

LupIn Limited Vs. Johnson and Johnson

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Court : Mumbai

Decided On : Aug-13-2012

Judge : B.R. Gavai

Appeal No. : NOTICE OF MOTION (LDG.) NO. 2178 OF 2012 IN SUIT (LDG.) NO. 1842 OF 2012

Appellant : LupIn Limited

Respondent : Johnson and Johnson

Judgement :

P.C.:

The plaintiff company is engaged in the business of manufacturing, marketing and selling pharmaceutical products. The defendant company is also engaged in the business of manufacturing, marketing and selling of pharmaceutical products. It is the contention of the plaintiff that the plaintiff has independently conceived and adopted a distinctive mark "LUCYNTA" and registered it in class-5 of Fourth Schedule to the Trade Marks Rules, 2002 on 9th March 2012 from 20th August 2012. It is the contention of the plaintiff that the defendant would be committing an act of infringement by using the impugned mark "NUCYNTA". In this premises, the plaintiff has filed the present suit for injunction restraining the defendant from using the impugned mark "NUCYNTA" since it is infringing the plaintiff's registered trademark "LUCYNTA". The plaintiff has also taken out notice of motion for certain

reliefs during the pendency of the suit and also moved this Court for grant of ad-interim orders.

2. As against this It is the case of the defendant that the defendant has invented a new drug, namely, "TAPENTADOL" and coined and adopted a distinctive trademark "NUCYNTA" which is in existence in the international market since 2008. It is the contention of the defendant that its mark NUCYNTA is registered in various countries as registered trademark much prior to the registration of plaintiff's mark in India. It is the contention of the defendant that taking into consideration the popularity of the defendant's trademark LUCYNTA and the drug invented, namely, "TAPENTADOL", the plaintiff has deceptively imitated the trademark NUCYNTA with the same drug. It is their case that since the adoption of the plaintiff itself is deceptive the plaintiff is not entitled to any relief. It is further case of the defendant that the defendant has also filed a suit on an action of passing off against the plaintiff in the Delhi High Court along with application for interlocutory reliefs which is pending before the said Court.

3. Though various rival submissions have been advanced at bar by Dr.Tulzapurkar, learned senior counsel appearing for the plaintiff and Shri Kadam, learned senior counsel appearing for the defendant, I find that before considering the prayer of the plaintiff for an ad-interim relief, it is necessary that the view taken by the Division Bench of this Court in Appeal No.88/2005 in Notice of Motion No.2638/2004 in Suit No.2663/2004 dated 16th February 2005 (**M/s.Maxheal Pharmaceuticals v. Shalina Laboratories Pvt.Ltd.**) to the effect that at the stage of consideration of an application for interlocutory orders, it is not permissible for this Court to go into the question of validity of the mark and as long as the mark remains on the register (even wrongly) the proprietor thereof is entitled for an order of injunction. I further find that to an extent the aforesaid view is in conflict with the view expressed by the Division Bench of this Court in the case of **M/s.J.K.Sons v. M/s.Parksons Games and Sports**, CDJ 2011 BHC 317 and the judgment of Full Bench of this Court in the case of **Abdul Cadur Allibhoy v. Mahomedally Hyderally**, 1901 (3) Bom.L.R. 220.

4. The learned single Judge of this Court (Vimadalal, J.), in the case of **Hindustan Embroidery Mills Pvt. Ltd. v. K.Ravindra and Co.**, (1974) 76 Bom.L.R. 146, had an occasion to consider the prayer of the plaintiff in the notice of motion based on infringement of trademark as well as passing off. The learned single Judge had considered the cases of infringement of trademark and passing off separately. While considering the case of the plaintiff therein, in respect of infringement of trademark, learned single Judge observed thus:

“6. It was then sought to be contended by Mr. Shah that, if there was some doubt in regard to the respective rights of the parties, having regard to considerations of balance of convenience, no interlocutory injunction should be granted, and reliance was placed in that connection on a passage from Kerly on Trade Marks, p. 655, para. 654. It is explained there that, by the expression "balance of convenience" is meant the relative amounts of damage which are likely to result if the injunction is granted and the plaintiff ultimately fails, or if it is refused and he ultimately succeeds, and it is stated that where there is a substantial case to be tried, the application for interim injunction may be ordered to stand over to the hearing, upon the defendant undertaking to keep an account of his sales under the mark objected to. There is, however, a statement in the same paragraph which shows clearly that it is not the practice to consider the validity of the registration of the mark on a Motion for interlocutory injunction, and that, whilst a mark remains on the register (even wrongly), it is not desirable that others should imitate it. As far as the cruciform and script marks which have been registered are concerned, the same are registered admittedly in the name of the plaintiff-Co., and an injunction should, therefore, be granted restraining the defendants from infringing those marks. It was sought to be stated by the defendants at the hearing of the Motion before me that they are not selling goods bearing the cruciform or script marks, but are only selling goods bearing the Chimney mark, but that statement is false in view of the plaint in the "threats action" (suit No. 493 of 1967) which they have filed in this Court, in para 2 of which it is stated in clear terms that Hindustan Embroidery Mills Pvt. Ltd. manufacture and sell textile goods under all the said three marks, and in which a permanent injunction has been sought by the present defendants against the present plaintiffs in respect of all those three marks.”

(emphasis supplied)

The learned single Judge in the aforesaid paragraph has reproduced para-654 of Kerly on Trademark which states that it is not the practice to consider the validity of the registration of the mark on a motion for interlocutory injunction, and that, whilst a mark remains on the register (even wrongly), it is not desirable that others should imitate it. The learned Judge, therefore, granted injunction in favour of the plaintiff therein. The aforesaid observations of the learned single Judge have been subsequently followed by various learned single Judges of this Court in many matters. The learned Division Bench of this Court in the case of **M/s.Maxheal Pharmaceuticals v. Shalina Laboratories Pvt.Ltd.** (supra) had also an occasion to consider the similar arguments advanced on behalf of the appellant therein. The Division Bench observed thus:

“6. Mr.Tulzapurkar also submitted that the mark was earlier registered in the name of American Remedies and having regard to the fact that in the examination report the said mark (American Remedies) was cited as conflicting mark there is reason to believe that the respondents managed to get registration by fraud and misrepresentation. The answer to this contention is contained in the judgment of Justice Vimadalal of this Court in Hindustan Embroidery Mills Pvt Ltd vs K Ravindra and Co (1974) 74 Bom L R, 146, wherein the learned Judge pointed out that it is not the practice of this court to consider the validity of registration of a trade mark on a motion for interlocutory reliefs taken out by the person who has got the mark registered in his name. While a mark remains on the register (even wrongly), it is not desirable that others should imitate it. Moreover the respondents have already applied for rectification of the registration in favour of the American Remedies.”

(emphasis supplied)

The aforesaid observations of the Division Bench of this Court have been subsequently followed by various single Judges while considering the interlocutory applications for injunction filed on behalf of the plaintiff in suits of infringement of trademark. Though, at times, it has been argued on behalf of the defendants that the plaintiff's adoption itself was either fraudulent or that the plaintiff was not

entitled to registration of mark in its favour, the learned single Judges of this Court have refused to go into that question, and rightly so, since the Division Bench of this Court has held that it is not the practice of this Court to consider the validity of the registration of the trademark in a motion for interim relief taken out by the person in whose favour the mark is registered and while the mark remains on register (even wrongly) the others should not imitate it. The single Judges of this Court, undoubtedly, are bound by the aforesaid view of the learned Division Bench.

5. However, I find that in view of certain provisions of the Trademark Act, 1999 ("said Act" for short) which have not been considered by the Division Bench in the aforesaid judgment and in view of subsequent pronouncements of law by the Apex Court, Division Bench of this Court and Delhi High Court, the view expressed by the Division Bench of this Court in the case of **M/s.Maxheal Pharmaceuticals v. Shalina Laboratories Pvt.Ltd.** (supra) requires reconsideration.

6. It will be relevant to refer to some of the provisions of the said Act. Sections 27, 28, 29 and 31 of the said Act read thus:

"27. No action for infringement of unregistered trade mark. -

(1) No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark.

(2) Nothing in this Act shall be deemed to affect rights of action against any person for passing off goods or services as the goods of another person or as services provided by another person, or the remedies in respect thereof."

"28. Rights conferred by registration.-

(1) Subject to the other provisions of this Act, the registration of a trade mark shall, if valid, give to the registered proprietor of the trade mark the exclusive right to the use of the trade mark in relation to the goods or services in respect of which the trade mark is registered and to obtain relief in respect of infringement of the trade mark in the manner provided by this Act.

(2) The exclusive right to the use of a trade mark given under subsection (1) shall be subject to any conditions and limitations to which the registration is subject.

(3) Where two or more persons are registered proprietors of trade marks, which are identical with or nearly resemble each other, the exclusive right to the use of any of those trade marks shall not (except so far as their respective rights are subject to any conditions or limitations entered on the register) be deemed to have been acquired by any one of those persons as against any other of those persons merely by registration of the trade marks but each of those persons has otherwise the same rights as against other persons (not being registered users using by way of permitted use) as he would have if he were the sole registered proprietor.”

“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.

(3) In any case falling under clause (c) of subsection (2), the court shall presume that it is likely to cause confusion on the part of the public.

(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.

(6) For the purposes of this section, a person uses a registered mark, if, in particular, he -

(a) affixes it to goods or the packaging thereof;

(b) offers or exposes goods for sale, puts them on the market, or stocks them for those purposes under the registered trade mark, or offers or supplies services under the registered trade mark;

(c) imports or exports goods under the mark; or

(d) uses the registered trade mark on business papers or in advertising.

(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.”

“31. Registration to be prima facie evidence of validity.-

(1) In all legal proceedings relating to a trade mark registered under this Act (including applications under section 57), the original registration of the trade mark and of all subsequent assignments and transmissions of the trade mark shall be prima facie evidence of the validity thereof.

(2) In all legal proceedings as aforesaid a registered trade mark shall not be held to be invalid on the ground that it was not a registrable trade mark under section 9 except upon evidence of distinctiveness and that such evidence was not submitted to the Registrar before registration, if it is proved that the trade mark had been so used by the registered proprietor or his predecessor in title as to have become distinctive at the date of registration.”

7. Perusal of section 28(1) would reveal that the registration of trademark, if valid, shall give the registered proprietor of the trademark an exclusive right to use the trademark in relation to the goods and services in respect of which the trademark is registered and to obtain relief in respect of infringement of trademark. Subsection (3) of said section provides that if two or more persons are registered

proprietor of trademarks, which are identical with or nearly resemble each other, though they shall not have exclusive rights as against each other, each of them will have same rights as against the persons who are not registered users as they would have if they were the sole registered proprietors. Section 29 describes as what shall amount to infringement of registered trademark. Section 31 provides that the registration would be prima facie evidence of its validity. Subsection (1) of section 31 provides that in all legal proceedings relating to a trademark registered under the Act, the original registration of the trademark and all subsequent assignments and transmissions of the trademark shall be prima facie evidence of the validity thereof. Subsection (1) of section 27 provides that no person shall be entitled to institute any proceeding to prevent or to recover damages for the infringement of an unregistered trademark. Subsection (2) thereof, which is a non-obstante clause, provides that nothing in this Act shall be deemed to affect the rights of action against any person for passing off of goods or services as the goods of another person or as services provided by another person or the remedies in respect thereof.

8. The question as to whether registration of trademark would be relevant in action of passing off and as to whether a manufacturer of product was entitled to an injunction against another manufacturer having registered trademark arose for consideration before the Division Bench of Delhi High Court in the case of **N.R.Dongre v. Whirlpool Corp.**, 1996 PTC (16) page 476. In the said case, the plaintiff Whirlpool Corporation was engaged in manufacturing, selling and servicing of washing machines under the trademark "Whirlpool". It was their case that though their trademark WHIRLPOOL was registered in India, the registration lapsed on account of some reasons. It was their further case that notwithstanding the lapse of registration, the trademark was used in India through sale of its washing machines to U.S.Embassy and U.S.AID offices in New Delhi and also through advertisements in various publications having a circulation in India. It was also its contention that due to recent economic policy it established a joint venture known as TVS Whirlpool Ltd. and filed various applications for registration of their trademark WHIRLPOOL in classes-7, 9 and 11. It was their case that the trademark WHIRLPOOL belonging to the plaintiff had acquired global reputation. One Chinara Trust had applied for registration of trademark WHIRLPOOL. Though

the opposition was filed on behalf of the plaintiff therein, the Assistant Registrar dismissed the opposition of the plaintiff and registered the trademark WHIRLPOOL in the name of M/s.Chinar Trust. While the plaintiff was proceeding with the petition for cancellation and removal of registration in favour of said Chinar Trust, the plaintiff came across the advertisements by which the defendant was advertising its product as Whirlpool. As such, plaintiff filed suit and claimed for interim injunction. The learned single Judge of the Delhi High Court granted interim injunction. An appeal was carried by the defendant contending therein that the defendant who was the proprietor of the trademark WHIRLPOOL, though can stop the others from using the trademark, due to the order of injunction it was prevented from using the same for itself. While considering the arguments on behalf of the appellant/defendant, the Division Bench observed thus:

“30. We now proceed to consider the question as to whether the respondents can maintain an action for passing off against the appellants who are the registered proprietors of the trade mark “WHIRLPOOL’ in India. Learned counsel for the appellants submitted that the appellants have an exclusive right to use the trade mark “WHIRLPOOL” under section 28(1) of the Act as they are the registered proprietors of the same. In order to appreciate the submission of the learned counsel, it will be necessary to set out section 28(1) of the Act. This section read as under:

“28(1) Subject to the other provisions of this Act, the registration of a trade mark in Part A or Part B of the register shall, if valid, give to the registered proprietor of the trade mark the exclusive right to the use of the trade mark in relation to the goods in respect of which the trade mark is registered and to obtain relief in respect of infringement of the trade mark in the manner provided by this Act.”

31. According to section 28(1) of the Act, registration of a trade mark gives to the registered proprietor thereof exclusive right to use the same in relation to the goods in respect of which it has been registered. But from the opening words of section 28(1) namely, “subject to other provisions” it is clear that the right conferred on a trader is not an indefeasible right as the same is expressly made subject to other provisions of the Act. This is further, made clear by section 27(2)

of the Act, which provides that “nothing in this Act shall be deemed to affect the right of action against any person for passing off the goods as goods of another person or the remedies in respect thereof.” Thus it is manifest that Section 28 of the Act and all other provisions come within the over riding sway of section 27(2) of the Act. Similarly section 33 of the Act also saves vested rights of a prior user. It lays down that nothing in the Act shall entitle a registered proprietor of a trade mark to interfere with the use of the trade mark by a prior user of the same. Thus the right created by section 28(1) of the Act in favour of a registered proprietor of a trade mark is not an absolute right and is subsequent to other provisions of the Act namely sections 27(2), 33 etc. Neither section 28 nor any other provision of the Act bars an action for passing off by an anterior user of a trade mark against a registered user of the same. In other words registration of a trade mark does not provide a defence to the proceedings for passing off as under section 27(2) of the Act a prior user of a trade mark can maintain an action for passing off against any subsequent user of an identical trade mark including a registered user thereof. Again this right is not affected by section 31 of the Act, under which the only presumption that follows from registration of a mark is its prima facie evidentiary value about its validity and nothing more. This presumption is not an un rebuttable one and can be displaced. Besides section 31 is not immune to the overriding effect of section 27(2). Placing reliance on section 28(3) of the Act the learned counsel for the appellant contended that when two registered proprietors of identical or near similar trade marks cannot be deemed to have acquired exclusive right to the use of any of those trade marks against each other, how can an unregistered user of the trade mark maintain an action for passing off against a registered user of the same mark and seek an injunction restraining him from using it. This argument of the learned counsel seems to stem from a misconception about the real purpose and intent of section 28(3). Actually section 28(3) protects registered proprietor of a trade mark from an infringement action by another registered proprietor of an identical or near similar trade mark. In this regard it will also be necessary to extract Section 28(3) and section 30(1)(d) which carries out the intent of section 28(3). These sections read as under:-

“28(3) Where two or more persons are registered proprietors of trade marks, which are identical with or nearly resemble each other, the exclusive right to the use of

any of those trade marks shall not (except so far as their respective rights are subject to any conditions or limitations entered on the register) be deemed to have been acquired by any one of those persons as against any other of those persons merely by registration of the trade marks but each of those persons has otherwise the same rights as against other persons (not being registered users using by way of permitted use) as he would have if he were the sole registered proprietor.”

30(1)(d) Notwithstanding anything contained in this Act, the following acts do not constitute an infringement or the right to the use of a registered trademark the use of a registered trade mark, being, one of two or more trade marks registered under this Act which are identical or nearly resemble each other, in exercise of the right to the use of that trade mark given by registration under this Act.”

32. A reading of section 28(3) with section 30(1)(d) shows that the proprietor of a registered trade mark cannot file an infringement action against a proprietor of an identical or similar trade mark. While sections 28(3) and 30(1)(d) on the one hand deal with the rights of registered proprietors of identical trade marks and bar action of infringement against each other, section 27(2) on the other hand deals with the passing off action. The rights of action under section 27(2) are not affected by section 28(3) and section 30(1)(d). Therefore, registration of a trade mark under the Act would be irrelevant in an action for passing off. Registration of a trade mark in fact does not confer any new right on the proprietor thereof than what already existed at common law without registration of the mark. The right of goodwill and reputation in a trade mark was recognized at common law even before it was subject of statutory law. Prior to codification of trade mark law there was no provision in India for registration of a trade mark. The right in a trade mark was acquired only by use thereof. This right has not been affected by the Act and is preserved and recognised by sections 27(2) and 33. It can, thus, clearly be seen that the Division Bench, in unequivocal terms, has held that registration of trademark does not provide a defence to the proceedings for passing off, as under section 27(2) of the Trade and Merchandise Marks Act a prior user of a trade mark can maintain an action for passing off against any subsequent user of an identical trade mark, including a registered user thereof. It has been further held that right is

not affected by section 31 of the Act, under which the only presumption that follows from registration of a mark is prima facie evidentiary value about its validity. It has been held that presumption is not an un rebuttable one and can be displaced. Therefore, it has been held that the registration of the trademark under the Act is not relevant in an action for passing off. The Division Bench further observed as under:

“43. Having regard to the above discussion, the following position emerges. The Courts do not approve of any attempt by one trader to appropriate the mark of another trader, even though that trader may be a foreign trader and mostly uses his mark in respect of the goods available abroad i.e. out side the country where the appropriation of the mark has taken place. As mentioned earlier awareness and knowledge of the mark in the latter country may be because of small trickle of goods in that country or through advertisement. The manner and method by which the knowledge of the mark is acquired by the public is of no consequence and will not matter. Applying this principle and the reasons already stated we have prima facie come to the conclusion that the appellants have acquired reputation and goodwill in respect of its goods bearing trade mark 'WHIRLPOOL' in this country. Even though the appellants have no connection with the respondents, they are using the mark 'WHIRLPOOL' for their products. Prima facie it appears to us that buyers are likely to be deceived or confused as to the origin and source of the goods. They will believe that the product is manufactured by the respondents, an impression not founded in truth. The imitation will pass off as genuine. No one can be permitted to trade by deceiving or misleading the purchasers or to unauthorisedly divert to itself the reputation and goodwill of others. Under section 27(2) an action for passing off against registered user of trade mark is maintainable at the instance of a prior user of the same, similar or identical mark. Since such a remedy is available against the registered user of a trade mark, an interim injunction restraining him to use the mark can also be granted to make the remedy effective.”

(emphasis supplied)

9. The aforesaid judgment of the Division Bench was carried further before the Apex Court [1996 PTC (16) page 583 (**N.R.Dongre v. Whirlpool Corporation**)]. While upholding the view taken by learned single and Division Bench of the Delhi High Court, the Apex Court observed thus:

“19. The question now is : whether the exercise of discretion by the trial court is favour of the plaintiffs to grant the interlocutory injunction is in accordance with the settled principles of law regulating grant of interlocutory injunctions or not? We think it is so.

20. Injunction is a relief in equity and is based on equitable principles. On the above concurrent findings, the weight of equity at this stage is in favour of the plaintiffs and against the defendants. It has also to be borne in mind that a mark in the form of a word which is not a derivative of the product, points to the source of the product. The mark/name 'WHIRLPOOL' is associated for long, much prior to the defendants' application in 1986 with the Whirlpool Corporation plaintiff No. 1. In view of the prior user of the mark by plaintiff No. 1 and its trans-border reputation extending to India, the trade mark 'WHIRLPOOL' gives an indication of the origin of the goods as emanating from or relating to the Whirlpool Corporation plaintiff No. 1. The High Court has recorded its satisfaction that use of the 'WHIRLPOOL' mark by the defendants indicates prima facie an intention to pass-off defendants' washing machines as those of plaintiffs' or at least the likelihood of the buyers being confused or misled into that belief. The fact that the cost of defendants' washing machine is 1/3rd of the cost of the plaintiffs' washing machine as stated by Shri Sibal, itself supports the plaintiffs' plea that the defendants' washing machines are not of the same engineering standard and are inferior in quality to the washing machines of the plaintiffs'. In addition, it has been rightly held that the grant of interlocutory injunction would cause no significant injury to the defendants who can sell their washing machines merely by removing the small metallic strip bearing the offensive trade mark/name which includes 'WHIRLPOOL'. On the other hand, refusal of the interlocutory injunction would cause irreparable injury to the plaintiffs' reputation and goodwill since the trade mark/name 'WHIRLPOOL' is associated for long because of prior user and even otherwise with the plaintiff No.1-Whirlpool Corporation. These factors which have been relied on for grant of the interlocutory

injunction by the trial court indicate that the exercise of discretion was in accordance with the settled principles of law relating to the grant of interlocutory injunctions in a passing-off action. The affirmance of the trial court's order by the Division Bench on an appeal reinforces the trial court's view.

21. Applying the settled rule indicating the scope: of interference in an appeal against exercise of discretion by the trial court to grant an interlocutory injunction, we find no ground to take a different view or to interfere with the grant of the injunction.

22. On the above conclusion reached on the facts of this case, it is unnecessary to refer to the several decisions cited at the bar to indicate the settled principles of law regulating grant or refusal of interlocutory injunctions and the scope for grant of such an injunction in a passing-off action even against the proprietor of a registered trade mark. None of those decisions lays down that in a passing-off action based on the right in common law distinct from the statutory right based on a registered mark, an injunction cannot be granted even against an owner of the trade mark in an appropriate case. It is for this reason, Shri Kapil Sibal fairly conceded this position at the outset and relied on the fact of registration in favour of the defendants only for the limited purpose indicated earlier. The surviving controversy at this stage was confined only to the legality and propriety of an interlocutory injunction granted on the facts of this case.”

It can, thus, clearly be seen that the Apex Court upheld the view of the Delhi High Court that in an action of passing off, an injunction can be granted against the owner of the registered trademark in an appropriate case at the instance of the prior user.

10. The Apex Court again had an occasion to consider the similar issue in case of **Milmento Optho Industries and others v. Allergan Inc.**, 2004 (28) PTC 585 (SC). The plaintiffs therein had filed suit for injunction based on an action for passing off in respect of mark “OCUFLOX”. According to the plaintiffs, they were the prior user of the trademark in respect of an eye care product. It was their contention that they first used the mark on 9th September 1992 and marketed the same in various countries worldwide. It was also claimed that they had also

applied for registration in several countries including India. The plaintiff had applied for interim injunction. Learned single Judge of the Calcutta High Court, though had granted ad-interim injunction, the same was vacated by him holding that since the plaintiffs' product was not being sold in India and defendants having introduced the product first in India, plaintiffs were not entitled to an injunction. Appeal filed by the plaintiffs against the said order was allowed by the Division Bench, which granted injunction in favour of the plaintiff. The defendants carried the matter before the Apex Court. While dismissing the appeal, the Hon'ble Apex Court observed thus:

“9. We are in full agreement with what has been laid down by this Court. Whilst considering the possibility of likelihood of deception or confusion, in present times and particularly in the field of medicines, the Courts must also keep in mind the fact that nowadays the field of medicine is of an international character. The Court has to keep in mind the possibility that with the passage of time, some conflict may occur between the use of the mark by the Applicant in India and the user by the overseas company. The Court must ensure that public interest is in no way imperiled. Doctors particularly eminent doctors, medical practitioners and persons or Companies connected with medical field keep abreast of latest developments in medicine and preparations worldwide. Medical literature is freely available in this country. Doctors, medical practitioners and persons connected with the medical field regularly attend medical conferences, symposiums, lectures etc. It must also be remembered that nowadays goods are widely advertised in newspapers, periodicals, magazines and other media which is available in the country. This results in a product acquiring a worldwide reputation. Thus, if a mark in respect of a drug is associated with the Respondents worldwide it would lead to an anomalous situation if an identical mark in respect of a similar drug is allowed to be sold in India. However one note of caution must be expressed. Multinational corporations, who have no intention of coming to India or introducing their product in India should not be allowed to throttle an Indian Company by not permitting it to sell a product in India, if the Indian Company has genuinely adopted the mark and developed the product and is first in the market. Thus the ultimate test should be who is first in the market.

10. In the present case, the marks are the same. They are in respect of pharmaceutical products. The mere fact that the Respondents have not been using the mark in India would be irrelevant if they were first in the world market. The Division Bench had relied upon material which prima-facie shows that the Respondents product was advertised before the Appellants entered the field. On the basis of that material the Division Bench has concluded that the Respondents were first to adopt the mark. If that be so then no fault can be found with the conclusion drawn by the Division Bench.”

(emphasis supplied)

It can, thus, be seen that the Apex Court has held that the relevant question would not be as to who has started using the mark first in India but the question would be who is first in the world market.

11. The learned single Judge of the Delhi High Court in the case of **Lowenbrau AG v. Jagpin Breweries Ltd.**, 157 (2009) DLT 791 was considering an application for injunction by the plaintiffs who were manufacturing beer under the registered mark/name “LOWENBRAU” on the ground that defendant No.2 by manufacturing and selling beer under the mark “LOWENBRAU BUTTENHEIM” was infringing their statutory rights under the Trade Mark Act. The learned single Judge observed thus:

“14. In view of Section 124(5) of the Act, this Court is competent to adjudicate and decide the interlocutory application for injunction. While deciding the interlocutory application in view of language of Sections 28 and 124 of the Act, the Court is competent to take prima facie view on the question of validity of registration of the mark in favour of either side. Merely because the mark is registered, injunction will not automatically follow, when validity of registration is questioned in the written statement/pleadings. While deciding whether injunction should be granted or not, a tentative view is required to be taken on the question of validity of registration and principles for grant of injunction applied. However, final decision on validity of registration is to be taken by the authorities and not by the civil court. Registration is prima facie regarded as valid but mere registration alone is not conclusive and is not binding on the civil court when the application for injunction is considered and

decided. Onus however, will be on the party which questions validity of registration to show that the registration is prima facie and tentatively bad or invalid."

(emphasis supplied)

It can, thus, be seen that the learned single Judge has taken a view that while deciding whether injunction should be granted or not, a tentative view is required to be taken on the question of validity of registration for grant of injunction. It has further been held that registration is prima facie regarded as valid, but mere registration alone is not conclusive and is not binding on the civil court when the application for injunction is considered and decided. Accepting the contention of the defendant that the word LOWENBRAU has become synonymous with the beer of German origin and that being bonafide used by them and others all over the world, the learned single Judge found that the defendant had valid defence and, therefore, refused to grant injunction in favour of the plaintiff, who was a registered owner of the trademark LOWENBRAU.

12. The Division Bench of the Delhi High Court in the case of **Marico Limited v. Agro Tech Foods Limited**, 174 (2010) DLT 279 : 2010 (44) PTC 736 (Del) had occasion to consider an identical issue. It was the contention of the plaintiff therein that the plaintiff was the registered owner of the trademark LOSORB. It was contended that the defendant by using expression "LOW ABSORB" had infringed the trademark of the plaintiff. The plaintiff had also sought an injunction on the basis of passing off. The learned single Judge refused to grant an order of injunction. In an appeal filed against the said order, the Division Bench considered the aspects of passing off and infringement independently. The Division Bench while considering the matter from the aspect of infringement observed thus:

"14. In view of the aforesaid legal position, the first issue which arises is whether the learned Single Judge was justified in holding that he was entitled to look into the validity of registration of the trademark. Of course, we must hasten to add we are doing so and so has the learned Single Judge done, only for the purpose of deciding the interlocutory application for grant or refusal of injunction and as envisaged in Section 124(5). In the facts of the present case, we find that the injunction application was disposed of at a stage when the defendant filed an

application for vacation of the injunction and no written statement of the defendant was on record. As already discussed hereinabove, the stage of challenging the validity of registration by the defendant arises only when the written statement is filed, because it is only in the written statement that the plea of the registration being invalid would be taken up in furtherance of the expression "if valid" as found in Section 28 and also similar language as found in Section 124(1)(a). This also flows from the fact that under Section 31(1) registration is only a prima facie evidence of validity and not conclusive evidence. Registration would only be a conclusive evidence of validity if the rectification/cancellation proceedings filed for cancellation of the registered trademark do not finally succeed. We are, therefore of the view that in the facts of the present case since the issue of invalidity of registration is to be taken up only in a written statement for an issue to be framed with respect thereto in terms of Section 124(1)(a)(ii) and the written statement was yet to be filed when the impugned order was passed, where such an issue would/could be raised, the learned Single Judge was justified in looking into the aspect of prima facie validity of the registration of the trademark and it cannot be the stand of the appellant that the plea of invalidity of registration cannot be looked into because there is no such plea in the written statement inasmuch as the written statement was yet to be filed in the suit. The learned Single Judge was fully entitled to look into the aspect of validity of registration in the facts of the present case by reference to the expression "if valid" as occurring in Section 28 and the related provisions of Section 31 and the different Subsections of Section 124. The learned Single Judge applied his mind and considered this issue of prima facie validity of registration of trademark for deciding the interlocutory application and which is very much permissible and in fact so provided under Section 124(5)."

15. Now let us examine the issue of prima facie validity of registrations of the appellant for deciding the aspect of grant of injunction in the facts of the present case. When we look at the facts in the present case, we find that when the application was filed for registration of the trademarks "LOSORB" and "LOSORB", the applications clearly stated "proposed to be used". Quite clearly therefore on the date of registration there was no user at all of the trademark, much less such use of it so as to give the trademark a distinctive character as a result of use made of it or the same being a well known trademark. Clearly therefore, the registration of

the trademark "LOSORB" and "LOSORB" were prima facie invalid because the said trademarks basically are a minor variation of a descriptive expression "LOW ABSORB" which is not an unusual juxtaposition of words in the English language and no evidence existed before the Registrar of distinctiveness because the marks were sought to be registered not on proof of actual user so as to make the same distinctive on the date of filing of the application for registration but only on "proposed to be used" basis. The expression "LOW ABSORB" conveys the same meaning as "ABSORBS LOW". Such descriptive word marks are clearly such for which there is an absolute ground for refusal of registration by virtue of Section 9(1)(b) of the Act because clearly the said word marks are in fact clear indications of designation of the kind, quality, intended purpose or other characteristics of the goods of which the trademark is applied. The registrations being prima facie invalid no action for infringement would thus lie. On the issue of acquiring distinctiveness subsequent to the making of the application for registration, we have already dilated at length in the earlier part of this judgment while dealing with the issue of passing off that it cannot be said that the mark "LOW ABSORB" has acquired a secondary meaning by user of a few years. We will now examine the issue whether the expressions "LOSORB" or "LOSORB" have achieved a secondary meaning even if "LOW-ABSORB" may not have. On this aspect one immediately feels that it is an aspect of concern with respect to the claim of the plaintiff that if partly tweaked descriptive words and expressions of English language are claimed to be coined words, the same would result in a grave and absurd situation because a non-tweaked word being a completely descriptive word will in fact be deceptively similar to the tweaked descriptive English language word or expression of which registration is obtained. Meaning thereby that because of success in getting registered a minor modification of a descriptive word or expression of the English language, a person who gets registration can prevent a purely descriptive use of a normal word or expression as found in English language dictionary on the ground that it would be identical with or deceptively similar to a registered trademark - a position which is found in the present case. Such a position, in our opinion, cannot at all be countenanced and must be struck down with a heavy hand. When we see the facts and circumstances of the present case, we find that both the parties claim to have an ingredient in their product

namely edible oil an anti foaming agent which results in lower oil being consumed while frying the food. In such a case scenario, it cannot be claimed at this interim stage that there is a secondary significance by user up to registration to such coined words "LOSORB" and "LOSORB" keeping in view the fact that such coined words have a clear reference to an indicative of the kind, quality, intended purpose, characteristic etc. of the goods and are not ordinarily entitled to registration. We have, while on the issue of passing off, already adverted to the aspect of whether the sales are related to the trade marks "LOSORB/LO-SORB" or to "Sweakar/Saffola", being a moot point. Having expounded on the law as above, we may again add that in a particular case, it is possible that a descriptive word mark on account of its such extensive user over a great length of time, when no other person has been shown to use the same, the same may in fact become a well known trademark or a trademark which has achieved such distinction by user that it can be registered. Where the combination of words forming a trade mark is an unusual juxtaposition of words or part words the distinction may be achieved more easily than where the user of words put jointly is not an unusual syntax and also especially when the adaption is arbitrary with respect to the goods/trade. There can be a case where a coined word would be entitled to trademark protection where the coined word is the result of joining of one or two or few normal non descriptive English words of the dictionary or one word out of the two or more words forming a coined word is an arbitrary adaption. As already stated, therefore, in trademarks matters, every case necessarily turns upon and is decided on its own facts including but not limited to the trade mark, goods in question, customers, use and all other factors and their intense co-relation in each case.

16. Thus, looking at the issue of entitlement of the learned Single Judge to question the validity of the registration of the trademark for the purpose of deciding the interlocutory application, we find that the same was also justified because firstly no evidence was filed of distinctiveness of the trademarks at the time of registration since the same did not exist because admittedly the applications were filed for registration of the trademarks on a "proposed to be used basis" and secondly so far as the evidence of user we have already held that the user in the facts of the present case is not such as to confer distinctiveness amounting to a

secondary meaning for the word marks which are in fact just a tweaked form of ordinary descriptive words in not an unusual syntax.

(emphasis supplied)

It can, thus, be seen that the Division Bench has taken a view that in an application for injunction, the Court is justified in looking to the prima facie validity of the registration of trade mark. The Division Bench on facts found that the learned single Judge was justified in going into the question of validity of registration of the plaintiff's trademark and further found that no case was made out for interfering with the order of refusal of injunction passed by the learned single Judge.

13. The Full Bench of this Court in **Abdul Cadur Allibhoy v. Mahomedally Hyderally** (supra) has taken a view that the plaintiff, who himself has imitated his mark from somebody else's mark, is not entitled to an equitable relief of injunction.

14. The Division Bench of this Court (Hon'ble Chief Justice and Hon'ble Justice Vazifdar) in a case of **M/s.J.K.Sons v. M/s.Parksons Games and Sports** (supra) recently had an occasion to consider the aforesaid judgment of Full Bench. Before the Division Bench, it was sought to be urged on behalf of respondents that the judgment of the Full Bench would apply only in cases of infringement of copyright and would not apply in cases of infringement of trademark or passing off. It was also sought to be urged that if the original proprietor of the mark, whose mark is alleged to be imitated, does not object to the use of mark, then anyone else cannot do so on his behalf. It was observed thus:

"6. Mr.Dhond, the learned counsel appearing on behalf of the respondents on a previous occasion submitted that the judgment only applies to cases of infringement of copyright and does not apply to an action for infringement of a trade mark or passing off. He submitted that a passing off action is to protect goodwill in a business ; passing off is associated with a particular business and business is related to a product sold as part of the business. Thus if the proprietor of the mark, in this case State Express, does not object to the use of the mark, the appellants cannot do so on their behalf.

7. We are unable to restrict the ratio of the judgment to cases of infringement of copyrights. The submission misses the basis of the judgment which precludes an infringer of a mark or copyright from founding a cause of action based on deceit. In other words, it denies a person reliefs in respect of a mark or artistic work which are copies of another. There is no question in such a case of a defendant (in this case the appellants) raising the defence/objection on behalf of another (in this case State Express 555).

8. In Abdul Cadar Allibhoy's case the Full Bench found that the plaintiffs' label was designed by combining the labels of four other manufacturers. It was submitted that the plaintiffs' labels or trade marks were so tainted in their conception and origin, that it could not form the basis of any reliefs. The question before the Full Bench, whether the plaintiff was entitled on the basis of such a mark to an injunction against the defendant, was answered in the negative. Chief Justice Jenkins held:-

"Still confining myself to the original label I will first consider whether if it were the subject of this suit an injunction in respect of it could be granted. The principles on which an injunction can be claimed in a case of this class are thus stated by Lord Westbury in the *Leather Cloth Company Ltd. v. The American Leather Cloth Company Ltd.* : 4 De. G.J. and S. P.144.

"These conclusions seem to follow immediately from the very principle to which a plaintiff seeking protection for a trademark appeals. He desires to restrain the defendant from selling his own goods as the goods of another person : but if by the use of the trademark in question the plaintiff himself is representing and selling his goods as the goods of another, or if his trademark gives a false description of the article, he is violating the rule on which he seeks relief from the defendant." This is after all but a particular application of the more general rule that a plaintiff must come into a Court of Equity with clean hands, and by parity of reasoning a plaintiff who seeks the relief of an injunction in this Court (and it is with that form of relief alone that we are concerned in this case) must answer the same description...."

While dealing with the contention that the mark had become *publici juris*, the Full Bench (per Russel, J.) cited with approval the judgment in *Ford v. Foster* L.R. 7 Ch. Ap. Page 628. The Full Bench (per Russel, J.) after rejecting the contention that the mark had become *publici juris* held as under:-

“It seems to me that the present case comes within the words of Mellish, J.J. In L.R., 9 Ch., pp. 630-631:-

“Then would it be a defence to that action at law that the plaintiff has made false representation to the public that his article was patented when in fact it was not If the false representation was in the trade mark itself, although I cannot find that that point has ever been decided or raised in a Court of Common Law, yet I am disposed to think, and indeed I have a pretty clear opinion, that if that question were raised it would be held that the fact of the trade mark itself containing a false representation to the public would be an answer at law to an action brought for a deceptive use of the trade mark by the defendant. The declaration at law always begins by setting out that the plaintiff had used for a length of time a certain particular trade mark, and that his goods were known by that trade mark, and it substantially sets up that by the user of that mark, and his goods being known in the market by it, he has practically got a right to the use of that mark. It appears to me that it would come within the rule *Ex turpi causa non oritur actio*; and if the trade mark contains a false representation calculated to deceive the public, a man cannot by using that, which is in itself a fraud, obtain - I do not say an exclusive right - but any right at all.”

I would further refer to *Leather Cloth Co. v. Lhorsont* ; -

“It was there decided that there was a representation of a matter of fact in the trade mark which was calculated to deceive ; that there was evidence that it did deceive certain persons ; that such a trade mark could not be the subject of any right whatever that this Court would recognize, and, to use the expression of Sir Roundel Palmer, that it was “outlawed.” See also, *Fuentes Trade Marks* (1891, 2 Ch., 166).”

The above observations establish that it is a defence even to an action for passing off or infringement of a trade mark that the plaintiffs (in this case the respondents) marks are an imitation of the mark of another to wit that the respondents had themselves infringed the mark of another. The entire judgment in fact deals with such `marks', `trade marks' and not copyright.

9. The Full Bench had relied only upon the judgment of Lord Westbury in *The Leather Cloth Company v. The American Leather Cloth Company (Limited)*. That judgment was in fact confirmed by the House of Lords in *The Leather Cloth Company (Limited) v. The American Leather Cloth Company (Limited)* 11 ER 1435 = (1865) XI HLC 521. It is interesting to note that the Lord Chancellor Lord Westbury against whose judgment the appeal had been filed to the House of Lords was also a party to the judgment of the House of Lords. 8 app117610.

Reading the judgment of Lord Westbury as the Lord Chancellor and the judgment of the House of Lords confirming the same it is clear that the above principles are not restricted to cases of infringement of copyright but also apply to an action for infringement of trade marks and passing off. The Full Bench followed the judgment of the Lord Chancellor, which was appealed against. In that judgment i.e. the judgment appealed against (4 De. G.J. and S. 136) the Lord Chancellor also observed:-

“The same things are necessary to constitute a title to relief in equity in the case of the infringement of the right to a trade mark, as in the case of the violation of any other right of property. But when the owner of a trade mark applies for an injunction to restrain the Defendant from injuring his property by making false representations to the public, it is essential that the Plaintiff should not in his trade mark, or in the business connected with it, be himself guilty of any false or misleading representation ; for, if, the Plaintiff makes any (143) material false statement in connection with the property he seeks to protect, he loses, and very justly, his right to claim the assistance of a Court of Equity.

.....

There is a homely phrase, long current in this Court, that a Plaintiff must come into equity with clean hands. There is not the case with the present Plaintiffs, whose case is condemned by the principles to which they appeal, and I must therefore reverse the decree of the Vice-Chancellor and dismiss their bill; but, as I do not approve the conduct of the Defendants, I dismiss it without costs.”

It is thus clear that the principle was applied to an action for infringement of trade mark and passing off.”

(emphasis supplied)

It is, thus, clear that the Division Bench has held that, the principle enunciated by the Full Bench that a party who itself has imitated somebody else's trademark is not entitled to an order of injunction, is applicable to an action of infringement of trademark and passing off.

15. It can be seen that the Division Bench in **M/s.Maxheal Pharmaceuticals v. Shalina Laboratories Pvt.Ltd.** (supra) held that once the registration is granted in favour of the proprietor, he is entitled to an order of injunction restraining the others from using the same even if the same is wrongly granted. It further held that it is not the practice of this Court to go into the question of validity of the registration at the stage of grant of injunction. However, the Division Bench of this Court in **M/s.J.K.Sons v. M/s.Parksons Games and Sports** (supra), relying on the judgment of the Full Bench of this court in the case of **Abdul Cadur Allibhoy v. Mahomedally Hyderally** (supra), has held that the principle that a person who himself has imitated somebody else's mark and guilty of false and misleading representation is not entitled to an injunction, is applicable to the cases of infringement of trademark and passing off. In view of the law laid down by the Apex Court, as discussed hereinabove, there should be no difficulty in so far as action for passing off is concerned. It appears to be a settled position of law that an action for passing off would lie at the instance of prior user even against the registered user. The difficulty would be in respect of action for infringement of trademark, inasmuch as in view of the judgment of the Division Bench in the case of **M/s.Maxheal Pharmaceuticals v. Shalina Laboratories Pvt.Ltd.** (supra), a proprietor plaintiff can claim an injunction even against a prior user, on the action

of infringement, merely on the basis of having registration in his favour. In my respectful view, this would lead to anomalous situation. If an action for passing off is by a prior user, the Court would be permitted to go into the issues including the issue of validity of registration of the defendant's trademark and even grant an order of injunction in favour of the person whose mark is not registered and against the person whose mark is registered. However, if an injunction is sought by a proprietor of a registered trademark, in view of the view taken by the Division Bench of this Court in the case of **M/s.Maxheal Pharmaceuticals v. Shalina Laboratories Pvt.Ltd.** (supra), the Court would be powerless to go into the question of validity or otherwise of the plaintiff's registration and will have to grant an injunction merely for asking. In view of the view taken by the Division Bench, which binds the learned single Judges of this Court, this Court would be bound by the said judgment to grant injunction in favour of the plaintiff, who is registered proprietor, even if this Court finds that the adoption of the plaintiff's trademark is fraudulent or deceptive.

16. The effect on the Indian economy of the liberalization, privatization and globalisation cannot be totally ignored. At the same time, it also cannot be ignored that due to technological advancement, the information and knowledge worldwide is available at the flick of a second. Knowledge and awareness of the goods of the foreign traders and trademarks would be available in India immediately after the launching thereof and viceversa by use of internet. It is common knowledge that the medical practitioners and experts surf on internet to find out the latest drugs available. The possibility cannot be ruled out of a local manufacturer coming to know about the product launched overseas and by imitating it immediately getting it registered in his favour. Whether, even in such a case, the courts would be precluded from considering the question of validity of registration and would be forced to grant an order of injunction in favour of the registered proprietor of the trademark merely on the ground that the Court cannot go into the question of validity of registration as long as the mark remains on the register (even wrongly)? In view of the judgment of the Division Bench in the case of **M/s.Maxheal Pharmaceuticals v. Shalina Laboratories Pvt.Ltd.** (supra), the courts would be bound to grant injunction in favour of the registered proprietor. The important factor which has been directed to be taken into consideration in such matters by

the Apex Court in the case of **Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd.**, 2001 PTC 300 (SC) of ensuring public interest will have to be given go-bye, if the injunction is to be granted in favour of such fraudulent and deceptive registered user of trademark.

17. I find that the judgment of the Division Bench in the case of **M/s.J.K.Sons v. M/s.Parksons Games and Sports** (supra) which holds that the principle as laid down by the Full Bench of this court, in the case of **Abdul Cadur Allibhoy v. Mahomedally Hyderally** (supra) that the plaintiff who himself has imitated somebody else's mark is not entitled to an order of injunction, is equally applicable to the action of infringement and passing off, would have the effect of permitting the question of tentative validity of the registration being gone into at the stage of grant of injunction. If the Court has to go into the question as to whether the plaintiff himself has imitated somebody else's trademark or not, it cannot be gone into unless the Court goes into the question of prima facie validity or otherwise of the registration of the trademark. The perusal of section 28 of the Act would also reveal that the protection granted in favour of the proprietor of the registered trademark is on the condition that the said registration is valid. Even the provisions of section 31 of the said Act provides that registration of trademark shall be prima facie evidence of the validity thereof. I am in respectful agreement with the view taken by the Division Bench of the Delhi High Court in the case of **Marico Limited v. Agro Tech Foods Limited** (supra) that since as per section 31 the registration is only a prima facie evidence of the validity of registration, the courts would be permitted to go into the question of tentative validity of the registration while considering the application for grant of injunction. No doubt that in such a case, the onus would lie on the person who challenges the validity of the trademark and he will have to establish that the registration of trademark in favour of the proprietor thereof is prima facie or tentatively not valid. In my view, if it is held to be impermissible, it would lead to an anomalous situation. Even in the facts some what similar to the facts of the present case, a party would be entitled to get an injunction against the registered proprietor on an action of passing off on the ground that he is a prior user and that the registered proprietor is an imitator. At the same time, the registered proprietor would be entitled to get an injunction against the prior user on the ground that he is a registered proprietor and as long

as the mark remains on the register (even wrongly) he is entitled to an injunction against others. In this respect, it will be relevant to refer to the observations of the Apex Court in the case of **Milmento Oftho Industries and others v. Allergan Inc.** (supra) wherein it is held that what is important is who was the first in the world market.

18. I am, therefore, of the considered view that the view taken by the Division Bench in the case of **M/s.Maxheal Pharmaceuticals v. Shalina Laboratories Pvt.Ltd.** (supra) reproduced hereinabove requires reconsideration by a larger bench.

19. The registry is, therefore, directed to place the matter before the Hon'ble the Chief Justice for appropriate orders.

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