

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

RESERVED ON : 3rd DECEMBER, 2014

DECIDED ON : 18th DECEMBER, 2014

+ CS (OS) 1097/2009

SUSHMA BERLIA & ORS.

..... Plaintiffs

**Through : Mr.Amarjit Singh, Advocate with
Ms.Vernika Tomar, Advocate.**

VERSUS

KAMAL KUMAR & ORS.

..... Defendants

Through : None.

**CORAM:
HON'BLE MR. JUSTICE S.P.GARG**

S.P.GARG, J.

1. The plaintiffs have instituted the instant suit for permanent injunction against the defendants restraining infringement of trademark, passing off and damages, etc.

2. As per the averments in the plaint, plaintiffs No.1 and 2 are the joint proprietors and owners of all intellectual property rights in the mark 'APEEJAY'. The plaintiff No.3, and other business concerns managed and controlled by plaintiffs No.1 & 2 are using intellectual

property assets of plaintiffs No.1 & 2 as licensee / permitted users. Para No.7 describes name of the schools and educational institutions managed, administered and run by plaintiff No.3 society. It is averred that the trademark / trade name / service mark 'APEEJAY' was first conceived and adopted in the year 1967 / 1968 and put to commercial use with the opening of the first school at Mahavir Marg, Jalandhar, Punjab in the year, 1968. Subsequently, the plaintiffs has expanded the use of its mark 'APEEJAY' widely in respect and in relation to educational services, school management, school development activities, management of teachers-students relationship and promotion of 'APEEJAY' students in their endeavours and career progress. Since the year of adoption of the mark 'APEEJAY', the plaintiffs have continuously and extensively used it in the course of their services and management activities. The said mark has become a symbol of plaintiffs' corporate identity. It is not only a distinctive but is also adapted to distinguish the goods and services of the plaintiffs from the goods and / or services of any other person. It is the mark identified and identifiable only with the plaintiffs and none else. The plaintiffs have acquired and retained an exclusive right to use the mark in respect of goods and services provided by them. It is averred that the plaintiffs are registered proprietors of the trade / service marks and have

acquired statutory right to the exclusive use of it to the exclusion of others.

3. It is alleged that defendants have formed an association of persons under the name and style of 'APEEJAY School Parents Association, Faridabad'. The defendant No.1 has illegally and unauthorizedly used the mark 'APEEJAY' as an essential feature / part of the name of their association and has obtained registration thereof as a society under the Society Registration Act. The services for which the defendant No.1 has formed the association are the services which are provided by the plaintiffs as their objective. These fall within the exclusive domain of the school management of the plaintiffs and the defendants have no right or justification to interfere with its management or to set up a parallel body to deal with the issues of school management. The defendants have no right title or interest for the adoption and / or use of the mark 'APEEJAY' or any other deceptively similar mark. Intention of the defendants is to cause damages to the reputation established by the plaintiffs in the said mark. The defendants were requested to desist from using the mark 'APEEJAY' but to no effect. Hence, the present suit.

4. The suit was contested by the defendants. In the written statement, the defendants controverted the allegations of the plaintiffs and

submitted that the 'association' was formed for the protection of the fundamental rights of the students / children studying in the plaintiffs' school and for the protection of the rights of the parents of the students as also against unjust and arbitrary actions of the plaintiffs' school. The association is neither a business house nor a profit making organization for competing with the plaintiffs and / or passing of the goods or services. It is only restricted to the parents of the children studying in the plaintiffs' school and none else. The defendants have no intention to cause loss to the reputation of the plaintiffs. The use of mark 'APEEJAY' does not in any way infringe the mark of the plaintiffs as the defendants are not carrying on any trade. It is a general practice that an association of students / parents of students / teachers do include the name of the school they are related to. The association was formed as the complaints of the parents were not being paid any heed by the authorities and the students were being harassed by charging exorbitant fee arbitrarily causing mental agony to the students and their parents. Plaintiff No.3 arbitrary hiked the fee in the period of recession, which was objected to by the parents of the students. The use of name 'APEEJAY' was only for identification purpose. It was further averred that this Court has no territorial jurisdiction.

5. It appears that subsequently, none appeared on behalf of the defendants on adjourned hearings / dates. By an order dated 20.04.2011, defence of the defendants was struck off. This Court by an order dated 06.09.2011 directed the President and Secretary of 'APEEJAY School Parents Association, Faridabad' to remain present on the next date of hearing. However, when the matter was called that day, none appeared on behalf of the defendants. By an order dated 08.09.2011, they were proceeded ex-parte.

6. The plaintiffs have filed evidence by way of affidavit of Mr.Bharat Bhushan.

7. I have heard learned counsel for the plaintiffs and have examined the file. In its ex-parte evidence, the plaintiffs have filed on record the affidavit of Mr.Bharat Bhushan which is exhibited as Ex.PW-1/A. It relied upon various documents (Ex.PW-1/1 to Ex.PW-1/7, Ex.PW-1/9 to Ex.PW-1/15). Ex.PW-1/18, as per affidavit has been marked as mark PW-1/8. Reliance was also placed on certified copies of Ex.PW-1/5 to Ex.PW-1/7.

8. Mr.Bharat Bhushan, in his evidence (Ex.PW-1/A) proved the averments of the plaint without any variance. He specifically deposed that mark 'APEEJAY' was adopted in the year 1967 by the plaintiffs in

respect of services / goods relating to education. The society has continuously and extensively used it in the course of their services and management activities since then. Ex.P-4 is the original brochure of 'APEEJAY' Education Society. It has become a symbol of plaintiffs' society's corporate identity. The mark 'APEEJAY' when used singularly and / or with any other mark, symbol or name is instantly connected in the mind of the relevant section of the public with the business and service of the plaintiffs. The said mark is not only distinctive but is also adopted to distinguish the goods and services of the plaintiffs from the goods and services of any other person. Ex.P-5 is copies of the certificates of the registration of the mark 'APEEJAY'. Ex.P-6 has been collectively exhibited as the copies of the printouts showing the status of the trademark as registered. Copies of various articles, advertisement, newspapers issued and advertised by the societies are exhibited collectively as Ex.P-8. He further deposed that 'APEEJAY' has acquired an immense reputation and goodwill in the mind of the public and it is directly connected with the service and goods of the society. Ex.P-15 is the legal notice issued to the defendants to desist from infringing plaintiffs' registered trademark. It was further deposed that the defendants by their illegal activities are causing tremendous loss and damages to the

goodwill of the plaintiffs by circulating printing material in the form of pamphlets, catalogues as well as in the electronic form on the internet. The defendants have put plaintiffs to loss in business as well as reputation by their illegal trade activities.

9. Testimony of PW-1 (Bharat Bhushan) has remained unchallenged and unrebutted. Adverse inference is to be drawn against the defendants for not contesting the suit on adjourned date and remaining ex-parte. There are no sound reasons to disbelieve the positive uncontroverted testimony of PW-1.

10. The defendants have not disputed that the mark 'APEEJAY' is associated with the plaintiffs' society and is in use by them since 1967. Only plea of the defendants in the written statement is that this mark was used by them only for identification purpose to indicate that their association consisted of the parents of the students studying in the plaintiffs' school. It had no commercial activity to cause any loss or damage to the plaintiffs' society.

11. There is no denial that the parents of the students studying in plaintiffs' school have every right to form association to carry out its objectives permissible in law. The moot question is whether the defendants' association can be permitted to use the mark 'APEEJAY'

without consent and permission of the plaintiffs' society. The plaintiffs' concern is that the defendants by adding their name to their association intend to reflect that the association has been formed with the consent and permission of the plaintiffs' school. I find merit in the plea of the learned counsel for the plaintiffs. There is every possibility of the public at large to get confused to infer that the association has patronage of the plaintiffs' society or that it is associated with it. In fact, the plaintiff society has no concern with it.

12. It is settled law that the tort of passing off is sufficiently wide to be applicable to non-trading business or non-profit making bodies. A professional association may prevent non-members from using a name so as to give impression as representative of the association. In '*British Diabetic Association vs. Diabetic Society*', (1996) FSR 1, both the parties were charitable societies. Their names were deceptively similar. The word 'Association' and 'Society' were too close since they were similar in derivation and meaning and were not wholly dissimilar in form. Permanent injunction was granted.

13. In the decision in '*M/s. Regency Industries Ltd. vs. M/s. Kedar Builders*', Vol.X 1990 PTC 1, it was held that passing off action need not necessarily be associated with goods only. Taking note of the

said observations, the argument that the defendants' carrying no trade activity, is devoid of merit.

14. Similarity of the name 'APEEJAY' in the defendant No.2's association was sufficient to lead to the public to think that the defendants' association was the association of the plaintiffs. It might mislead the people into thinking that the defendants' association was a branch of the plaintiffs' school and sponsored by the school. If the defendants' association is guilty of any misdoing the same is likely to reflect discredit upon the plaintiffs' school.

15. In '*Helpage India vs. Helpage Garhwal*', 2001 (21) PTC 872 (Del), this Court held that registration of the name of the defendants under the Societies Registration Act cannot come in the way of this Court for granting the relief prayed for.

16. In the light of above discussion, the suit of the plaintiffs is partly decreed and the defendants are restrained from using the mark 'APEEJAY' or any other identical or deceptively similar mark in any manner as a part of their association's name.

17. Reliefs prayed in para No.44 (d) to 44 (f) have already been given up.

18. Decree-sheet be prepared accordingly.

19. The suit stands disposed of in the above terms.

(S.P.GARG)
JUDGE

DECEMBER 18, 2014 / *tr*