned Lord formulated -

"...a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act...the fact of his having done that unequivocal act to the knowledge of the persons concerned

is an election."

47. *In Clough v. London and North Western Rail Co. (1861-73) All ER Rep 646, the Court referred at All ER p. 651 F to Comyn's Digest, wherein it has been stated:*

"If a man once determines his election, it shall be determined forever."

In the said case, the question was whether in a contract of fraud, whether the person on whom the fraud was practiced had elected to avoid the contract or not. The Court held that as long as such party made no election, it retained the right to determine it either way, subject to the fact that an innocent third party must not have acquired an interest in the property while the former party is deliberating. If a third party has acquired such an interest, the party who was deliberating will lose its right to rescind the contract. Once such party makes its election, it is bound to its election forever.

48. *In Harrison v. Wells (1967) 1 EB 263 : (1966) 3 WLR 686: (1966) 3 ALL ER 524 (CA) Salmon L.J., in the Court of Appeal, observed that the rule of estoppel was founded on the well-known principle that one cannot approbate and reprobate. The doctrine was further explained by Salmon, L.J. by holding:*

"it is founded also on this consideration, that it would be unjust to allow the man who has taken full advantage of a lease to come forward and seek to evade his obligations under the lease by denying that the purported landlord was the landlord".

49. *In Kok Hoong v. Leong Cheong Kweng Mines Ltd. 1964 AC*

993, the Privy Council held that:

"...a litigant may be shown to have acted positively in the face of the court, making an election and procuring from it an order affecting others apart from himself, in such circumstances that the court has no option but to hold him to his conduct and refuse to start again on the basis that he has abandoned."

50. Ashutosh Mookerjee, J. speaking for the Division Bench of Calcutta High Court in Dwijendra Narain Roy v. Joges Chandra De, AIR 1924 Cal. 600, held that it is an elementary rule that a party litigant cannot be permitted to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold, to approbate and reprobate to the detriment of his opponent. This wholesome doctrine, the learned Judge held, applies not only to successive stages of the same suit, but also to another suit than the one in which the position was taken up, provided the second suit grows out of the judgment in the first.

54. In New Bihar Biri Leaves Co. v. State of Bihar (1981) 1 SCC 537, this Court observed that it is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maxim, qui approbat non reprobat (one who approbates cannot reprobate), applies in our laws too.

In the present case also, the conduct of the Appellant in view of its inconsistent pleas before the Trial Court and before this Court is far from satisfactory. The said pleas are inconsistent, contrary to each other and detriment of its opponent.

It appears to this Court that, the Appellant is changing stances convenient to it, by adopting different pleas at different stages of the litigation and is not consistent with its basic pleading. It is highly unconscionable that, the Appellant in furtherance of License Agreement dated 6th December 2014, after using the trademarks/labels of Respondent No.1 for a substantial period, now at such a belated stage i.e. in present Appeal has for the first time adopted a spacious plea of 'oral/verbal license'. According to this Court, the plea of Appellant of 'Oral License', is a palpably sham plea adopted by it after hearing the Respondents' arguments and as an afterthought.

18 It is the case of the Appellant that, it has right to manufacture the said goods by using trade marks of Respondents and its vesting is for perpetuity. It is *inter alia* contended that, the Appellant has perpetual rights to use the said trade marks for the said goods by virtue of 'Oral assignment'. Section 2(b) of the Trade Marks Act defines *"assignment"* means an assignment in writing by act of the parties concerned. Section 25 of the said Act mentions that, the registration of a trade mark, after the commencement of the said Act, shall be for a period of ten years, but may be renewed from time to time in accordance with the provisions of the said

Section. The Trade Marks Act does not provide for any *'oral assignment'* and therefore, there cannot be any perpetual license or assignment/vesting of the said trade marks with the Appellant. In the presence of written license agreement dated 6th December, 2014, there cannot be any oral license even as per the general law. The thing which Respondents and in particular, Respondent No.1 under the law cannot have, it cannot give to the Appellant.

19 The aforestated deliberation would lead to draw a clear and safe conclusion that, the Appellant has no *prima facie* case in its favour. As the Appellant has, in the alternative prayed for liquidated damages/monetary compensation, no irreparable loss would be caused to it, if injunction is refused in its favour. The balance of convenience does not tilt in favour of Appellant. The Appellant is therefore not entitled for temporary injunction.

Perusal of record discloses that, the Trial Court has not committed any error either on facts or in law, while passing the impugned Order dated 25th February, 2020.

The Appeal being dehors of merits is accordingly dismissed.

20 In view of dismissal of Appeal from Order itself, nothing survives in Interim Application No.2694 of 2020 and is also accordingly disposed off.

(A.S. GADKARI, J.)

SANJIV SHARNAPPA MASHALKAR Digitally signed by SANJIV SHARNAPPA MASHALKAR Date: 2022.06.06 16:57:24 +0530