

MANU/DE/0892/2008

Equivalent Citation: MIPR2008(3)82, 2008(37)PTC468(Del)**IN THE HIGH COURT OF DELHI**

FAO(OS) 44/2007

Decided On: 30.05.2008

Appellants: **The Indian Hotels Company Ltd. and Anr.**
Vs.

Respondent: **Jiva Institute of Vedic Science and Culture****Hon'ble Judges/Coram:**

T.S. Thakur and Veena Birbal, JJ.

Counsels:

For Appellant/Petitioner/plaintiff: Mukul Rohtagi, Sr. Adv., U. Hazarika, Neel Masson, Manik Kharanjawala, Ruby Singh Ahuja, Megha Mishra, Lakshmi Ramachandran and Deepali Sharma, Advs

For Respondents/Defendant: Pratibha M. Singh, Sujoy Kumar and Sudeep Chatterjee, Advs.

Subject: Intellectual Property Rights**Acts/Rules/Orders:**

Societies Registration Act, 1860 ;Trade Marks Act, 1999 - Section 21, Trade Marks Act, 1999 - Section 27, Trade Marks Act, 1999 - Section 39; Code of Civil Procedure (CPC) - Order 39 Rules 1, Code of Civil Procedure (CPC) - Order 39 Rules 2, Code of Civil Procedure (CPC) - Order 39 Rules 2A, Code of Civil Procedure (CPC) - Order 39 Rules 3A, Code of Civil Procedure (CPC) - Order 39 Rules 4, Code of Civil Procedure (CPC) - Order 39 Rules 10, Code of Civil Procedure (CPC) - Order 39 Rules 13; Constitution of India - Article 227

Cases Referred:

Zila Parishad, Budaun v. B.R. Sharma AIR 1970 All 376; Mangal Achi v. Asokan AIR 1973 Mad 258; Raj KUmari Suri v. Prem Lal Dhiman AIR 1972 Him Pra 67; Andhra University v. P.V. Raju (1974) 2 Andh WR 17; Devasahayam v. Arumukhan AIR 1953 Trav Co 240; Ramulu v. Ganga Ram AIR 1953 Hyd 138; United Club v. Nowgong Football Association of Nowgong AIR 1964 Assam 81; Shyam Behari Singh v. Biseswar Dayal AIR 1924 Pat 713; Sk. Jusa v. Ganpat Dagdu Gire AIR 1976 Bom 222; A. Venkatasubbiah Naidu v. S. Chellappan and Ors. AIR 2000 SC 3032; Parry & Company v. Perry & Company AIR 1963 Mad 460; Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd. 2001 (5) SCC 73; Diplock in Erwen Warnink by v. J Townend & Sons 1979(2) AER 927; Century Traders v. Roshan Lal Duggar Co. AIR 1978 Delhi 250 : PTC Supp. 1 720 (Del); Heinz Italia v. Dabur India Ltd. (2007) 6 SCC 1; Dhariwal Industries Ltd. v. M.S.S. Food Products (2005) 3 SCC 63; Milmet Oftho Industries v. Allergan Inc. (2004) 12 SCC 624; Laxmikant v. Patel v. Chetanbhat Shah 2002 24 PTC 1(SC); Automatic Electric Limited. v. R.K. Dhawan and Anr. 1999 PTC (91) 81; Info Edge (India) Pvt. Ltd. and Anr. v. Shailesh Gupta and Anr. 2002 (24) PTC 355 (Del.); Essel Packaging Limited v. Sridhar Narra and Anr. 2002 (25) PTC 233 (Del.)

Citing Reference:

Discussed		12
Mentioned		9

Case Note:

Intellectual Property Rights - Trade Mark - Infringement of - Ex parte order of ad interim injunction - Appeal - Maintainability - plaintiffs, who are running business under the trade name/trade mark "Jiva" filed suit against Appellant-Defendant who allegedly used the same trade mark for the ayurvedic therapies, products goods and services and for Jiva SPAs established in their hotels - plaintiff's application for interim injunction which was filed along with the suit was allowed ex parte — Thereafter, Appellant-Defendant restrained from using the trade name and/or trade mark "JIVA" - Hence, the present appeal - Whether an appeal is maintainable even against an ex parte order of injunction — Held, an ex parte order of ad interim injunction is as much appealable as an order passed after hearing both the parties - Rule is that an order granting injunction without complying with the requisites envisaged in Rule 3 of Order 39 be void - But where the Trial Court is unable to pass a final order disposing of the application for injunction within the time stipulated for the purpose, a party who is unable to get an order disposing of the application for injunction should not

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suffer - Hence, an appeal at the insistence of any such party would be maintainable - Appeal partly allowed

Intellectual Property Rights - Trade Mark - Infringement of - plaintiffs alleged infringement of their trade mark "JIVA" registered in class 16 — Whether an infringement of trademark is proved - Held, neither the plaintiffs nor the Appellant-Defendants are trading in goods covered by class 16 - An action for infringement not maintainable at the instance of the plaintiffs for any goods or activities other than those included in class 16 - Section 21 gives an exclusive use of the right in respect of a trade mark only in relation to the goods in respect of which it has been registered and not otherwise - Hence, no prima facie case of infringement by Appellant-defendant in favour of plaintiff is made out — Appeal partly allowed

Intellectual Property Rights - Trade Mark - Passing off - Prior user — plaintiffs alleged that the use of trademark "Jiva" by the Defendants-Appellants for the spas run in their hotels as also Ayurvedic services and products provided therein resulted in passing off of their mark — Whether the plaintiffs have made out a case for the grant of the injunction prayed by them against passing off - Held, for proving passing off plaintiffs have to satisfactorily establish that they are prior user of the trademark "JIVA" in respect of the products in question and that they have an established reputation in the field of Ayurvedic health care products and also Defendants mark is confusingly similar to that of the plaintiff - Even if the user of the mark was not for a considerable length of time, actual use of the trade mark with an intention to adopt and use it as a mark is enough - By the documents placed on record plaintiffs- Respondents have prima facie established that they have been in the business of Ayurvedic health care products and Ayurvedic home remedies at least from the year October, 1995 onwards - Hence, essential requirement of prior user for the grant of an injunction clearly established by the plaintiffs - Defendants restrained from selling/using or offering for sale/use any ayurvedic product under the trademark "JIVA" - But Defendant-Appellant allowed to use trademark "JIVA" for its spas run in the hotels established by it as plaintiffs have not established that use of "JIVA" as a trademark for "Spas" - Appeal partly allowed

Civil - Temporary Injunction - Grant of - Whether plaintiff satisfied the tests for the issue of a temporary injunction - Held, in an action for passing off, the plaintiff in order to get an injunction in its favour has to prove not only that he has a prima facie case but also that the balance of convenience is in his favour, and that he will suffer an irreparable injury if the injunction were to be denied - In the present case, plaintiffs' business in the manufacture and sale of ayurvedic preparations runs into lacs of rupees - Manufacture and sale of such preparations under the Trade Mark "JIVA", by the Appellants is, therefore, bound to create avoidable confusion among the customers — Denial of the said relief might cause would be irreparable for the plaintiffs - Relief granted - But allowed Appellant-Defendant to use the trademark "JIVA" for its spas run in the hotels established by it as Respondents appear to have adopted the trademark "JIVA" for their spas "bona fide" without any intention to fraudulently benefit from the goodwill of the plaintiffs

Ratio Decidendi:

"Where the Trial Court is unable to pass a final order disposing of the application for injunction within the time stipulated for the purpose, then a party who is unable to get an order disposing of the application for injunction can maintain an appeal."

"Section 21 gives an exclusive use of the right in respect of a trade mark only in relation to the goods in respect of which it has been registered and not otherwise."

"For proving passing off plaintiffs have to satisfactorily establish that they are prior user of the trademark in respect of the products in question and that they have an established reputation in the respective field and also the Defendants mark is confusingly similar to that of the plaintiff."

"In an action for passing off, the plaintiff in order to get an injunction in its favour has to prove not only that he has a prima facie case but also that the balance of convenience is in his favour, and that he will suffer an irreparable injury if the injunction were to be denied."

JUDGMENT

T.S. Thakur, J.

1. This appeal arises out of an ex parte ad interim order of injunction dated 17th October, 2006 passed by learned single Judge on the original side of this Court whereby the appellant-company has been restrained from using the trade name and/or trademark 'JIVA' or any other identical, deceptively similar or confusing trade name in relation to any of its goods or services and from manufacturing, producing or rendering and offering for sale and/or advertising, marketing any goods or services under the trade name and/or trademark

2. The factual matrix leading to the institution of the suit in the present appeal may in nutshell be stated as under:

3. plaintiff No. 1/respondent herein is a society registered under the Societies Registration Act, 1860 while plaintiff No. 2/respondent herein is a company incorporated under the Companies Act. plaintiff No. 3/respondent herein is one of the members of the first plaintiff society and also its President. He also claims to be a shareholder in the Second plaintiff company. The plaintiffs claim to be engaged in diverse activities in the fields of education, culture, religion, spiritual as also in Ayurveda. They also claim to be engaged in manufacturing ayurvedic health care goods, products and providing services in that discipline. In support of their claim, they place reliance upon various pamphlets, publicity material, catalogues, prospectus and literature.

4. The case of the plaintiff is that plaintiff No. 1 society was registered in the year 1992 inter alias to run "Ayurveda and Nature Care Centre" that came to be known as Jiva Institute. A Pharmacy in the name and style of Jiva Ayurvedic Pharmacy was also started in partnership by Dr. Pratap Singh Chauhan, which some time later took plaintiff No. 3 Rishi Paul Chauhan as a partner in terms of a partnership deed dated 20th June, 2000. The plaintiffs further claim that their other associate entities comprising the Jiva Group included Jiva Research Institute, Jiva Institute of Vedic Studies, Jiva USA Inc, Jiva International, LLC. The plaintiffs allege that Jiva is an integral and prominent part of the names of all the constituent members of the Jiva Group including the plaintiffs and that the word 'JIVA' is their trade name/mark in relation to not only their names and identity but also in relation to their goods products, services and activities. The plaintiffs allege that the trade name and mark 'JIVA' is a well-known trade name and mark associated entirely with the constituents of the plaintiff group of concerns.

5. The defendant company had started using the said trade name and mark including for the ayurvedic therapies, products goods and services and for Jiva SPAs established in their hotels. The plaintiffs' case was that the defendant company is neither entitled to the adoption, use of the said trade name or mark nor to the registration thereof under the Trade Marks Act, 1999 not only because the marks of the plaintiff and defendant No. 1 are identical but even the goods, products and services and activities are identical and at any rate cognate in nature and content. It was further alleged that the trade channels and class of customers of the plaintiffs and the defendants company too were identical thereby giving rise to a real likelihood of an impression being created among the members of the public that there was some kind of association or nexus between the two. The adoption and use of an identical and/or similar trade name and/or trade mark by the defendant company was, according to the plaintiff, intended to take unfair advantage of the distinctive character and reputation of the plaintiffs in the field of ayurveda products and services which the plaintiffs were offering. The plaintiffs further allege that they were the prior users of the mark/name JIVA and were, Therefore, entitled to protection against its use by the defendant company. The adoption of the trade name JIVA by the defendant company was according to the plaintiff mala fide, dishonest and fraudulent which was bound to result in dilution and erosion of the plaintiffs' trade name and trade mark and hence prove detrimental to the plaintiffs' long standing goodwill and reputation built over years of honest and dedicated hard work. In support of the assertion that the plaintiffs had earned considerable goodwill for their trade name, it is alleged that because of the quality, brilliance, efficiency and commitment and dedication of the plaintiffs and its associates, the group ha attracted considerable media attention in India and abroad including coverage by electronic media by prestigious TV channels like BBC and CNN having global reach . The plaintiffs alleged that the use of trademark 'JIVA' in relation to Ayurvedic therapies and other body treatments was bound to create confusion among the consumers of the trade and result in passing off the goods and services of the defendant No. 1, appellant herein as that of the plaintiffs. The plaintiffs, respondents Therefore prayed for a decree for permanent injunction restraining the defendants, their officers and agents from adopting and/or using the trade name and/or trade mark 'JIVA' or any other identical or similar trade name or mark in relation to any of the goods, products, services or activities etc. from passing off their goods, products, services and/or activities as those of the plaintiffs.

6. A decree for a sum of Rs. 25 lakhs towards sale proceeds and profits accruing to the defendants and rendition of accounts and any other reliefs were also prayed for in the suit. The suit filed by the plaintiffs initially was an action in "passing off" of goods and services of the defendant which is running luxury hotels within and outside the country, but was later on by an amendment allowed to be converted into a suit for infringement also.

7. The suit was accompanied by an application for an ad interim ex parte injunction against the defendants appellants. Geeta Mittal, J. sitting on the original side of this Court, before whom the application was argued was of the opinion that the plaintiffs had made out a prima facie case for the grant of an ex parte ad interim injunction and that denial of any such injunction would result in irreparable loss and damage.

8. The defendant company appeared to file a written statement and also moved an application under Order 39 Rule 4 of the CPC for vacation of the ex parte injunction. Apart from raising certain preliminary objections to the maintainability of the suit, the defendant asserted that it was engaged in running and operating hotels under the well-known trade mark TAJ. The company had for the benefit of its customers and guests using the hotel services provided facilities incidental to the use of hotel services. The defendant denied the assertion

manupatra that the use of word/mark 'JIVA' in relation to SPAs in five star hotels owned by the defendant would result in tarnishing or blurring the mark claimed by the plaintiff. On the contrary, the defendant asserted that it being one of the leading hotel chains in India, it was presumptuous and unwarranted for the plaintiffs to cause aspersions suggesting dilution of the mark by reason of its user in the hotels established by the defendants. The allegation that the plaintiffs were prior users of the mark name 'JIVA' were also denied. It was alleged that it was wholly presumptuous for the plaintiffs to make a claim that the use of mark 'JIVA' for all or any nature of goods or services regardless of the limited scope in their own area of activity would result in passing off or required protection by an injunction from the Court. According to the defendant, it had started using the mark 'JIVA' for Spas since October, 2004. Ever since then, it had spent considerable amount in making its spas run under that name in different hotels all over the world. The defendant's further case was that in case of Spas established under the name 'JIVA', it was providing a gymnasium with cardiac and strength fitness equipment, steam and sauna baths, swimming pools, body massage services. In some of these Spas, the defendant was offering the basic ayurveda body rejuvenation and relaxation therapies. All these activities and services, however, nevertheless, constituted a very small portion of the primary hotel activity and utilized generic ayurveda products. Since the defendant did not offer ayurvedic or educational programmes or literature of any kind and since the class of customers of the defendant's services was completely different from the class of customers of plaintiffs services or goods, the defendant could not be restrained from using the name 'JIVA' in its own field of activity, namely, Spas especially in view of the stellar reputation, it enjoyed in the field of hotel industry including Spas in the same. It also claimed to be the registered proprietor of the trade mark 'JIVA' in France, Seychelles, Thailand, Maldives and United Kingdom.

9. We have heard learned counsel for the parties at length and perused the record. Before we advert to the points that were argued at the bar, we need to point out that the order under appeal is an ex parte order of injunction against which the defendant appellant had a remedy by way of an application under Order 39 Rule 4 of the CPC for vacation of that order. The appellant has made an application for vacation of the said ex parte order as early as on 12.12.2006. That application could not, it appears, be taken up for hearing by the learned single Judge for one reason or the other, notwithstanding the mandate of Rule 3A of Order 39 of the CPC which reads:

Court to dispose of application for injunction within thirty days. - Where an injunction has been granted without giving notice to the opposite party, the Court shall make an endeavor to finally dispose of the application within thirty days from the date on which the injunction was granted; and where it is unable so to do, it shall record its reasons for such inability.

10. The present appeal was filed almost simultaneously to assail the ex parte order of injunction on several grounds to which we shall refer presently. Suffice it to say that when the appeal came up for hearing on 8.2.2007, a Division Bench of this Court comprising M.K. Sharma CJ and Sanjiv Khanna, J. requested the learned single Judge to make an endeavor to dispose of the application for injunction at an early date. The court observed:

In view of the aforesaid submissions of learned counsel for the parties, we request the learned single Judge to re-consider the order passed on 10.1.2007.

As ex parte stay order is operating against the appellant and since an application for vacating the same has been moved and there is urgency as admitted by both the parties, we hope and trust that the learned single Judge shall make an endeavor to hear the matter at the earliest.

Learned counsel for the appellant states that this matter may be adjourned. In view of the aforesaid statements, this matter is adjourned to 19.3.2007.

Parties shall appear before the learned single Judge for fixing a date, on 14.2.2007.

11. On 9.5.2007, when this appeal came up for hearing again, the court made the following interim order:

Having heard learned counsel for the parties we cancel the next date of hearing, i.e., 24.7.2007 for the reason that the learned Single Judge has now fixed the Applications under Order XXXIX Rule 1,2 and 4 CPC for hearing and disposal on 31.7.2007. Mr. Rohatgi, learned senior counsel for the Appellant is aggrieved by the fact that the matter has been adjourned on more than one occasion even after the orders passed by the Division Bench on 8.2.2007. In these circumstances, if the applications are not decided, we shall have no alternative but to hear the Appeal.

Mr. Rohtagi undertakes that no adjournment shall be taken by the Appellant herein.

List the Appeal for hearing on 13.8.2007.

12. Aggrieved by the above order, the appellant filed a special leave petition in the Supreme Court which was disposed of by their lordships by an order dated May 18, 2007 with the following direction:

We would request the Division Bench to call for the records of the suit from the court of learned Single Judge and decide the appeal on its own merit. If any delay has occurred in preferring the appeal or in filing the written statement, the same stands condoned.

We would request the Division Bench, in view of the agreement between the parties, that the matter should be heard next week, to prepone the date of hearing of the appeal within a week. We would further request the Division Bench to dispose of the matter as expeditiously as possible.

The appeal is disposed of accordingly.

13. It is in the light of the above direction that the present appeal was argued on merits by the learned counsel for the parties. That an appeal is maintainable even against an ex parte order of injunction was not disputed at the bar. Indeed there is no room for any doubt on that aspect in view of the settled legal position. That an ex parte order of ad interim injunction is as much appealable as an order passed after hearing both the parties. See *Zila Parishad, Budaun v. B.R. Sharma* MANU/UP/0057/1970 : AIR1970All376 , *Mangal Achi v. Asokan* MANU/TN/0251/1973 : AIR1973Mad258 , *Raj Kumari Suri v. Prem Lal Dhiman* MANU/HP/0015/1972, *Andhra University v. P.V. Raju* (1974) 2 AWR 17 , *Devasahayam v. Arumukhan* AIR 1953 TC 240, *Ramulu v. Ganga Ram* AIR 1953 Hyd 138, *United Club v. Nowgong Football Association of Nowgong* AIR 1964 gau 81, *Shyam Behari Singh v. Biseswar Dayal* MANU/BH/0267/1924 : AIR1924Pat713 and *Sk. Jusa v. Ganpat Dagdu Gire* MANU/MH/0201/1976 : AIR1976Bom222 .

14. The issue is no longer rest integra in view of the decision of the Supreme Court in *A. Venkatasubbiah Naidu v. S. Chellappan and Ors.* MANU/SC/0581/2000 : AIR2000SC3032 where the legal position regarding the maintainability of an appeal against an ex parte order of injunction was stated by their lordships as under:

11. Learned Senior Counsel for the respondents then contended, that an order granting injunction without complying with the requisites envisaged in Rule 3 of Order 39 be void. Rule 3 reads thus:

The Court shall in cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction direct notice of the application for the same to be given to the opposite party:

[Provided that, where it is proposed to grant an injunction without giving notice of the application to the opposite-party, the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay, and require the applicant

(a) to deliver to the opposite-party, or to send to him by registered post, immediately after the order granting the injunction has been made, a copy of the application for injunction together with

(i) a copy of the affidavit filed in support of the application;

(ii) a copy of the plaint; and

(iii) copies of documents on which the applicant relies, and

(b) to file, on the day on which such injunction is granted or on the day immediately following the day, an affidavit stating that the copies aforesaid have been so delivered or sent.

15. Dealing with situations where the trial court is unable to pass a final order disposing of the application for injunction within the time stipulated for the purpose the court held that a party who is unable to get an order disposing of the application for injunction should not suffer. An appeal at the insistence of any such party would be maintainable. The court observed:

18. It is the acknowledged position of the law that no party can be forced to suffer for the inaction of the Court or its omissions to act according to the procedure established by law. Under the normal circumstances the aggrieved party can prefer an appeal only against an order passed under Rules 1, 2, 2A, 4 or 10 of Order 39 of the Code in terms of Order 43 Rule 1 of the Code. He cannot approach the appellate or revisional Court during the pendency of the application for grant or vacation of temporary injunction.

In such circumstances the party who does not get justice due to the inaction of the Court in following the mandate of law must have a remedy. So we are of the view that in a case where the mandate of Order 39 Rule 3A of the Code is flouted, the aggrieved party, shall be entitled to the right of appeal notwithstanding the pendency of the application for grant or vacation of a temporary injunction, against the order remaining in force. In such appeal, if preferred, the appellate Court shall be obliged to entertain the appeal and further to take note of the omission of the subordinate Court in complying with the provisions of Rule 3A. In appropriate cases, the

appellate Court, apart from granting or vacating or modifying the order of such injunction, may suggest suitable action against the erring judicial officer, including recommendation to take steps for making adverse entry in his ACRs. Failure to decide the application or vacate the ex-parte temporary injunction shall, for the purposes of the appeal, be deemed to be the final order passed on the application for temporary injunction, on the date of expiry of thirty days mentioned in the Rule.

19. Now what remains is the question whether the High Court should have entertained the petition under Article 227 of the Constitution when the party had two other alternative remedies. Though no hurdle can be put against the exercise of the constitutional powers of the High Court it is a well recognized principle which gained judicial recognition that the High Court should direct the party to avail himself of such remedies one or the other before he resorts to a constitutional remedy. Learned Single Judge need not have entertained the revision petition at all and the party affected by the interim ex-parte order should have been directed to resort to one of the other remedies. Be that as it may, now it is idle to embark on the aspect as the High Court had chosen to entertain the revision petition.

16. In the light of the above, there is no option for the court except to dispose of this appeal on merits although the same may deprive this court of the advantage of having the views of the trial court who has not considered the points raised by the defendant appellant nor the documents upon which it places reliance. Consideration of the material being relied upon by the parties for the first time in appeal also has the element of an appellate Court doing what is essentially the duty and job of the trial Court. In the ordinary course and as a matter of practice we may have insisted upon trial Court first making an order on merits, but given the circumstances of the present case and the directions of their lordships of the Supreme Court that we ought to hear and dispose of the matter on merits we have no choice but to dispose of this appeal on its merits. The fact that the trial Court is a learned Single Judge of this Court and the appeal is an intra Court appeal makes it so much more difficult for us to adopt the procedure which their lordships have ordained in para 19 of the decision in A.V. Naidu's case (supra)

17. That brings us to the merits of the controversy between the parties. The plaintiffs have a made two-fold grievance in the plaint. They have in the first place alleged infringement of their trade mark 'JVA' registered in class 16. Secondly, they have sought relief against passing off. We shall deal with the two aspects ad Serialtim albeit on a prima facie basis.

18. It is not in dispute that the plaintiffs trade mark is registered in Clause 16 which reads:

16. Paper, cardboard and goods made from these materials, not included in other classes; printed matter; book-binding material; photographs; stationery; adhesives for stationery or household purposes; artists, materials; paint brushes; typewriters and office requisites (except furniture); instructional and teaching material (except apparatus); plastic materials for packaging (not included in other classes); playing cards; printers type; printing blocks.

19. It is also not in dispute that neither the plaintiffs nor the defendants are trading in goods covered by class 16 (supra). An action for infringement may not, Therefore, be maintainable at the instance of the plaintiffs for any goods or activities other than those included in class 16. We are supported by the decision of the High Court of Madras in Parry & Company v. Perry & Company MANU/TN/0156/1963 : AIR1963Mad460 in this regard. The Court has in that case observed:

Section 21 gives an exclusive use of the right in respect of a trade mark only in relation to the goods in respect of which it has been registered. That section cannot be read as giving an exclusive right to a registered proprietor to use the mark not only in respect of the goods in relation to which it is registered but also in respect of other goods which are found in the same category or classification. If a registered owner wants to use a mark in respect of several goods in a particular class, he will have to apply for registration in respect of all those goods, what Rule 13 enables him to do in such cases is to file one application for one class of goods.

20. It is common ground that after the Trade Marks Act, 1999 came into force w.e.f. 15th September, 2003 both the parties have applied for Registration in class 42 which read as under:

42. Providing of food and drink; temporary accommodation; medical, hygienic and beauty care; veterinary and agricultural services, legal services, scientific and industrial research; computer programming; services that cannot be classified in other classes.

21. It is also not in dispute that the application filed on 7th August, 2006 by the respondent for registration in Clause 42 was prior in point of time to that filed by the appellant. Registration has not, however, been granted to either the plaintiffs or the defendants so far. That being so, the plaintiffs cannot be said to have made out a

22. Absence of registration does not, however, conclusively answer the question whether the plaintiffs have made out a case for the grant of the injunction prayed by them against passing off. plaintiffs' case in this regard is based on prior and long user of the mark 'JIVA' by them. Before we advert to the merits of that claim, we may briefly refer to a few decisions of the Supreme Court that state the tests applicable in an action for passing off.

23. In *Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd.* MANU/SC/0199/2001 : [2001]2SCR743 , the Supreme Court declared the tests applicable to the tort of passing off in the following words:

As per Lord Diplock in *Erwen Warnink by v. J Townend & Sons 1979(2) AER 927*, the modern tort of passing off has five elements i.e. (1) a misrepresentation (2) made by a trader in the course of trade, (3) to prospective customers of his or ultimate consumers of goods or services supplied by him, (4) which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence) and (5) which causes actual damage to a business or goodwill of the trader by whom the action is brought or (in a quia timet action) will probably do so.

24. In *Century Traders v. Roshan Lal Duggar Co.* MANU/DE/0153/1977 : AIR1978Delhi250 , the legal position has been similarly stated by this Court. The following passage is in this regard apposite:

14. Thus, the law is pretty well-settled that in order to succeed at this stage the appellant had to establish user of the aforesaid mark prior in point of time than the impugned user by the respondents. The registration of the said mark or similar mark prior in point of time to user by the appellant is irrelevant in an action passing off and the mere presence of the mark in the register maintained by the trade mark registry did not prove its user by the persons in whose names the mark was registered and was irrelevant for the purposes of deciding the application for interim injunction unless evidence had been led or was available of user of the registered trade mark.

25. In *Heinz Italia v. Dabur India Ltd.* MANU/SC/2133/2007 : MIPR2007(2)193 , the prior user of trade mark has been held to be sufficient to entitle the aggrieved part to secure an injunction even when in absense of any registered trade mark. The court observed:

10. We have also considered the arguments with regard to the prior user of the trademark "Glucon-D" and the specific packaging. It is the admitted case that the term "Glucose-D" has been used by the respondent from the year 1989 and that the packaging which is the subject matter of dispute in the present suit has been in use from the year 2000. In the case of *Century Traders (supra)* it has been held that in an action for passing off, the plaintiff has to establish prior user to secure an injunction and that the registration of the mark or similar mark in point of time, is irrelevant.

26. In *Dhariwal Industries Ltd. v. M.S.S. Food Products* MANU/SC/0160/2005 : 2005(30)PTC233(SC) , the same legal position has been reiterated by their lordships. The following passage is in this regard instructive:

6. Section 27 of The Trade Marks Act, 1999 provides that nothing in that Act shall be deemed to affect the right of action against any person for passing off goods or services as the goods of another person or as services by another person or the remedies in respect thereof. Therefore, the fact that neither party has a registered trade mark as on the date of the suit cannot stand in the way of entertaining the claim of the plaintiff and granting the plaintiff an injunction in case the plaintiff is in a position to show prima facie that it was the prior user of its mark, that it had a prima facie case and that the balance of convenience was in favor of the grant of an interim injunction. It is provided in Section 39 of the Act that an unregistered trade mark may be assigned or transmitted with or without goodwill of the business concerned. It is, Therefore, possible for a plaintiff or a defendant to show that an unregistered trade mark that was being used by another person earlier had been assigned to it and that it can tack on the prior user of its predecessor.

27. Reference may also be made to *Milmet Oftho Industries v. Allergan Inc.* MANU/SC/0512/2004 : 2004(170)ELT260(SC) , where the court has held that if a party has adopted the mark prior to the others doing so, the prior user would be entitled to an injunction. The following passage is in this regard relevant:

In our view, these are matters which would require examination on evidence. Considering the fact that for all these years, because of the injunction Order, the Appellants have sold

their product under some other name, the balance of convenience is that the injunction order be continued and the hearing of the Suit be expedited. If on evidence it is proved that the Respondents had adopted the mark prior to the Appellants doing so, on the settled law, then the Respondents would become entitled to an injunction. However, if on evidence it is shown that the Respondents had not adopted the mark prior to its use in India by the Appellants then, undoubtedly, the trial Court would vacate the injunction. The trial Court would undoubtedly then assess the damage which Appellants have suffered for having wrongly not been allowed to use the mark for all these years.

28. Time now to examine the facts of the case at hand. The plaintiffs-respondents herein claim to be a name to reckon with in the field of Ayurvedic Health care product and services amongst other things. These goods are manufactured and traded by them under the name of Jiva Ayurvedic Pharmacy. Other associate entities of the plaintiff comprising the Jiva group include Jiva Research Institute, Jiva Institute of Vedic Studies, Jiva USA Inc. and Jiva International. The plaintiffs allege that the use of trademark 'Jiva' by the defendants-appellants herein for the spas run in their hotels as also Ayurvedic services and products provided therein result in passing off of their mark. This would mean that the plaintiffs have to satisfactorily establish that they are prior user of the trademark 'JIVA' in respect of the products in question; that they have an established reputation in the field of Ayurvedic health care products; and that their product is similar to that of the defendants so as to be capable of confusing an unwary customer.

29. In proof of their claim, the plaintiffs have placed on record a large number of pamphlets, brochures and other printed material highlighting their activities in the field of Ayurveda, research and education research and education and manufacture of Ayurvedic products. They have also placed reliance upon the following newspaper clippings:

1. Times of India report dated ,Sep 08,1995 at pg 4 ,titled "cyberspace opens windows to world in Vedic classroom"

Relevant paragraphs:

Para 1: A school in Faridabad has become the first to explore the cyberspace for education and introduce the internet in the classroom. The driving force behind is to explore the Vedic Culture.

Para 2: The computer is not used as a subject but as a tool to enhance the faculty of learning.

Para 3: On the internet there are endless opportunities in the form of projects, quizzes and database of information. The learning system is centralized similar to that was in Gurukuls.

2. Jiva Outline-Article published in The Economic Times dated 23rd Oct. 1995 ,titled "In the line of health". The report very precisely states the availability of Avurvedic Health Center. The article recognized Kavraj Pratap Singh Chauhan, a graduate from the Jiva Institute as the principal man behind the center.

3. Article published in The Indian Prospective, dated January 1966,pg 22,titled "Ayurveda on the internet". The article states Ayurvedic health centre as the 1st traditional healing center ,medicines available over the internet.

4. Article published in PC QUEST, Oct issue, 1997,pg 168 titled "Education with a difference", the Jiva Institute re defines traditional school.

Para 3 : Jiva is a school in Faridabad ,following the CBSE pattern ,allowing students to interact globally using e mail.

Para 6: Jiva held its 1st seminar at national science center, New Dekhi on Sep 12 1997.

Para 8: Jiva formed strategies and collaborations with WIPRO to provide solutions for the school and home market.

Para 9: Jiva collaborates with INTEL to popularize this alternative system of medicine.

5. United States Information Service, letter to MR. Chauhan , dated March 4th 1998 to Jiva Institute ,approving the funding of Jiva's Eco Friendly School Project.

6. Article published in Web Vision dated 14th Dec,1998 titled" Jiva sets up ayurvedic net Varsity.

Article states Jiva Institute to be an independent , nonprofit organization, planning to set up an Ayurvedic Institute on the net by early next year.

Jiva currently runs an online Ayurvedic , Health Center at www.ayurveda.org

7. Letter of introduction from the PMS office, dated Feb 3 1999, introducing Mr. Steven Rudolph, Educational Director of Jiva Institute.

8. Article published in the Hindustan Times, Dated 25th Jan, 2001, titled "doc takes ayurveda to Japan" which stated Dr. Chauhan of Jiva Institute delivering a lecture and conducting workshops in Keyo University, Japan on a ten days trip.

9. Memorandum of Understanding entered on Jan 10th ,2002 ,for community connection Project between Media Lab Asia and Jiva Institute .

10. Photograph clipping of the Jiva Institute winning the world summit award on 28th November ,2003

11. Article published in the Hindustan Times, dated March 22 2007, president Abdul Kalam, appreciating teledoc and the rural health care prog. launched by Jiva Institute.

30. A perusal of the above newspaper clippings however reveals that all the articles, with the exception of two, do not make any mention of Ayurvedic preparations. They talk about the launch of an Ayurvedic Health Centre online by Dr. Chauhan of the respondent institute and illustrate how basic knowledge about Ayurveda will now be available online. Having said so, we cannot overlook the fact that two articles, one published in Web Vision in December, 1998 and the other in Hindustan Times of the year 2001, do make a reference to the Ayurvedic Health Centre launched by the Jiva Institute of Vedic Arts, Sciences and Culture, Faridabad. The article states that visitors to the above institute can order Ayurvedic products and consult the institute via e-mail. In the article published in Hindustan Times on 28.5.2001, the author refers to pure Ayurvedic medicines being prepared in the Jiva Ayurvedic Pharmacy strictly in accordance with the instructions laid down in the original Ayurvedic text. The following excerpts from the article are in this regard relevant:

According to Dr. Chauhan, director of the Health Division of the Jiva Institute, Faridabad, a large number of Japanese suffer from high mental stress on account of overwork and extreme work pressure.

There is hardly any time to relax, and this results in mental troubles like anxiety, stress and depression.

The Ayurvedic remedies as well as the simple techniques helped many of the participants at the various programmes organized in Japan.

In order to help more and more people, a group of Dr. Chauhan's students have decided to start a branch of the Jiva Ayurveda in Tokyo.

Dr. Chauhan, who is engaged in spreading Ayurveda around the world, is known for his treatment of chronic physical and mental disorders.

The secret of his success is the pure Ayurvedic medicines that are being prepared in the Jiva Ayurvedic Pharmacy, strictly according to the instructions laid down in the original Ayurvedic texts.

Besides offering free consultation at his institute, Dr. Chauhan is also available in cyberspace and one can avail of free consultation through his home page. (www.ayurvedic.org).

31. The publications mentioned above apart, the plaintiffs-respondents have also relied upon financial statements/trading profit and loss account of M/s Jiva Ayurvedic Pharmacy for the years 2003-04, 2004-05 and 2005-06. These statements appearing at pages 195 to 197 of the paper book show sales worth Rs. 15,43,426.90 and exports worth Rs. 2,03,850/- for the year 2003-04. In the year 2004-05, sales of products are worth Rs. 35,88,134/- apart from export sales worth Rs. 31,02,315.90. Similarly, in the year 2005-06, the trading profit and loss account filed by the respondent shows sales worth Rs. 31,65,401/- and exports worth Rs. 32,68,759.26. From a bare perusal of these documents, it is evident that the respondents have prima facie established that they have been in the business of Ayurvedic health care products and Ayurvedic home remedies at least from the year October, 1995 onwards, when the first newspaper clipping appearing in the Economic Times issue dated October 23, 1998 was published and which reads:

INFOMATICS
ON THE CIRCUIT

In the line of health

Ayurvedic health services are now just a button away. Thanks to internet. You can now access simply Ayurvedic home remedies online with Ayurvedic Health Centre, Launched by Kaviraj Pratap S Chauhan, a graduate in Ayurvedic medicine from Jiva Institute of Vedic Arts, Sciences and Culture, Faridabad (near Delhi), the service allows users to learn a number of simple Ayurvedic home remedies, select an individualised regime and diet in addition to getting basic information about this system of medicine. And Chauhan finds the number of people accessing this information increasing every day. In fact, people from the US, Japan, Sweden, Denmark, South Africa and Australia have already shown a keen interest in it.

32. As against the above, the case of the defendants appellants is that they have been using the mark 'JIVA' for their spas and products sold by them in the same since October, 2004. This means that the user of the trademark 'JIVA' by the plaintiffs respondents was much earlier in point of time. Even if one were to take the publication in Web Vision of December, 1998 which too refers to Jiva Ayurvedic Net University and mentions about Ayurvedic products manufactured by the respondents, the user of the trademark 'JIVA' from 1998 qua the said products would be prior in point of time to the adoption of the said mark by the appellant in October, 2004. The essential requirement of prior user for the grant of an injunction is thus clearly established by the plaintiffs in the instant case.

33. So also is the requirement of the plaintiffs' reputation in the field of Ayurvedic health care products is satisfied by the publications referred to above and other publications of the plaintiffs placed on record. That the adoption of 'JIVA' as a trade name for Ayurvedic products manufactured by the plaintiffs-respondents would result in confusion among customers of ordinary prudence and memory is evident from the stark similarity between the two marks. If the respondents were also to start marketing Ayurvedic products under the trademark 'JIVA', it is bound to result in confusion and passing off of goods which the defendant-appellant may manufacture or get manufactured from any other source and sell under the trademark 'JIVA' as if they are the goods manufactured and sold by the plaintiffs-respondents. We may at this stage add that although the plaintiffs-respondents have on a prima facie basis established long user of the trademark 'JIVA', for the manufacture and sale of their Ayurvedic products, yet even if the user was not for a considerable length of time, it would make little difference. Actual use of the trademark under circumstances that show an intention to adopt and use it as a trademark is enough. The legal position in this regard is well settled by the decision of a Division Bench of this Court in Century Traders v. Roshan Lal Duggar Co. PTC Supp. 1 720 (Delhi) where the Court has observed:

For the purpose of claiming such proprietorship of a mark, it is not necessary that the mark should have been used for considerable length of time. As a matter of fact, a single actual use with intent to continue such use eo 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 vendible 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 of duration of the use. A mere casual, intermittent or experimental use may be insufficient to show an intention to adopt the mark as a trade mark for specific article or goods.

34. The plaintiffs-respondents have in the case at hand prima facie established that they have been in the business of manufacture and sale of Ayurvedic products under the Trade name 'JIVA' much earlier than the defendants appellants herein. It is true that the defendants may also be promoting Ayurvedic educational programmes or literature and dissemination of knowledge online with respect to Ayurveda, but that does not detract from there being prior users of the mark 'JIVA' for the manufacture, sale and promotion of their Ayurvedic products.

35. Mr. Rohtagi, learned senior counsel for the appellant, however, argued that the appellants are running a chain of super deluxe hotels in India and abroad and that the services offered by them in the spas established in the said hotels meant only for customers visiting the hostels cannot possibly result in any passing off of goods by the appellant as that of the plaintiff-respondent. If the nature of activity of the plaintiffs-respondents is different from the one carried on by the defendants-appellants, no protection could be granted to the trademark of the plaintiff, argued the learned counsel. It was contended that the respondents were not in the business of establishing or running 'spas' much less in the establishment of spas in luxury hotels.

36. On behalf of the plaintiffs-respondents it was on the other hand argued by Ms. Pratibha Singh that the business run by the appellants in its spas in hotels was cognate and allied to the business of providing 'ayurvedic therapies' and 'massages' offered by the plaintiffs-respondents. Even if no such immediate co-relation existed between the two activities, the plaintiffs-respondents were entitled to protect their trademark 'JIVA' to ensure adequate scope for further and future market expansion. It was contended that the interview of Mr. Sameer Patel of the appellant company clearly established that the appellant planned to launch Ayurvedic products for use and sale in Spas which was an activity identical to the plaintiffs area of operation. It was also argued that the products used in the spas established by the appellants in their hotels being identical to the ones manufactured by the respondents, the activity of sale and use of such products that

manupatra offered the trade mark of the plaintiffs or viewed in isolation from the services offered by the appellant in its spas. The two were so interrelated and integrated with each other that one was incomplete without the other.

37. In the interview of Sh. Sameer Patel, General Manager of the Spa Division of the appellant company published in "India Asia Spa", Sh. Patel has elaborated the concept underlying JIVA Spas established by the appellant in its hotels. The interview describes JIVA as a concept that draws upon Yoga, Meditation, Ayurveda, Aromatherapy and other indigenous therapies using exotic Indian ingredients for treatment and experiences at such spas. The appellant is, according to Mr. Patel planning to start a Jiva Spa Training academy that will train all the staff deployed at Jiva spas offering certification courses in order to create professional employment opportunities for young and talented Indians. It is, thus, evident that even according to the appellant Ayurveda is the basis for the therapies and experiences in most of the spas and the entire concept of therapeutic healing by use of ancient healing knowledge and philosophy of wellbeing is an amalgam of modern technology and ancient herbal therapies recognized in Ayurveda. The argument that a Spa is essentially different from herbal therapies offered by Ayurveda whether in clinics or institutes, Therefore, does not stand closer scrutiny. The essence of the treatment, therapies and experience in a spa that draw their vitality from Ayurveda can be no different from an experience which an ayurveda institute banking entirely on ayurvedic techniques and formulations provides in its rudimentary form without the glitz and glamour of a five star hotel. Such being the case, the very fact that the appellant describes its establishment in the hotel as a Spa while the plaintiffs-respondents describe them as an 'Ayurvedic clinic' providing services that are in essence similar makes little difference for purposes of determining whether the respondent is entitled to an injunction forbidding the use of a trademark being used by it for a long time before its adoption by the appellant. The business of providing Ayurvedic therapies and herbal cures for ailments is an allied and a cognate business to the one which the appellant carries on in its Spas for the benefit of its customers. The size of the turnover may vary but the fact remains that the plaintiffs having adopted the trade mark for their business involving not only manufacture of ayurvedic products but also offering of ayurvedic therapies in the clinics established by them earlier than the defendants-appellants would entitle them to an injunction subject to other requirements of balance of convenience and irreparable injury also being found in their favour.

38. The plaintiffs may also be entitled to the injunction prayed for by them with a view to protecting future expansion of their business, for it is well settled that an action for passing off not only involves an examination of the businesses as they are being carried on as on the date of the proceedings but also take note of the way the said businesses may be carried on in future. The following passage from the decisions of the Supreme Court in *Laxmikant v. Patel v. Chetanbhat Shah* MANU/SC/0763/2001 : 2002 24 PTC 1(SC) is in this regard apposite.

An action for passing-off will then lie wherever the defendant company's name, or its intended name, is calculated to deceive and so to divert business from the plaintiff, or to occasion a confusion between the two businesses. If this is not made out there is no case. The ground is not to be limited to the date of the proceedings; the court will have regard to the way in which the business may be carried on in the future, and to its not being carried on precisely as carried on at the date of the proceedings. Where there is probability of confusion in business, an injunction will be granted even though the defendants adopted the name innocently.

39. In the light of what we have stated above, we have no hesitation in repelling the contention urged by Mr. Rohtagi that since the appellant carries on business in Spas it can continue using the trade mark of the respondent as the said trade mark is used by the respondent only for manufacture of its ayurvedic products.

40. It was next argued by Mr. Rohtagi that the word 'JIVA' is a descriptive word which cannot be protected as a trade mark by a Civil Court. We do not think so, the appellant has itself applied for registration of the Jiva as a trade mark and cannot, Therefore, argue that the mark is descriptive. In *Automatic Electric Limited. v. R.K. Dhawan and Anr.* 1999 PTC (91) 81 this court has in similar circumstances repelled the contention and held that since the defendant had itself sought to claim a proprietary right and monopoly in "DIMMER DOT", the disputed trade mark it did not lie in its mouth to say that the said mark was a generic expression. The Court observed:

16. The defendants got their trade mark "DIMMER DOT" registered in Australia. The fact that the defendant itself has sought to claim trade proprietary right and monopoly in "DIMMER DOT" is a generic expression.

41. It was also contended by Mr. Rohtagi that since other parties were also making use of the trade mark Jiva the plaintiff was not entitled to the injunction prayed for. The decision of this Court in *Info Edge (India) Pvt. Ltd. and Anr. v. Shailesh Gupta and Anr.* 2002 (24) PTC 355(Delhi) provides a complete answer to that submission. The court was in that case also dealing with a similar argument against the issue of an injunction which was repelled, holding that the use of the trade mark by some other party against whom the plaintiffs have not proceeded immediately for seeking an injunction would not dis-entitle him from seeking an injunction against another party who was similarly committing a violation.

manupatra 42. To the same effect is the decision of this Court in *Essel Packaging Limited v. Sridhar Narra and Anr.* 2002 (25) PTC 233 (Delhi) where the court has in almost similar circumstances held that use of the trade mark by other parties against whom the plaintiffs have not proceeded does not dis-entitle him to proceed against the defendant. The Court observed:

22. Merely because some other parties or persons are using the name ESSEL does not provide a justification to the defendants for using the said name as the plaintiff has been using this name much prior to the adoption of this name by defendants and its widespread use of this name shows that this word has become synonymous with the business of the plaintiff and its group companies.

43. That brings us to the question whether other tests for the issue of a temporary injunction viz. balance of convenience and irreparable injury are satisfied by the plaintiffs in this case. There is no manner of doubt that even in an action for passing off, the plaintiff has to prove not only that he has a prima facie case but also that the balance of convenience is in his favour, and that he will suffer an irreparable injury if the injunction were to be denied. The decision of Supreme Court in *Laxmikant v. Patel v. Chetanbhat Shah* MANU/SC/0763/2001 : 2002 24 PTC 1(SC) authoritatively declares the law in this regard. The court has in that case observed:

13. In an action for passing off it is usual, rather than essential, to seek an injunction temporary or ad-interim. The principles for the grant of such injunction are the same in the case of any other action against injury complained of. The plaintiff must prove a prima facie case, availability of balance of convenience in his favor and his suffering an irreparable injury in the absence of grant of injunction.

44. The plaintiffs are, as seen earlier, not only manufacturing and marketing ayurvedic preparations but are offering therapies in a clinic at Faridabad and another at South Extension in Delhi. There is material to which we have referred earlier to show that the plaintiffs' business in the manufacture and sale of ayurvedic preparations runs into lakhs of rupees, as is evident from the Profit and Loss accounts for three years, immediately preceding the filing of the suit. Manufacture and sale of such preparations under the Trade Mark 'JIVA', by the appellants is, Therefore, bound to create avoidable confusion among the customers who use such preparation, whether by purchasing them across the counter or in Spas established by the appellant. The injunction granted by the learned Single Judge to the extent the same forbids use of 'JIVA' as a trademark for the manufacture and sale of the medicinal/health care products cannot be faulted specially when the injury which a denial of the said relief might cause would be irreparable for the plaintiffs. The same is not however true about the use of the mark, for the Spas in the hotels established by the appellants. We say so for the following reasons:

- a. There is only one clinic which the plaintiffs are said to be running at Faridabad after closure of the one started in South Extension part of Delhi. There is no other establishment, clinic or any other facility existing in any other city in this country or elsewhere in the world.
- b. There is no evidence about the number or the class of people who are visiting the clinic at Faridabad to enable this Court to compare their social and financial profile with the class of customers visiting the five star hotels established by the appellant and availing of the spa facility offered in the same.
- c. There is no evidence about the turnover of the plaintiffs from the clinic in which they claim to be offering services comparable to those offered in a spa.
- d. There is no evidence about any expenditure incurred by the plaintiff-respondent or planned for making its business of clinics popular among the general public or any definite section thereof.
- e. There is no evidence about any future plans for expansion of the business by the plaintiffs and the likelihood or apprehension of any general confusion among the customers.

45. As against the above, the respondents appear to have adopted the trademark 'JIVA' for their spas 'bona fide' without any intention to fraudulently benefit from the goodwill of the plaintiffs. They also appear to have spent a sizable amount on advertisements to make the mark popular. The fact that the appellant has established spas in their hotels in six countries after getting the trademark 'JIVA' registered in those countries without any objection from the plaintiffs also is a significant circumstances that tilts the balance of convenience in favor of the appellants. Last but not the least, the plaintiffs have not established that use of 'JIVA' as a trademark for 'Spas' by the appellants would cause irreparable injury to them having regard to the totality of the circumstances attendant upon the case.

46. In the result, we allow this appeal in part and to the following extent:

- a. Order dated 17th October, 2006 passed by the learned Single Judge to the extent the same restrains the appellant from using the trademark 'JIVA' for its spas run in the hotels established

by it shall stand vacated, subject to the appellant filing an undertaking to the effect that (i) it shall maintain true and correct accounts of its income and expenditure relating to the business of the said spas and file the same in this court every six months; and (ii) that it shall not start any spa independent of a hotel owned/leased or mortgaged by it under the trademark 'JIVA'.

b. The impugned order to the extent it restrains the appellant from selling/using or offering for sale/use any ayurvedic product under the trademark 'JIVA' shall stand confirmed and made absolute pending final disposal of the suit. The appeal shall to that extent stand dismissed.

47. The parties are left to bear their own costs.