

**IN THE ADDITIONAL DISTRICT COURT-IV,
THIRUVANANTHAPURAM
PRESENT : SRI. SUDHAKANTH. R, ADDL. DISTRICT JUDGE – IV**

Saturday the 21st day of March, 2026/ 1st Chaitram, 1948

COMMERCIAL APPEAL No. 2/2025

Appellants / Defendants:-

- 1 Phykon Solutions Pvt. Ltd, L-11 Basement – 1 Floor,
Tejaswini Building, Technopark Campus, Karyavattom P.O,
Thiruvananthapuram – 695581,
represented by its Director Prabhu Chandra Mohan

- 2 Prabhu Chandra Mohan, Managing Director, Phykon Solutions
Private Limited, aged 40 years, S/o. S Chandramohan,
residing at T.C. 4/44(3), Samvardhini, Pangappara, Karyavattom,
Thiruvananthapuram – 695581

- 3 Prathish Vijay, Director, Phykon Solutions Private Limited,
aged 40 years, S/o. Kurup Vijaya Kumar, residing at Villa 6B2,
Njandoorkonam - Chenkottukonam Road, Chenkottukonam,
Thiruvananthapuram-695587 .

(By Adv .Dr. Viswambharan V.S, and Adv. Bibina Salu R.B)

Respondent/ Plaintiff :-

Mithun Gopal, aged 42 years, S/o Vijayakumar,
residing at S4, Paithrika Serenity, Karimanal P.O,
Thiruvananthapuram-695583 .

**(By Adv. Anoop Bhaskar, Adv. Ammu Manoharan and
Adv. Sathya Sreekumaran)**

This appeal having been finally heard on **26.02.2026** and the court on
the **21.03.2026** passed the following :-

This appeal is filed under order XLIII Rule 1 (R) of the Civil Procedure Code 1908 and section 13 of the commercial court Act- 2015 preferred by the defendants / respondents 1 to 3 against the order in IA-1/2024 in CS No. 78/2024 dated 23/06/2005 on the file of the 2nd Additional Commercial Court, Thiruvananthapuram .

J U D G M E N T

2. The averments in in IA No.1 /2024 can be summarised as follows:-

The petitioner is the plaintiff in the above case he is the registered joint proprietor of the registered trade mark 'PHYKON'. The respondents 1 and 2 are the other joint proprietors of the above trade mark . The 1st defendant is a private limited company engaged in the business of Information Technology related products and services . The petitioner and respondents 2 and 3 are the only equity share holders of the 1st respondent company namely M/s 'PHYKON' Solutions Private Limited . The 1st respondent company was originally incorporated in the name and style '**Compunet System Private Limited**' on 29/11/1995. On 01/12/2006 the petitioner along with respondents 2 and 3 were appointed as the directors of the 1st respondent company. Thereafter the company under went significant changes in its business policies and governance. During this period there were other directors in the Board .

The Board or Directors recognized the need for a change in the companies name. At that time the petitioner and respondents 2 and 3 in their individual capacity , offered to provide a trade name for the company to use it in its business operation. Consequently the trade mark 'PHYKON' was a developed by this 3 individuals . The 1st respondent company was granted permission by the petitioner / respondent 2 and 3 to use their mark 'PHYKON' for conducting its business. Then the company obtained a new certificate of incorporation on 06/02/2007 and the 1st respondent company started using the trade mark 'PHYKON' with our permission . This arrangement was specifically devised by us to ensure that without our collective permission, the company shall not be able to carryout the business under the name 'PHYKON'. The petitioner along with respondents 2 and 3 also decided not to charge the company separately for the use of our trade mark taking into account our commitment to the company's success. Accordingly the name of the company was changed to 'Phykon Solutions Private Limited' and obtained a fresh certificate of incorporation dated. 06/02/2007 and since then the company was carrying out its a trade using the trade mark 'PHYKON'. While so in the year 2016 the respondents 2 and 3 and the petitioner jointly decided to register the trade mark 'PHYKON' under Trade Marks

Act 1999. The application was submitted jointly by the petitioner and respondent 2 and 3 before the registrar of trade mark Chennai for the above purpose through the agent named M/s Puthran and Associates . The above said application was allowed and the trade mark 'PHYKON' was got registered in the joint name of petitioner and respondents 2 and 3 and the certificate in that regard was also issued. The petitioner served as the whole time director , co – promoter and the key managerial personnel of the company since 2006 and he was illegally removed from the directorship in the extra ordinary general meeting held on 17/07/2023. Pursuant to the same a conspiracy was hatched up by the respondents 2 and 3. There upon the respondents 2 and 3 issued shares of the company by grossly under valuing the shares in order to disrupt the equal share holding pattern. The petitioner instituted a suit as OS. 1932/2023 before the II Additional Munsiff Court, Thiruvananthapuram seeking for realization of damages and the declarative relief with respect to the rights issue and same is pending consideration. The petitioner is intending challenge the resolution for removing him from directorship before the National Company Law Tribunal. The attempt of the respondents 2 and 3 was to robe the petitioner and remove him from all positions and responsibilities in the administration of the company. It is in the above

scenario the joint proprietorship of the trade mark has been irrecoverably lost among the joint proprietors. The petitioner is deprived of the benefits, which used to receive from the company for serving as its director. The above benefits were also and indirect result of the business of the company generated using the goodwill of the trade mark 'PHYKON'. As the dispute between the parties escalated to dead lock, the petitioner issued a cease and desists notice to the respondents from using the trade mark 'PHYKON'. The 1st respondent company has issued a replay notice dated 18/08/2023 raising false claim and allegations. It is pertinent to note that the trade mark 'PHYKON' never formed part of the assets of the company. The petitioner along with respondents 2 and 3 decided jointly to develop the trade mark in order to create a business relation that could not be easily severed without collective consensus. Thus the trade mark 'PHYKON' was agreed to be used in relation to business of the 1st respondent company in which the petitioner and respondents 2 and 3 were connected to each other as its directors and share holders. When the petitioner is illegally removed from directorship, the business relationship among the parties for using the trademark permission is disrupted. The respondents 2 and 3 are not entitled to use the trade mark 'PHYKON'. They are continuously using

the same in the business of the company including in virtual platforms and domains. Therefore the petitioner is entitled to get a decree of permanent prohibitory injunction restraining the respondents from using the trade mark 'PHYKON' The cause of action for the petitioner arisen on 01/12/2006, the date on which the petitioner along with respondents 2 and 3 were inducted as the directors and on 06/02/2007 , when the company started company using the trade mark 'PHYKON' with the permission of the petitioner and respondents 2 and 3 and on 07/01/2016, the date on which the joint application for registration of the trade mark was submitted and the days subsequent there to in Attippara village and where the petitioner is permanently residing and also in Kazhakuttom village were the 1st respondent company is functioning and within the jurisdiction in the court.

3. The 2nd respondents filed a counter affidavit also for and on behalf of the respondents 1 and 3 stating the following contentions:-

2nd respondent is the managing director of the 1st respondent company . The 3rd respondent is also a director of the 1st respondent company . The petitioner is not maintainable either in law or on facts. The interim injunction application as well as the suit is instituted as an abuse of the process of law . The subject matter of the suit is not

properly valued and the court fee paid is insufficient . The relief 'B' is for a decree of declaration can not be considered as ancillary relief to 'A' for a decree of permanent prohibitory injunction. The petitioner has filed suit as well as the interim injunction application with a illicit motive to cause hindrance to the smooth functioning of the 1st respondent company and with a view to wreck personal vengeance against respondents 1 and 2. The 1st respondent is a private limited company originally incorporated as 'Compunet Systems Private Limited' incorporated under the companies Act on 29/11/1995. On 06/02/2007 pursuant to obtaining a fresh certificate of incorporation issued by the Registrar of Companies Kerala , the name of the 1st respondent company was changed to 'PHYKON' Solutions Private Limited. The 1st respondent company is engaged in the business of developing, supporting, consulting , value added reselling and marketing of computer soft ware including multi media software and hardware, System integration, user training, Net working and data communication etc. The present Board of Directors of the 1st respondent company consist of respondents 2 and 3, who are the major share holders of the 1st respondent company. The petitioner is holding to 25% sharers . The petitioner was removed as a director of the 1st respondent company as per the resolutions of the extra ordinary general meeting held

on 17/07/2023 . The petitioner was removed from the Directorship as he had acted detrimental to the interest of 1st respondent company. The 1st respondent is continuing as a share holder of 24.56 % sharers .

4. The name of the 1st respondent company was changed as 'PHYKON' Solutions Private Limited in year 2007 and it is an admitted fact that the 1st respondent has been continuously and uninterruptedly conducting its business under the name and style Phykon Solutions Private Limited in year 2007 and continue to do so till this day. It was in the year 2016 the Board of Directors of the 1st respondent company consisting of the petitioner and respondents Nos. 2 and 3 felt that it was necessary to protect the companies trade name and trade mark 'PHYKON' and filed application registry at Chennai. It is for protecting the companies trad mark 'PHYKON' . The application was filed in the joint name petitioner and respondents 2 and 3 in the year 2016 and trade name was registered in the year 2019. It is submitted that trade mark 'PHYKON' was registered to protect the 1st respondent exclusive usage of the same . The petitioner and respondent 2 and 3 were merely acting in their fiduciary capacity as directors of the 1st respondent company and they did not get any individual right or proprietorship over the trade mark 'PHYKON' . The right of exclusive use of the trade mark 'PHYKON' is

vested with the 1st respondent company. The cost for submitting application for trade mark registration was paid out of the account of the 1st respondent company. The payment are reflected in the audited balance sheet for the financial year 2016-2017 and 2017-2018, the above balance sheet have been signed and authenticated by the petitioner himself then in his capacity as the director of the company. The 1st respondent company was and has been continuously using the trade mark 'PHYKON' since the year 2007 , the 1st respondent has exclusive right over the trade mark 'PHYKON' and the said right is protected under section 34 of the Trade Mark Act 1999 . It is not correct to say that the petitioner along with respondents 2 and 3 offered the trade mark 'PHYKON' for the 1st respondent company in there individual capacity. It is also not correct to say that the permission was granted to the 1st respondent company to use the trade mark 'PHYKON' for conducting the business with the joint permission granted by the petitioner and respondents 2 and 3. It is has been categorically admitted by the petitioner that 1st respondent company was and has been using the trade mark 'PHYKON' since the year 2007. it is clarified that there was no arrangement or agreement between the petitioner and respondents 2 and 3 to permit the 1st respondent company to use the trade mark 'PHYKON'

as alleged. It is not correct say that the petitioner was illegally removed from the directorship. The petitioner was acting as a director and chief technical officer of the 1st respondent company. The petitioner was entrusted with the task of taking care of IT department and holding the passwords of the company's domain , email server and other important IT Credential, while so the petitioner raised some unreasonable demands and acted detrimental to the interest of the company and its share holders. As the unreasonable demands were resisted by the other directors of the company, he was not inclined to co operated with the company and share the passwords and other relevant information in his knowledge and custody . It is for the above reason several operations and project of the company were Jeopardized and the shareholders were compelled to take corrective measures. The petitioner also withheld the companies passwords of 'phykon.com' and used to engage in contacting the clients against the company policy. Petitioner held company gmail account of both respondents, which was only medium of business communication and black mailed the respondents. As a result of the illegal act committed by the petitioner, the 1st respondent company suffered huge loss, shortage of funds affecting progress of the company and its employee. Thereafter the company receive a special notice from

the shareholders of the company u/s 115 of the companies Act- 2013 to convene an extra ordinary general meeting u/s 10 of the Act to consider the removal of the petitioner from the board of the company u/s 169 of the Act. On 17/07/2023 in the extra ordinary general meeting the members of the company passed a resolution to remove the petitioner from his directorship of the company. It is not correct to say that the respondent 2 and 3 had hatched up a conspiracy to rob all the positions and responsibilities of the petitioner related to the company is false and denied. It is not correct to say that the trade mark 'PHYKON' is not forming part of the asset of the 1st respondent company. The trade mark 'PHYKON' being an intangible asset and its value is not quantified, it was not reflected in the assets of the company in the balance sheet. The 1st respondent company is continuously using the trade mark 'PHYKON' since 2007. It can be seen in the financial statement for the financial year 2016- 2017 and financial 2017-2018 that payment for the registration of the trade mark 'PHYKON' and it was paid out of the account of the 1st respondent company. Thus it is clear that though the trade mark 'PHYKON' has been registered in the name of the petitioner and respondents 2 and 3, it was for the use of the 1st respondent company and there were acting only fiduciary capacity and the directors of 1st

respondent. It is settled law that the a director of company is bound in a fiduciary capacity to protect the interest of the company and pecuniary advantage if any gained in that capacity, it shall be for the benefit of the company. Therefore the petitioner has not got any individual right or proprietary right over the trade mark 'PHYKON'. The petitioner is having no case that he along with respondents 2 and 3 were conducting any other business jointly other than the 1st respondents company and the trade mark 'PHYKON' and it was registered to be used for such a business. The exclusive right to use the trade mark 'PHYKON' is vested with the 1st respondent company. There is no prima facie case infavour of the petitioner. The attempt of the petitioner is to some how obtain an order of injunction so as to stall functioning of the 1st respondent company. The petitioner is not entitled to get a decree of declaration and sought for in the plaint. As the 1st respondent is using the trade mark 'PHYKON' since the year 2007, the 1st respondent is having the exclusive right to use the trade mark 'PHYKON' and such a right is protection under section 34 of the Trade Mark Act 1999. The balance of the convenience only in favour of the respondents . Therefore the petition is to be dismissed.

5. The trial court upon hearing both parties on the merits of the application and marking the documents produced by the petitioner as Ext. A1 to A12 and the documents produced by the respondent as Ext. B1 to B4 for reference, allowed the interim application as per order date 23/06/2025 and the respondents were restrained by an interim injunction from using the trade mark 'PHYKON' .

6. The appellants urged the following grounds in the appeal memorandum:-

The trial court has not applied in the mind to the facts and circumstances arising the case while passing the impugned order . The trial court failed to consider the relevant fact as to whether there is prima facie case to grant and order of interim injunction . The 1st respondent company was and has been continuously using the trademark 'PHYKON' since 06/02/2007, which can be seen from Ext. A1 certificate of incorporation dated 06/02/2007. The respondents have specifically contended that the trade mark 'PHYKON' was registered only in the year 2019 to protect the 1st respondents exclusive usage of the same and petitioner / respondents 2 and 3 are acting only in fiduciary capacity. The respondents have categorically denied the joint proprietorship of the trade mark 'PHYKON'. The trial court completely ignored the fact that the

passing of an order of injunction will be prejudice and obligate the case of respondents without the suit is being decided on the merits of the case .

The trial court failed to appreciate that the 1st respondent company is continuously using the trade mark 'PHYKON' since the year 2007 and as such the balance of convenience is in favour of the respondents . The trial court failed to consider that if the interim injunction is granted the functioning of the 1st respondent company will be interrupted and stands still. The trial court failed to consider that in the absence of an injunction, damaged if any caused to the petitioner is quantifiable in monetary terms and such a loss can be adequate compensated by an award of damages if the plaintiff ultimately succeeds in the suit. There is no averment in the application or in the plaint to find that any irreparably will caused to the petitioner in the event of not granting an order of injunction. In the absence of any prima facie case and the balance of convenience is infavour of respondent, the trial court passed an order interim injunction and same is liable to be set aside. It was not necessary for the trial court for conduct a mini trial for entering a decision in the application for interim injunction . The trail court, while passing the order arrived at a conclusion that regarding co- owner ship right of the trade mark 'PHYKON' without appreciating the specific contention raised by the respondents. The trail

court erroneously arrived at a conclusion that in the matter of co-ownership right of a registered trademark , the owner is the holder of the registration certificate . The respondents have contended that the statutory fees and attorney fees for filing the trade mark application was paid out of the fund of the 1st respondent company and said payment are reflected in the audital balance sheet for the financial years 2016-2017 and 2017- 2018 which were marked for reference as Ext. B1 and B2 and the said statement were authenticated by the petitioner himself in his capacity as the director of the company. The trial court failed to appreciate the fact that the 1st respondent is the prior user of the trade mark 'PHYKON' and he was using the same since the year 2007 and its right to used the above trade mark is a protected u/s 34 of the trade mark Act. The trial court incorrectly arrived at a conclusion that the protection under section 34 would be applicable only in an action alleging " passing off ". The trial court without any legal Basis arrived at a conclusion that the claim of prior use is contradictory and self destructive . Even if it is assumed that the trial court has correctly rendered a finding that ' the owners of the trade mark 'PHYKON' are the plaintiff and respondents 2 and 3' neither the petitioner nor respondents 2 and 3 have any right to prevent the 1st respondent company for using the trademark. The relief of

declaration can not be considered an ancillary relief to a decree of permanent prohibitory injunction. If the interim injunction is continued the business of the 1st respondent company would come to stand still. There are 120 employees are working in the 1st respondent company. Even if it is assumed that the petitioner and respondents 2 and 3 are the joint proprietors or co owners of the trade mark 'PHYKON' , the trial court ought not have granted the interim injunction against a co- owner. The trial court failed to consider the audited balance sheet which were marked as Ext. B1 and B2. The trial court ought to have found that there is no prima facie case that infavour of the petitioner and the balance of convenience is only infavour of the respondents. Therefore the appeal may be allowed and the order of interim injunction may be set aside .

7. The parties in the above appeal are refereed hereunder in their same status before the trial court for convenience of discussion.

8. On the basis of the grounds urged in the appeal memorandum, the points that arise for consideration are.

- (1) Whether the plaintiff is entitled to an order of interim injunction restraining the defendants from using the trademark 'PHYKON'?
- (2) Is there any ground sufficient to set aside or modify the order of interim injunction granted by the trial court?

(3) Reliefs and costs?

9. **Points Nos 1 and 2:-** These points can be considered to sake of convenience and the brevity of discussion . The plaintiff is the equity share holder of the 1st defendant company, admittedly once he was the director of the 1st defendant company. The plaintiff claimed to be the co- proprietary owner of the registered trademark 'PHYKON' . It is an admitted fact that the 1st defendant company was originally incorporated in the name and style M/s Compunet system private limited on 29/09/1995. Then the plaintiff and the defendants 2 and 3 were the directors of the company . The case of a plaintiff is that after the incorporation, the plaintiff along with defendants 2 and 3 developed the trademark 'PHYKON' for the company and they gave permission to the company to use the trademark 'PHYKON'. In the year 2016 the name of the company was changed to 'phykon solutions private limited' . The company is conducting business of Software related products . The plaintiff was acting as the full time director and managing entire affairs of the company. While so he was removed from the directorship by a resolution passed in the extra ordinary general meeting held on 17/07/2023. The claim of the plaintiff is that the trademark 'PHYKON' has been registered under the Trademark Act 1999 on the basis of joint

applications submitted by the plaintiff and defendants 2 and 3 . It is claimed by the plaintiff that by virtue of provisions u/s 28 (2) of the Trademark Act 1999, the defendants cannot use the trademark 'PHYKON' for the 1st defendant company without his consent and he has withdrawn his permission to use the trademark 'PHYKON' by the 1st defendant company by issuing legal notice. The service of notice has been admitted by the defendants . Therefore it is claimed by the plaintiff that the right use of the trademark 'PHYKON' by the 1st defendant is withdrawn by the plaintiff in his capacity as the co-proprietor of the trademark and the 1st defendant company cannot use the trademark 'PHYKON' in the absence of his permission and user of the trademark is against his interest and his proprietary right over the trademark 'PHYKON' . It is based on the above fact , the plaintiff has sought for an order of interim injunction restraining the defendants for using the trademark 'PHYKON' for the 1st defendant company.

10. On the other hand it is contented by the defendants that 1st defendant company is using the trademark 'PHYKON' since 2007 , though the trademark was registered in the year 2019 in the joint name of plaintiff and defendants 2 and 3. The case of the defendants is that though the trademark has been registered in the name of plaintiff and

defendants 2 and 3, then they were acting as the directors of 1st defendant company and they were acting in the fiduciary capacity and the expenses for the the registration of trademark was met out of the account of the company and the trademark was intended for the use of the 1st defendant company. It is by contending by the reason stated above the defendants have claimed that though the certificate of registration of trademark is in the joint name of the plaintiff and defendants 2 and 3, they jointly applied for the trademark while acting as directors of the 1st defendant company, hence the plaintiff cannot claim joint co-proprietorship over the trademark 'PHYKON'. The next contention put forwarded by the defendant is that the 1st defendant company is incorporated by registration under the Companies Act , it is juristic person having separate legal entity than its share holders and company was using the trademark 'PHYKON' since 2007 and trademark was and has been used continuously by the 1st defendant company , the 1st defendant has a vested right to use the trademark 'PHYKON' as a prior user by virtue of section 34 of the Trademark Act 1999.

11. The trial court has observed that the claim of the defendants that the trademark 'PHYKON' is owned by the 1st defendant company and the claim of vested right of the prior user u/s 34 of Trademark Act

1995 is destructive to each other and there no issue is involved in the suit as to the vested right because of the prior user, the contention regarding the vested right as put forwarded by the defendant is irrelevant.

12. It is an admitted fact that the trademark 'PHYKON' is registered under the provisions of Trademark Act 1999 in the joint name of plaintiff and defendants 2 and 3 . It is contended by the defendants that though the trademark has been registered in the joint name of plaintiff and defendants 2 and 3 , they applied for registration of trademark while they were in fiduciary capacity as the directors of 1st defendant company and the expenses for registration was paid out of the fund of the company and that fact can be realized from Ext. B1 and B2 audited balance sheet of the company , which is signed by the plaintiff himself as in his capacity as the director of the company and for the above reason the plaintiff is estopped from denying the proprietorship of the trademark 'PHYKON' of the 1st defendant company.

Section 24 of the Trademark Act deals with the subject jointly owned trademarks . Section 24 reads as follows:-

*24. **Jontly owned trade marks** -----(1) Save as provided in sub - section (2) , nothing in this Act shall authorise the registration of two or more persons who use a trade mark independently , or propse so to use it, as joint proprietors thereof.*

(2) Where the relations between two or more persons interested in a trademark are such that no one of them is entitled as between himself and the other or others of them to use it except-

- (a) on behalf of both or all of them; or*
- (b) in relation to an article or service with which both or all of them are connected in the course of trade, those persons may be registered as joint proprietors of the trade mark , and this Act shall have effect in relation to any rights to the use of the trade mark , and this Act shall have effect in relation to any rights to the use of the trade mark vested in this person if those rights had been vested in a single person.*

13. The Section 24 (2) thus makes it clear that two or more persons can submit application for registration of trademark jointly and the relationship between the persons interested in trademark is such that no one of them alone is entitled to use the trade mark to the exclusion of others except on behalf of all of them or in relation to an article or service with which all of them are connected in the course of trade . The trademark is an intellectual property and its registration itself is a declaration as to the ownership of the trademark. It has been contended by the defendants that the company had spent money for meeting the expenses for registration. Ext. B1 and B2 balance sheets would show that the company had spent Rs. 45, 500/- as an advance for trademark and it is shown under the head short term loans and advances. The

learned counsel for the defendants urged that since the joint application was submitted by the plaintiffs and defendants 2 and 3 while they were acting as directors of the company in in fiduciary capacity and the amount for registering the trademark has been spent by the company , the 1st defendant company is entitled to get the benefit of section 88 of the Indian Trust Act 1882 .

Section 88 of the Indian Trust Act 1882 reads as follows:

88. Advantage gained by fiduciary.—*Where a trustee, executor, partner, agent, director of company, legal advisor, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained.*

Illustrations

- (a) A, an executor, buys at an undervalue from B, a legatee, his claim under the will. B is ignorant of the value of the bequest. A must hold for the benefit of B the difference between the price and value.
- (b) A, a trustee, uses the trust-property for the purpose of his own business. A holds for the benefit of his beneficiary the profits arising from such user.

- (c) *A, a trustee, retires from his trust in consideration of his successor paying him a sum of money. A holds such money for the benefit of his beneficiary.*
- (d) *A, a partner, buys land in his own name with funds belonging to the partnership. A holds such land for the benefit of the partnership.*
- (e) *A, a partner, employed on behalf of himself and his co-partners is negotiating the terms of a lease, clandestinely stipulates with the lessor for payment to himself of a lakh of rupees. A holds the lakh for the benefit of the partnership.*
- (f) *A and B are partners. A dies. B, instead of winding up the affairs of the partnership, retains all the assets in the business. B must account to A's legal representative for the profits arising from A's share of the capital.*
- (g) *A, an agent employed to obtain a lease for B, obtains the lease for himself. A holds the lease for the benefit of B.*
- (h) *A, a guardian, buys up for himself incumbrances on his ward B's estate at an undervalue. A holds for the benefit of B the incumbrances so bought, and can only charge him with what he has actually paid.*

14. The learned counsel relied on illustration (d) of the above provision and submitted that even if the trademark is a registered in the joint name of plaintiff and defendants 2 and 3 while they were acting in fiduciary capacity, the company is entitled to get the advantage gained by using such fiduciary capacity. In the present case the joint application for

registration of trademark was filed while the plaintiff and defendant 2 and 3 were acting as the 'directors of phykon solutions private limited' . They were having knowledge of the fact that the term phykon is being used by the 1st defendant company at the time of submitting the application. The trade mark 'PHYKON' was a registered in year 2019 and the plaintiff is having no case that the above said trademark is used by the joint proprietors of trademark in their capacity for conducting any business or promoting any trade other than the business of the 1st defendant company. If they have an intention to have the benefit of registered trademark only for the 1st defendant company, they should have submitted the application in the name of the 1st defendant company and in their capacity as the directors of the company, as the company is having a separate legal entity. The defendants have not offered and explanation other than as contended above for not applying the trademark be registered in the name of the company. It can be seen from Ext. B1 and B2 balance sheet that the trademark has not been shown as the intellectual property owned and as the asset of the 1st defendant company. Therefore in the absence of cogent evidence to prove that the plaintiff and defendants 2 and 3 while acting as the directors of the 1st defendant company have acted against the interest of the 1st defendant

company and gained an advantage by way of getting the trademark be registered in their joint name using the fund of the company , the provisions u/s 88 of the Trust Act 1882 cannot said to be applicable to the present case. The certificate of registration of trademark is a declaration of its ownership and merely because the amount was advanced by the 1st defendant company for trademark itself shall not make any ownership for the 1st defendant company over the trademark 'PHYKON' . Therefore the owners of the trademark 'PHYKON' are the plaintiffs and defendant 2 and 3 by virtue of section 24 of the Trademark Act 1999.

15. It has been claimed by the defendants that the trademark 'PHYKON' is being used by the 1st defendant company since 2007 and the trademark was got registered in the joint name of plaintiffs and defendants 2 and 3 in the year 2019 , its rights to use the trademark is being protected u/s 34 of the Trade mark Act 1999. The trial court considered the fact that the 1st defendant company is the prior user of trade mark and trade name 'PHYKON' . The trial court in para 23 of the order as observed that *“ A person or entity cannot be a registered owner and prior user at the same time. The defense of prior use has protected under 34 of Trade Mark act 1995 has relevance only in action alleging of*

passing off no such issue is involved in this suit hence said the contention of the defendants is not sustainable.” . Issues in Civil case arise when a material proposition of fact or law is affirmed by one party and denied by the other. The court has to frame issues based on the rival pleading of the parties. It is not permissible in the matter of framing issues for the court to conduct a mini trial and arrive at a conclusion that any of the pleading in the plaint or the contention in the written statement is maintainable or not maintainable. The court is bound to frame issues based on the basis of the pleading of either parties. It is for the plaintiff or the defendant to opt at the time of trial to adduce evidence as to which fact alleged by them to be proved, if various allegations in the pleading or written statement is taken which are destructive to each other . Therefore the observation in the order of the trial court as stated above is not legally sustainable.

16. It has been admitted by the plaintiff himself that the 1st defendant company is using the trade mark ‘PHYKON’ since 2007. According to the defendants more than 120 employees are working in the 1st defendant company and it has got much reputation in its business field and among its customers. In the decision in **KRISHNA**

BHATTACHARJEE v. SARATHI CHOUDHURY and Another reported in (2016) 2 Supreme Court cases it has been held

Para 30.1. From the reading of Section 27(2) of the Act, it is clear that the right of action of any person for passing off the goods/ services of another person and remedies thereof are not affected by the provisions of the Act. Thus, the rights in passing off are emanating from the common law and not from the provisions of the Act and they are independent from the rights conferred by the Act. This is evident from the reading of the opening words of Section 27(2) which are “ Nothing in this Act shall be deemed to affect right....”

30.2. *Likewise, the registration of the mark shall give exclusive rights to the use of the trade mark subject to the other provisions of this Act. Thus, the rights granted by the registration in the form of exclusivity are not absolute but are subject to the provisions of the Act.*

30.3 . *Section 28(3) of the Act provides that the rights of two registered proprietors of identical or nearly resembling trade marks shall not be enforced against each other. However, they shall be same against the third parties. Section 28(3) merely provides that there shall be no rights of one registered proprietor vis -a vis another but only for the purpose of registration. The said provision 28 (3) nowhere comments about the rights of passing off which shall remain unaffected due to overriding effect of Section 27(2) of the Act and thus the rights emanating from the common law shall remain undisturbed by the enactment of Section 28(3) which clearly states that the rights of one registered proprietor shall not be enforced against the another person.*

17. Admittedly the 1st defendant company is a prior user of a trade mark 'PHYKON'. In the light of above said decision the plaintiff being a joint proprietor of the trade mark cannot enforce his right against the 1st defendant company by way of a prohibitory injunction. It is pertinent to not that the plaintiff along with defendants 2 and 3 jointly applied for registration trad mark 'PHYKON' while they were acting as the directors of the 1st defendant company and they were having knowledge of the fact that the 1st defendant company is using the trade mark 'PHYKON' since 2007. The 1st defendant company is earning profit by conducting Computer Software related products and as many employees are working in the company and it has got reputation in its business field. If an interim injunction is granted as prayed in the application , it can be reasonably inferred that it would cause hindrance and affect the functioning of the company as well. Considering the forgoing discussion it is to find at this stage that the plaintiff is having no prima facie case and the balance of convenience is infavour of the defendants. Therefore the order of interim injunction passed by the trial court IA.1/2025 in CA. 2/2025 is to be set aside. These points are answered in favour of the defendants/ appellants.

18. **Point No. 3:-** While answering points Nos. 1 and 2 it has been found that the plaintiff has failed to make out a prima facie case and the balance of convenience is infavour of the defendant and the interim injunction granted by the trial court IA.1/2025 in CA. 2/2025 is to be set aside. Therefore the appeal to be allowed.

In the result, The appeal is allowed and the order passed by the trial court in IA.1/2025 in CA. 2/2025 is hereby set aside . Considering the circumstances of the case there is no order as to costs.

(Dictated to Confdl. Asst., transcribed and typed by him, corrected and pronounced by me in the open court on this the 21st day of March, 2026) .

Sd/-

SUDHAKANTH. R
Addl. District Judge-IV

APPENDIX: Nil

Id/-

Addl. District Judge-IV

//True Copy//

By Order

Sd/-
SHERISTADAR

Copy of Judgment in
Commercial Appeal 2/2025
Dated: 21.03.2026