

# The Tata Oil Mills Co. Ltd. vs Hansa Chemical Pharmacy on 24 November, 1978

**Equivalent citations: 1986(2)ARBLR303(DELHI), ILR1979DELHI236**

## JUDGMENT

Prithvi Raj, J.

(1) The plaintiff (The Tata Oil Mills Company Ltd.) has filed the present suit for the grant of permanent injunction restraining the defendant, its servants, agents, representatives, dealers and workmen from infringing its registered copyright to "OK Washing Soap Wrapper" belonging to it. The plaintiff also seeks a permanent injunction restraining the above-said persons from manufacturing selling, offering for sale to dealers washing soap under 521 wrapper which is a colourful imitation of its wrapper and from giving an impression that the defendant's washing soap was that of the plaintiff or was connected with the plaintiff in any manner what soever amounting to passing off. An order for destruction of the impugned wrappers, labels, blocks, dyes and other trade literature concerning the adoption and use of the impugned wrapper mark is also sought. The plaintiff also prays for rendition of the defendant's accounts of sales of washing soap under the wrapper objected to by it and further prays that a decree for the amounts so determined be passed in its favor and against the defendant with costs.

(2) The case of the plaintiff is that it carries on an old established business for decades past engaged in the manufacture and sale, inter alia, of washing soaps, detergents, toilet soaps and toilet preparations including hair oils, shampae and eau de Cologne. The plaintiff alleges that one amongst its well-known products is "OK Brand Washing 'soap'" wrapper of which consists of a distinctive colour scheme wherein the legends and description are given in red and blue colour against white background. The upper portion of the wrapper shows A Tata Product, in white colour, arranged in a blue coloured diamond device, appearing on either side with the expression Ok arranged in a shield device in red colour, appearing in the centre of the two blue diamond devices. The panels consists of two blue coloured diamond devices containing the expression Ok appearing in vernacular language. According to the plaintiff its Ok washing soap wrappers are in regular and continuous since the year 1976 in relation to its washing soap. The plaintiff claims to have built up large and important sale for its washing soap exceeding Rs. 300 lakhs.

(3) The plaintiff aware that it holds protection for its wrapper through Registration No. A-1 8305/77 granted to it under the Indian Copyright Act, 1957, besides registration Nos. 13573/77 and A-1 8595/77. The grievance of the plaintiff is that the defendant (Hansa Chemical Pharmacy, Hathroi Fort, Jaipur) has recently introduced in the market washing soap under a wrapper in respect of their washing soap whose adoption and the use of the lay-out, colour combination and artistic representation exactly resembles that of the plaintiff and that such a user by the defendant is with the deliberate intention to deceive and cause confusion to earn profits in illegal manner knowing fully well that the plaintiff's washing soap marketed under Ok wrapper has acquired a high

reputation because of the excellent quality and marketing potentialities offered by the plaintiff and that their (defendant's) quality of product is inferior. The plaintiff contends that apart from infringing its Ok washing soap wrapper, the defendant is passing off and further liable to pass off their washing soap as that of the plaintiff and to cause confusion and deception by giving an impression that the washing soap so packed under the impugned wrapper is that of the plaintiff or, in any manner connected with the plaintiff and its business.

(4) The plaintiff in respect of its prayer for the grant of (i) permanent injunction restraining infringement of copyright, (ii) permanent injunction restraining passing off (iii) an order for destruction of the labels, wrapper, dyes, blocks etc. and (iv) for rendition of accounts has valued each of the said reliefs for the purposes of court-fee at Rs. 200 each and has paid separately court-fee of Rs. 20 on each of the reliefs sought. For the purposes of jurisdiction plaintiff for the first three reliefs has fixed the same value as was fixed by it for the purposes of court-fees but in respect of its prayer for rendition of account, the plaintiff has fixed the value at rupees one lakh being the estimated value of its loss due to the defendant's sale of the washing soap under the impugned wrapper.

(5) Along with the suit the plaintiff has filed the present application under Order 39 Rules I and 2 read with section 151 of the Code of Civil Procedure re-iterating its averments made in the plaint has prayed that during the pendency of the suit, the defendant, its servants' agents, dealers, representatives and workmen be restrained from manufacturing, selling and/or offering for sale, directly or indirectly dealing in washing soap under 521 wrapper which is a colourable imitation of the plaintiff's wrapper, 'and from giving an impression that the defendant's washing soap is that of the plaintiff or is connected with the plaintiff in any manner whatsoever, amounting to passing off, and from infringing the registered copyright pertaining to Ok washing soap wrapper belonging to the plaintiff.

(6) The defendant in its written statement controverting the allegations of the plaintiff resists the suit, among other, on the grounds that this Court has no jurisdiction to try the suit, that the suit is not properly valued for the purposes of court-fee and jurisdiction in that the value for the purpose of jurisdiction under section 8 of the Suits Valuation Act, 1887, has to be the same as the value adopted by the plaintiff for the purposes of court fee ; that the wrapper of the plaintiff is not distinctive as alleged or that the colour scheme adopted by the plaintiff is distinctive and/or that the plaintiff has any right thereof independently of the rest of the wrapper, and that the alleged offending wrapper is neither identical nor deceptively similar to that of plaintiff. The defendant deny that their wrapper has caused any confusion and/ or deception and/or that the plaintiff has been or is likely to be put to any loss whether in business or reputation as alleged.

(7) The defendant alleges that it is a partnership firm registered under the Indian Partnership Act, 1932, and that it had been in the business of manufacture and sale of soaps since 1931. It is alleged from 1931 to 1976 they were adopting the manual process of soap manufacture but from the year 1976 onward they had introduced automation in the manufacture of their soaps by installation of machines and that the wrappers used by them were first introduced by them in January, 1977, which were subsequently changed in April, 1977. The defendants deny that they had represented in

then- wrappers the layout and/or colour combination and/or artistic representation of the plaintiff's wrapper or that the defendant's wrapper had been deliberately made and/or caused to be made to appear as that of the plaintiff and/or that the defendant was motivated by any intention to deceive and/or cause confusion and/or to earn profits in an illegal manner. The defendant further deny that they are passing off and/or likely to pass off their washing soap as being that of the plaintiff or that their washing soap packed in the allegedly offending wrappers has caused or is likely to cause confusion and/or deception as being that of the plaintiff and/or as being in any manner connected with the plaintiff and/or its business.

(8) The defendant's stand in their reply to the interim application is practically the same as the one taken in the written statement. The same, therefore, is not required to be noted.

(9) It may bear mention here that subsequently to their filing the written statement and reply to the interim application, the defendant's impugned wrapper had been registered under the Copyright Act, 1957, by the Copyright office as No. A 20449/78. The defendant accordingly by I.A. No. 2861 of 1978 submit that in the interest of Justice they may be allowed to refer to and rely on the registration of the wrapper in their name.

(10) It would be appropriate to first deal with the preliminary objections urged against the maintainability of the suit in this Court.

(11) The jurisdiction of this Court was sought to be ousted on the ground that the Suit arises under Chapter Xii of the Copyright Act, 1957, and that the original jurisdiction in respect of such suits or other civil proceedings arising under the said Chapter is that of the District Court under section 62 of the said Act. Section 62 of the Copyright Act, 1957, reads as under :

"62(1) Every suit or other civil proceeding arising under this chapter in respect of the infringement of copyright in any work or the infringement of any other right conferred by this act shall be instituted in the District Court having jurisdiction.

(2)For the purpose of sub-section (1), a "district court having jurisdiction shall notwithstanding anything contained in the Code of Civil Procedure, 1908, or any other law for the time being in, force, include a District Court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or other proceeding or, where there are more than one such person, any of them actually and voluntarily resides or carries on, business or personally works for gain".

(12) The learned counsel for the defendants submitted that a plain reading of the above-noted section makes it clear that every suit or other civil proceeding arising under Chapter Xii in respect of the infringement of copyright in any work or the infringement of any other right conferred by the Copyright Act, 1957, shall be instituted in the District Court having jurisdiction. I do not agree. The Copyright Act does not define the expression 'District Court'. The question, therefore, is what is meant by the said expression. Sub-section (4) of section 2 of the Code of Civil Procedure defines the

term District. According to the said definition 'district' means the local limits of the jurisdiction of a principal civil court of original jurisdiction (herein- after called a "District Court"), and includes the local limits of the ordinary original civil jurisdiction of a High Court. It is thus evident that by the term "District Court" what is envisaged is the principal civil court of original jurisdiction in a district. There can be no dispute that the expression "District Court" by virtue of section 62(1) of the Copyright Act, has the meaning assigned to the expression in the Code of Civil Procedure, 1908. Now under sub-section (2) of section 5 of the Delhi High Court Act, 1966, notwithstanding anything contained in any law for the time being in force, the High Court of Delhi in respect of the Union Territory of Delhi has the ordinary original civil jurisdiction in every suit the value of which exceeds fifty thousand rupees, as amended by section 3 of the Delhi High Court (Amendment) Act, 1969. It would, therefore, be seen that after the coming into force of Delhi High Court Act, 1966, as amended, this High Court has become the principal civil Court of original jurisdiction with respect to every suit the value of which exceeds fifty thousand rupees. [See also Bakshi Lochan Singh and others v. Jathedar Santokh Singh and others, I.L.R. (1971) I Delhi 615(1)].

(13) Reference here may also be made to Raja Soap Factory and others v. S. P. Santharaj and others . In. that case the plaintiff challenged the infringement of its trade mark. Under section 2(e) of the Trade and Merchandise Marks Act, 1958, the expression "District Court" has the meaning assigned to it in the Code of Civil Procedure, 1908. On May 5, 1964, when the suit was filed the District Court of Mysore, within the territorial limits of which the cause of action was alleged to have arisen was closed for summer vacation and no Judge competent to exercise the powers of the District Court was functioning in the District Court on duty on that day. At the request of the plaintiff the High Court entertained the plaint and also an application for interim injunction. The High Court granted the interim injunction in terms of prayer in the application. In appeal before the Supreme Court the defendants contended that the High Court had no jurisdiction to entertain the action instituted by the plaintiffs and had no powers to make an order issuing a temporary injunction as the action as framed could properly be instituted in the District Court. Rejecting the contention, it was observed that the expression "District Court" has by virtue of section 2(e) of the Trade Mark and Merchandise Act, 1958, the meaning assigned to that expression, in the Code of Civil Procedure, 1908. Section 2(4) of the Code defines a "District" as meaning the local limits of the jurisdiction of a principal civil court called the District Court and includes the local limits of the ordinary original civil jurisdiction of a High Court. Their Lordships accordingly held, if a High Court was possessed of ordinary original civil jurisdiction. It would, when exercising that jurisdiction be included for the purposes of the Trade and Merchandise Marks Act, 1958, in the expression "District Court". It was accordingly held that the High Court was competent to exercise original jurisdiction under section 105 of the Trade and Merchandise Marks Act, 1958, if invested with the ordinary original civil jurisdiction of a District Court.

(14) The Delhi High Court having ordinary original civil jurisdiction in respect of the Union territory of Delhi in every suit the value of which exceeds fifty thousand rupees is competent to entertain and try the present suit.

(15) It was then contended that assuming that the suit is maintainable in this Court, facts necessary to give territorial jurisdiction to the Court are non-existent in the present suit. The contention was

that the defendant neither resides nor works for gain nor carries on business in Delhi and that no part of the alleged cause of action had arisen or was alleged to have arisen within the territorial jurisdiction of this Court. There is no merit in this submission. The plaintiff has invoked the territorial jurisdiction of this Court on the allegation that it is marketing its washing soap under Ok wrapper through its office at 28, Asaf Ali Road, New Delhi, where it carries on its business and works for gain, besides averring that the washing soap under the infringing wrapper is available at Delhi and elsewhere, and so even under Common Law, this Court has jurisdiction to entertain the suit. Sub-section (2) of section 62 of the Copyright Act, 1957, noted above, carves out an exception to the provision of section 20 of the Code of Civil Procedure and enables a plaintiff seeking remedy for infringement of Copyright to file the suit in the Court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or other proceeding or, where there are more than one such persons, any of them actually and voluntarily resides or carries on business or personally works for gain. There being no traverse to the plaintiff's averment that it is marketing its washing soap under the Ok wrapper through its office at 28, Asaf Ali Road, New Delhi, where it carries on its business and works for gain, it has to be held that this Court has jurisdiction to entertain and try the suit. The bare denial of the defendant that no part of the alleged cause of action arose or is alleged to have arisen within the territorial jurisdiction of this Court is of no consequence.

(16) The learned counsel for the defendant then submitted that there being no allegation that the defendants are selling or causing to be sold the infringing product in Delhi, the suit for the redress of the plaintiff's grievance regarding passing off was not friable by this Court, more so when the defendants have categorically contended that their sales are effected mainly in the State of Rajasthan and to a very limited extent at Amritsar and Nepal. It may bear mention here that the plaintiff in paragraph 13 of the plaint had contended that the washing soap under the infringing wrapper is available at Delhi. The rival contentions of the parties at best may be said to necessitate an enquiry being made in the matter by the framing of an issue but on a prima facie view of the matter it cannot be said for the present that this Court has no jurisdiction to entertain and try the suit in respect of the allegation regarding "passing off".

(17) It was then contended though not specifically pleaded, that a suit for account must be founded on an obligation to render an account. The Plaintiff having not averred such an obligation, the suit for an account was not competent. Support for this argument was sought to be drawn, from *Govinda Karthe v. Paremeswaran Thampym*, 1961 Klt 360(3) wherein it was observed that the mere fact that the plaintiff asks an account or brings his suit on account or that accounts have to be gone into in order to determine the account, if any, due to the plaintiff, will not make the suit for an account, and that every bill for an account must be founded upon an obligation to render an account.

(18) The observations in the above noted case were made in a wholly different context. The Court was not dealing with a case for infringement of the copyright. The argument sought to be urged has to be repelled in view of the provisions of section 55 of the Copyright Act which prescribes civil remedies that are available to the owner of the copyright for infringement of this copyright. Among other remedies that are available to the owner of the copyright is the remedy to sue for accounts. It being a statutory remedy available under law it is futile to contend that the defendant in such a suit

must stand in some such "relation to the plaintiff as that of agent, or belie or receiver or trustee or partner or mortgagee."

(19) The next submission of the learned counsel for the defendant was that the suit had not been properly valued for the purposes of jurisdiction. It was contended that the plaintiff having valued the relief for the purpose of court-fees in respect of this prayer, viz., restraining infringement of copyright, for permanent injunction restraining passing off, for an order for destruction of labels, wrappers, dyes, blocks etc. and for rendition of account at Rs. 200 each in accordance with the provision of section 7(iv) of the Court-fees Act, 1870, the same valuation has to be taken to be the value for the purposes of jurisdiction under section 8 of (The) Suits Valuation Act, 1887, in that the value as determinable for computation of Court-fees and the value for purposes of jurisdiction shall be the same. There can be no dispute to this proposition of law. Indeed their Lordships in S. Rm. Ar. S. Sp. Sathappa Chettiar v. S. Rm. Ar. Am. Ramanathan Chettiar, , have held that there can be little doubt that the defect of the provisions of section 8 of (The) Suits Valuation Act is to make the value for the purposes of jurisdiction dependent upon the value as determinable for computation of Court-fees. The result is that it is the moment at which the plaintiff has valued the relief sought for the purposes of court-fees that determines the value for jurisdiction in the suit and not vice versa.

(20) The learned counsel for plaintiff, however, contended that the High Court of Judicature at Lahore had framed rules under section 9 of the Suits Valuation Act, 1957, with regard to the manner and determination of the value of certain types of suits for the twin purposes of court-fees and jurisdiction and that the said rules are applicable in the High Court of Delhi by virtue of section 7 of the Delhi High Court Act, 1966, and that the valuation placed by the plaintiff with regard to the jurisdiction was in consonance with the said rules. That being so, the suit, it was urged, is friable by this Court. The learned counsel for the defendants contest the correctness of this assertion. The question accordingly is whether the rules framed by the High Court of Judicature at Lahore were applicable in the High Court of Delhi or not.

(21) In order to determine the respective contention of the parties, it would be appropriate to note the relevant provisions of the Suits Valuation Act and the rules made there under by the High Court of Judicature at Lahore.

SECTION 9 of the Suits Valuation Act, 1887, reads as under : "DETERMINATION of value of certain suits by High Court Where the subject matter of suits of any class, other than suits mentioned in Court-Fees Act, section 7, paragraph (v) and (vi), and paragraph, (x), clause (d) is such that in the opinion of the High Court it does not admit of being satisfactorily valued the High Court may, with the previous sanction of the State Government direct that the suits of that class shall, for the purposes of the Court- fees Act, 1870, and of this Act and any other enactment for the time being in force, be treated as if their subject- matter were of such value as the High Court thinks fit to specify in this behalf".

(22) The High Court of Judicature at Lahore in 1942 with the previous sanction of the State Government under the powers conferred by section 9 of the Suits Valuation Act of 1887 and all other powers in that behalf made rules regarding the manner of determining the value of suits for

purposes of jurisdiction specified in section 9 of Suits Valuation Act, 1887. Rules 3 and 4 of the said, .Rules are relevant for our purposes.

RULE3 reads as under :

"SUITSin which the plaintiff in the plaint asks for accounts only not being :

(I)suits to recover the amount which-may be found due to the plaintiff on taking unsettled accounts between him and the defendant (II)suits of either of the kinds described in order Xx, Rule 13 of Code of Civil Procedure' VALUE: (a) For the purposes of the Court-fees Act, 1870. . .Rs. 200.00 (B)For the purposes of the Suits Valuation Act, 1887, and the Punjab Courts Act, 1918. ....Rs. 1,000/".

WHILERule 4 reads as under :

"4(I)Suits in which the plaintiff in the plaint seeks to recover the amount which may be found to the plaintiff on taking unsettled accounts between him and defendant ;

(II)Suits of either of the kinds described in, Order Xx, rule 13 of the Code of Civil Procedure .

VALUEfor the purposes of court-fee.....as determined by the Court-fees Act, 1870.

VALUEfor the purposes of jurisdiction for the purpose of the Suits Valuation Act, 1887, and the Punjab Courts Act, 1918, as valued by the plaintiff in the plaint subject to determination by the Court at any stage of the trial"

(23) The learned counsel for the plaintiff submitted that the rules framed by the High Court of Judicature at Lahore and since followed in the said High Court, the East Punjab High Court, the Punjab High Court and the Courts in Delhi even after the constitution of the Delhi High Court pertain to the practice and procedure followed by the said Courts with regard to the manner and determination of the value of certain types of suits for the purposes of court-fees and jurisdiction and that the said practice and procedure, with the necessary modifications apply in relation to the High Court of Delhi by virtue of section 7 of the Delhi High Court Act 1966. The learned counsel accordingly submitted that the said rules are applicable to all suits friable by this High Court.

(24) By virtue of sub-section (2) of section 5 of the Delhi High Court Act, 1966, notwithstanding anything contained in any law for the time being in force, the High Court of Delhi has in respect of the Union Territory of Delhi ordinary original civil jurisdiction in money suit the value of which exceeds twenty five thousand rupees, since raised to fifty thousand rupees by section 3 of the Delhi High Court (Amendment) Act, 1969 (Act No. 37 of 1969).

(25) Section 7 of the Delhi High Court Act, 1966, deals with the practice and procedure to be followed in, the High Court of Delhi. The said section reads as under : "SUBJECT to the provisions of this Act, the law in force immediately before the appointed day with respect to practice and procedure in the High Court of Punjab shall, with the necessary modifications, apply in relation to the High Court of Delhi and accordingly the High Court of Delhi shall have all such powers to make rules and orders with respect to practice and procedure as are immediately before the appointed day exercisable by the High Court of Punjab and shall also have powers to make rules and orders with respect to practice and procedure for the exercise of its ordinary original civil jurisdiction", (26) The question accordingly is whether the rules made by the High Court of Judicature at Lahore are rules pertaining to practice and procedure with regard to the manner and determination of the value of certain types of suits for the purposes of court-fees and jurisdiction as was sought to be contended by the learned counsel for the plaintiff.

(27) The learned counsel for the defendant contended that a matter of practice and procedure generally speaking arises in the course of an action and that practice in its larger sense denotes the mode of proceeding by which a legal right is enforced as distinguishable from the law which gives the right. He accordingly submitted that "practice." in the common and ordinary sense of the word denotes the rules that guide the *cursus curiae* and regulates the proceedings in a cause within the walls of the Court itself while "procedure" including the whole course of practice, from the issuing of the first process by which the suitors are brought before the Court to the execution of the last process on the final judgment. In other words, the learned counsel submitted, procedure concerning all steps necessary to be taken in litigation for the establishment of a right in order that the right may be judicially recognised and declared in such manner as will enable the party asserting the right legally to enjoy it. In the practice, the learned counsel urged that before a party approaches the Court, the party must ensure the provision of law under which it invokes the pecuniary and territorial jurisdiction of the Court which cannot be a matter of practice and procedure but embodied in statute.

(28) Now, what is the meaning of the words practice and procedure ? Patton in his book on jurisprudence, 3rd Edition at page 535 states that procedure is the body of rules that govern the process of litigation while practice regulates the proceedings in a case within the four walls and limits of the Court itself.

(29) In "Words and Phrases" Volume 33 published by West Publishing Company at page 188 "practice and procedure" are said to relate to the legal rules directing the manner of bringing parties into the Court, and the method of the Court after they are brought in, in hearing, dealing with, and disposing of, matters in dispute between them.



(30) JOWITT'S Dictionary of English Law, Second Edition (page 1400) describes practice as the form and manner of conducting and carrying on suits, actions, or prosecutions at law or in equity, civil or criminal, through their various stages from the commencement to final judgment and execution, according to principles and rules laid down, by the several courts. It is further stated at page 1438 that procedure is the mode in which the successive steps in litigation, are taken.

(31) It is, therefore, evident that practice and procedure relate to the body of rules prescribing the method for seeking the remedy and not the enforcement of a right. The object of the Suits Valuation Act is to prescribe the method of valuing certain suits for the purposes of detremining the jurisdiction of Courts with respect thereto. Section 9 of the Suits Valuation Act deals with that class of suits which do not admit of being satisfactorily valued. The said section provides that in such suits the High Court may provide for the valuation of those suits. The rules framed under section 9 of the Suits Valuation Act by the High Court of Judicature at Lahore provide a mode for valuing the suits for the purposes of jurisdiction in suits which do not admit of being satisfactorily valued. The said rules provide a mode by which a plaintiff is to proceed for the enforcement of his legal rights. if practice and procedure relate to the body of rules directing the manner of bringing the parties into Court, it is not understood as to why the rules in question, cannot be said to provide a mode for bringing the parties into Court.

(32) In *H. Mahomed Ishaq Sahib v. Mahomed Moideen and another* Air 1922 Madras, 421(5), it was observed that the power , under which fees were levied the original side of the High Court was derived from the general powers to issue general rules for regulating the practice and procedure of the Courts.

(33) If that be so, the rules in question cannot be said to be other than the one for regulating the practice and procedure of the Courts.

(34) Reference here may be made to *Poyser v. Minors* (1881) 7 Q.B.D. 329(6). Therein Lush L.J. observed that practice in its larger sense denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding's the Court is to administer.

(35) It may bear mention here that *Poyser's* case (supra) was considered in *A.G. v. Sillem* (1864)10 H.L.C. 704(7) but therein Westbury J. observed that "practice" means the same thing as procedure and denotes "rules that make or guide cursus curise and regulate the proceedings in a case within the walls or limits of the Court itself".

(36) *Sillem* (supra) was noticed in *Harish Chandra Bajpai v. Tirloki Singh*, IS57 S.C.R. 370 (8). The question under consideration, in *Harish Chandra's* case was whether the provision's of Order 6 Rule

17 of the Civil Procedure Code were applicable to proceedings before an Election Tribunal. Their Lordships approving the observations of Westbury J. that practice and procedure denotes "rules that make or guide the 'cursus curiae' and regulate the proceedings in a case within the walls or limits of the Court itself" observed that these proceedings include 'all steps, which might be taken in the prosecution or defense thereof, including an application for amendment.

(37) But it has to be borne in mind that the observations of their Lordships were made in, a wholly different context regarding the applicability of the provisions of Order 6 Rule 17 of the Code of Civil Procedure to a proceeding before an Election Tribunal.

(38) The learned counsel for the defendants, however, strenuously contended that the procedure must be in, relation to the proceedings in Court after it had taken seisin of the matter and that such an implication was inherent in the term procedure. Support for this argument was sought from M/s. Bharat Barrel and Drum Mfg. Co. Pvt. Ltd. and another v. The Employees' Estate Insurance Corporation, . Their Lordships in the above case were interpreting the term procedure appearing in section 96(l)(b) of the Employees' Estate Insurance Act, 1948. It was in that context that it was observed that apart from the implication inherent in the term procedure appearing in section 96(l)(b), the power to prescribe by rules any matter falling within the ambit of the term must be the "procedure to be followed in proceedings before such Court". It was further observed that the word "in" emphasised by them, furnished a clue to the controversy that procedure must be in relation to proceeding's in, Court after if had taken seisin of the matter. It would, therefore, be seen that their Lordships' observations were made only in the context of section, 96(l)(b) of the Employees' State Insurance Act, 1948.

(39) It may be noted here that a Full Bench of this Court in Smt. Sheila Devi and others v. Shri Krishan Lal Kaira and others Air (1974) 11 Delhi 491(10) had an occasion to consider this question. The Full Bench noticed the controversy between the parties regarding these rules but left the question open to be canvassed before the learned Single Judge observing that it was not determinative of the question referred to the Full Bench. However, at page 500 the Full Bench had observed that prima facie the rules are applicable to Delhi. The Full Bench further observed that if there are rules made by any High Court under section 9 of the Suits Valuation Act, 1887, and the same are applicable, the valuation for the purposes of court-fees under section 7(iv) of the Court-fees Act will have to be according to such rules. It was also observed that so far as the rules made by the Punjab High Court are concerned, it has to be noted that Rules 3 and 4 contemplate separate valuation for the purpose's of court-fees and for the purposes of jurisdiction. It was further observed that if the said rules are applicable, the valuation for the purposes of court-fees would be separate from the valuation for the purposes of jurisdiction as provided in the said rules.

(40) From the observations of the Full Bench it is clear that Rules on a prima facie consideration were held to be applicable to Delhi.

(41) The learned Single Judge on the matter being remitted to him observed that these rules were made in the year 1942 by the High Court of Judicature at Lahore under section 9 of the Suits Valuation Act, 1887, and have since been followed in the said High Court and in, the successor High

Courts, the East Punjab High Court, the Punjab High Court and in Courts in Delhi even after the constitution of the Delhi High Court. (See Hans Raj Kaira v. Kishan H Lal Kaira and others Air (1976) 11 Delhi 745(11).

(42) The learned counsel for the defendants strenuously contended that the learned Single Judge was doubtful about the applicability of these rules to the Delhi High Court. In support of his submission he drew my attention to the subsequent observation of the learned Single Judge in his judgment.

(43) It is no doubt true that the learned Judge in a subsequent part of his judgment has observed that in relation to the reliefs of accounts, injunction, and recovery of money court fee has to be paid and valorem under the appropriate sub-clauses of clause (iv) of section 7 of the court-fees Act and that neither of the two suits under consideration could be said to belong to the category of suits which were exempt from the operation of section, 8 and that the value of the suits for purposes of jurisdiction in relation to these reliefs has to be the same as has been determined for the purposes of court-fees, unless there was anything in the Rules of the Lahore High Court, if applicable, which provide to the contrary. The words "if applicable" used by the learned Single Judge do not lend support to the argument of the learned counsel for the defendants that the learned Single Judge was doubtful about the applicability of the rules made by the High Court of Judicature at Lahore to the High Court of Delhi.

(44) M. S. Joshi J. in Manohar Lal Gupta v. State of Haryana and others 1977 2nd (Delhi) 181(12) has held that the rules framed under section 9 of the Suits Valuation Act by the High Court of Judicature at Lahore are applicable to suits filed in this Court because of section 7 of the Delhi High Court Act. I am in respectful agreement with the view of my learned brother.

(45) Besides the Division Bench judgment of this Court in Radhey Sham Sawhny and others v. Bawa Joginder Singh Bhalla and others, is an authority in support of the proposition that all the rules and orders of the Punjab High Court which were applicable in the Union Territory of Delhi on the coming into existence of the Delhi High Court continue to operate by virtue of section 7 of the Delhi High Court Act. Even on the assumption that rules made by the High Court of Judicature at Lahore under section 9 of the Suits Valuation Act, 1887, are substantive law, the same remain operative in the Union Territory of Delhi as held by the Division Bench in the above-said case.

(46) It may be noted here that the rules as framed by the High Court of Judicature at Lahore in respect of the manner of determining the value of suits for purposes specified in section 9 of the Suits Valuation Act, 1887. have been embodied in Chapter III-C of the Rules and Orders (Volume 1) of the Punjab High Court and that the said Rules and Orders are applicable in the Union Territory of Delhi. That being so, the grievance sought to be made by the defendants is misconceived and untenable.

(47) It was then contended that clause 27 of the Letters Patent of the High Court of Judicature at Lahore empowered the said High Court to frame rules for practice and procedure and that the High Court of East Punjab inherited this power for framing rules under clause 7 of the High Courts

(Punjab) Order, 1947. The submission was that by virtue of the said clause subject to the provisions of the said Order the law in force immediately before the 'appointed day with respect to practice and procedure in the High Court at Lahore shall, with the necessary modifications', apply in relations to the High Court of East Punjab, and accordingly that High Court shall have all such powers to make rules and orders with respect to practice and procedure as were immediately before the appointed day exercisable by the High Court at Lahore with a proviso that any rules or orders which were in force immediately before the appointed day with respect to practice and procedure in the High Court at Lahore shall, until varied or revoked by rules or orders made by the High Court of East Punjab apply with any necessary modifications in relation to practice and procedure in the High Court of East Punjab as if made by that Court.

(48) It was accordingly contended that only such rules as had been framed in the exercise of the power under clause 27 of the Letters Patent by the High Court of Judicature at Lahore and preserved under clause 7 of the High Courts (Punjab) Order, 1947, have been made applicable to the High Court of Delhi under section 7 of the Delhi High Court Act. The rules in question, it was submitted, were framed under section 9 of the Suits Valuation Act and, therefore, are not attracted by section 7 of the Delhi High Court Act. I do not agree. On a proper construction of section 7 of Delhi High Court Act, it is evident that the rules in question have been made applicable to the Delhi High Court.

(49) Proviso to section 7 of the Delhi High Court Act envisages that any rules or orders which were in, force immediately before the appointed day with respect to practice and procedure in the High Court of Punjab shall, until varied or revoked by rules or orders made by the High Court of Delhi, apply with necessary modifications in relation to practice and procedure in the High Court of Delhi as if made by that High Court. It is, therefore, evident that the rules or orders which were in 'force immediately before the appointed day with respect to practice and procedure in the High Court of Punjab have been made applicable to the High Court of Delhi as if made by this High Court. Rules framed under section 9 of the Suits Valuation Act were rules in force immediately before the appointed day with regard to practice and procedure in. the High Court of Punjab and would, therefore, be applicable in the High Court of Delhi. This view is fortified by the judgment of the Division Bench of this Court in case Radhey Sham and others (supra).

(50) Another contention sought to be urged was that the rules in, question were applicable only to Courts which enjoyed ordinary original civil jurisdiction and that there was no question of these rules being applicable to the High Court of Judicature at Lahore, the East Punjab High Court and the Punjab High Court as these Courts were not exercising ordinary original civil jurisdiction. It was because of the absence of this jurisdiction, goes the argument, that the High Court of Delhi has been vested with the said jurisdiction by virtue of the section 5 of the Delhi High Court Act. That being so, it was submitted, the rules in question would not be applicable to the High Court of Delhi as on the appointed day when the High Court of Delhi came into being the rules were applicable only to Courts which were exercising ordinary original civil jurisdiction. It was submitted that section 7 of the Delhi High Court Act makes applicable to the High Court of Delhi the law in force immediately before the appointed day with respect to practice and procedure in the High Court of Punjab but these rules being not applicable in High Court of Punjab would not apply in relation to the High Court of Delhi. The argument is without any merit and cannot be countenanced in face of section 16

of the Delhi High Court Act. The said section envisages that all proceedings pending immediately before the appointed day in any subordinate Court in the Union, Territory of Delhi in or in relation to any such civil suit as is referred to sub-section (2) of section 5 shall on, that day stand transferred to the High Court of Delhi which shall proceed to try, hear and determine the matter as if it had been pending therein. Such a suit it is conceded on standing transferred to the High Court of Delhi shall retain its valuation already fixed under the rules in question for the purposes of Court-fees and (The) Suits Valuation Act. If that be so, it is not understood as to how the rules in question would not apply to a suit filed directly in the High Court of Delhi. The rules apply to all suits in which the plaintiff seeks to recover the account. which may be found due to the plaintiff on taking unsettled accounts between him and defendant. The plaintiff has been given the liberty to value his claim for the purposes of Court-fees in a suit where it is difficult to value the claim with any precision or definiteness with I further liberty to put such value as he may think proper for the purposes of jurisdiction subject to determination by the Court at any stage of the trial.

(51) Lastly, it was submitted that the suit is otherwise not properly valued for the purposes of court-fee and jurisdiction. The submission was that for seeking the relief for accounts the plaintiff has to seek a declaration that its copyright had been infringed and that the defendants are passing off their goods as that of the plaintiff. If that be so, it was urged, the relief for accounts would be consequential relief flowing from the relief of declaration sought. There is a fallacy in this submission which is wholly misconceived. Sub-section (1) of Section 55 of the Copyright Act, 1957, envisages that where copyright in any work has been infringed, the owner of the copyright shall except as otherwise provided by this Act, be entitled to all such remedies by way of injunction, damages, accounts and otherwise as are or may be conferred by law for the infringement of a right. The remedies available to the holder of the copyright in case of the infringement of his work are statutory remedies, independent of each other, entitling the aggrieved party to sue for any or all the reliefs available to him under the law.

(52) This brings me to the merits of the case. The case of the plaintiff, as already noted above, is that the defendants are committing infringement in respect of its wrapper registered against No. A-18305/77- Apart from it, the defendants are alleged to be passing off their washing soap as that of the plaintiff by giving an impression that the washing soap packed under the impugned wrapper is that of the plaintiff, or, in, any manner connected with the plaintiff and its business.

(53) The defendants in denying these allegations submit that they are in the business of manufacture and sale of soaps since 1931. They submit that the wrappers used by them in respect of their brand of soap being "521 washing soap" which brand of washing soap was first introduced by them in January 1957 went a change in April 1957.

(54) With a view to appreciate the rival contentions it would be appropriate to note the law on the subject. In *Ness's Product Ltd. and another v- M/s. Milkmaid Corporation and another*, a Division Bench of this Court observed that distinction between an action for infringement and for passing off is well known. The latter is a common law remedy being in substance an action for deceit, that is passing off by a person of his own goods as those of another. The former is a statutory remedy conferred on the registered proprietor of a registered trade mark for the vindication of the exclusive

right to the use of the trade mark in relation to those goods. The use by the defendant of the trade mark of the plaintiff is not essential in an action for passing off, but is the sine quo non in the case of an action for infringement. In an action for infringement, the plaintiff must no doubt make out that the use of the defendant's work is likely to deceive, but where the similarity between the plaintiff's and defendant's work is so close either visually, phonetically or otherwise and the Court reaches the conclusion that there is an imitation, no further evidence is required to establish that the plaintiff's rights are violated. In other words, if the essential features of the trade mark of the plaintiff have been adopted by the defendant the fact that the get up, packing and other writing or marks on the goods or on the packets in which the defendant offers his goods for sale show marked differences or indicate clearly a trade origin different from that of the registered proprietor of the mark would be immaterial; whereas in the case of passing off the defendant may escape liability if he can show that the added matter is sufficient to distinguish his goods from those of the plaintiff.

SIMILARview was taken earlier by a Division Bench of this Court in Nanak Chand and others v. Kohinoor Chemical Co. Ltd. and was reiterated by this Court in Khemraj Shrikrishnadas v. M/s. Garg and Co. and another .

(55) In Century Traders v. Roshan Lal Duggar and Company I.L.R. (1977) Ii Delhi 709(17), it was held by a Division Bench of this Court that registration of mark in the trade mark registry would be irrelevant in an action for passing off. In deciding whether a particular mark is common to the trade, use of that mark would be extremely relevant. Mere registration would not be enough. Further, registration itself does not create a trade mark. The trade mark exists independently of the registration which merely affords further protection under the statute. Priority in adoption and use of a trade mark is superior to priority in registration. For the purposes of claiming such proprietorship of a mark, it is not necessary that the mark should have been used for a considerable length of time. As a matter of fact, a single actual use with intent to continue such use co instanti confers a right to such mark as a trade mark. It is sufficient if the article with the mark upon it has actually become a ven,dable article in the market with intent on the part of the proprietor to continue its production and sales. It is not necessary that the goods should have acquired a reputation for quality under that mark. Actual use of the mark under such circumstances as showing an intention to adopt and use it as a trade mark is the test rather than the extent or the duration of the use.

(56) In R. G. Anand v. M/s. Delux Films and others 1968 Dlt 321(18) it was observed that broadly speaking copyright is claimable only in respect of the form in which the ideas or opinions are expressed. What is protected is not original thought or information but the original expression of thought or information in some concrete form. Accordingly, it would be an infringement only if the defendant makes an unlawful use of the form in which the thought or information is expressed.

(57) In Ruston and Homby Ltd. v. Zamindara Engineering Co., . Their Lordships observed that in a passing off action the issue is, "Is the defendant selling goods so marked as to be designed or calculated to lead purchasers to believe that they are the plaintiffs goods" while in an infringement action the issue is, "Is the defendant using a mark which is colourable imitation of the plaintiffs registered trade mark?" It was further observed that the action for infringement is a statutory right.

It is dependent upon the validity of the registration and subject to other restrictions laid down in sections 30, 34 and 35 of the Act. On the other hand the gist of the passing off action is that 'A' is not entitled to represent his goods as the goods of 'B' but it is not necessary for 'B' to prove that 'A' did this knowingly or with any intent to deceive. It is enough that the get up of 'B's' goods has become distinctive of them and that there is a probability of confusion between them and the goods of 'A'. No case of actual deception nor any actual damage need be proved.

(58) In *Parle Products (P) Ltd. v. J. P. & Co. Mysore*, it was held by their Lordships that in order to come to the conclusion whether one mark is deceptively similar to another, the broad and essential features of the two are to be considered. They should not be placed side by side to find out if there are any differences in the design and if so, whether they are of such character as to prevent one design from being mistaken for the other. It would be enough if the impugned mark bears such an overall similarity to the registered mark as would be likely to mislead a person usually dealing with one to accept the other if offered to him.

(59) Let us examine the Ok washing soap wrapper of the plaintiff and the impugned wrapper of the defendants in the light of the principles enunciated in the above noted cases.

(60) The upper portion of the plaintiff's wrapper shows the words 'A Tata Product', in white colour arranged in a blue coloured diamond device, appearing on either side with the expression Ok arranged in a shield device in red colour, appearing in, the centre of the two blue diamond devices. The side panels consist of two blue-coloured diamond devices containing the expression Ok appearing in vernacular languages- The colour scheme of the plaintiff's wrappers consists of red and blue colours against white background- A perusal of the defendants impugned wrapper shows that it bears close resemblance to the plaintiff's wrapper, being partially of the same side, its colour scheme and design are almost the same as that of the plaintiff's wrapper- The essential features of the impugned wrapper are that the upper portion shows 'A Hansa Product' in white colour, arranged in blue diamond devices, appearing on either side with the numeral 521 in red colour arranged in a shield device- This is exactly the pattern of the plaintiff's design, except that for the words 'A Tata Product' in white colour, arranged in blue diamond devices, appearing on either side, the defendants have words 'A Hansa Product' in white colour- Further for the words 'OK' in red colour arranged in a shield device, the defendants have the numeral 521 in red colour, arranged in a shield device- The side panels, again, in the impugned wrapper comprise numeral 521 in vernacular and device of a swan instead of the word 'OK' arranged in blue diamond devices like that of the plaintiffs- On an overall view of the impugned label, there can be no doubt that it has been so designed in, its get up and in its colours that there is a likelihood of confusion being created in the mind of a purchaser- The wrapper of the defendants is calculated to lead purchasers to believe that the soap of the defendants is the plaintiff's soap- The similarity between the plaintiff's and defendants' wrapper is so close that on a visual comparison of the two, it has to be held that the wrapper of the defendants is an imitation of the plaintiff's wrapper, in that essential features of the trade mark of the plaintiff have been adopted by the defendants- The defendants, however, by indicating on their wrapper that the washing soap sold in' the said wrapper is made by 'The Hansa Chemical Pharmacy, Jaipur' seek to escape their liability in respect of passing off submitting that the added matter is sufficient to distinguish their goods from those of the plaintiff; but is the added matter enough to reject the other

grievance of the plaintiff ?

(61) The plaintiff's other grievance is in respect of infringement of its copyright pertaining to the design of its wrapper- The plaintiff claims to be the holder of the registration No- A-1 8305/77 granted to it under the Indian Copyright Act, 1957, besides registration nos 18573/77 and A-1 8595/77- The defendants subsequent to their filing the written statement and the reply to the present application by an application (LA- No- 2861 of 1978) dated 8th August, 1978, have apprised this Court that their wrapper in question has also been registered under the Copyright Act, 1957, by the copyright office as No. A 20449/78. From the certified copy of the said registration it is evident that the defendants' wrapper was registered on 1st June, 1968. Does this registration exonerate the defendants of having infringed the copyright of the plaintiff ?

(62) The plaintiff's copyright was registered on 7th September, 1977. The case of the plaintiff is that the defendants in October 1977 adopted the infringing wrapper of which the plaintiff came to know in November 1977. The defendants on the contrary contend that their washing soap being brand "521 Washing Soap" was for the first time introduced by them in the impugned wrappers in January, 1977 and that the said wrapper went a change in April 1977. Now the plaintiff does not ever categorically as to from which date it is using its wrapper which was registered with the trade mark registry on 7th September, 1977. It would, therefore, be a legitimate inference to draw that the plaintiff started using their wrapper in September, 1977. The plaintiff does not contend that it has been using its mark/design prior to its registration. The defendants on the contrary claim the user of their impugned wrapper from January, 1977, that is, prior in point of time than the plaintiff. There is no material on the record contrary to this assertion. As held by the Division Bench of this Court in Century Traders (supra) the trade mark exists independently of the registration which merely affords further protection under the statute, but the registration itself does not create a trade mark. Even a single actual use with intent to continue such use *co instanti* confers a right to such mark as a trade mark. It being not necessary that the goods should have acquired a reputation for quality under that mark, except that they have become a vendable article, the evidence on the record consisting of the supporting affidavits of the parties is not enough to clinch the issue in favor of one or the other party. In the facts and the circumstances of the case the plaintiff cannot be said to have established a *prima facie* case or that the balance of convenience is in its favor or that if the interim injunction is refused in terms of the prayer made by the plaintiff it would cause irreparable injury to it. However, with a view to protect the interest of the plaintiff it would be appropriate that the defendants be directed to file the accounts of their sales in the Court with a copy to the plaintiff. The defendants are accordingly directed to file the accounts of their sales from the date of filing of the suit to 31st October, 1978, within six weeks of this order besides filing regularly the monthly accounts. The accounts for the month of November, 1978, shall be filed by the middle of December, 1978, and the accounts for the subsequent months by the middle of the next succeeding month.

(63) The application (I.A. No. 16 of 1978) stands disposed of accordingly. The parties to bear their respective costs.