

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

MONDAY, THE 19TH DAY OF OCTOBER 2015/27TH ASWINA, 1937

FAO.No. 190 of 2015 ()

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AGAINST THE ORDER DATED 04/08/2015 IN I.A. NO.3993/2015 IN OS. NO.13/2015 OF
VI ADDITIONAL DISTRICT COURT, ERNAKULAM.**

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APPELLANT/PLAINTIFF:

**HOTEL SEAGULL,
A PARTNERSHIP FIRM, KALVETHY, FORT COCHIN,
KOCHI -682 001, REPRESENTED BY ITS PARTNER
MR.V.K. PRATHAPAN, VELIPARAMBIL HOUSE,
PALLICHAL ROAD, KOCHI -682 005.**

**BY ADVS.SRI.BENOY K.KADAVAN,
SRI.GOUTAM SURESH TAMPI.**

RESPONDENTS/DEFENDANTS:

- 1. SEAGULLS CATCH RESTAURANT PVT. LTD.,
41/623, CHITTOOR ROAD, NEW RAJAJI ROAD JUNCTION,
PADMA, ERNAKULAM- 682 035, REPRESENTED BY ITS
MANAGING DIRECTOR ABDUL SHUKKOOR.**
- 2. ABDUL SHUKKOOR, MANAGING DIRECTOR,
SEAGULLS CATCH RESTAURANT PVT. LTD.,
41/623, CHITTOOR ROAD, NEW RAJAJI ROAD JUNCTION,
PADMA, ERNAKULAM- 682 035.**

**BY ADVS. SRI.SHINU J.PILLAI,
SMT.S.SUJA,
SMT.S.PINDULEKHA,
SRI.S.A.ANAND.**

**THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD
ON 06/10/2015, THE COURT ON 19/10/2015 DELIVERED THE FOLLOWING:**

rs.

P.B.SURESH KUMAR, J.

F.A.O. No.190 of 2015

Dated 19th October, 2015

J U D G M E N T

The order dismissing an application for temporary injunction filed by the plaintiff in an action for passing off is under challenge in this appeal.

2. The plaintiff is a partnership firm running a restaurant under the name and style "Hotel Seagull" at Fort Cochin. The first defendant company has established a restaurant in the name and style "Seagull's catch-Sea food restaurant" at Ernakulam on 15.6.2015. The case of the plaintiff is that the restaurant run by them has been established in the year 1980; that in course of time, it has earned reputation and goodwill as a speciality sea food restaurant and that the first defendant company is using the name "Seagull" in the name of their restaurant with a

view to pass off their services as that of the plaintiff. The plaintiff has, therefore, claimed in the suit, among others, a decree of prohibitory injunction restraining the defendants from using the mark “Seagull” or “Seagull's catch” or any other desceptively similar name or mark in connection with the business of running restaurants.

3. Along with the suit, the plaintiff filed I.A.No.3993 of 2015 and obtained an ad-interim order of injunction against the defendants on the same lines in which the decree was sought in the suit. The defendants objected the application for temporary injunction contending, among others, that the first defendant is a company promoted by “Seagull's catch Food Services Co., Jeddah, Saudi Arabia”; that the said company is carrying on business in Saudi Arabia as a speciality sea food provider; that the said company has reputation in Kerala on account of the presence of large number of Keralites in

Saudi Arabia and that therefore, the question of passing off the services of the first defendant as that of the plaintiff does not arise. They also contended that there exists large number of similarly and identically named restaurants out side Kerala and the plaintiff cannot therefore claim exclusive right to use the name “Seagull” for their restaurants.

4. The court below found that the plaintiff has no *locus standi* to institute the suit. It was also found that the word “Seagull” being a dictionary word used by many, the plaintiff cannot claim exclusivity over the same. It was further found that the defendants have independent reputation under its trade name “Seagull's catch” and therefore, the question of passing off their services as that of the plaintiff does not arise. In the light of the said findings, the court below dismissed the application for temporary injunction filed by the plaintiff. The plaintiff

who is aggrieved by the said decision of the court below has thus come up in this Appeal.

5. Heard the learned counsel for the appellant/plaintiff as also the learned counsel for the respondents/defendants.

6. Before examining the correctness of the decision taken by the court below and the sustainability of the contentions raised by the counsel appearing for the parties, I would like to remind myself of the principles governing an application for temporary injunction in an action for passing off. An action for passing off is a common law remedy available to a person who is doing a trade or rendering a service to prevent others from passing off their goods or services as that of the plaintiff. In order to establish a case for passing off, the plaintiff has to show that he has acquired reputation attached to the goods or services which he supply, in the mind of the

purchasing public in association with the identifying name or mark under which his goods or services are offered to the public and that the conduct of the defendant is leading or likely to lead the public to believe that the goods or services offered by him are the goods or services of the plaintiff. The plaintiff should also show that he is likely to suffer damage by reason of the conduct of the defendant.

In **National Garments v. National Apparels** (AIR 1990 Kerala 119), this Court took the view that while considering an application for prohibitory injunction in an action for passing off, the principles applicable for granting interlocutory injunction are slightly different from the principles applicable in ordinary cases. For a temporary order in an action for passing off, the plaintiff need not, in general, show a strong *prime facie* case. However, the *prima facie* case required to be shown is something more than a case that will avoid the action being struck out as

frivolous or vexatious.

7. Sufficient and more materials have been produced by the plaintiff to show that they have been running their restaurant at Fort Cochin since 1980. Document No.6 produced by the plaintiff along with the application for temporary injunction is a certificate issued by the Chartered Accountant of the plaintiff indicating the turn over of the business of the plaintiff from 1991-'92 to 2013-'14. It is evident from the said document that there has been a steady progress in the turn over of the business of the plaintiff and that their turn over which was about 31 lakhs during 1991-'92 has reached about 310 lakhs during 2013-'14. The plaintiff has also produced documents to show that the name of their restaurant has been appeared in international travel directories and on-line platforms providing information concerning the hotels and restaurants around the world. In the light of the

documents produced by the plaintiff as aforesaid, it is only reasonable to infer that the plaintiff has acquired reputation and goodwill in the business run by them with the identifying name "Hotel Seagull". Document No.8 is a photograph of the name board of the restaurant of the plaintiff and Document No.9 is a photograph of the name board of the restaurant of the defendants. As admitted by the defendants, they are using the name "Seagull" as part of the name of their restaurant. It is trite that similarity of two marks is to be examined in the context of an unwary person of average intelligence and imperfect recollection. On a comparison of the names, I have no doubt in my mind that the name of the restaurant of the defendants is likely to confuse the prospective customers of the plaintiff. As noticed above, in an action for passing off, the plaintiff need only show that the conduct of the defendant is likely to cause damage to him. Since the plaintiff is running

their restaurant at Fort Cochin, the apprehension expressed by them that the conduct of the defendants is likely to cause damage to the plaintiff cannot be said to be without any basis, especially when both the restaurants are sea food restaurants run with the name "Seagull". It is thus evident that the plaintiff has made out a *prima facie* case for an order of temporary injunction.

8. Now I shall deal with the contentions raised by the defendants one by one. One of the contentions of the defendants, as upheld by the court below is that the plaintiff has no *locus standi* to Institute the suit. According to the defendants, Document No.5 partnership deed of the plaintiff firm indicates that there are only two partners in the firm, whereas the application filed by the plaintiff before the Trademarks Registry shows that there is yet another partner in the firm. The argument is that in the absence of satisfactory materials to show as to who

constitutes the firm of the plaintiff, it cannot be said that the plaintiff has the *locus standi* to institute a suit. There is no substance in this contention. As noticed above, the plaintiff is a partnership firm. The defendants have no case that a partnership firm is not entitled to file a suit in its name. The defendants have also no case that the person who instituted the suit on behalf of the plaintiff firm is not a partner of the firm. As such, according to me, the change, if any, among the partners of the firm does not affect the rights of the firm to Institute a suit in its name.

9. The next contention is that the first defendant which is running the restaurant in the name "Seagull's catch" is a company promoted by a Saudi Arabian Company which has reputation as a speciality sea food provider and therefore, the question of the first defendant company passing off their services as that of the plaintiff does not arise. Apart from the statements

made in the objection filed in the application for temporary injunction, there is nothing on record to indicate that the first defendant is a company promoted by M/s.Seagull's catch Food Services Co., Jeddah. There is also nothing on record to indicate that the Saudi Arabian Company referred to above has acquired reputation in India or elsewhere as a speciality seafood provider. Further, there is no averment in the objection filed by the defendants to the application for temporary injunction as to the time from which the said Saudi Arabian Company commenced their business. To a specific question put by me, the learned counsel for the defendants fairly conceded that the Saudi Arabian Company referred to by them started its business in the name "Seagull's catch" after 1980. In an action for passing off when the areas of activity are identical and the trade marks being similar, the only question to be seen is as to who is the prior user (See

Uniply Industries Ltd. v. Unicorn Plywood Pvt. Ltd. and others [(2001) 5 SCC 95]). I have already found that the plaintiff has acquired reputation in restaurant business with the identifying name “Seagull” in the State of Kerala and as noticed above, the plaintiff is the prior user of the name “Seagull”. In the said circumstances, the contention of the defendants that the question of the first defendant company passing off their services as that of the plaintiff does not arise, is unsustainable.

10. The next contention raised by the defendants is that, at any rate, in the light of the reputation acquired by the Saudi Arabian Company referred to by the defendants in the written statement, it cannot be said that the defendants have any intention at all to pass off their services as that of the plaintiff. It is now settled that absence of any intention to deceive or defraud is not a defence in an action for passing off (See

M/s.Jaleel Associates and another v. M/s.Hotel Sagar (2005(1) ILR Kerala series 237). In **Laxmikant V. Patel v. Chetanbhai Shah** [(2002)3 SCC 65], the Apex Court held that where there is probability of confusion in business, an injunction can be granted even though the defendants adopted the name innocently. There is, therefore, no substance in the said contention also.

11. The next contention raised by the learned counsel for the defendants is that there are large number of restaurants in the name “Seagull” outside Kerala and therefore, the plaintiff cannot claim any exclusivity over the name “Seagull”. He relied on the decision of the Apex Court in **Skyline Education Institute (Pvt) Ltd. v. S.L.Vaswani** (AIR 2010 SC 3221) in support of the said contention. It is now settled that descriptive words like “Seagull” in the instant case can be used as trade marks if it has acquired a distinctiveness or secondary meaning in

connection with the business. I have found that the plaintiff has established a secondary meaning for the word “Seagull” in restaurant business by their user of the said word for the last about 35 years. Once it is found that the plaintiff has established a secondary meaning for their trade name which is descriptive in nature, it cannot be said that they are not entitled to use the name exclusively. The decision of the Apex Court relied on by the defendants as referred to above is not a case where the court found on facts that the plaintiff has established a secondary meaning for the name used by them. As such, merely for the reason that some other persons are using the same name for restaurant business elsewhere in the world does not affect the right acquired by the plaintiff to use the word “Seagull” exclusively for their restaurant. There is, therefore, no substance in this argument also.

In the result, the appeal is allowed and an order

of temporary injunction as prayed for by the plaintiff in I.A.No.3993 of 2015 is granted. It is made clear that the findings rendered by me in this judgment are prima facie findings arrived at for the purpose of the application for temporary injunction and the same do not preclude the defendants in contesting the suit on merits. All the interlocutory applications in the appeal are closed.

Sd/-

P.B.SURESH KUMAR, JUDGE.

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