

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION

ORIGINAL SIDE

C.S. 250 of 2010

Tea Board, India

... Plaintiff

-Versus-

ITC Limited

... Defendant

B E F O R E :

THE HON'BLE JUSTICE SAHIDULLAH MUNSHI

February 4, 2019.

Mr. Vipul Kundalia, Adv.
Mr. Sonal Agarwal, Adv.

... for the plaintiff

Mr. Anindya Kumar Mitra, Sr. Adv.
Mr. Sarvapriyo Mukherjee, Adv.
Mr. Paritosh Sinha, Adv.
Mrs. Mitul Dasgupta, Adv.
Mr. Kiranjit Mazumder, Adv.
Mr. Soumya Sen, Adv.
Mr. Joydeep Roy, Adv.
Mr. Arijit Dey, Adv.

... for the defendant

The Court : This is a suit, *inter alia*, for the following reliefs
made by the plaintiff in the plaint –

- i. “Leave under clause 14 of the Letters patent;

- ii. A perpetual injunction restraining the defendant, by itself, or by its directors, or officers, or servants, or agents or employees or assigns as well as all those acting in concert with it or on its behalf or claiming under or through it or otherwise however from using or conducting or marketing in any manner or in any way carrying on its business at the said hotel by using in any manner whatsoever the impugned name “DARJEELING LOUNGE: or any other name or mark or word which is phonetically or structurally similar or identical or deceptively similar to the registered geographical indications “DARJEELING” name and logo in the name of the plaintiff in any manner or for any purpose whatsoever;
- iii. Perpetual injunction restraining the defendant, by itself, or by its directors, or officers, or servants, or agents, or employees or assigns as well as all those acting in concert with it or on its behalf or claiming under or through it or otherwise howsoever from in any manner, committing any acts of unfair competition including passing off or attempting to pass off or causing, enabling or assisting others to pass off its business and services so as to discredit the fame of DARJEELING tea as a geographical indication and/or to mislead persons as to the nature of the beverages sold at the said premises of the defendant’s being rung under the impugned mark

and/or so as to allude a nexus with the registered geographical indications for the name DARJEELING or logo and confuse persons in any manner or under any circumstances whatsoever.

- iv. Perpetual injunction restraining the defendant, by itself, or by its directors, or officers, or servants, or agents, or employees or assigns as well as all those acting in concert with it or on its behalf or claiming under or through it or otherwise howsoever from in any manner, passing off or attempting to pass off or causing, enabling or assisting others to pass off its business and services as if the same have any nexus with the Darjeeling tea trade or Darjeeling tea being the certification trade marks registered in the name of the plaintiff in any manner or under any circumstances whatsoever;
- v. Perpetual injunction restraining the defendant, by itself, or by its directors, or officers, or servants, or agents, or employees or assigns as well as all those acting in concert with it or on its behalf or claiming under or through it or otherwise howsoever from in any manner, from vending or selling its business or goods or services at its said hotel under any name which is phonetically or structurally similar or identical or deceptively similar to the registered certification trade marks "DARJEELING"

name and logo in the name of the plaintiff for any purpose or in any manner whatsoever;

- vi. A perpetual injunction restraining the defendant, by itself, or by its directors, or officers, or servants, or agents, or employees or assigns as well as all those acting in concert with it or on its behalf or claiming under or through it or otherwise howsoever from in any manner, from indulging in any activity which dilutes the distinctive character of the certification trade marks for the Darjeeling name and logo in the name of the plaintiff in any manner whatsoever;
- vii. An order for deliver up for destruction upon oath of all products including signboards, menu cards, napkins, cutlery, stationery, brochures, promotional materials, letter heads, cash memos or any other items of whatsoever description and nature, bearing the impugned name and/or any other name or marks which may be phonetically or structurally similar or identical or deceptively similar to the said registered marks "DARJEELING" name and logo of the plaintiff;
- viii. In addition to the injunction hereinbefore prayed for a decree for damages in sum of Rs.50 crores for such amount as may be determined and found due and payable to the plaintiff upon appropriate enquiries;

- ix. Interim Injunction;
- x. Attachment;
- xi. Receiver;
- xii. For the purposes aforesaid all necessary accounts, enquiries, and directions;
- xiii. Costs;
- xiv. Further and other reliefs.”

According to the plaintiff, defendant has fraudulently, disguisedly and illegally infringed the registered geographical indication rights and rights of the plaintiff in the manner as described in the plaint as also by further fraudulent acts of infringement, particulars whereof being that –

- a) The defendant has wrongfully used the geographical indications in the designation and/or naming of its business premises as ‘DARJEELING LOUNGE’.
- b) The defendant has wrongfully used the name ‘DARJEELING’ for the presentation and sale of goods which it sells in such lounge.
- c) The defendant has wrongfully suggested that the goods which it sells at the said ‘DARJEELING LOUNGE’ originate in the said geographical area other than the

true place of origin of such goods as are sold which are not originating in Darjeeling at all.

- d) The defendant has wrongfully used the geographical indications and other registered rights of the plaintiff in a manner to mislead and continues to mislead all persons frequenting or using the facilities at its said Darjeeling Lounge as regards the geographical origin of the goods which were sold thereat.
- e) The use of the name 'DARJEELING' for the purpose of the said lounge and for all purposes connected therewith including the publicity thereof and the selling of goods thereat had constituted acts of unfair competition and/or passing off in respect of the registered geographical indications rights and other registered rights of the plaintiff.
- f) The defendant's use of the name 'DARJEELING' in connection with the said lounge for all purposes relating thereto constituted acts which are completely contrary to honest commercial trade practice.
- g) The defendant, by using the impugned name 'DARJEELING' for the purposes of the said lounge, has so acted as to create confusion between the establishments and/or goods and/or commercial activities of all persons and parties who are actually

concerned with the production and trade of Darjeeling tea grown thereat.

- h) The use of the name 'DARJEELING' for the purposes of its lounge and all purposes relating thereto is tantamount to the making of false allegations in the course of trade which false allegations are of such a nature as to discredit the registered geographical indications for the name 'DARJEELING' and logo.
- i) The wrongful acts of the defendant in using the 'DARJEELING' name and logo tantamount to misleading the public as regards the nature or manufacturing process or characteristics and suitability of the goods actually sold in the said lounge.

In order to prevent the defendant from the aforesaid violations under Trademarks Act and/or Geographical Indication Act the plaintiff moved an *interlocutory* application for temporary injunction in this suit by which the plaintiff prayed for restraining the defendant from using or conducting or making in any manner or in any way carrying its business at the hotel situate in Kolkata by using in any manner whatsoever the name "DARJEELING LOUNGE" or any other name or mark or word which is phonetically or structurally similar or identical or deceptively similar to the registered geographical indication, "DARJEELING" the name and logo in the name of the plaintiff in any manner whatsoever and/or passing off or attempting

to pass off its business or services so as to discredit the fame of Darjeeling tea as a geographical indication and/or to mislead persons as to the nature of the beverages sold at the said premises of the defendant so as to allude a nexus with the registered geographical indication in the name of 'DARJEELING' or logo and to confuse persons in any manner.

The application for temporary injunction was rejected by the Hon'ble Single Bench and an appeal was filed being A.P.O.T. No.245 of 2011. By a judgment and order dated 24th August, 2011, the Hon'ble Division Bench presided over by the Hon'ble Justice Bhaskar Bhattacharya, as His Lordship then was, dismissed the appeal holding, *inter alia*, that the Hon'ble Single Judge rightly refused the prayer for interim order and there was no reason to arrive at a different conclusion than what has been arrived at by the Hon'ble Single Judge. Challenging the said judgment and order passed by the Hon'ble Division Bench on 24th August, 2011, in A.P.O.T. No. 245 of 2011, a Special Leave Petition being Special Leave to Appeal (Civil) No.S32282 of 2011 was filed. When the said appeal was taken up for consideration by Their Lordships in the Hon'ble Apex Court, learned Counsel appearing for the plaintiff, on specific instruction by the authorities of the Tea Board of India, submitted that the plaintiff will not lead any oral or documentary evidence before the Court where the actual suit is pending. It was also stated before the Hon'ble Apex Court that the plaintiff would not dispute any averment made in the written statement or in the documents already filed before the Court

by the respondent/defendant. Subsequently, another order was passed on 22nd January, 2016, wherein the Hon'ble Apex Court held-

“The questions sought to be raised before this Court in respect of grant of interim relief which has been rejected by the High Court, may be urged before the High Court in the suit.

The High Court is requested to hear and decide the suit as expeditiously as possible as its calendar permits.

The parties may place before the High Court the order of this Court dated 6th March, 2013 and the High Court will take due notice of the same while fixing its calendar.

With the aforesaid directions, the special leave petition is disposed of.

We make it clear that we have not expressed any opinion on the merits of the case.”

In pursuance of the above direction issued by the Hon'ble Apex Court the suit was taken up for hearing and it was agreed by the parties that on the basis of the pleadings and the admitted documents the hearing of the suit will be concluded.

In support of the contention raised in the plaint the plaintiff has annexed the following documents :-

1. Copy of Certificate of Registration of Certificate Marks bearing nos.83159 in class 30 and trademark No.532240 in class 30 in favour of the plaintiff. The said Certificate has been issued by the authority

authorized under Section 3(2) of the Trademarks Act, 1999.

2. Copy of Certificate of Registrations of Geographical Indication in favour of the plaintiff.
3. Copy of Certificate of Registration of Copyright with respect to the Darjeeling Logo in favour of the plaintiff.
4. Copy of a list of domestic and overseas licensees registered with the plaintiff.
5. Copy of advertisement clipping from the Trademark Journal bearing the advertisement of Darjeeling Lounge.
6. Copy of photographs of Darjeeling Lounge.
7. Copy of letter dated 9th June, 2005 written by the attorney of the plaintiff and addressed to the defendant.
8. Copy of letter dated 7th September, 2005 written by the attorney of the defendant and addressed to the plaintiff's attorney.
9. Copy of letter dated 23rd February, 2006 written by the Chairman of the plaintiff and addressed to the defendant.

10. Copy of letter dated 30th May, 2008 written by the attorney of the plaintiff and addressed to the Chairman of the defendant.
11. Copy of letter dated 30th January, 2009 written by the attorney of the defendant and addressed to the plaintiff.
12. Copy of the Order of the Deputy Registrar of Trademarks dated 8th April, 2009.

The genesis of the dispute between the plaintiff and the defendant was the use and attempted registration of the impugned mark "DARJEELING LOUNGE" by the defendant in respect of a refreshment lounge in the five-star hotel SONAR BANGLA in Kolkata. Plaintiff contended that the defendant has been using the said lounge to offer food items and all kinds of beverages, alcoholic and non-alcoholic including Darjeeling tea. The plaintiff has asserted that in April, 2005 it became aware of the defendant's impugned trademark application for "Darjeeling Lounge" being application no.1265886 in class 41 when the same was advertised in the Trademarks Journal. Aggrieved by the defendant's attempted registration and use of the impugned mark "DARJEELING LOUNGE" the plaintiff, through its Attorneys, addressed a letter dated January 9, 2005 to the defendant which is at page 108 of the plaint. Plaintiff pointed out that it has rights in the geographical indication and certification marks 'DARJEELING' and 'DARJEELING' logo and, therefore, it called upon

the defendant to withdraw its trademark application. On July 13, 2005, the plaintiff was constrained to send a notice within the prescribed period under the provisions of the Trademarks Act, 1999 against the defendant's application no.1265886 in class 41. Objections and counter-objections continued in between the plaintiff and defendant and, ultimately, the present suit has been filed by the plaintiff on September 30, 2010. Defendant filed written statement disputing the plaint case.

According to the defendant, there is no cause of action for filing the suit. The suit is barred by the law of limitation. There has been neither any violation of trademark, nor is there any passing off. Since the plaintiff had only certification trademark, no right or cause of action could arise for the plaintiff under such certification trademark against the defendant's using the "DARJEELING LOUNGE". The plaintiff has also no right to sue the defendant for the alleged cause of action under Geographical Indication Act, 1999 either. According to the defendant, suit is not maintainable in view of Section 26 of the Geographical Indication Act, 1999 and particularly that the word 'DARJEELING' is also being used as a corporate name by many others against whom no action has been taken by the plaintiff.

As per direction of the Hon'ble Apex Court, since the matter was taken up for early disposal, issues were framed by this Court by an order dated 23rd November, 2016. This Court framed the following issues :-

1. *“Is the suit maintainable in its present form and in law?”*
2. *Whether the use of the name DARJEELING LOUNGE by the defendant in respect of its refreshment lounge services constitutes an act of infringement under the Trademarks Act, 1999 and the Geographical Indication Act, 1999?*
3. *Whether the use of the name DARJEELING LOUNGE by the defendant in respect of its refreshment lounge services constitutes an act of passing off and unfair competition under the Trademarks Act, 1999 and the Geographical Indication Act, 1999?*
4. *Whether the use of the name DARJEELING LOUNGE by the defendant in respect of its refreshment lounge services amounts to dilution of the plaintiff’s registered geographical indication DARJEELING?*
5. *Whether the adoption, use and attempted registration of the mark DARJEELING LOUNGE by the defendant is an act of bad faith?*
6. *Is the use of the name “Darjeeling” in relation to the Lounge located on the ground floor of the hotel, ITC Sonar (for short said Lounge) perceived by general public as referring to Darjeeling Tea as alleged in paragraph 45 of the plaint?*

7. *Has the defendant applied the name “Darjeeling” to the said Lounge to falsely suggest that the goods, sold and/or catered in the said Lounge originate from Darjeeling, as alleged in paragraph 48, paragraph 57(c) of the plaint?*
8. *Have the use of the name, “Darjeeling” in respect of the said Lounge confused or misled the average consumers or persons frequenting the said Lounge into believing that the services/goods offered at the said lounge owes their origin to Darjeeling as alleged in paragraph 57 (d) of the plaint?*
9. *Has the defendant used to name “Darjeeling” for presentation of goods served in the said Lounge, as alleged in paragraph 57(b) of the plaint?*
10. *Has the plaintiff by its trademark registered under Chapter IX of the Trademarks Act acquired any right other than the authority to certify that any tea marked with the name or logo of “Darjeeling” is guaranteed to be 100% Darjeeling Tea originating from 87 tea gardens in the Darjeeling district of West Bengal mentioned in the certificate of registration?*
11. *Has the name of the said Lounge as “Darjeeling Lounge” deceived or confused the members of the public who have stayed at the defendant’s hotel to believe that said*

Lounge is being operated under the licence from the plaintiff and all beverages sold at the said Lounge have nexus with Darjeeling, as alleged in paragraph 50 of the plaint?

12. *Is the "Darjeeling" logo protected by the Copyright Act as claimed in paragraph 15 of the plaint?*
13. *Is the claim for dilution and erosion to the registered Geographical Indication as made by the plaintiff barred by Section 22 of the Geographical Indication of Goods (Registration and Protection) Act, 1999?*
14. *Is the claim for dilution and erosion of the certification Trademark of the plaintiff barred under Section 69 of the Trade Marks Act, 1999?*
15. (a) *Does Geographical Indication of Goods (Registration and Protection) Act, 1999 extend to services?*

(b) *If no, is this suit misconceived and not maintainable?*
16. (a) *Is the plaintiff user of the name Darjeeling or Seller of tea?*

(b) *If no, is the plaintiff entitled to maintain any claim for passing off?*
17. *Since the averments made in the Written Statement and in the documents filed by the defendant are not*

disputed can the plaintiff maintain any of its claims made in the prayers of the plaint?

18. *Is the suit barred by limitation?*

19. *Is the adoption or use of the name, "Darjeeling" by the defendant for the said Lounge with any mala fide cause any damage or injury to Geographical Indication of the plaintiff registered under the Geographical Indication of Goods (Registration and Protection) Act, 1999 or result in erosion or dilution thereof?*

20. *Has the defendant committed any fraudulent or dishonest or illegal act as alleged in paragraph 57 of the plaint?*

21. *Is the plaintiff entitled to any relief?"*

Before going to discuss the issues to better understand the scope of the suit let me consider the decisions relied on by the parties.

In support of the plaint case the plaintiff has relied on various decisions, those are as follows:

- **Dharampal Satyapal Ltd. – Vs. Suneel Kumar Rajput**, reported in **AIR 2013 SCC online Del. 3473**;
- **R. N. Gosain – Vs. – Yashpal Dhir**, reported in **(1992) 4 SCC 683**;

- **Automatic Electric Ltd. – Vs. – R.K. Dhawan & Anr.**, reported in **1999 SCC Online Del. 27**;
- **M/s. Bengal Waterproof Ltd. – Vs. M/s. Bombay Waterproof Manufacturing Co. & Anr.**, reported in **(1997) 1 SCC 99**;
- **Industria De Diseno Textile Sa – Vs. – Oriental Cuisines Pvt. Ltd. & Ors.**, reported in **(2015) 220 DLT 679**;
- **Pfizer Products Inc. – Vs. – Rajesh Chopra**, reported in **2007(35) PTC 59 Del.**;
- **Hindustan Pencils – Vs. – M/s. India Stationery Products**, reported in **AIR 1990 Del. 19**;
- **Gillette Company – Vs. – LA-Laboratories**, reported in **(2005) FSR 37**;
- **Wander Ltd. – Vs. – Antox India Pvt. Ltd.**, reported in **1990 (Supp) SCC 727**;
- **Laxmikant – Vs. – Patel**, reported in **AIR 2002 SC 275**;
- **Sony Kabushiki Kaisha – Vs. – Mahalaxmi Textile Mills**, reported in **2009 (41) PTC 184 (Cal) (FB)**;
- **T.V. Venugopal – Vs. – Ushodaya Enterprises**, reported in **2011 (45) PTC 433 (SC)**;

The defendant has also relied on the following decisions in support of their defence that no prayer should be granted in the suit as the suit is liable to be dismissed on the ground stated in the written statement.

- **Marico Ltd. – Vs. G.P.L. Oil Company & Anr.**, reported in **AIR 2018 Cal 66**;
- **Tea Board India – Vs. – I.T.C. Ltd.**, reported in **2011 (5) CHN 1 (para-24)**;
- **Sant Ram –Vs- Rajinder Lal & Ors.** reported in **(1979) 2 SCC 274**;
- **National Insurance Co. Ltd. – Vs. – Hindustan Safety Glass Works Ltd.**, reported in **AIR 2017 SC 1900**;

Dharampal Satyapal Limited (supra) has been relied on by the plaintiff showing that on the question of whether the plaintiff's mark has a distinctive character, it is not open to the defendants to argue that Rajnigandha is not a distinctive characteristic. According to the plaintiff, the defendants have applied for registration of their marks, which appears to be similar to the plaintiff's mark. But on perusal of the fact, while dealing with the issues, I shall point out that this submission of the plaintiff cannot be accepted and is contrary to the admitted case based on the pleading.

R. N. Gosain (supra) has been relied on to point out that law does not permit a person to both approbate and reprobate. This is a

settled principle of law but the proposition has to be based on a particular fact which could support the plaintiff's case. The ratio decided in the said decision has no manner of application in the fact of the present case.

The decision in the case of **Automatic Electric Ltd. (supra)** has been relied on by the plaintiffs to show that the defendants got their trade mark "DIMMER DOT" registered in Australia. The fact that the defendant itself has sought to claim trade proprietary right and monopoly in "DIMMER DOT", it does not lie in their mouth to say that the word "DIMMER" is a generic expression. User of the word "DIMMER" by others cannot be a defense available to the defendants, if it could be shown that the same is being used in violation of the statutory right of the plaintiff. In the instant case this allegation that has been made by the plaintiff, has been denied by the defendant and no evidence could be placed by the plaintiff to show the contrary. Therefore, this decision also has got no manner of application in the present facts and circumstances of this case.

As against the defendant's argument on the point of limitation (Section 22 of the Limitation Act) the plaintiff submitted that **M/s. Bengal Waterproof Limited (supra)** has been relied on to establish that passing off is a common law remedy being an action in substance of deceit under the Law of Torts. According to the plaintiff wherever and whenever fresh deceitful act is committed the person deceived would naturally have fresh cause of action in his favour.

Thus, every time when a person passes off his goods as those of another he commits the act of such deceit. The fact in the present case is completely different where no deceitful act is found to have been committed by the defendant and further that there is no complaint by any third party regarding such passing off. Therefore, the question of recurring and fresh cause of action at each time when a person passes off his goods as those of another, commits an act of such deceit, does not arise in the present case. In my opinion on the face of the pleading there appears no infringement of trade mark and consequently no conclusion for passing off can be reached at even considering the ratio of the referred decision and the plaintiff cannot escape from the question of limitation.

Industria De Diseno Textile S.A. (supra) has been placed by the plaintiff to point out that as soon as the defendants first trade mark application was published by the Trade Mark Journal, Chennai in the year 2007, the plaintiff filed an opposition to the registration. The argument sought to be advanced that the cause of action continued by series of objections and/or representation at points of time. This cannot save the limitation by which the claim has been barred under the statute. It is the settled law that in case of continuing cause of action or where cause of action arose on several dates, first such cause of action is to be considered for the purpose of limitation.

Pfizer Products Inc. (supra) has been relied on by the learned Counsel for the plaintiff to argue that it is doubtful that whether laches or acquiescence can deny the relief of a permanent injunction. According to him judicial opinion has been consistent in holding that if the defendant acts fraudulently with the knowledge that he is violating the plaintiff's rights then in that case, even if there is an inordinate delay on the part of the plaintiff in taking action against the defendant, the relief of injunction is not denied.

The right to get an order of permanent injunction *vis-à-vis* a declaration in a declaratory suit in the nature of permanent relief can only be had if the party so claimed has a right to file the suit if statute creates a bar expressly and when no application for condonation of delay, admittedly, cannot be made for condonation of the delay in filing the suit, no relief, in my view, the plaintiff can claim in such a time barred suit against the provision of statute.

Hindustan Pencils (supra) has been placed to agitate that the party which has acted in bad faith cannot turn around and take the plea of delay. As I have already held that delay in filing a suit is an inherent defect and Court lacks jurisdiction over such a time-barred suit. Therefore, by no way this defect is curable if it is an original proceeding. The submission made by the learned Counsel does not help him to get over the problem.

Gillette Company (supra) has been cited on the issue of unfair trade competition. It has been submitted by the learned Counsel for

the plaintiff that the defendant is guilty of dishonest use of the lounge and according to the plaintiff, defendant's action constitutes unfair trade competition. Service of tea and other beverages at the lounge cannot be considered to be a trade and that being so, question of unfair trade competition cannot arise in this case. It is unfortunate that so much time of the Court has been consumed by the learned Counsel for the plaintiff and cited various decisions more for academic purpose than the need for resolving the dispute in the suit and most of the decisions are based not on the pleadings in the plaint.

The decision in **Wander Ltd. (supra)** has been relied on to apprise the Court about the ingredients of passing off and its applicability in the present case. With the deepest of respect to the learned Counsel, it is held that no amount of passing off could have been proved in this case, nor is it admitted in the defence pleading. Therefore, such decision has no manner of application also.

The decision in **Laxmikant (supra)** has been relied on to agitate further the issue of passing off. It has been sought to be argued that the legal and economic basis of this tort is to provide protection for the right to property which exists not in a particular name, mark or style but in an established business, commercial or professional reputation or goodwill. So, to sell merchandise or carry on business under such a name, mark, description or otherwise in such a manner as to mislead the public into believing that the merchandise or

business is that of another person, is a wrong actionable at the suit of the other person. In absence of any such proof that the defendant has misled the public into believing that the tea served at the lounge is not the Darjeeling tea but has been served as the same or some other product is being served in the name of Darjeeling tea. Therefore, misleading public being not admitted in the written statement, the example sought to be cited by the said decision, has no manner of application, if the plaintiff could not prove and establish it by evidence. Three basic elements of passing off action being reputation of goods, possibility of deception and likelihood of damages to the plaintiff, in my considered view, is totally absent in the present case and, therefore, the cited decision on the issue of passing off action has no manner of application.

The decision in **Sony Kabushiki Kaisha (supra)** has been relied on the identical issue of principle of passing off, has also got no manner of application in the present case as discussed earlier.

The decision in **T.V. Venugopal – Vs. – Ushodaya Enterprises**, reported in **2011 (45) PTC 433 (SC)** has been relied on by the plaintiffs in support of their claim for passing off arising from use by the defendant from its well-known and deceptive mark 'EENADU'. This decision has no manner of identity with the facts and circumstance of the present case and is clearly distinguishable on fact. Therefore, I do not rely on the decision.

The decision in **Government of Malaysia –Vs. OHIM (Halal Malaysia case) Judgment of General Court (Fourth Chamber)-** has been relied on to argue that Court takes the view that public bodies too may be protected by passing off actions to the extent that their activities can generate goodwill. If those bodies make use of particular sign that belongs to them exclusively, they may rely on the goodwill attached to the marketing of goods and services bearing that sign. It has further been argued that if those bodies share the use of any sign with other operators, the goodwill may be relied on by the same public bodies and by the operators in question. At any rate, in the present case, goodwill may have been generated. In this case the fact is totally different from the present case. There the applicant's trade mark and the trade mark of the opponents were identical in all respect, only the difference of style of writing inside the mark. Therefore, the case of passing off was advanced and Court accepted the same. But the case here is totally different. Ratio of the judgment has been shown to be applicable in the present case contending that having regard to the applicant's certification system relating to the compliance of the goods with Sharia Law to its function of inspecting the manufacturing process developed by parties wishing to become authorized users of its certification mark, and its function of monitoring use of the certification mark by those authorized users to ensure that the quality standards of its system are complied with. It is the applicant that must be regarded as the owner of the goodwill, has got no application in the present set of facts where the Tea Board

is a producer of tea but only possesses a certification mark and the defendant "DARJEELING LOUNGE" by no means is misusing the said certification mark by their lounge service at "DARJEELING LOUNGE."

In my view the plaintiff has not been able to meet the cardinal question regarding the bar of limitation under Section 26(4) of the G.I. Act, 1999.

No case of passing off as alleged by the defendant could at all be established in this case in as much as the case of passing off can only be proved by leading cogent evidence either documentary or oral. No attempt so far has been made by the defendant to prove this passing off.

In the decision in **Marico Ltd. – Vs. G.P.L. Oil Company & Anr.**, reported in **AIR 2018 Cal 66** seven items of criteria for establishing passing off have been laid down by this Hon'ble Court but conspicuously none of the said criteria could be fulfilled by the plaintiff.

The judgment relied on the issue of passing off, namely, **M/s. Bengal Waterproof Limited (supra); Toyota Jidosha Kabushiki Kaisha (supra)**, do not help the plaintiff in any manner inasmuch as no pleading has been made in the plaint regarding continuing wrong. Rather the contention made by the plaintiff appears to be contrary to the principle laid down in the judgment of **Marico Ltd. (supra)**.

The plaintiff referred to various judgments on geographical indications and those decisions relied on are of foreign Courts. It is very simple not to give importance to the ratio of those judgments inasmuch as provisions of Trade Marks Act or G.I. Act of this country were never dealt with in those decisions and in this regard the decision relied on by the defendant particularly when they adopt the reasoning of the Hon'ble Division Bench in the case of **Tea Board India - Vs. - I.T.C. Ltd.**, reported in **2011 (5) CHN 1 (para-24)** appears to be more appropriate in the fact situation of the present case.

The plaintiff has also cited a decision in **Sant Ram -Vs- Rajinder Lal & Ors.** reported in **(1979) 2 SCC 274** to contend that the G.I. Act is a social welfare legislation and for the benefit of the producers of goods, namely, tea. In this case, as I have found, the plaintiff is not producer of any goods, nor is the producer of Darjeeling Tea. Therefore, this decision has no manner of application in the present case.

It has been rightly pointed out by Mr. Mitra, learned Senior Counsel, that Darjeeling Tea is produced in 87 Tea Estates within the district of Darjeeling, but none of whom has made any complaint whatsoever to any prejudice being caused to any of them by the defendant's using the name "DARJEELING LOUNGE" located in ITC SONAR hotel situated in Kolkata. The plaintiff further relied on an Indian decision in **National Insurance Co. Ltd. - Vs. - Hindustan**

Safety Glass Works Ltd., reported in **AIR 2017 SC 1900**. The plaintiff in this case is not a consumer and there is no allegation of delay on the part of the defendant. In the **National Insurance case (supra)** the company was instrumental in the delay in settlement of the case owing to his consumer complaint was belatedly filed. The Hon'ble Supreme Court held that the National Insurance Company's contention that the complaint was barred by limitation, was untenable. The facts in the present case are altogether different and those have got no application in the present case.

In order to decide the question involved in this suit let me answer the issues framed by this Court. For the sake of brevity, issue nos.1, 18 and 21 are taken up together.

Issue Nos.1, 18 and 21: At the beginning, it is necessary to point out that the plaintiff has not obtained a registered trademark under Sections 18 and 23 of the Trademarks Act, 1999. On the contrary, the plaintiff has obtained a certification trademark registration under Chapter VIII of the Trade and Merchandise Marks Act, 1958 as admitted in the plaint. Certification trademark has been separately defined under Section 2(1)(c) of the Trademarks Act, 1958 for the proper appreciation and application of the law in the facts of the present case, it is necessary to take note of the provisions of Sections 18 and 23 of the Trademarks Act, 1999 as also Section 2(1)(c) of the Trade and Merchandise Marks Act, 1958. The certification trademark application was filed by the plaintiff in form no.TM4

prescribed under the Trade and Merchandise Marks Rule, 1959 and rules issued thereafter under the Trade and Merchandise Marks Act, 1958 (hereinafter to be referred to as the “T.M.M. Act”). Certification trademark issued under the said T.M.M. Act confined to goods and was not extended to services.

The T.M.M. Act, 1958 was repealed by the Trademarks Act, 1999. In this regard, Section 159(2) of the Trademarks Act, 1999 is required to be taken note of. The said provision provides that certificate issued under the T.M.M. Act, 1958 will continue to be in force and have the effect as if it was issued under the corresponding provisions of Trademarks Act, 1999. The repealing Section does not say that certificate as issued under T.M.M. Act, 1958 would stand extended by the provisions of Trademarks Act, 1999. Therefore, the provisions of law clearly enunciate that certification trademark is confined to goods, not to any services. The goods here relates to ‘Tea’. It is profitable to reproduce Section 159 of the Trademarks Act, 1999 which is set out below:-

“159. Repeal and savings.— (1) *The Trade and Merchandise Marks Act, 1958 (43 of 1958) is hereby repealed.*

(2) *Without prejudice to the provisions contained in the General Clauses Act, 1897 (10 of 1897), with respect to repeals, any notification, rule, order, requirement, registration, certificate, notice, decision, determination, direction, approval, authorization, consent, application, request or thing made, issued, given or done under the Trade and Merchandise marks Act, 1958 (43 of 1958), shall, if in force at the commencement of*

this Act, continue to be in force and have effect as if made, issued, given or done under the corresponding provisions of this Act.

(3) The provision of this Act shall apply to any application for registration of a trade mark pending at the commencement of this Act and to any proceedings consequent thereon and to any registration granted in pursuance thereof.

(4) Subject to the provisions of section 100 and notwithstanding anything contained in any other provision of this Act, any legal proceeding pending in any court at the commencement of this Act maybe Continued in that court as if this Act had not been passed.

(5) Notwithstanding anything contained in this Act, where a particular use of a registered trade mark is not an infringement of a trade mark registered before the commencement of this Act, then, the continued use of that mark shall not be an infringement under this Act.

(6) Notwithstanding anything contained in sub-section (2), the date of expiration of registration of a trade mark registered before the commencement of this Act shall be the date immediately after the period of seven years for which it was registered or renewed:

Provided that the registration of a defensive trade mark referred to in section 47 of the Trade and Merchandise Marks Act, 1958 shall cease to have effect on the date immediately after the expiry of five years of such commencement or after the expiry of the period for which it was registered or renewed, whichever is earlier.”

From the plaintiff's own showing of a copy of the entry in the register of trademarks as disclosed by it in the plaint at page 81 does

not show that the certification trademark extends to any service. It is apparent that the said certification trademark is applicable only in respect of goods and not the services. Pages 83 and 84 of the plaint are copies of the entry in the register of trademark with a device of a woman holding two leaves and a bird. It does not appear that the defendant has used any mark or logo similar to the logo of the plaintiff like tea. The second certified copy disclosed in the plaint at page 84 also corroborates that the certification trademark registration is confined to goods which is described as 'Tea'. Thus, it appears that under the certification trademark, no right with respect to any service has been conferred on the plaintiff nor under the certification of trademark any right in respect of the word 'Darjeeling' has been conferred on the plaintiff. The only right has been granted to the plaintiff is to certify tea as 'DARJEELING TEA'. From the records it does not reveal that the defendant has been using the certifications trademark in respect of any goods. In paragraph 10 of the plaint the plaintiff has stated that on or about October 9, 1986, the plaintiff duly applied to be registered as the proprietor of the 'DARJEELING' logo, while on December 10, 1998, the plaintiff duly applied to be registered as the proprietor of the name 'DARJEELING', both as certification trademarks under Chapter VIII of the T.M.M. Act, 1958 which was then in force and the same were duly registered under the T.M.M. Act. It has been admitted in paragraph 10 that by virtue of these registration the plaintiff has the authority to certify that any tea marked by the said name 'DARJEELING' or logo, is guaranteed to be

100% Darjeeling Tea originating from the 87 tea gardens in the Darjeeling district of West Bengal and possesses certain organoleptic qualities and characteristics. This being the position, save and except the authority to certify that the concerned tea is connected with Darjeeling region, the plaintiff cannot claim any further proprietary right over the services rendered by the defendant under the name DARJEELING LOUNGE. Tea Board, therefore, under the provisions of the law, cannot exercise their authority with a limited interest of certification trademark to verify the services rendered by the defendant in their lounge named 'DARJEELING LOUNGE'. That apart, action of the plaintiff appears to be barred under Section 26(1), Geographical Indications of Goods (Registration and Protection) Act, 1999 (hereinafter to be referred to as the 'G.I. Act'). In paragraph 7, the defendant has stated that the suit is barred under Section 26(1) of the G.I. Act, since the defendant has been using the service mark 'DARJEELING LOUNGE' in respect of its premier executive lounge at ITC Hotel at Kolkata, right from the time of the inception of the hotel since 1st January, 2003. It is the definite case made out by the plaintiff that G.I. Act, 1999 came into force only on 15th September, 2003 whereas the hotel being run by the defendant since 1st January, 2003. Therefore, the argument advanced on behalf of the plaintiff based on their plaint averment that the defendant had no authority to continue with the 'DARJEELING LOUNGE' in that name does not hold good. The provisions of G.I. Act is not attracted in the purported cause of action canvassed by the plaintiff in its plaint rather, the

defendant's specific case is that the suit is barred under the provisions of Section 26(4) of the said Act. Provisions of Section 26 of the G.I. Act, 1999 is set out below :

“26. Protection to certain trade marks. – (1) *where a trade mark contains or consists of a geographical indication and has been applied for or registered in good faith under the law relating to trade marks for the time being in force, or where rights to such trade marks have been acquired through use in good faith either –*

a) before the commencement of this Act; or

b) before the date of filing the application for registration of such geographical indication under this Act,

nothing contained in this Act shall prejudice the registrability or the validity of the registration of such trade mark under the law relating to the trade marks for the time being in force, or the right to use such trade mark, on the ground that such trade mark is identical with or similar to such geographical indication.

(2) Nothing contained in this Act shall apply in respect of a geographical indication with respect to goods or class or classes of goods for which such geographical indication is identical with the term customary in common language as the common name of such goods in any part of India on or before the first day of January, 1995.

(3) Nothing contained in this Act shall in any way prejudice the right of any person to use, in the course of trade, that person's name or the name of that person's predecessor in business, except where such name is used in such a manner as to confuse or mislead the people.

(4) Notwithstanding anything contained in the Trade Marks Act, 1999 or in this Act, no action in connection with the use or registration of a trade mark shall be taken after the expiry of 5 years from the date on which such use or registration infringes any geographical indication registered under this Act has become known to the registered proprietor or authorized user registered in respect of such geographical indication under this Act or after the date of registration of the trade mark under the said Trade Marks Act subject to the condition that the trade mark has been published under the provisions of the said Trade Marks Act, 1999 or the rules made thereunder by that date, if such date is earlier than the date on which such infringement became known to such proprietor or authorized user and such geographical indication is not used or registered in bad faith.”

Sub-section (4) of Section 26 contemplates that no action in connection with the use or registration of a trademark can be taken after the expiry of five years from the date on which such use or registration infringes any geographical indication registered under the said Act has become known to the registered proprietor or authorized user registered in respect of such geographical indication under the Act.

By the plaintiff's own showing in paragraphs 31 and 32 that the plaintiff had knowledge of this Darjeeling Lounge since April, 2005 whereas, the plaint has been presented and admitted on 1st October, 2010. Therefore, it is apparent on the face of the record that the presentation of the plaint was made beyond expiry of five years attracting the bar under sub-section (4) of Section 26, meaning thereby, that the suit was not maintainable in view of the provisions

of Section 26(4) of the G.I. Act. In this regard, reference to paragraph 7 of the written statement will clarify the position where it has been stated that at least since 7th February, 2005, when the defendant's application for registration of its certification mark 'DARJEELING LOUNGE' in class 42 was advertised in the Trademark Journal, 1328 Supplementary (1) where the usual date was shown to be 1st January, 2003. It has been claimed by the defendant that the plaintiff had and/or ought to have knowledge even prior to the said date as the inauguration of the defendant's premier hotel having the said Lounge was widely covered by and reported in the media, including in an article in the major national daily "The Hindu Business Line" on 30th December, 2002, "The Telegraph" dated 18th January, 2003, "The Hindu" dated 24th August, 2003. All these reports, according to the defendant, contained references to the various facilities at the defendant's hotel including the 'DARJEELING LOUNGE'. However, the suit has been instituted by the plaintiff on 1st October, 2010.

It is the case made out by the defendant and has not been disputed by the plaintiff as no evidence was led as they decided not to lead, the defendant runs a premier chain of luxury hotels across the country under the name ITC Welcome Group. The defendant's luxury hotel in the city of Kolkata was named 'THE SONAR BANGLA' at the time of its inauguration on 1st January, 2003. In June, 2007, the name of the said hotel was modified to 'SONAR'. The said hotel was conceptualized on the theme of a businessman's resort around the concept of West Bengal's Baganbaris; and the defendant has

since inception in good faith named many parts of the said hotel after the names of West Bengal's well-known geographical sites and dynasties – the banquet hall of the said ITC Hotel in Kolkata is called PALA, the hotel lounges are called BAY OF BENGAL and DARJEELING LOUNGE and the lawn is called SUNDERBANS etc. All these names have been adopted in good faith in order to showcase the glorious history of the well-known places of West Bengal. Darjeeling, Sunderbans are places in West Bengal which are well-known to the people outside West Bengal as well. Lots of tourists and visitors from outside West Bengal visit Darjeeling in India for enjoying its scenic beauty and in particular to view KANCHANGJUNGA, which is a tribute to West Bengal. The defendant has been running the 'DARJEELING LOUNGE' at the said ITC Hotel in Kolkata admittedly, since 1st January, 2003 and on such fact, the bar under Section 26(1)(a) is applicable in the present case inasmuch as the said lounge was introduced on 1st January, 2003 whereas the Act came into force on 15th September, 2003, before the commencement of this Act. In such background also, Section 26(4) is very much applicable and the relief sought to be made out in the plaint based on the claim advanced by the plaintiff appears to have been barred under the provisions of Section 26(4) of the G.I. Act, that is, no such claim as advanced by the plaintiff after expiry of five years can be entertained. Therefore, the plaintiff's suit appears to be barred by the said provision.

Although, the plaint appears to have been barred by limitation, yet this Court proposes to give answer to all the issues framed in this case as is required under Rule 2, Order XIV of the Code of Civil Procedure.

Order XIV, Rule 2 of Code of Civil Procedure is set out below :

“R.2. Court to pronounce judgment on all issues- (1)
Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to –

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.”

Since Rule 2 of CPC prescribes that Court shall pronounce judgment on all issues both of law and fact. I decide all the issues.

For the sake of convenience **Issue Nos. 2, 3, 4, 5, 6, 7, 8, 9, and 11** are taken up together and discussed hereinbelow:

On the allegation that the use of the name of ‘DARJEELING LOUNGE’ by the defendant in respect of its refreshment lounge

services constitutes an act of infringement under the Trade Marks Act, 1999 and Geographical Indications of Goods Act, 1999. I have taken note of the provisions under those relevant Acts and discussed threadbare. However, in order to answer these issues it is necessary to discuss about the provisions of Trade Marks Act, 1999. Admittedly, the plaintiff has obtained only a certification Trade Mark under Chapter VIII of the T.M.M. Act, 1958 and not a regular trade mark as being issued under Section 23 of the said Act. In case of certification trade mark application of Sections 28 and 29 of the Trade Marks Act, 1999 are expressly excluded by Section 69(c) of the said Act of 1999. The rights of proprietors of certification trade mark are limited only to certify that a particular brand of tea originates from Darjeeling. When a trade mark is not registered under Section 23 of the Trade Marks Act, 1999, it does not attract the provisions of Sections 28 and 29 of the said Act. The certification trade mark of the plaintiff would stand infringed only in the event the defendant certifies that a particular tea is a 'Darjeeling Tea', that is to say, the tea is produced in the district of Darjeeling. It is never the case of the plaintiff's that the defendants at any point of time certified or even intended to certify any tea with the use of the lounge as a 'DARJEELING LOUNGE'. This has no reference with regard to the geographical origin of the place of Darjeeling. Infringement of certification trade mark is confined only to Section 75 and that too, such infringement is restricted to the goods and services for which the certification trade mark is registered and it cannot be extended to any other goods and services. That apart, no

such case has been made out for infringement of certification trade mark under Section 75 of the Trade Marks Act, 1999. Therefore, in my opinion, there is a clear difference between Section 28 and Section 29 of the Trade Marks Act, 1999, which is applicable to regular trade mark and that of Section 75 of the Trade Marks Act, 1999, which is applicable to only certification trade mark. At the same time, it is also not found that there has been any infringement under the Geographical Indications of Goods Act because the defendant's 'Lounge' is not relating to goods. Plaintiff's rights conferred by the registration of the word 'Darjeeling' is only in relation to tea. 'Darjeeling' is not a trade mark. It is only used to indicate geographical indication of a place of origin of tea originating from Darjeeling. The law relates to geographical indication is confined only to goods, which originates from the district of Darjeeling. The plaintiff does not own any right in the name of 'Darjeeling' for any goods other than tea as has been pleaded by the defendant in paragraph 18 of the written statement. The Geographical Indications Act can only extend to goods and admittedly, the defendant's lounge does not fall within the category of 'goods'. So also the allegation of passing off and unfair competition as alleged by the plaintiff does not appear to have any substance. Although, the allegation has been made about passing off but the plaintiff has not led any evidence to that effect. Without proper evidence and unless the allegation of passing off is substantiated by cogent evidence, mere statement on oath in plaint, is not sufficient to get a decree against the defendant

in this regard. The plaintiff, however, has failed to prove the phenomena of passing off.

Before the Supreme Court the plaintiff has admitted that they will not lead any further evidence and the Trial Court should be directed to dispose of the suit on the basis of the available records. Available records are not sufficient to hold that there has been any passing off at the instance of the defendant. It is the admitted case that the defendant carries on business as a hotelier and it is nowhere alleged in the plaint that the plaintiff and the defendant are trade rivals or there is any competition between them. Therefore, the question of passing off cannot be thought of. The allegation of 'unfair competition' has been defined in Section 22 (Explanation 1) of Geographical Indication Act. According to the section act of 'unfair competition' means 'any act of competition contrary to the honest practice in industrial or commercial area'. Admittedly there is no competition between the plaintiff and defendant in any industrial or commercial matters and therefore, the question of competition far less to say unfair competition within the meaning of Geographical Indication Act cannot and/or does not arise at all. As per the provision of Section 22 'unfair competition' is a genus and passing off a specie thereof. The plaintiff has also alleged that the use of the name of 'DARJEELING LOUNGE' by the defendant in respect of its refreshment lounge services amount to dilution of plaintiff's registered geographical indication 'Darjeeling'. This allegation of the plaintiff has also not been substantiated. Although, such an

allegation has been made and it has already been expressed that GI Act does not apply to 'DARJEELING LOUNGE' because the same is used for only lounge services and such claim cannot be maintained in view of the provision of Section 26(4) of the GI Act as pointed out earlier. The dilution as alleged and pleaded by the plaintiff in their plaint is subject to proof and onus lies upon the plaintiff to prove that there has been dilution of the plaintiff's registered geographical indication Darjeeling but in absence of any evidence which they voluntarily absent from, debar them from raising this issue in the final hearing. Accordingly, the plaintiffs are not entitled to any relief on this issue of so-called dilution. How the defendant's 'DARJEELING LOUNGE' can be equated with the plaintiff's certification trade mark and/or geographical indication 'Darjeeling' is not at all understood. The allegation of the plaintiff is as if word 'Darjeeling' cannot be used by any other concerned which is absolutely baseless and there is no reasonable foundation of such submission.

It is also not understood how the plaintiff can make allegation that adoption, use of an admitted registration of the mark 'DARJEELING LOUNGE' by the defendant is an act of bad faith. This too is a question of fact and may be gathered even from circumstantial evidence if no direct evidence is available but in the instant case as pointed out earlier that the plaintiff itself abstained from leading evidence and relied solely on the documentary proof and their pleading in support thereof in the plaint. Therefore, this allegation also fails and in my view, they have failed to substantiate

the same. The plaintiff has further alleged that the use of the name 'Darjeeling' in relation to the lounge located on the ground floor of the Hotel, ITC Sonar perceived by general public as referring to 'Darjeeling tea' as has been alleged and pleaded in paragraph 45 of the plaint. This allegation has also not got any foundation and the same is not either proved by leading appropriate evidence. No witness has been called for to prove that any single member of general public has perceived that the use of the name 'Darjeeling' is in relation to the lounge located at the ground floor of the Hotel, ITC Sonar refers to or collected with in any manner the 'Darjeeling Tea'. No affidavit either has been filed in this proceeding that is to say for anybody or any member of the general public has been confused or perceived that the use of the word 'Darjeeling' in relation to lounge of the defendant is referring the 'Darjeeling Tea'. Therefore, this allegation also cannot stand.

No evidence has been adduced not even any affidavits used by the plaintiff to suggest that goods sold and/or offered by the defendant to its customers in the 'DARJEELING LOUNGE' originates from Darjeeling.

It is apparent from the defendant's case that only high-end guests can access the Lounge through their room card key and such guests are educated and knowledgeable persons and it is unexpected that such high-end guests can be confused or misled by the use of the word 'DARJEELING LOUNGE' in any manner. Admittedly, the

defendant serves snacks and drinks of all variety which cannot be confused with the tea by any stretch of imagination. This stand of the defendant remains uncontroverted, therefore, there is no scope to hold that the defendant's application for the name 'Darjeeling' to the said lounge as in any manner falsely suggested that the goods, sold and/or catered in the said lounge originate from Darjeeling, as has been alleged by the plaintiff in their plaint in paragraph 48 and 57 (b), (c) and (d) of the plaint.

Issue Nos. 10, 12, 13 and 14 are taken up together and discussed herein below.

The plaintiff raises the issue that by its trademark registered under Chapter IX of the Trademarks Act had acquired any right other than the authority to certify that any tea marked with the name or logo of 'Darjeeling' is guaranteed to be 100% Darjeeling Tea originating from 87 tea gardens in the Darjeeling district of West Bengal mentioned in the certificate of registration. The right acquired under the certification trade mark is very limited. Section 78 of the Trademarks Act, 1999 deals with such limited right. This right is only to certify the good, namely, Tea, in this case, which originates from the district of Darjeeling. Section 2(e) of the TM Act, 1999 also corroborates the proposition. The definition of certification trademark in the TM Act, 1999, is set out below:

“2(e). Certification trade mark” means capable of distinguishing the goods or services in connection with

which it is used in the course of trade which are certified by the proprietor of the mark in respect of origin, material, mode of manufacture of the goods or performance³ of services, quality, accuracy or other characteristics from goods or services not so certified and registrable, as such Chapter IX in respect of those goods or services in the name as proprietor of the certification of that person,”

Accordingly, the issue raised under issue no. 10 is negated.

On the question whether ‘Darjeeling’ logo protected by the Copyright Act as claimed in paragraph 15 of the plaint, on a careful consideration it appears that the plaintiff’s logo consists of the device of a woman holding two leaves and a bud in a roundel with the name ‘Darjeeling’ as pointed out in paragraph 9 of the plaint. The defendant, admittedly, does not use the plaintiff’s logo in Darjeeling Lounge as has been clearly pointed out in paragraph 15 of the written statement. The defendant’s mark “DARJEELING LOUNGE’ as advertised in the Trademarks Journal, apparent from page 105 of the plaint, will clearly show that there is no similarity whatsoever between the plaintiff’s logo and the defendant’s certification trade mark logo. This point, though pleaded on behalf of the plaintiff in the plaint has not been pressed and/or argued at the time of hearing. Further, the plaintiff has not raised any issue of infringement of alleged copyright of Darjeeling Logo. This issue is wholly redundant and irrelevant and it is answered in the negative.

So far the allegation of dilution or any erosion to the registered Geographical Indications of the Goods (Registration and Protection) Act, 1999, the defendant submits that this allegation is identical with the allegation raised under issue nos. 2 and 4. The provisions of G.I. Act do not apply in the present case. Therefore, the said allegation of dilution is answered in the negative. To consider the allegation of the plaintiff whether the dilution and erosion of the certification Trademark of the plaintiff is barred under the provision of Section 69 of the Trade Marks Act, 1999, it may be pointed out that this issue has already been answered in relation to issue no.2 where I have already pointed out that Sections 28 and 29 of the Trade Marks Act, 1999 do not apply to the plaintiff's mark. The only right that has been conferred on the plaintiff's certification trade mark is as provided under Section 78 of the Trade Marks Act, 1999. Infringement of certification trade mark is defined and limited to Section 75 of the Trade Marks Act, 1999. Therefore, this allegation also has no basis.

As earlier pointed out, the allegation of this nature depends upon the proof advanced by the plaintiff. No documentary evidence is forthcoming in this regard, nor has the plaintiff proved it by leading in oral evidence. Therefore, the allegation is yet to be substantiated by the plaintiff and the allegation fails.

Issue nos. 15, 16 and 17 are taken up together for convenience. Defendant has stated that Section 2(e) read with Section 2(f) of the G.I. Act clearly indicates that the geographical indication is

confined to goods. The statement of objects and reasons of the said Act also supports the submission of the defendant. In my view the whole object of the G.I. Act is to add to the economic prosperity to producers of 'goods' and promote 'goods' bearing Indian geographical origin for export. The decisions from foreign courts have been considered but I find no application thereof in the facts and circumstances of the present case. The decisions referred to before this Court is based on Act which does not contain an identical provision of the G.I. Act. Therefore, I do not rely those decisions cited by the plaintiff. In fact the suit is misconceived and cannot be held to be maintainable under the G.I. Act. This question has been dealt with earlier and I do not feel it to repeat once again in deciding the issues referred to hereinabove. On the question whether the plaintiff is an user of the name of the "Darjeeling" or seller of tea or if the plaintiff is entitled to maintain any claim for passing off, in my view, the issue is already dealt with earlier. No further discussion thread bare is required in dealing with the issue in question. The plaintiff not being an user of the name 'Darjeeling' or seller of tea. There is no question on defendant's passing off its goods and services to the public as that of the plaintiff. It is again reiterated that in absence of any proper proof either documentary or oral, Court cannot come to a conclusion of passing off. Therefore, the issues referred to hereinabove are, accordingly, answered in the negative.

Issue Nos. 19 and 20 are conveniently dealt with together. In these issues the plaintiffs alleged rather repeated that adoption or

use of the name 'Darjeeling' by the defendant for the said lounge with any *mala fide* cause any damage or injury to geographical indication of the plaintiff registered under the Geographical Indication of Goods (Registration and Protection) Act, 1999 or result in erosion or dilution thereof. The issue is nothing but the repetition of the earlier issues and has already been answered to. Therefore, I refrain myself from going into details over again the issue in question. It can only be added that those allegations are required to be proved by leading evidence either oral or documentary, which is completely lacking in the present case and therefore, the plaintiff cannot proceed on the allegations as made in issue no. 19. So far the points taken in issue no. 20 whether the defendant committed any fraudulent or dishonest or illegal act as alleged in paragraph 57 of the plaint, I hold that no particulars of fraud or dishonesty having been meticulously pleaded in the plaint, the allegation of wrong use does not arise, nor does it amount to fraudulent or dishonest use. No evidence is forthcoming from the end of the plaintiff to prove such fraudulent and dishonest activities. Therefore, this issue also goes against the plaintiffs.

On consideration of the materials disclosed by the parties in support of their respective pleadings and claims I come to a conclusion that the suit is frivolous and the same should be dismissed, which I hereby do holding that the plaintiff is not entitled to any relief in this suit.

The suit is, hereby, dismissed with a cost of Rs.1,00,000/- (Rupees One Lakh) only.

Mr. Mitra, learned Senior Counsel appearing for the defendant does not make any objection if the entire amount of cost awarded herein is remitted to the High Court Legal Aid Services Committee. Accordingly, I direct the Member Secretary, Legal Aid Services Committee to earmark the said amount for Mediation.

Urgent Photostat certified copy of this judgment, if applied for, be delivered to the learned counsel for the parties, upon compliance of all usual formalities.

(Sahidullah Munshi, J.)