

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

DECIDED ON: 12.04.2010

+ CS (OS) 2678/2008
I.A. Nos.15765/2008, 14015&15644/2009

M/S LIVING MEDIA INDIA LTD. & ANR Plaintiffs
Through: Mr. Praveen Anand, Advocate.

versus

ASAD PATEL & ORS Defendants
Through: Mr. Mohd. Shahid, Advocate.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to Reporter or not? | YES |
| 3. | Whether the judgment should be reported in the Digest? | YES |

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

% The plaintiff companies have filed the present suit for permanent injunction seeking to restrain the defendants, their proprietors, partners, principal officers, servants and agents, dealers, distributors and representatives from advertising, directly or indirectly using in respect of news channel or in any manner, the mark Khabrein AAJ TAK or any other mark identical and/or deceptively similar to the plaintiffs' AAJ TAK mark. The plaintiffs also claim delivery-up and damages.

2. The first plaintiff is engaged in the business of news dissemination since 1987. The plaintiff avers to production of a successful news program NEWS TRACK and also its other reputed publications, such as INDIA TODAY, BUSINESS TODAY, COMPUTER TODAY and audio cassettes under the mark, MUSIC TODAY. The second plaintiff runs a dedicated 24 hour Hindi news channel under the trade mark AAJ TAK. It is stated that the first plaintiff was involved in the news broadcasting business since 1994 through its TV TODAY division;

later, after incorporation of the second plaintiff on 28.12.1999, the news broadcasting business was transferred to it by an agreement dated 20.04.2000.

3. The trademark AAJ TAK, it is stated, was first used in 1995 by the first plaintiff when it produced a 20 minute news bulletin, which was aired on the Metro channel of Doordarshan, and has been consistently used ever since for several other news programs, namely SAPTHAHIK AAJ TAK, BUSINESS AAJ TAK, SUBA AAJ TAK and DILLI AAJ TAK, and thereafter in for of a 24 hour news channel under the trademark AAJ TAK.

4. The plaintiffs claim that their mark AAJ TAK has acquired a high degree of distinctiveness due to long and continuous use and further that they have spent extensively on publicizing the mark across a wide geographical area, and consequently the mark is well recognised by the members of the public and trade as associated with the plaintiffs.

5. The plaintiffs claim to have become aware in May, 2007 of the defendants using Khabrein AAJ TAK for their cable news program. A criminal complaint under section 417 and 467 of the IPC was immediately filed against the unauthorized and illegal use of the plaintiffs' registered trademark. It is alleged that the defendants have not only copied the plaintiffs' registered mark AAJ TAK and have been using it for an identical service, being that of news broadcasting, but has also copied the distinctive logo and writing style. The first defendant is allegedly the principal officer and the third defendant is the proprietor of the second defendant.

6. The plaintiffs allege that the defendants have clearly adopted the impugned mark along with the distinctive script and presentation identical to that of the plaintiffs with mala fide intentions with a view to trade upon the plaintiff's goodwill and reputation and derive unfair benefits. This, allege the plaintiffs, amounts to infringement of their registered trademark and copyright in the logo. The said act also amounts to passing off as the defendants have falsely created an association with the plaintiffs and attempted to pass off their services as those coming from the plaintiffs and/or authorized by the plaintiffs. Apart from the above, the plaintiffs also assert that wrongful adoption and use of the impugned mark could result in dilution of their registered trademark by reducing its capacity to identify and distinguish the services provided by the plaintiffs.

7. The order sheets reveal that the defendants' right to file a written statement was closed on 03.12.2009, when the Court observed that:

"The record shows that despite several opportunities, the defendants have not filed written statement. The summons in the suit were issued on 19.12.2008, and also ex parte injunction was granted.

In the circumstances, defendants' right to file written statement stands forfeited."

Order VIII Rule 10 of the CPC prescribes the procedure when a party fails to present a written statement, it reads as under:

"Where any party from whom a written statement is required under rule 1 or rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up."

This Court, is thus empowered by the above provision to proceed to pronounce its judgement in the matter.

8. Though the defendants have not filed a written statement in the matter, yet they have filed an application under order XXXIX Rule 4 for vacation of the *ex-parte* injunction issued against them. The defendants state that the title Khabrein AAJ TAK is registered with the Indian Motion Picture Producers' Association since 17.06.2002 and has been renewed from time to time and subsists till date, the said certificate is annexed with the application and the receipt of renewal of registration is also annexed. The defendants also submit their use of AAJ TAK is not similar or identical to that of the plaintiff, as they have prefixed "Khabrein" to AAJ TAK. Apart from stating these, the defendants do not say anything more. They have not denied any documents supplied by the plaintiffs and not even presented a written statement.

9. The plaintiffs have filed printout of the news clip dated 21.10.2008 evidencing the use of the impugned mark by the defendants along with a compact disc of the said news clip. In the printout and the video footage of the news clip, it is seen that the microphone used for interviewing has the words "Khabrein AAJ TAK" printed in Hindi; Khabrein is written in small font in a diagonal pattern on the top left corner of the microphone and AAJ TAK is written in a larger font, forming a prominent part of the logo. The style of AAJ TAK is identical to that of the plaintiffs, the only difference being that on plaintiffs' microphone AAJ

TAK is written diagonally from lower left to top right, whereas on defendants' "AAJ TAK" is written in a straight pattern and "Khabrein" written diagonally. The plaintiffs have also supplied a photocopy of the first defendant's business card, which the impugned logo Khabrein AAJ TAK appears prominently. Further, a copy of the trademark registration certificate is also supplied by the plaintiffs, in support of their registered trademark AAJ TAK in the unique stylized manner under class 9 under no. 680926 as of the date 20.09.1995.

10. The plaintiffs place reliance on a previous order of this Court made in a case instituted by the same plaintiffs against the defendants therein, titled *M/s Living Media India Ltd. V. Jitendra V. Jain and Anr.*, 98 (2002) DLT 430 (IAs 10383 and 12189/1999 in Suit No. 2282/1999, dated 21.05.2002). The issue in that case was identical with the case at hand, as even in that case the defendants were using Khabrein as prefix to AAJ TAK. The Court held as under:

"26. The mark is always used for the purpose of indicating either a connection in the course of trade between the goods and it is the prior user which provides the right of protection. Thus even if the adjective "Khabrein" is pre-fixed it does not make the trade mark "Khabrein Aaj Tak" distinct or different from the mark "AAJ TAK".

27. The word "AAJ TAK" itself is so distinctive that it has acquired such a meaning that any pre-fix or suffix would be of no relevance so far as the action of passing off is concerned. The only object and design of the defendant to adopt the word "AAJ TAK" was to trade and encash upon the goodwill of the plaintiff earned over the years through the advertisements and because of its extensive popularity. The mark "AAJ TAK" has become synonymous with the plaintiff so far as the news channel is concerned.

28. The word "AAJ" and "TAK" may be individually descriptive and dictionary word and may not be monopolised by any person but their combination does provide a protection as a trademark if it has been in long, prior and continuous user in relation to particular goods manufactured, sold by a particular person and by virtue of such user the mark gets identified with that person. It is so irrespective of the fact whether such a combination is descriptive in nature and has even a dictionary meaning. In such a case any other person may choose any of the two words viz. either "AAJ" or "TAK" as its trade name or mark but it has to be prohibited from using the combination of these words as such a user not only creates confusion as to its source or origin but also bares the design or motive of its subsequent adopter.

29. Any kind of prefix or suffix would not make any difference so far as the trade name or for that purpose the domain name "AAJ TAK" is concerned. It is immaterial whether the defendant has no clientele or publication in Delhi. Channel "AAJ TAK" is a National Channel. It has widespread reputation and goodwill. Adoption of similar or deceptively similar mark amounts to passing off even if it has no local physical market, goodwill or reputation of a product or person is all pervasive. It is not

confined in the four walls or to a particular territory. It has to be protected wherever it is threatened or is sought to be eroded or exploited. Merely because the product or mark adopted by a rival has no circulation or sale in the territory of the plaintiff's mark or product is no defense against protection of the mark. Protection of mark is in actuality protection of reputation and goodwill. At every cost the reputation has to be protected and preserved."

11. The plaintiffs have clearly established that they hold a valid trademark registration for the mark AAJ TAK. In absence of the defendants' written statement the plaint averments remain uncontroverted. The defendants have stated in their Order XXXIX Rule 4 application that their mark Khabrein AAJ TAK is registered with the Indian Motion Picture Producers' Association since June, 2002. Such registration only secures the right to use the title for the purpose for which it is registered, to the exclusion of other producers. Grant of registration by a private body of producers, in no manner, overrides or derogates the statutory rights of a person conferred under the Trade Marks Act, 1999 or the Copyright Act, 1957. In any case, the registration secured by the defendants is much later (since 17.06.2002), as against the plaintiffs', who secured registration under the Trademarks Act on 20.09.1995. The only valid defence in a suit such as the present one can be prior user of the impugned mark – which plea has not been taken.

12. It is also seen that the manner in which the defendants have used AAJ TAK prefixed with "Khabrein", is almost identical to that of the plaintiffs. Also, the defendants are engaged in the same business of news broadcasting. The words AAJ TAK form a prominent part of the defendants' logo, Khabrein is printed in a very small font in comparison to the font used for printing AAJ TAK, so much so that the word Khabrein can easily go unnoticed. The defendants do not claim being unaware the plaintiffs being engaged in the same business much prior to them. Had they even claimed so, their contention should fail in view of the plaintiffs' widespread popularity and reach. It is clear that the defendants' have adopted the impugned mark, with mala fide intentions to gain undue benefits and trade on the plaintiffs well established and hard earned reputation. The act of passing off also stands established against the defendants.

13. No doubt that the order in *Jitendra V. Jain* (supra) is an interim one, yet one cannot lose sight of the fact that the controversy was identical in nature and the discussion on the issue was detailed. The principles of law stated therein, in the considered opinion of this Court, are sound and the Court finds no reason to digress from the view upheld in that order.

14. On the question of damages it is settled that the assessment of damages has to be based on cogent evidence furnished for the purpose. The plaintiff has not provided any record of the business procured by the defendants as being detrimental to the business of the plaintiff nor has it annexed a statement of loss of profits suffered by it on account of business diversion due to the defendants using the mark. All that is stated by the plaintiff is that the defendants may have earned undue and undeserved profits on account of use of impugned mark and script to which they are not entitled and which they are liable to pay to the plaintiffs and that as it has no access to the accounts of the defendants, it is unable to assess the profits made by them. In *Infosys Technologies Ltd. v. Park Infosys and Ors.*, 2007 (34) 178 (DEL), the Court, after noticing the observations in *Microsoft Corporation v. Yogesh Popat and Anr.*, 118 (2005) DLT 580, *The Heels v. V.K. Abrol and Anr.*, CS (OS) No. 1385/2005, *Hindustan Pencils Ltd. v. Aparna Enamel Industries*, 131 (2006) DLT 65 and *Hero Honda Motors Ltd. v. Shree Assuramji Scooters*, 125 (2005) DLT 504 and discussing the reasoning in detail and distinguishing the facts and law cited in those cases from the case for consideration, held as under:

“42. Upon a consideration of the plaint and the affidavit by way of the evidence filed before this court, I find that the plaintiff has failed to prove either the profits derived by the defendant from its illegal activities or such sales record to establish the loss which has resulted to the plaintiff by establishing a decline in the value of its business or a fall in the percentage increase in the business as compared to preceding years. The only material which has been placed by the plaintiff on record is the value of its international sales over different years. Bald figures without even an assertion of loss or diminution in business and without any submission in this behalf do not establish the essential features noticed above which would have entitled the plaintiff to damages. Therefore, while holding that the defendants cannot be permitted to continue with its illegal activities, however, I find that no award of damages can be made in favor of the plaintiff.”

The Court is entirely in agreement with the above observations; the plaintiff, therefore, cannot claim anything more than costs of these proceedings.

15. In view of the above, the plaintiffs' are held entitled to a decree of permanent injunction in terms of paragraphs 23 (a), (b), (c) and (d) along with costs at Rs. 1,00,000/- (Rs. One lakh). The suit is decreed in such terms. All pending applications are also disposed of.

APRIL 12, 2010

**S. RAVINDRA BHAT
(JUDGE)**