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

\+ RFA(COMM) 196/2025 & CM APPL. 20458/2025

WESTEND GREEN FARMS SOCIETY .....Appellant
Through: Mr. Abhinav Mukerji, Sr. Adv. with Mr. Sumit Gehlot, Mr. T.S. Thakran, Mr. Abhishek Singh and Ms. Manju Gehlot, Advs.

versus

VICKY KAKKAR .....Respondent
Through: Mr. Rakesh Lakra, Ms. Shivani Kher, Mr. Akash Kumar and Mr. Bhavya Sharma, Advs.

\+ RFA(COMM) 203/2025 & CM APPL. 20810/2025

WESTEND GREEN FARMS SOCIETY .....Appellant
Through: Mr. Abhinav Mukerji, Sr. Adv. with Mr. Sumit Gehlot, Mr. T.S. Thakran, Mr. Abhishek Singh and Ms. Manju Gehlot, Advs.

versus

PRATYUSH KANTH .....Respondent
Through: Mr. Rakesh Lakra, Ms. Shivani Kher, Mr. Akash Kumar and Mr. Bhavya Sharma, Advs.

\+ RFA(COMM) 204/2025 & CM APPL. 20814/2025

WESTEND GREEN FARMS SOCIETY .....Appellant
Through: Mr. Abhinav Mukerji, Sr. Adv. with Mr. Sumit Gehlot, Mr. T.S. Thakran, Mr. Abhishek Singh and Ms. Manju Gehlot, Advs.

versus

MANU .....Respondent

Through: Mr. Rakesh Lakra, Ms. Shivani Kher, Mr. Akash Kumar and Mr. Bhavya Sharma, Advs.

\+ RFA(COMM) 211/2025 & CM APPL. 21833/2025

WESTEND GREEN FARMS SOCIETY .....Appellant

Through: Mr. Abhinav Mukerji, Sr. Adv. with Mr. Sumit Gehlot, Mr. T.S. Thakran, Mr. Abhishek Singh and Ms. Manju Gehlot, Advs.

versus

KAPIL KUMARIA .....Respondent

Through: Mr. Rajiv Tyagi and Mr. Rohit Gupta, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR
HON'BLE MR. JUSTICE OM PRAKASH SHUKLA

JUDGMENT (ORAL)

% 17.12.2025

C. HARI SHANKAR, J.

The *lis*

1. These appeals arise from similar orders passed by the learned District Judge (Commercial Court)-02, New Delhi District, Patiala House Courts[1], whereby the plaints in the suits, instituted by the appellant against the respondents, stand rejected by the learned Commercial Court under Order VII Rule 11(a)[2] of the Code of Civil

[1] "Commercial Court", hereinafter

[2] **11. Rejection of plaint**.—The plaint shall be rejected in the following cases:—
(a) where it does not disclose a cause of action;

Procedure, 1908[3], on the ground that the plaints failed to disclose any cause of action.

2. Aggrieved thereby, the plaintiff in the suits has approached this Court by means of the present appeals.

3. As the factual differences between the appeals are only cosmetic, we would be adverting to the facts as they exist in RFA (Comm) 196/2025, which arises out of CS (Comm) 294/2022[4].

The facts

4. We may straightaway reproduce the following passages from the plaint in CS (Comm) 294/2022, which set out the appellant's case:

> "5. That the plaintiff uses "WESTEND GREENS" as a key and essential part of its Name. The plaintiff adopted the mark "WESTEND GREENS" as a part of its name and for its services in the year 1993 and has been conducting its activities using the name and trade mark "WESTEND GREENS" since then. Being registered proprietor of the trade Mark "WESTEND GREENS", the plaintiff enjoys exclusive right to use the aforesaid trade mark. On account of continuous and extensive use of the trade mark "WESTEND GREENS" by the plaintiff over a long period of time, the said trade mark enjoys an unparalleled reputation and goodwill. The trade mark "WESTEND GREENS" has come to be exclusively identified and associated with the services offered by the plaintiff. Any third party adopting the name and registered mark "WESTEND GREENS" or any other deceptively similar name and trade mark without the consent or the license of the plaintiff amounts to an infringement and passing off of the trade mark of the plaintiff.
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> 9. That apart from its common law rights, the plaintiff is also

[3] "CPC" hereinafter

[4] **Westend Greens Farms Society v. Vicky Kakkar & Anr**

the registered proprietor of the mark 'WESTEND GREENS' in Class — 45 (for rendering services for welfare and protection of its members and to meet the needs of its members) as word mark as well as device. Details of the said registrations are set out below:

S. No	Application No.	User Date	Status / Certificate No.	Trade Mark
A.	4844654	13/05/1993	Registered 2796421	WESTEND GREENS (Word Mark)
B.	4844653	13/05/1993	Registered 2796420	
C	4915688	13/05/1993	Registered 2820034	

The above mentioned registrations are valid, subsisting and in full legal force. Any third party adopting the name and registered trade mark 'WESTEND GREENS' or any other deceptively similar name and trade mark without the consent or the license of the plaintiff would amount to an infringement of the registered trade mark of the plaintiff.

On 22.03.2022 Legal Proceedings Certificates (LRCs) have been applied for the said Trade Marks bearing application bearing No.4844653, 4844654 & 4915688, which are likely to be received in next 30 days and the plaintiff undertakes to file them as and when received. The plaintiff has filed copies of the said trade mark journals alongwith latest status reports from the website of Trade Mark Registry. There are no disclaimers imposed on the said Trade Marks bearing No.4844653, 4844654 & 4915688 and are valid upto 02/02/2031, 02/02/2031 & 22/03/2031 respectively and the plaintiff has not granted any licences or assignment in respect of said Trade Marks.

10. That the defendant No.2 - Amaltas Avenue Resident's Welfare Society is a separate Society registered under the Societies Registration Act, 1860 (having registration No. S-53405 of 2005) and having its office at Samaikha, New Delhi -110037. The defendant No.2 consists of 30 farms/units. *The plaintiff Society and the defendant No.2 society are totally independent and separate entity from each other.*

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12. That the defendant No.l/Mr. Vicky Kakkar is neither the member/resident of the plaintiff society nor his said farm bearing N0.I8A, forms part of the plaintiff society. Admittedly, the defendant No.1/Mr. Vicky Kakkar is member/resident of the defendant No.2 society i.e. Amaltas Avenue Resident's Welfare Society and his said farm bearing N0.I8A, is situated and is part of the defendant No.2. The plaintiff was shocked and outraged when in March, 2021 it noticed that the *defendant No.1 has illegally started using the plaintiffs name and registered trade mark "WESTEND GREENS" and has illegally installed sign board outside his said farm illegally mentioning/engraving with the plaintiffs name, and registered trade mark "WESTEND GREENS" and its above mentioned registered logo*. The defendant N0.1 has illegally copied same and similar design of sign board using the plaintiffs name and registered trade mark/logo "WESTEND GREENS". *The defendant No.1's property illegally depicts the plaintiffs registered trade mark/logo "WESTEND GREENS" without any agreement, leave or license from the plaintiff who is the sole and rightful owners and users of the mark.*

13. *That the defendant No.I is misrepresenting his said farm being part of the plaintiff society. By illegally using the plaintiffs name and registered trade mark "WESTEND GREENS" the defendant N0.I is trying to enhance his property value and is trying to attract potential customers for the purpose of leasing/selling of his said farm thereby unjustly enriching himself. The defendant No. 1 is carrying commercial activity in his property. The adoption and use of the registered trade mark "WESTEND GREENS" by the defendant N0.I, clearly violate the plaintiffs statutory as well as common law rights and use of the registered trade mark by the defendant No.1 is completely malafide and dishonest. By this misrepresentation the public may think that the defendant No.1 is some way connected with the plaintiff society and that is why he is using the registered trade mark "WESTEND GREENS".* By adopting the name and registered trade mark "WESTEND GREENS", which is plaintiffs name as well as registered trade mark, the defendant No. 1 is infringing and passing off the

plaintiffs registered trade mark. Despite being aware of illegal use of the registered trade mark "WESTEND GREENS" by the defendant No. 1, the defendant No. 2 has not stopped its illegal use/adoption, which is its duty.

14. That the defendant No. 1 has illegally used the plaintiffs said registered trade mark "WESTEND GREENS". *It is clear that by adopting the plaintiffs registered trade mark in relation to his said farm, the defendant No.1 wish to illegally and unfairly take advantage of and trade upon the plaintiff pre-existing registered trade mark and goodwill. The defendant No. 1 also attempt to misrepresent that a relationship exists between him and the plaintiff, which is deceptive to the consumer/general public. These actions amount to infringement of registered trade mark and passing off and are an unfair trade practice prohibited by law.* The defendant No.1 by using the name and registered trade mark "WESTEND GREENS" has included the whole of the name/mark of the plaintiff, which have caused confusion in relation to source of origin as *people assume that the defendant No.1 is in some way connected to the plaintiff, which is resulting in infringement of registered trade mark and passing off*.

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16. That the plaintiff is seriously aggrieved by the injury caused by actions of the defendant No.1. *The defendant No.l's actions are willfully and fraudulently designed to mislead, confuse, and deceive the consumers/general public into believing that he is connected, associated, sponsored, approved or otherwise affiliated to the plaintiff society. It is obvious that the defendant No. 1 seek to illegally and fraudulently misappropriate the plaintiffs goodwill and reputation.* It is clear from the above that not only do the defendant No.l's actions constitute infringement of registered trade mark under the Act they also amount to passing off.

17. *That illegal use of the plaintiff s mark shows the defendant No. 1's malafide intention and there is no doubt as he is using the plaintiffs registered trade mark to deceive the public at large and cause confusion in the market to gain undue advantages from the plaintiffs mark*, which has gained a considerable recognition amongst the people as well as with the general public.

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22. That this is a clear case of infringement of the registered trade mark of the plaintiff as per Section 29 of the Trade Marks Act. *The defendant No.1 has taken unfair advantage by illegally adopting the plaintiffs trade mark 'WESTEND GREENS', which is*

detrimental to its distinctive character and is against the reputation of the plaintiffs trade mark. Admittedly the plaintiff is the registered proprietor of the trade mark 'WESTEND GREENS' and the defendant No.1 has illegally adopted the trade mark without the permission of the plaintiff. *The said illegal adoption has deceived and caused confusion in the general public about the source and affiliation.* The plaintiff being the registered proprietor of the said trade mark 'WESTEND GREENS' has a right to take action against the said infringement and there is a statutory remedy available with the plaintiff against the violation of exclusive right to use the said trade mark in relation to its services.

23. That it is trite law that when a person gets his trade mark registered, he acquires valuable rights by reasons of such registration. *Registration of his trade mark gives him the exclusive right to use of the said trade mark in connections with the goods/services in respect of which it is registered* and if there is any Invasion of this right by any other person using the mark which Is the same or deceptively similar to his trade mark, he can protect his trade mark by an action for Infringement In which he can obtain Injunction. Further*, it is also trite law that on registration of a trade mark the registered proprietor under Section 28 of the Trade Marks Act gets the exclusive right to use of such trade mark in relation to the goods/services in respect of which the trade mark is registered and to obtain relief in respect of any Infringement of such trade mark.* Further, it is also trite law that the statutory registration establishes prima facie case in favour of the registered proprietor. *The registered proprietor has right of exclusion against every third person, who is Illegally using the registered trade mark. The name 'WESTEND GREENS' is the name as well as registered trade mark of plaintiff society. The defendant No.1 has no right to use the plaintiff society's name and trade mark 'WESTEND GREENS' in any form whatsoever*."

5. Following the above factual and legal assertions, the plaint prayed as under :

"It is therefore prayed that the following reliefs be granted in favour of the Plaintiff and against the Defendants:

a) A decree of permanent injunction restraining the Defendants, their servants, agents, and employees from using Plaintiff's name and registered trade mark "WESTEND GREENS" or any other name or mark which contain Plaintiff's name and/or trade mark "WESTEND

GREENS" or any word which is deceptively similar thereto in any manner whatsoever;

b) A decree of mandatory injunction directing the Defendants to remove reference to plaintiff's name and registered trade mark "WESTEND GREENS" or any mark deceptively similar mark from the property/farm of defendant No.1;

c) A decree of mandatory injunction directing the Defendants to handover to plaintiff for destruction, all infringing materials including but not limited to sign board(s), signage, hoardings, etc., containing any reference to plaintiff's name and registered trade mark "WESTEND GREENS" or any mark deceptively similar to it.

d) A decree of mandatory injunction directing the Defendants to notify to general public, customers, agents, dealers, associates and all such other persons relating to them in any manner whatsoever, that defendants are in no way approved, affiliated with, connected to or associated with the plaintiff and plaintiff's name and registered trade mark "WESTEND GREENS" in any manner;

e) An order for rendition of accounts of profit illegally earned by the Defendants and a decree in terms of the said amount after ascertainment of the amount;

f) A decree for delivery up of any other infringing materials, containing any reference to the Plaintiff's name and registered trade mark "WESTEND GREENS" or any name/mark deceptively similar to it;

g) An order for Damages to the tune of Rs.5,00,000/- be passed against the Defendants and in favour of the Plaintiff;

h) For costs of the proceedings to be assessed and granted in favour of the Plaintiff, and

i) Any further orders in the interest of justice."

6. The respondents filed an application under Order VII Rule 11(a) of the Code of Civil Procedure, 1908, seeking rejection of the plaint as not disclosing any cause of action. By the impugned

judgment, the learned Commercial Court has allowed the application and has rejected the plaint, as sought by the respondents.

The impugned judgment

7. The learned Commercial Court has, in the impugned judgment, noted, at the outset, the settled position in law, that an application under Order VII Rule 11 of the CPC has to be decided on a demurer, solely on the assertions in the plaint, treating them to be correct. There can be no gainsaying this legal position, which stands settled in a plethora of authorities, including ***Liverpool & London S.P. & I Association Ltd v M.V. Sea Success***[5] and ***Exphar SA v. Eupharma Laboratories Ltd***.[6], which the learned Commercial Court has itself cited.

8. The learned Commercial Court has thereafter proceeded to examine the ambit of the expression "use in the course of trade" as contained in Section 29 of the Trade Marks Act, 1999, on the basis of the judgments rendered by learned Single Judges of this Court in ***Pepsico Co. Inc. v. Hindustan Coca Cola***[7] and ***Kabushiki Kaisha Toshiba v. Toshiba Appliances Co***.[8] as well as the Court of Justice of the European Union (CJEU) in ***Arsenal Football Club v. Reed***[9]. The learned Commercial Court has held that "use in the course of trade" for the purposes of Section 29 of the Trade Marks Act, requires commercial activity with an aim at gaining economic advantage.

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[5] **(2004) 9 SCC 512**
[6] **(2004) 3 SCC 688**
[7] **(2001) 94 DLT 30**
[8] **(2024) 100 PTC 569**
[9] **[2003] RPC 144**

9. The learned Commercial Court has, thereafter, reproduced various paragraphs of the plaint, which we have already extracted earlier in this judgment. Thereafter, the learned Commercial Court has proceeded to reason thus:

> "34. Applying the ratio of law laid down in above referred decisions of Hon'ble Delhi High Court and Court of Justice of the European Union (CJEU) to the facts of the present case, it would be quite evident that one of the essential ingredients i.e. 'use of trademark in the course of trade', which is sine qua none for constituting infringement of trademark within the meaning of S. 29 of the Act of 1999, is missing in the present case. *The relevant averments appearing in the plaint, as already reproduced in the preceding paragraphs, would clearly go to show that it is own case of the plaintiff that it is a residential society engaged in carrying out welfare activities for its residents*. Likewise, it is also own case of the plaintiff that erstwhile defendant no.2 is also a residential welfare society, wherein the applicant / defendant no.1 is residing in Farm, No.18A. Reliefs sought by the non-applicant/ plaintiff society in this matter are wholly based upon the allegations that applicant/ defendant no.1 has illegally installed sign board mentioning / engraving registered trademark 'WESTEND GREENS' outside the said Farm/House and same, according to the case of the plaintiff, amounts to infringement of trademark of the plaintiff society. *Except for one bald single sentence appearing in para no.13 of the amended plaint that defendant no.1 is carrying commercial activity in his property, the entire plaint is found to be completely silent in that regard. The plaintiff has nowhere disclosed in the entire plaint about the nature of any such commercial activity allegedly being carried out by the applicant/ defendant in his said property.*
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> 35. As already mentioned hereinabove, it is own case of the plaintiff society that it and erstwhile defendant no.2 are residential welfare societies constituted for the purpose of carrying out welfare activities for the benefit of their respective residents/ members who are residing in the properties/ farm houses situated therein. Indisputably, the trademark 'WESTEND GREENS' is registered in favour of the plaintiff society under class 45, which is in the category of providing services mainly legal and security services, as well as certain personal and social services rendered by others to meet the needs of individuals. *It is nowhere the case of the plaintiff society that it has been carrying on any commercial activity in*

relation to any goods and/or services being provided by it either to its residents or to any other person. It is also nowhere the case of the plaintiff society that applicant/ defendant no.1 is using the said trade mark 'WESTEND GREENS' in relation to his business or trade in any manner whatsoever. The only allegations found appearing in the plaint is that the applicant/ defendant no.1 has put up signage board bearing impugned trademark 'WESTEND GREENS' in conjunction with number i.e. Farm No.18A, outside his farm house and same is being alleged to be infringement on the part of the defendant no.1 to the registered trade mark of the plaintiff society. That being so, *this Court finds considerable force in the submissions made on behalf of applicant/ defendant no.1 that the plaintiff society has miserably failed to show even prima facie that applicant/defendant no.1 is using its registered trademark 'WESTEND GREENS' within the meaning of S. 29 of the Act of 1999. The irresistible conclusion, therefore, which follow is that necessary ingredients constituting infringement of trademark of the plaintiff society so as to give rise to any cause of action in favour of plaintiff to institute the plaint seeking reliefs qua infringement of trademark against applicant/ defendant no.1 are not fulfilled. Therefore, this Court is of the considered opinion that the plaint does not disclose any valid cause of action against applicant/ defendant no.1 as provided under Rule 11(a) to Order VII CPC.*

36. In view of the foregoing reason and discussion made hereinabove, the application under consideration is hereby allowed and disposed off. Consequently, the plaint is rejected under Order VII Rule 11 CPC."

(Emphasis supplied)

10. Aggrieved by the aforesaid judgment, the plaintiff in the suits has instituted the present appeals.

11. We have heard Mr. Abhinav Mukerji, learned Senior counsel for the appellant in all these appeals as well as Mr. Rakesh Lakra, learned counsel for the respondents in RFA (Comm) 196/2025, 203/2025 and 204/2025 and Mr. Rajiv Tyagi, learned counsel for the respondent in RFA (Comm) 211/2025, at length.

12. Written submissions have also been filed.

Rival contentions

13. Submissions of Mr. Mukerji

13.1 Mr. Mukerji submits that the learned Commercial Court could not have rejected the plaint, as it has, under Order VII Rule 11 of the CPC. He has emphasised the fact that the appellant is the registered proprietor of the trademark WESTEND GREENS in Class 45[10], for services relating to welfare and protection of its members and maintenance. WESTEND GREENS, it is pointed out, stands registered in favour of the appellant in Class 45 both as a word mark as well as device marks. The appellant has been continuously using the mark WESTEND GREENS since 1993.

13.2 Mr. Mukerji submits that the respondents, with no reasonable justification whatsoever, installed signboards at their premises, illegally including the WESTEND GREENS registered trade mark of the appellant, so as to make it appear that the respondents were members of the appellant's society. It is pointed out that "Westend Greens" is the society of the appellant, and the respondents are the residents of the adjoining society Amaltas Avenue. There is, therefore, no reason for the respondents to use the mark WESTEND GREENS on their signboards, except to capitalize on the reputation of the appellant and make it appear as though the respondents are also part of

[10] Of the Nice Classification as applicable for registration of trade marks *vide* Section 7 of the Trade Marks Act.

the appellant's society. This is intended to create confusion in the minds of the public and enhance the value of the respondents' properties so that potential customers would be attracted to purchase the said properties or take them on lease.

13.3 Mr. Mukerji further submits that once the appellant has asserted, and alleged, that

(i) the respondents are not residents of the appellant's Westend Green Farms society but of the neighbouring Amaltas Avenue resident's welfare society,

(ii) there was, therefore, no justification for the respondents to use the WESTEND GREENS mark on their signboards,

(iii) the use of the mark was with the view to illegally capitalize on the appellant's goodwill and reputation, so as to enhance the value of the respondents' properties, and

(iv) the respondents are carrying out commercial activities in their premises,

all necessary pleadings, to constitute a sustainable cause of action for an infringement proceeding, stood pleaded. Whether infringement actually exists, or not, is a matter for trial.

13.4 Mr. Mukerji submits that the learned Commercial Court could not, therefore, have rejected the plaints on the ground that they did not make out any cause of action.

13.5 Mr. Mukerji relies on the definition of "trade" as contained in Section 2(x) of the Competition Act, 2002 which defines "trade", as any trade, business and includes provision of service." Applying this

definition to Section 29 of the Trade Marks Act, Mr. Mukherjee's contention is that it cannot be said that the use, by the respondents, of the WESTEND GREENS mark on their signboards, without any justification, is not "in the course of trade".

13.6 Besides submits Mr. Mukerji, as the proprietor of a validly registered trade mark, the plaintiff is entitled, under Section 28(1) of the Trade Marks Act, to exclusive use of the trademark in the class in which it is registered and to all reliefs against infringement of the mark. Use of the mark by the defendant is not, he submits, a determinative criterion for the purposes of infringement. He relies for this purpose on para 18 of ***Glaxo Group Limited v. Vipin Gupta***[11]**,** and para 13 and 18 of ***Automatic Electric Ltd v. R.K. Dhawan***[12]**,** both rendered by learned Single Judges of this Court.

13.7 Mr. Mukerji further submits that the intention of the infringer in using the infringing mark is irrelevant to the aspect of infringement, or to the entitlement of the proprietor of the infringed mark to relief thereagainst.

13.8 On facts, Mr. Mukerji submits that the respondents are trying to lease/sell their properties by displaying, on their signboards, the appellant's WESTEND GREENS mark, thereby misleading the prospective lessees/buyers into believing the respondents to be part of the WESTEND GREENS society. This, he submits, amounts to commercial use of the infringing mark, thereby making out a case for

[11] **(2006) 133 DLT 207**
[12] **(1999) 77 DLT 292**

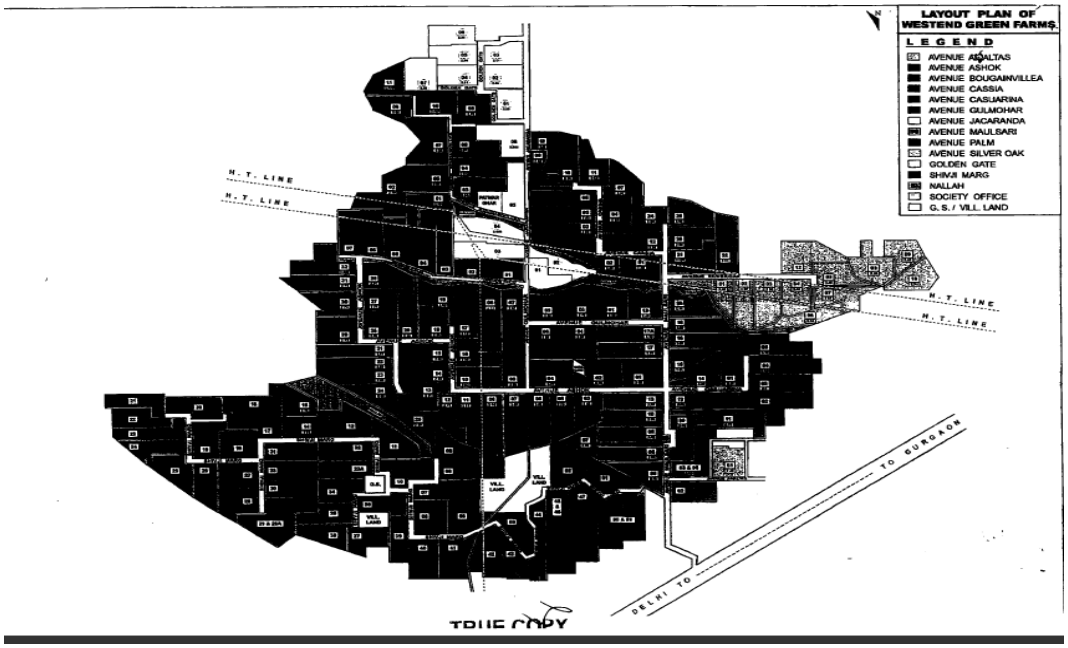
institution of the suit.

13.9 Apart from the aspect of infringement, Mr. Mukerji submits that he has also pleaded passing off and even if, for the sake of argument, it were to be presumed that the strict ingredients of Section 29 have not been pleaded in the plaint, the assertions in the plaint, nonetheless, suffice to maintain a claim for passing off. The learned Commercial Court, he submits, has completely overlooked this aspect of the matter, thereby vitiating the impugned judgment in its entirety.

13.10 For all these reasons, Mr. Mukerji submits that the impugned judgment is liable to be set aside and the suit restored for further proceedings.

14. Submissions of learned counsels for the respondents

14.1 Arguing *per contra*, learned counsels for the respondents submit that there is no infirmity in the impugned judgment of the learned Commercial Court, as would merit interference in appeal. They submit that the reference to WESTEND GREENS on the nameplate/signboard outside their premises is only because the respondents are also residents of Westend Greens Farms, which is a name which applies to the entire area comprising all the societies. For this purpose, the respondents have invited our attention to the layout plan filed along with the plaint, which we deem appropriate to reproduce thus:



From the above layout plan, it is pointed out that Amaltas Avenue is the first of the societies which is comprised in the Westend Green Farms area. The appellant's contention that the respondents are not entitled to use WESTEND GREENS as a part of their nameplate/signboard, is, therefore, submit learned counsel, contrary to the position which emerges from the layout plan filed by the appellant itself along with its plaint.

14.2 Learned counsel further submit that "use in the course of trade", of the allegedly infringing mark, is an indispensable *sine qua non* for "infringement", within the meaning of Section 29, to be said to exist. The learned Commercial Court, they submit, has correctly interpreted the expression "trade" as involving an element of buying and selling. They submit that there is no averment in the plaint that the respondents were commercially dealing in their properties as could maintain a cause of action to allege infringement.

14.3 In so far as the sole averment regarding carrying out of commercial activity in the respondent's premises is concerned, learned counsel submit that the learned Commercial Court has correctly observed that the nature of the commercial activity, if any, remained undisclosed in the plaint. Moreover, submit learned counsel, there is no averment in the plaint linking the alleged commercial activity, if any, to the use of the mark WESTEND GREENS on the nameplate/signboard of the respondents.

14.4 Learned counsel would, therefore, request the Court to reject the appeals, and affirm the impugned order.

Analysis

15. Principles governing Order VII Rule 11(a) of the CPC

15.1 Three stellar principles, governing exercise of jurisdiction under Order VII Rule 11(a) of the CPC, deserve to be noted at the outset.

15.2 Averments in the plaint alone are relevant – "Cause of action"

15.2.1 The most primordial principle governing Order VII Rule 11 of the CPC, as correctly noted by the learned Commercial Court, is that the application has to be decided on the basis of the averments in the plaint, and the documents filed therewith, and without reference to any other material. Averments in the written statement of the defendants, or even in the application under Order VII Rule 11 of the CPC, are of no consequence. All material, outside the plaint and the accompanying

documents, is taboo. The Court can only look at the plaint and the documents filed with the plaint, and nothing else.

15.2.2 This is, in fact, apparent even from the words used in Order VII Rule 11, which commences with the words "the *plaint* shall be rejected in the following cases".

15.2.3 Exercise of jurisdiction under Order VII Rule 11(a) proceeds on a demurrer, assuming the facts stated in the plaint to be true.[13]

15.2.4 Further, Order VII Rule 11(a) envisages rejection of a plaint "where *it* does not disclose a cause of action". Thus, it is only where *the averments in the plaint* do not disclose a cause of action, that a court can reject a plaint Order VII Rule 11(a).

15.2.5 There is wealth of judicial authority vouchsafing this position, to wit ***D. Ramachandran v. R.V. Janakiraman***[14], ***Central Provident Fund Commissioner v. Lala J.R. Education Society***[15], ***Bhau Ram v. Janak Singh***[16], ***Exphar S.A.***, ***Mayar*** and ***Raptakos Brett & Co. v. Ganesh Property***[17]. In ***Sapan Sukhdeo Sable v. Assistant Charity Commissioner***[18], it was held that the plaint had to be read in its entirety.

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[13] Refer **Mayar (HK) Ltd v. Owners & Parties, Vessel M.V. Fortune Express, (2006) 3 SCC 100,** hereinafter "**Mayar**"
[14] **(1999) 3 SCC 267**
[15] **(2016) 14 SCC 679**
[16] **(2012) 8 SCC 701**
[17] **(1998) 7 SCC 184**
[18] **(2004) 3 SCC 137**

15.2.6 In ***Church of North India v. Lavajibhai Ratanjibhai***[19], the Supreme Court further clarified the position thus:

> "39. A plea of bar to jurisdiction of a civil court must be considered having regard to the contentions raised in the plaint. For the said purpose, *averments disclosing cause of action* and the reliefs sought for therein must be considered in their entirety. The court may not be justified in determining the question, one way or the other, only having regard to the reliefs claimed dehors the factual averments made in the plaint. *The rules of pleadings postulate that a plaint must contain material facts.* When the plaint read as a whole *does not disclose material facts giving rise to a cause of action* which can be entertained by a civil court, it may be rejected in terms of Order 7 Rule 11 of the Code of Civil Procedure."
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> (Emphasis supplied)

This decision is of significance, as it rules, clearly, that a plaint must *disclose material facts which give rise to the cause of action*. In a suit for trade mark infringement or passing off, therefore, the plaint must not merely *aver that infringement or passing off has taken place*, but must *disclose the facts on the basis of which the allegation is made*.

15.2.7 This position, in fact, also flows from Order VII Rule 1(e) of the CPC, which requires a plaint to disclose "*the facts constituting the cause of action* and when it arose".

15.2.8 The scope and contours of the expression "cause of action" have been defined and delineated by the Supreme Court in a wide swathe of decisions.

15.2.9 ***Kusum Ingots & Alloys Ltd v Union of India***[20] provides one

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[19] **(2005) 10 SCC 760**
[20] **(2004) 6 SCC 254**

of the most comprehensive definitions of "cause of action":

> "6. Cause of action implies a right to sue. *The material facts which are imperative for the suitor to allege and prove constitute the cause of action*. Cause of action is not defined in any statute. It has, however, been judicially interpreted inter alia to mean that every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. Negatively put, it would mean that *everything which, if not proved, gives the defendant an immediate right to judgment, would be part of cause of action.* Its importance is beyond any doubt. *For every action, there has to be a cause of action, if not, the plaint or the writ petition, as the case may be, shall be rejected summarily.*
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> *****
>
> 9. Although in view of Section 141 of the Code of Civil Procedure the provisions thereof would not apply to writ proceedings, the phraseology used in Section 20(c) of the Code of Civil Procedure and clause (2) of Article 226, being in pari materia, the decisions of this Court rendered on interpretation of Section 20(c) CPC shall apply to the writ proceedings also. Before proceeding to discuss the matter further it may be pointed out that *the entire bundle of facts pleaded need not constitute a cause of action as what is necessary to be proved before the petitioner can obtain a decree is the material facts*. The expression material facts is also known as integral facts."
>
> (Emphasis supplied)

Importantly, this decision underscores the position, in law, that *the facts which a plaintiff must prove in order to be entitled to a decree* constitute the "cause of action". These facts must, therefore, essentially be pleaded in the plaint.

15.2.10 ***Mayar*** sheds light on what would constitute "material facts" in the context of a cause of action, apropos the pleadings which a plaint is required to contain:

> "12. From the aforesaid, it is apparent that the plaint cannot be rejected on the basis of the allegations made by the defendant in

his written statement or in an application for rejection of the plaint. The court has to read the entire plaint as a whole to find out whether it discloses a cause of action and if it does, then the plaint cannot be rejected by the court exercising the powers under Order 7 Rule 11 of the Code. Essentially, whether the plaint discloses a cause of action, is a question of fact which has to be gathered on the basis of the averments made in the plaint in its entirety taking those averments to be correct. A cause of action is a bundle of facts which are required to be proved for obtaining relief and for the said purpose, *the material facts are required to be stated* but not the evidence except in certain cases where the pleadings relied on are in regard to misrepresentation, fraud, wilful default, undue influence or of the same nature. So long as the plaint discloses some cause of action which requires determination by the court, the mere fact that in the opinion of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaint. In the present case, the averments made in the plaint, as has been noticed by us, do disclose the cause of action and, therefore, the High Court has rightly said that the powers under Order 7 Rule 11 of the Code cannot be exercised for rejection of the suit filed by the plaintiff-appellants.

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18. *As per law of pleadings under Order 6 Rule 2 of the Code, every pleading should contain, and contain only, a statement in a concise form of the material facts on which the party relies for his claim or defence, as the case may be. Thus, the facts on which the plaintiff relies to prove his case have to be pleaded by him.* Similarly, it is for the defendant to plead the material facts on which his defence stands. The expression "material facts" has not been defined anywhere, but from the wording of Order 6 Rule 2 the material facts would be, upon which a party relies for his claim or defence. *The material facts are facts upon which the plaintiff's cause of action or the defendant's defence depends and the facts which must be proved in order to establish the plaintiff's right to the relief claimed in the plaint* or the defendant's defence in the written statement. Which particular fact is a material fact and is required to be pleaded by a party, would depend on the facts and circumstances of each case. In ***A.B.C. Laminart (P) Ltd. v. A.P. Agencies***[21] this Court has considered the ambit of the exclusion clause whereby the jurisdiction of one court is excluded and conferred upon another court by agreement of the parties and said that in a suit for damages for breach of contract, the cause of action consists of making of the contract, and of its breach, so that the suit may be filed either at the place where the contract was made or at

[21] **(1989) 2 SCC 163**

the place where it should have been performed and the breach occurred."

(Emphasis supplied)

15.2.11 While examining whether the averments in the plaint make out a cause of action, for the purpose of Order VII Rule 11(a), therefore, the Court has to keep in mind the peripheries of the expression "cause of action", as they stand chalked out by the above decisions.

15.3 Order VII Rule 11 jurisdiction not to be lightly exercised

15.3.1 It is also settled that rejection of a plaint under Order VII Rule 11 of the CPC is an extreme step, and is not to be lightly taken by a Court. At the same time, the use of the word "shall" in Order VII Rule 11 make it obligatory for the Court to reject the plaint, where the ingredients of the Rule are fulfilled.[22]

15.3.2 Classically, a suit, once instituted, is entitled to proceed to trial. Order VII Rule 10[23] of the CPC and Order VII Rule 11 of the CPC are exceptions to this general rule. A Division Bench of this Court has, in ***Bright Enterprises Pvt Ltd v. M.J. Bizcraft LLP***[24], held that every suit is entitled to issue of summons and that the only exceptions to this principle are where a suit is bad for want of territorial jurisdiction, in which case the plaint has to be returned for

[22] Refer **Dahiben v. Arvindbhai Kalyanji Bhansali, (2020) 7 SCC 366**

[23] **10. Return of Plaint-**
(1) [Subject to the provisions of Rule 10-A, the plaint shall] at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted.
[*Explanation*- For the removal of doubts, it is hereby declared that a court of appeal or revision may direct, after setting aside the decree passed in a suit, the return of the plaint under this sub-rule.]

[24] **2017 SCC OnLine Del 6394**

presentation before the appropriate forum under Order VII Rule 10 of the CPC, or the suit is not maintainable for one or more of the reasons envisaged in the various clauses of Order VII Rule 11 of the CPC, in which case the plaint has to be rejected on that ground. A Court can, therefore, refuse to issue summons in a suit if the suit is hit by either Order VII Rule 10 or Order VII Rule 11 of the CPC.

15.3.3 Inasmuch as the rejection of a plaint Order VII Rule 11 guillotines a suit at its very inception, and does not allow it to proceed the trial, the power as to be sparingly exercised, and only where the conditions of the Rule are found to be stringently satisfied.[25]

15.3.4 While examining whether a case for rejecting the plaint under Order VII Rule 11(a) on the ground of non-existence of a cause of action does, or does not, exist, the plaint has to be read holistically. It is only where a complete reading of the plaint, juxtaposing one para with the other and harmonising the plaint as a whole, does not disclose the existence of a cause of action on the basis of which the plaintiff can sue, that the plaint can be rejected under Order VII Rule 11(a). The Court has to be conscious of the fact that plaints may not always be artistically, or even, at times, elegantly drafted, and has to carefully scrutinize the assertions in the plaint before satisfying itself that no cause of action, within the meaning of Order VII Rule 11(a), is made out from the averments contained therein.

15.3.5 The power under Order VII Rule 11(a) is a drastic power,

[25] **P.V. Guru Raj Reddy v. P. Neeradha Reddy, (2015) 8 SCC 331**

conferred by the statute *ex debito justitiae,* and to subserve the public purpose of ensuring that claims which are mere moonshine do not take up valuable judicial time and subject, in the process, the opposite party to unnecessary litigative trauma.

15.3.6 The Court, therefore, has to be aware of the extreme nature of the jurisdiction vested in it by Order VII Rule 11(a), when rejecting a plaint under the said provision. Plaints cannot be rejected merely because they are insufficient in particulars, or because there is any lack of clarity in the averments in the plaint.

15.3.7 If, however, on a holistic reading of a plaint, it is clear that the ingredients on the basis of which a cause of action to sue can be said to exist are not pleaded, the Court may legitimately reject the plaint under Order VII Rule 11.

15.4 Artful pleadings should not be permitted to make out a cause of action where none otherwise exists

15.4.1 The third principle which permeates Order VII Rule 11(a), and the exercise of jurisdiction thereunder, is that the Court should not allow itself to be led astray by artful pleadings, which may superficially create a cause of action where none exists.[26] While holistically reading a plaint, the Court has to scrupulously scrutinise the assertions in the paint to satisfy itself that the necessary ingredients which have to be pleaded to make out a cause of action have been so pleaded. While it may not be necessary for a plaintiff to

[26] Refer **ITC Ltd v. Debt Recovery Appellate Tribunal, (1998) 2 SCC 70**, **T. Aravindantan v. T.V. Satyapal, (1977) 4 SCC 467**

set out all particulars of the evidence that he may seek to lead to prove the assertions in the plaint, the requisite assertions must nonetheless exist.

15.4.2 Applying this principle on a suit alleging infringement or passing off of trade mark, for example, the plaint must not merely allege infringement or passing off, must also plead the existence of the necessary ingredients which make out a case of infringement or passing off.

15.4.3 The court has to satisfy itself that the pleadings are not a mere exercise in semantics, but really and substantially make out a cause of action which can be pleaded by the plaintiff and which is amenable to trail.

16. Applying the principles to the present case

We proceed to examine the issue of whether the averments in the plaint suffice to make out a cause of action to sue for infringement, and passing off, separately.

16.1 Re. Infringement

16.1.1 Infringement, as a statutory tort, is cabined and confined within Section 29 of the Trade Marks Act. There can be no infringement outside Section 29.

16.1.2 It is only a registered trade mark which can be infringed, as is

apparent from a bare reading of each of the sub-sections of Section 29. The circumstances in which infringement takes place are set out in sub-section (1), (2), (4), (5) and (7) to (9)[27] of Section 29, and each of the said sub-sections envisage infringement only of a registered trade mark. Registration of the infringed trade mark, therefore, is the *sine qua non* for infringement to exist. A mark which is not registered cannot be infringed.

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[27] **29. Infringement of registered trade marks**. –

(1) A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which is identical with, or deceptively similar to, the trade mark in relation to goods or services in respect of which the trade mark is registered and in such manner as to render the use of the mark likely to be taken as being used as a trade mark.

(2) A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which because of—

(a) its identity with the registered trade mark and the similarity of the goods or services covered by such registered trade mark; or

(b) its similarity to the registered trade mark and the identity or similarity of the goods or services covered by such registered trade mark; or

(c) its identity with the registered trade mark and the identity of the goods or services covered by such registered trade mark,

is likely to cause confusion on the part of the public, or which is likely to have an association with the registered trade mark.

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(4) A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which—

(a) is identical with or similar to the registered trade mark; and

(b) is used in relation to goods or services which are not similar to those for which the trade mark is registered; and

(c) the registered trade mark has a reputation in India and the use of the mark without due cause takes unfair advantage of or is detrimental to, the distinctive character or repute of the registered trade mark.

(5) A registered trade mark is infringed by a person if he uses such registered trade mark, as his trade name or part of his trade name, or name of his business concern or part of the name, of his business concern dealing in goods or services in respect of which the trade mark is registered.

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(7) A registered trade mark is infringed by a person who applies such registered trade mark to a material intended to be used for labelling or packaging goods, as a business paper, or for advertising goods or services, provided such person, when he applied the mark, knew or had reason to believe that the application of the mark was not duly authorised by the proprietor or a licensee.

(8) A registered trade mark is infringed by any advertising of that trade mark if such advertising—

(a) takes unfair advantage of and is contrary to honest practices in industrial or commercial matters; or

(b) is detrimental to its distinctive character; or

(c) is against the reputation of the trade mark.

(9) Where the distinctive elements of a registered trade mark consist of or include words, the trade mark may be infringed by the spoken use of those words as well as by their visual representation and reference in this section to the use of a mark shall be construed accordingly.

16.1.3 The infringer, on the other hand, has to be a person who is neither the proprietor of a registered trade mark nor a person using the registered trade mark by way of permissive use. The proprietor of a registered trade mark, therefore, can never be an infringer.

16.1.4 At a bare glance of various sub-sections of Section 29, it is clear that sub-sections (4), (5) and (7) to (9) do not apply to the present case.

16.1.5 Sub-sections (1) and (2) apply only where the infringing mark is used "in the course of trade".

16.1.6 "Use in the course of trade" is not defined in the Trade Marks Act. Though the learned Commercial Court has relied upon orders passed by learned Single Judges of this Court in ***Pepsico*** and ***Kabushiki Kaisha Toshiba***, these are interlocutory orders passed in applications under Order XXXIX Rules 1 and 2 of the CPC, merely expressing a *prima facie* view. They, therefore, cannot constitute valuable precedents to understand the expression "use in the course of trade".

16.1.7 What is clear, however, is that, for a mark to be said to be used in the course of a trade, it has to be shown that, firstly, the user is plying a trade and, secondly, that the user is using the trade mark in the course of such trade.

16.1.8 The existence of a link between the user of the mark and the trade being carried on by such user is, therefore, the indispensable *sine*

qua non, for infringement, within the meaning of Section 29 of the Trade Marks Act to be said to exist.

16.1.9 Applying the principle, already noted earlier, any plaint alleging commission of a tort has to plead the existence of the ingredients in the form of material facts which, if they exist, would result in commission of the tort. "Artful pleadings" alone would not suffice. The pleadings in the tort would have to plead the basis for the assertions, too, though the plaint may not refer to the supportive evidence in that regard.

16.1.10 In the case of a suit alleging infringement of a trade mark, therefore, the plaint must plead that (i) the plaintiff has a registered trade mark, (ii) the defendant is using a mark which is identical or deceptively similar thereto, (iii) the defendant is not registered or using the mark as a permitted user, (iii) *such use is in the course of trade* and (iv) the use of the allegedly infringing trade mark is resulting in likelihood of confusion in the market, or in the public believing an association between the marks. The requirement of pleading of material facts would also require disclosure of the *basis* of these assertions, though the evidence that the plaintiff intends to adduce in support thereof need not be referred to. Else, it would merely be a case of an illusion of a cause of action being created by artful pleadings, without any material to indicate that such a cause of action actually exists. The requirement of pleading of *material facts* would necessitate the plaintiff also disclosing the basis for the assertion that the defendant has committed the tortious act.

16.1.11 There is a fundamental difference between *pleading the existence of the basis for a material fact* and *disclosing the evidence on the basis of which such existence is pleaded*. Any plaint *must* plead the former, but not the latter. Expressed otherwise, *all ingredients of the cause of action – meaning the facts which the plaintiff would have to establish to entitle it to a decree – must be pleaded.*

16.1.12 The learned Commercial Court has held that the appellant's plaint does not plead the facts on the basis of which a cause of action, to maintain a suit for infringement, can be maintained, and we are inclined to agree. The requisite pleadings, to the effect that the respondent was using the WESTEND GREENS mark, are completely absent.

16.1.13 Use of the appellant's WESTEND GREENS mark by the respondent on their nameplate, or sign board, is not infringement, even if it results in confusion amongst the public, or misleads the public into believing that the respondents are also member of the appellant's residential society. The use must be *commercial*, i.e., it must be "in the course of trade".

16.1.14 Pleadings, in this regard, had, therefore, to identify the trade and, further, aver the material facts on the basis of which an assertion that the WESTEND GREENS mark was being used by the respondents in the course of trade could be made.

16.1.15 Towards this end, the only averments in the plaint are that in para 13, which avers that

(i) the respondent was "*trying to enhance* his property value" and was "*trying to attract potential customers for the purpose of leasing/selling of his farm thereby unjustly enriching himself"* and

(ii) the respondent was "*carrying on commercial activity* in his property",

Mr. Mukerji's contention is that, when one reads these averments on a demurrer, treating them as correct, the requisite pleadings, to maintain an action for trade mark infringement, must be found to exist.

16.1.16 We regret our inability to agree with Mr. Mukerji.

16.1.17 Enhancing the value of one's property cannot constitute "use in the course of trade", absent *trade in the property*. Nor is enhancing the value of one's property illegal, or even tortious, in any manner; far less would it amount to infringement, even *prima facie*.

16.1.18 No doubt, para 13 goes on to allege that the enhancement of the value of the respondent's property was "for the purpose of leasing/selling of" the farm. There is, however, nothing, either in the plaint or in the documents accompanying the plaint, to support the allegation that the respondent was trying to lease or sell the farm. Even *quia timet* actions have to disclose the basis of the apprehension. There is no averment that a single customer has ever evinced any intent to purchase, lease, or commercially deal with the respondent's property. There is no averment of the respondent having put out his farm in the market for lease, sale, or other commercial dealing. There is, for that matter, nothing to indicate that the appellant can have a

reasonable apprehension that the respondent *may* lease or sell his property in future.

16.1.19 The assertion, therefore, amounts to no more than an averment that the value of the respondent's property, were it on some future date to be commercially transacted, stood enhanced by use of the mark WESTEND GREENS. That, to our mind, cannot suffice as an averment that the mark was used by the respondent "in the course of trade". Expressed otherwise, though the "course of trade" may span an entire spectrum of activities, from the initial cogitations on whether to commercially transact in the property, to publicising the intent, to actually putting out the property in the market, to negotiating with customers, to, ultimately, transacting in the property, *something must commence*, or, at the very least, in a *quia timet* action, the plaint must disclose the basis for the apprehension, of the plaintiff, that *something may commence* in the future. Else, it remains a mere fear that the value of the property stood enhanced by use of the appellant's mark which, by no stretch of reasoning, can constitute "infringement" within the meaning of Section 29 of the Trade Marks Act.

16.1.20 The second averment, that the respondent was "carrying on commercial activity" in the premises, is even more insubstantial. Carrying on commercial activity in the respondent's premises is not infringing, within the meaning of Section 29. There is no reference to the nature, or kind, of commercial activity which the respondents were carrying on. The plaint does not disclose the basis for this assertion.

16.1.21 More importantly, there is *nothing whatsoever* to link the

alleged "commercial activity" with the allegedly infringing WESTEND GREENS mark. It is not mere trade, by the defendant, which attracts Section 29. It is *use of the infringing trade mark in the course of trade*. Absent any further averments, the mind boggles as to how a commercial activity, assuming it were to be carried out in the respondent's premises, would profit by the use of WESTEND GREENS on the name plate or signboard outside the premises. If, for example, the respondents were to be running a stationery shop in the premises, how, one wonders, would the use of WESTEND GREENS on the name plate outside the premises amount to use of the mark in the course of trade? The averment that the respondent was carrying on "commercial activity" in the premises, therefore, cannot even remotely amount to an assertion, even indirect, that the respondent was using the WESTEND GREENS mark in the course of trade.

16.1.22 No averments, as would suffice to make out a cause of action for infringement, against the respondent, was, therefore contained in the plaint of the appellant's suit.

16.1.23 We, therefore, are in entire agreement with the learned Commercial Court on this aspect.

16.2 Re. passing off

16.2.1 Mr. Mukerji submits that the appellant's suit alleged not only infringement, but also passing off, and that the learned Commercial Court has failed entirely to address this aspect.

16.2.2 To the extent that the learned Commercial Court has not referred to the allegation of passing off, in the plaint, Mr. Mukerji is correct. As the issue is, however, only whether the averments in the plaint make out a cause of action, we called upon Mr. Mukerji to point out the assertions, in the plaint, which could make out a cause of action to proceed against the respondents for passing off.

16.2.3 Mr. Mukerji once again relies on the paragraphs of the plaint which stand reproduced in para 4 *supra*.

16.2.4 The ingredients of passing off, as an intellectual property tort, are well-recognized, and exhaustive reference to precedents is hardly necessary. Classically, passing off, to be proved, requires establishment of (i) goodwill in the plaintiff's mark, (ii) misrepresentation by the defendant and (iii) resultant damage to the plaintiff. One of the most authoritative expositions of what "passing off" actually connotes is to be found in the following passage from the leading opinion of Lord Oliver of Alymerton in the decision of the House of Lords in ***Reckitt & Colman Products Ltd v. Borden Inc.***[28], which was adopted, with approval, by a Division Bench of this Court in ***Turning Point v. Turning Point Institute Pvt Ltd***[29]**:**

> "The law of passing off can be summarised in one short general proposition -- *no man may pass off his goods as those of another*. More specifically, it may be expressed in terms of the elements which the plaintiff in such an action has to prove in order to succeed. These are three in number. First, he must establish a goodwill or reputation *attached to the goods or services* which he supplies in the mind of the purchasing public by association with

[28] **(1990) 1 All ER 873 (HL)**
[29] **250 (2018) DLT 563 (DB)**

> the identifying "get-up" (whether it consists simply of a brand name or a trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive specifically of the plaintiff's goods or services. Secondly, he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) *leading or likely to lead the public to believe that goods or services offered by him are the goods or services of the plaintiff.* Whether the public is aware of the plaintiff's identity as the manufacturer or supplier of the goods or services is immaterial, as long as they are identified with a particular source which is in fact the plaintiff. For example, if the public is accustomed to rely upon a particular brand name in purchasing goods of a particular description, it matters not at all that there is little or no public awareness of the identity of the proprietor of the brand name. Thirdly, he must demonstrate that he suffers or, in a quia timet action, that he is likely to suffer damage by reason of the erroneous belief engendered by the defendant's misrepresentation that *the source of the defendant's goods or services* is the same as the source of those offered by the plaintiff."

16.2.5 In a comparatively recent pronouncement in ***Brihan Karan Sugar Syndicate Pvt Ltd v. Yashwantrao Mohite Krushna Sahakari Sakhar Karkhana***[30], the Supreme Court has cited, with approval, the following elucidation regarding the tort of passing off, as contained in ***Satyam Infoway Ltd v. Siffynet Solutions (P) Ltd***[31]:

> "13. The next question is, would the principles of trade mark law and in particular those relating to passing off apply? An action for passing off, as the phrase "passing off" itself suggests, is to restrain the defendant *from passing off its goods or services to the public as that of the plaintiff's*. It is an action not only to preserve the reputation of the plaintiff but also to safeguard the public. The defendant *must have sold its goods or offered its services* in a manner which has deceived or would be likely *to deceive the public into thinking that the defendant's goods or services are the plaintiff's.* The action is normally available to the owner of a distinctive trade mark and the person who, if the word or name is an invented one, invents and uses it. If *two trade rivals* claim to have individually invented the same mark, then the trader who is

[30] **(2024) 2 SCC 577**
[31] **(2004) 6 SCC 145**

> able to establish prior user will succeed. The question is, as has been aptly put, who gets these first? It is not essential for the plaintiff to prove long user to establish reputation in a passing off action. It would depend upon the volume of sales and extent of advertisement.
>
> 14. The second element that must be established by a plaintiff in a passing off action is misrepresentation by the defendant to the public. The word "misrepresentation" does not mean that the plaintiff has to prove any mala fide intention on the part of the defendant. Of course, if the misrepresentation is intentional, it might lead to an inference that the reputation of the plaintiff is such that it is worth the defendant's while to cash in on it. An innocent misrepresentation would be relevant only on the question of the ultimate relief which would be granted to the plaintiff [***Cadbury-Schweppes (Pty) Ltd. v. PUB Squash Co. (Pty) Ltd.***[32], ***Erven Warnink Besloten Vennootschap v. J. Townend & Sons (Hull) Ltd.***[33]]. What has to be established is the likelihood of confusion in the minds of the public (the word "public" being understood to mean actual or potential customers or users) *that the goods or services offered by the defendant are the goods or the services of the plaintiff.* In assessing the likelihood of such confusion the courts must allow for the "imperfect recollection of a person of ordinary memory" [***Aristoc Ltd. v. Rysta Ltd.***[34]].
>
> 15. The third element of a passing off action is loss or the likelihood of it."

16.2.6 Passing off, therefore, is a tort against the *goods or services* of the plaintiff, whereas infringement is a tort against its *registered trade mark*. The essence of passing off is misleading the public into believing the goods or services of the defendant to be those of the plaintiff. The use of the plaintiff's trade mark, or something deceptively similar thereto, is but the *modus operandi*.

16.2.7 A passing off action must, therefore, most fundamentally, identify the goods or services provided by the defendant, so as to establish that they are being identified, by the consuming public – the

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[32] **(1981) 1 WLR 193 (HL)**
[33] **(1979) 3 WLR 68**
[34] **1945 AC 68 (HL)**

man of average intelligence and imperfect recollection – as the goods or services of the plaintiff. For this, there has to be a reference to the goods in which the defendant deals, or the services that he provides.

16.2.8 In the appellant's plaint, there is none.

16.2.9 The appellant has contented itself with an allegation of misrepresentation, and an attempt to confuse the public into believing that the respondent is a resident of the Westend Green Farms Society. *As to how this misrepresentation is vis-à-vis any goods or services provided by the respondents, the plaint is totally silent.*

16.2.10 An allegation of misrepresentation, by itself, cannot make out a cause of action to sustain a passing off suit.

16.2.11 We, therefore, are of the opinion that the assertions in the appellant's plaint do not suffice to make out a cause of action to sue the respondents for passing off, either.

17. <u>The sequitur</u>

The inexorable sequitur of the above discussion has, therefore, to be that the learned Commercial Court is correct in its view that the assertions in the plaint do not make out a cause of action either for infringement or passing off.

18. Re. plea of residence

18.1 Learned counsel for the respondents also sought to contend, from the layout plan of the Westend Green Farms area, filed with the plaint, that Amaltas Avenue in which they were residing was also part of Westend Green Farms.

18.2 It is true that in the legend contained in the layout plan, Amaltas Avenue is shown as the first residential area below the title Westend Green Farms. Learned counsel for the respondents have therefore clearly raised an arguable issue.

18.3 However, this contention may not justify the rejection of the plaint under Order VII Rule 11 (a) of the CPC, as it would involve interpretation of the layout plan, which cannot be done at a preliminary stage and would require trial.

Conclusion

19. As the plaint does not contain the necessary averments as would disclose existence of the material facts which could make out a cause of action for the appellant to sue the respondents, for infringement and passing off, we are of the opinion that the learned Commercial Court correctly allowed the respondents' application under Order VII Rule 11 (a) of the CPC and rejected the plaint.

20. This above reasoning and conclusion applies *mutatis mutandis* to all the appeals.

21. The appeals are, therefore, dismissed with no orders as to costs.

C. HARI SHANKAR, J.

OM PRAKASH SHUKLA, J.

DECEMBER 17, 2025*/aky/yg/dsn*