IN THE HIGH COURT AT CALCUTTA

(Ordinary Original Civil Jurisdiction)

ORIGINAL SIDE

Present:

The Hon'ble Justice Krishna Rao

G.A. No. 1 of 2023

With

G.A. No. 2 of 2023

In

C.S. No. 126 of 2023

Ramji Lal Agarwal

Versus

Sourav Agarwal

Mr. Sabyasachi Choudhury, Sr. Adv.
Mr. V.V.V. Sastry
Mr. Rahul Poddar

... For the plaintiff.

Mr. Ranjan Bachawat, Sr. Adv.
Mr. Anuj Singh
Mr. Sourojit Dasgupta
Mr. Shayak Mitra
Ms. Niharika Singh
Ms. Rupal Singh
Mr. Ashok Kumar Singh

... For the defendant.

Hearing Concluded On : 06.02.2025

Judgment on : 12.03.2025

Krishna Rao, J.:

1. The plaintiff has filed the present application being G.A. No. 1 of 2023 in CS No. 126 of 2023 for grant of interim order restraining the defendant from carrying on any business using the trade name "Sindharam Sanwarmal" with any prefix or suffix thereto, either at the premises No. 43/44, Cotton Street, Kolkata -700 007 or at any area within a radius of one kilometer thereof. The defendant has filed an application being G.A. No. 2 of 2023 in CS No. 126 of 2023 for dismissal of the suit.

2. The case of the plaintiff is that one Mangi Lal Agarwal, the father of the plaintiff and grandfather of the defendant had established the business of dry-fruits, spices, dry-vegetables and other products under the name and style of "Sindharam Sanwarmal". The said trade name acquired substantial reputation and goodwill in the market of dry-fruits, spices, dry-vegetables and other products.

3. The said Mangi Lal Agarwal had five sons and all have joined their father in the family business under the name and style of "Sindharam Sanwarmal & Co." at 43/44, Cotton Street, Kolkata- 700 007. The sons of Mangi Lal Agarwal and their respective families not only expanded the family business but also set up and carried on similar business in diverse places all over the India.

4. The said Mangi Lal Agarwal died on 2nd January, 2006 and his wife died on 28th July, 2016. One of the sons of Mangi Lal Agarwal also died on 4th February, 2016. On 13th January, 2017 in order to ensure that all the five branches of the sons of the Mangi Lal Agarwal, can effectively carry on business, using the said trade name and maintain their own respective identity, a "Family Agreement" was executed between the surviving heirs of the said Mangi Lal Agarwal.

5. Mr. Sabyasachi Choudhury, Learned Senior Advocate representing the plaintiff submits that under the Family Agreement, the shops and the godown wherefrom the family members of five branches carried on business were clearly identified and a pattern of allotment of such shop rooms to individual branches were agreed upon.

6. Mr. Choudhury submits that the plaintiff was allotted one shop room on the ground floor (facing roadside) at premises No. 43/44, Cotton Street, Kolkata – 700 007 with the business of dry-fruits, spices, dry-vegetables and other products being carried out in the said premises under the name and style of "Sindharam Sanwarmal". He submits that the father of the defendant, Mohan Kumar Agarwal died on 22nd September, 2019. The father of the defendant was allotted one shop room on the ground floor (facing roadside) at the premises No. 43/44, Cotton Street, Kolkata- 700 007 wherefrom business of dry-fruits, spices, dry-vegetables and other products was carried on in the name and style of "Shree Hanuman Stores".

7. Mr. Choudhury submits that from both the shop rooms under the trade name "Sindharam Sanwarmal" and "Shree Hanuman Stores", dry fruits business were carried out. He submits that "Sindharam Sanwarmal & Co." has been registered with their logo under the Trade Marks Act, 1999 in the name of Gopal Agarwal and Smt. Rita Devi Agarwal (since deceased), wife of Mohan Kumar Agarwal and the mother of the defendant but it was always treated as family assets. He submits that it was also agreed under the Family Agreement that all the branches will be entitled to use the name of "Sindharam Sanwarmal" with either suffix or prefix to identify their respective business.

8. Mr. Choudhury submits that acting upon the Family Agreement dated 13th January, 2017, the five branches separated their respective businesses and carried on the same as separate individual businesses from the shops rooms and godowns recorded and allotted to the respective branch as per the family agreement. He submits that it was clearly agreed and understood between the parties that each one of them will be free to use the name "Sindharam Sanwarmal" with a prefix and suffix to carry on their respective business but no one shall operate any business with such name within one kilometer radius of the existing shop room in terms of Clause 3 of the said agreement.

9. Mr. Choudhury submits that at the time of execution of the agreement, two shop rooms were operated from the said same premises, one in the name of "Sindharam Sanwarmal" and another was in the name of "Shree Hanuman Stores". The shop room having the Board of

"Sindharam Sanwarmal" was allotted to the plaintiff and "Shree Hanuman Stores" was allotted to the father of the defendant. The two shop rooms were the existing shop rooms under Clause 3 of the agreement.

10. Mr. Choudhury submits that after the death of the father, the defendant has started operating the shop which was initially with the Board "Shree Hanuman Stores" as its trade name under the name and style of Sindharam Sanwaramal with suffix "Mewawala". He submits that this is the violation of the provisions of Clause 3 of the Agreement.

11. Mr. Choudhury submits that the defendant is free to operate any shop with the name "Sindharam Sanwarmal" and the suffix but not within one kilometer radius from his existing shop room.

12. Mr. Ranjan Bachawat, Learned Senior Advocate, representing the defendant submits that the goodwill to the trade name "Sindharam Sanwarmal" is a coparcenary assets belonging to the joint family of Mangi Lal Agarwal and three generations are entitled to the trade name and goodwill attached to it by way of survivorship under the Mitakshara School of Hindu Law to which Mangi Lal Agarwal belonged to during his life time.

13. Mr. Bachawat submits that the plaintiff cannot claim his exclusive right with regard to the mark "Sindharam Sanwarmal". He submits that the defendant is carrying on business of dry fruits with trade name "Sindharam Sanwarmal Mewawala" for more than five years and also

obtained Goods and Services Tax Registration Certificate and the Kolkata Municipal Corporation issued enlistment certificate in the name of the defendant.

14. Mr. Bachawat submits that the plaintiff has waived his right by permitting the defendant to carry out such business in the said premises. He submits that the suit and the application filed by the plaintiff, is at belated stage and the plaintiff is not entitled to get any interim order.

15. Mr. Bachawat submits that when the agreement was entered into by several members of the Agarwal family, the defendant was a major but the defendant was not made a signatory to the said agreement. In support of his submissions, Mr. Bachawat relied upon the judgment in the case of ***M.N. Aryamurthy and Another vs. M.D. Subbaraya Setty (dead) through LR and Ors.*** reported in ***(1972) 4 SCC 1*** wherein it was held that where one of the sons of the family is shown to have not accepted or participated in the family arrangement, the family arrangement as binding agreement between the several co-parceners must fail.

16. Mr. Bachawat relied upon the judgment in the case of ***Kalyani (Dead) by Lrs. vs. Narayanan and Ors.*** reported in ***1980 Supp SCC 298*** submitted that while expounding on the scope of a family arrangement, held that for a family arrangement to be valid all members of the family

so affected by such arrangement must consent and acquiesce to the same.

17. Mr. Bachawat submits that the shop room in question was never a joint family property. It had not been allotted the defendant's father under the agreement. It was tenancy in the name of the defendant solely since the year, 2014. He submits that the defendant despite his right, title and interest in the aforesaid mark as well as the moveable and immovable properties acquired by exploiting such mark, was not a signatory to the alleged family agreement and was not privy to the terms thereof at the time of its execution, the agreement or the terms thereof could not be said to be binding on the defendant.

18. Mr. Bachawat submits that the plaint is silent as to when the cause of action arose i.e. the date when the defendant purportedly set up another shop within the radius of one kilometer of the existing shop room and when the defendant allegedly permitted third parties to use the aforesaid mark.

19. Mr. Bachawat submits that it is clear from the plaint that the plaintiff is aggrieved by the alleged act of the defendant in granting franchise of the trade name to a third party. He further submits that though the agreement is named as "Family Agreement" but in Clause 8 of the agreement clearly stated that the parties thereto shall have separated in business and properties for all time to come from the date of these presents. He submits that the agreement clearly indicates that the

agreement was in fact a commercial agreement to divide the family business and the properties used to conduct it. He submits that the dispute raised by the plaintiff in the suit as well as in the present application is a commercial dispute covered under the provisions of Section 2(1)(c)(i), (vii), (viii) and (xvii) of the Commercial Courts Act, 2015.

20. Mr. Bachawat submits that the defendant has been using the mark "Sindharam Sanwarmal" along with the suffix "Mewawala" since 2017 and the plaintiff had the knowledge that the defendant is using the aforesaid mark but the plaintiff chose not to take any steps against the defendant till March, 2023. He submits that failing to take appropriate steps within a reasonable time after it had come to knowledge of the plaintiff that the defendant was using the said mark, the plaintiff acquiesced to the said act of the defendant. In support of his submissions, Mr. Bachawat relied upon the judgment in the case of ***Chairman, State Bank of India and Anr. vs. M.J. James*** reported in ***(2022) 2 SCC 301.***

21. Mr. Bachawat submits that the plaintiff and other alleged parties to the agreement have not taken any steps towards transfer of the properties mentioned in the schedules or the said agreement was duly stamped or registered. He submits that the plaintiff has not handed over of the possession of the properties, namely, two godowns in favour of the defendant. He submits that as per the provisions of Section 42 of the Specific Relief Act, 1963, the plaintiff has failed to perform the

purported family agreement, the plaintiff cannot seek enforcement of the negative covenants in the purported agreement against the defendant herein. In support of his submissions, Mr. Bachawat relied upon the judgment in the case of ***Enter Tech Entertainment Private Limited vs. Blueair India Pvt. Ltd.*** reported in ***2016 SCC OnLine Del 5507*** and in the case of ***All India Tea and Trading Company Limited vs. Loobah Company Limited*** reported in ***2021 SCC OnLine Cal 2917***.

22. The first contention raised by the defendant that the family agreement dated 13th January, 2017 is not binding upon the defendant as the defendant is not the signatory of the said agreement though at the time of execution of the agreement, the defendant was a major. In the first paragraph of the agreement, it is categorically recorded that "*which expression unless excluded by or repugnant to the context shall include his heirs, executors, administrators, legal representatives and assigns".*

In paragraph 17(f) of the affidavit-in-opposition, the defendant stated that from the year 2017, the defendant started using and adopted the mark "Sindharam Sanwarmal Mewawala" to trace the goodwill of the business to his own family. It is further stated that the word "Sindharam Sanwarmal" has been used by the members of the defendant's family for a considerable period of time and the defendant being the part of the said family is entitled to use the mark honestly and concurrently.

Mr. Bachawat has relied upon the judgment in the case of ***Kalyani (Supra)*** and ***M.N. Aryamurthy (Supra).*** In the case ***Kalyani (Supra),*** the Hon'ble Court referred the case of ***M.N. Aryamurthy (Supra)*** wherein it is held that when one of the sons of the family is shown to have not accepted or participated in the family arrangement, the family arrangement as binding agreement between the several coparceners must fail.

In the present case though the defendant has taken a specific stand that the Family Agreement is not binding upon him as he is not the signatory of the Family Agreement and at the time of execution of the Family Agreement, the defendant was a major. On the other hand, the defendant is enjoying the shop room on the ground floor at premises No. 43/44, Cotton Street, Kolkata -700 007. It is also admitted that earlier the said shop room was under the trade name of "Shree Hanuman Stores" and only in the year 2017, the defendant has started using and adopted the mark "Sindharam Sanwarmal Mewawala". In the Fourth Schedule of the Family Agreement, the said shop room was allotted to the father of the defendant.

In the written notes of arguments, the defendant has also taken the stand that the plaintiff has not handed over the possession of the properties, namely, two godowns on the ground floor of the premises at Sri Hariram Goenka Street, Kolkata - 700 007 and one room of the second floor of the premises No. 2326/1 Tilak Bazar, Gulley Hinga

Begh, Delhi -110 006 as mentioned in the Fourth Schedule of the Family Agreement to the defendant.

The defendant cannot say at one time that the Family Agreement is not binding upon him and on the other hand, the defendant is taking the benefit of the shop room allotted to his father in the Family Agreement and also taking the plea that the other godowns as mentioned in Fourth Schedule were not handed over to the defendant.

In the case of ***R.N. Gosain vs. Yashpal Dhir*** reported in ***(1992) 4 SCC 683***, the Hon'ble Supreme Court held that law does not permit a person to both approbate and reprobate. The principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that *"a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage"*.

The judgments relied by the defendant are distinguishable from the facts and circumstances as in the present case, the defendant is enjoying the shop room in the ground floor which is one of the property of Fourth Schedule given to the father of the defendant and the defendant is also stated that the other godowns were not handed over to him which are also in the Fourth Schedule property.

Considering the above, the stand taken by the defendant that the Family Agreement is not binding upon the defendant does not stand.

23. The second issue raised by the defendant that the reliefs claimed by the plaintiff is barred by limitation on the ground that the defendant is using and adopted the mark "Sindharam Sanwarmal Mewawala" since the year, 2017. The defendant has relied upon the License issued by the Kolkata Municipal Corporation in the month of August 2017, G.S.T. Registration Certificate, Enlistment Certificates renewed from time to time, Food License granted by the Food Standards Authority of India and Certificate of registration of the mark "Sindharam Sanwarmal Mewawala". The defendant has also relied upon the criminal proceeding initiated by the plaintiff against the defendant under Section 144 of the Code of Criminal Procedure, 1973 with regard to the Glow Sign Board of "Sindharam Sanwarmal Mewawala".

The defendant has relied upon the judgment in the case of ***Saranpal Kaur Anand vs. Praduman Singh Chandhok and Others*** reported in ***(2022) 8 SCC 401*** wherein it is held that :

> ***"29.*** *We have denoted the ambit and conditions of Section 17(1) of the Limitation Act, which is to protect rights of a party defrauded from lapse of time till he remains in ignorance of the fraud, or with reasonable diligence could have discovered the fraud. Section 17(1) does not assist a person who merely shuts his eyes in spite of circumstances requiring him to ascertain facts on which he would have discovered the fraud. Section 17(1) of the Limitation Act saves rights of the party defrauded from lapse of time as long as the party is not at fault on his own account. In the aforesaid factual background, it is apparent that the plaintiff*

> *was aware and had knowledge in October 2008 about execution and transfer of the ownership rights in favour of late Tej Kaur vide sale deed dated 23-8-1969 executed by Defendant 3, Gurdev Singh Anand. Unadorned assertion in the plaint feigning ignorance as to the sale deed would not help, as in the facts as pleaded and accepted in the plaint, the plaintiff was required to state and indicate that ignorance was not due to failure to exercise reasonable diligence.*
>
> ***30.*** *In view of the aforesaid facts and position of law, we dismiss this appeal and uphold the judgment of the Single Judge and the Division Bench of the High Court dismissing the suit as being barred by limitation. We also affirm the judgment of the Single Judge and the Division Bench with regard to the dismissal of two applications filed by the plaintiff for amendment of pleadings under Order 6 Rule 17 of the Code, namely, IAs Nos. 17994 of 2012 and 7590 of 2014 on the ground that when the suit itself has been barred by limitation, amendments to such a suit will be unnecessary."*

The judgment relied by the defendant is of two Judge's Bench of the Hon'ble Supreme Court and both the Judges have expressed difference of opinion by two separate judgments and matter is referred to the Hon'ble Chief Justice of India for appropriate orders/ direction.

The Hon'ble second Judge in her separate judgment held that:

> ***"53.*** *From the aforestated decisions of this Court, there remains no shadow of doubt that a plea of limitation cannot be decided as an abstract principle of law divorced from the facts as in every case the starting point of limitation has to be ascertained which is entirely a question of fact. A plea of limitation being mixed question of law and fact cannot be decided as a preliminary issue under Order 14 Rule 2(2)."*

The plaintiff has relied upon the judgement in the case of ***Sarat Chandra Mukherjee vs. Nerode Chandra Mukherjee and Others*** reported in ***1935 SCC OnLine Cal 16*** wherein the Hon'ble Division Bench of this Court held that:

> *"**6.** He held however that Article 32 would apply where the defendant, while perverting joint property from its specific common purpose, admits the plaintiffs' right to share the perverted user. But that is not the case here. It was held that in suits between co-owners inter se where the title of one is denied by the other, Article 144 or Article 120 would apply according as the relief claimed is one for possession or injunction. That was a case in which the defendants encroached upon common land by cultivating it as part of their holding so that the plaintiff co-owner was prevented from exercising a common right of way in the land. Article 120, Limitation Act, was held to apply. In that case there was no reference to Section 23 of the Limitation Act, which lays down that:*
>
> > *"In the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues."*
>
> ***7.** Section 3 of the Limitation Act, makes the provisions of Sch. 1, Limitation Act, subject to the provisions contained in S. 23, so that, if it can be shown that in this case there is a continuing wrong, a fresh period of limitation begins to run at every moment during which the wrong continues.*
>
> ***8.** It has been established that the plaintiff in this case has a right to use the land on which those sheds have been erected as a passage and that those sheds are obstructing-his passage way. The learned Judge has held that in these circumstances there was a continuing wrong and in this he appears to be correct. If authority is needed it is to be found in the case referred to by the learned Judge, 1923 Cal. 356 , a case similar to the*

present case in which land reserved as a common passage by long usage and agreement was obstructed by the erection of a verandah to a house. Such an obstruction, was found to be a continuing nuisance relying on the principle on which the Privy Council acted in 6 Cal. 394. Other cases which have been referred to are (1) the case of 1916 Cal. 733 in which it was held that obstructions which interfere with a right of way are in the nature of continuing nuisance as to which cause of action is renewed de die in them so long as the obstructions causing such interference are allowed to continue; (2) the case of 1919 Cal. 807, in which it was held that Section 23 of the Limitation Act, had no application in case of a Bowak or platform built over municipal land inasmuch as the injury was complete in the erection of the wall and the mere fact that the effect continued could not extend the time of limitation. But the real reason of the decision appears to have been that the Bowak having been in existence for 50 years the municipality had lost their right to the land on which it stood and there was therefore no continuing wrong; (3) another case referred to is the Full Bench case of 25 Bom. 644 , in which it was held that a suit for restitution of conjugal rights under Act 15 of 1865 was barred under Article 35, Limitation Act, and Article 23 had no application. Jenkins, C.J., held that even if the conduct of the husband be regarded as a continuing cause of action since Article 23 is general in its terms, whereas Article 35 provides a special remedy and where there is a repugnancy the special provision should prevail. With all due respect to the learned Chief Justice he appears to have left out of account Section 3 of the Limitation Act, by which all the Articles of Sch. 1, Limitation Act, are subject to the provisions of S. 23. No doubt the effect of this appears to be to nullify certain provisions of the Limitation Act, but we have to take the law as it stands and the learned Judges who concurred with the decision recognized the difficulty caused by the application of S. 23 of the Act.

9. *Inasmuch as it was held that Section 23 of the Limitation Act, Applies in this case, there is no need to consider the Question of onus arising as to the proof of the elapse of the full period of six years under Article 120, Limitation act. We find that the*

suit is net barred by Limitation and this appeal must be dismissed with costs."

The plaintiff relying upon the Family Agreement dated 13th January, 2017, specifically Clause 3 of the said agreement wherein it clarified that only the second party and fourth party can start only one shop room each using trade name "Sindharam Sanwarmal" with some prefix and suffix but no business shall be started with these names within one kilometer of the existing shop room. The defendant admittedly started using and adopted the mark "Sindharam Sanwarmal Mewawala" within the radius of one kilometer from the existing shop of the plaintiff. The issue raised by the defendant with regard to limitation whether the defendant is using and adopted the mark "Sindharam Sanwarmal Mewawala" in the year 2017 and the same was within the knowledge of the plaintiff and the plaintiff allowed the defendant to use the same without any objection in the matter of fact and the same cannot be decided in the summary proceeding. The point of limitation can be arises during the trial of the suit.

24. The defendant has raised an issue that the plaintiff himself breached the Family Agreement dated 13th January, 2017 and thus, the plaintiff cannot seek enforcement of negative covenant. It is the case of the defendant that as per Clause 1 of the Family Agreement, the parties agree and undertake that if necessary the party will register all necessary documents, papers and deeds by giving effect to the allotment in terms of the agreement but the same has not been done.

As per Clause 2, the concerned original deeds and papers of the respective shares has not been handed over to the respective parties. It is also the case of the defendant's, the plaintiff has not handed over the possession of the properties i.e. two godowns on the ground floor of the premises at Sri Hariram Goenka Street, Kolkata – 700 007 and one room on the second floor of the premises No. 2326/1, Tilak Bazar, Gulley Hinga Begh, Delhi - 110006 in terms of the Fourth Schedule to the defendant.

Section 42 of the Specific Relief Act, 1963 reads as follows:

> ***"42. Injunction to perform negative agreement.—*** *Notwithstanding anything contained in clause (e) of section 41, where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstances that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement:*
>
> *Provided that the plaintiff has not failed to perform the contract so far as it is binding on him."*

Mr. Bachawat has relied upon the judgment in the case of ***Enter Tech Entertainment Private Limited vs. Blueair India Pvt. Ltd.*** reported in ***2016 SCC OnLine Del 5507*** wherein the Delhi High Court held as follows:

> ***"22.*** *It is apparent from the plain language of the aforesaid section that it is only an enabling provision, which enables a court at its discretion to grant an injunction to enforce a negative covenant even in cases where an agreement cannot be specifically enforced; however, an injunction can*

> *only be granted where the petitioner has established a good prima facie case and the balance of convenience is also in his favour. Further, in terms of the proviso to section 42, the said section is applicable only when the plaintiff is not in breach. In the present case, it is difficult to accept that the petitioner was not in breach of the Agreement since admittedly, the petitioner had failed to pay for the goods supplied by the respondent. Plainly, payment for goods is an implicit obligation of a purchaser in a contract for sale and purchase of goods, which is the substratal subject of the Agreement. As indicated above, the petitioner has not been able to establish a prima facie case that the termination of the Agreement was wrongful."*

In the case of ***All India Tea and Trading Company Limited Vs. Loobah Company Limited*** reported in ***2021 SCC OnLine Cal 2917,*** the Coordinate Bench of this Court held that:

> ***"19.*** *Besides, relief at the interlocutory stage would require a petitioner to establish a prima-facie case and show that the balance of convenience is in its favour and that irretrievable injury would be caused to the petitioner if injunction is not granted. Moreover, since accounts are being filed by the respondent, the invasion is not such that compensation in money would not afford adequate relief to the petitioner."*

In the case of ***Gujarat Bottling Co. Ltd. and Others vs. Coca Cola Co. and Others*** reported in ***(1995) 5 SCC 545,*** the Hon'ble Supreme Court held that where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform

the negative agreement. This is the subject to proviso that the plaintiff has failed to perform the contract so far as it is binding on him. The Court is, however, not bound to grant an injunction in every case and an injunction to enforce a negative covenant would be refused if it would indirectly compel the employee either to idleness or to serve the employer.

25. It is the case of the defendant that the defendant is using the word "Sindharam Sanwarmal" because he is entitled to use such mark as he is also the party of family. It is the case of the defendant that the plaintiff is in collusion with other parties i.e. second and fifth party not only siting on a larger share of the coparcenary property but the plaintiff sought for only to enforce a portion of the purported family settlement agreement which is beneficial to the plaintiff.

26. The plaintiff has filed the suit for mandatory injunction, perpetual injunction and damages against the defendant. The plaintiff has filed the suit on the basis of the Family Agreement dated 13th January, 2017. In the Family Agreement, altogether particulars of 26 properties have been described. Five Scheduled properties have been mentioned by allocating the shares of each party. The plaintiff is in the present suit only concern with the Clause-3 of the Family Agreement. The plaintiff has neither prayed for specific performance of the Family Agreement nor has prayed for partition of the property. The plaintiff has also not made all the parties to the agreement as party in the suit.

27. The plaintiff has filed the suit for mandatory injunction against the defendant to perform the negative agreement in terms of Clause 3 of the Family Agreement dated 13th January, 2017. Clause 3 of the Agreement is in connection with three shop rooms either under the tradename "Sindharam Sanwarmal" or with some suffix which has been allotted to the first party, third party and fifth party and only the second party and the fourth party can start only one shop room each using tradename "Sindharam Sanwarmal" with some prefix or suffix. However, no business shall be started with these names within one kilometer of the existing shop room. It is the specific case of the plaintiff that the defendant has been using the shop room on the ground floor at the premises no. 43/44, Cotton Street, Kolkata – 700 007 in the name and style of "Sindharam Sanwarmal Mewawala" by violating the terms and conditions of Clause 3 of the Family Agreement.

28. The defendant has received the advantage of benefit of using the mark and the shop room which is the part of Agreement. The defendant has also made allegation that the plaintiff, Binod Kumar Agarwal, "second party" and Gopal Agarwal, "fifth party" have not complied with their obligation in terms of the Agreement. The defendant is using and adopted the mark since 2017 within the radius of one kilometer from the shop of the plaintiff. Before using the said name by the defendant, the name of the business of the defendant was "Shree Hanuman Stores", thus considering all the aspects, it is prima facie ground that the defendant is running his business in the premises under the name

and style of "Sindharam Sanwarmal Mewawala" in violation of Clause - 3 of the Family Agreement.

29. Section 2(1)(c)(vii) and (xvii) of the Commercial Courts Act, 2015 reads as follows.

> ***"2.(1)*** *In this Act, unless the context otherwise requires,-*
>
> ***(c)*** *"commercial dispute" means a dispute arising out of—*
>
> ***(vii)*** *agreements relating to immovable property used exclusively in trade or commerce;*
>
> ***(xvii)*** *intellectual property rights relating to registered and unregistered trademarks, copyright, patent, design, domain names, geographical indications and semiconductor integrated circuits."*

30. The defendant is running the business in the premises in question under the name and style of "Sindharam Sanwarmal Mewawala". The only question raised by the plaintiff that the defendant cannot run the business under the name and style of "Sindharam Sanwarmal Mewawala" in the said place in terms of Clause 3 of the Family Agreement. In the case of ***Ambalal Sarabhai Enterprises Limited vs. K.S. Infraspace LLP & Anr.*** reported in ***(2020) 15 SCC 585*** the Hon'ble Supreme Court held as follows:

> ***"37.*** *A dispute relating to immovable property per se may not be a commercial dispute. But it becomes a commercial dispute, if it falls under sub-clause (vii) of Section 2(1)(c) of the Act viz. "the agreements relating to immovable property used*

> *exclusively in trade or commerce". The words "used exclusively in trade or commerce" are to be interpreted purposefully. The word "used" denotes "actually used" and it cannot be either "ready for use" or "likely to be used" or "to be used". It should be "actually used". Such a wide interpretation would defeat the objects of the Act and the fast tracking procedure discussed above."*

31. In the present case also the defendant is using the trademark "Sindharam Sanwarmal Mewawala" and is exclusively using the said premises for the purpose of business, thus, the case is totally covered in Clause (vii) and (xvii) of Section 2(1)(c) of the Commercial Courts Act, 2015.

32. In view of the above, this Court finds that the suit filed by the plaintiff is not maintainable before this Court. Accordingly, the plaint is returned to the plaintiff with the liberty to file the same before the appropriate court.

33. **GA No. 1 of 2023** is **dismissed**. **GA No. 2 of 2023** is **allowed**. Consequently, **CS No. 126 of 2023** is **dismissed**.

(Krishna Rao, J.)