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

+ CS(OS) 290/2015 and I.A. 2317/2015 (u/O XXXIX R 1 and 2 CPC) and I.A. 16927/2015 (u/O VIII R 10 CPC)

BURGER KING CORPORATION Plaintiff
Through: Mr. Pravin Anand, Advocate with
Mr. Raunaq Kamath, Advocate

versus

BURGER PLACE Defendant
Through: None

CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI

% **ORDER**
07.09.2015

1. The plaintiff has instituted the present suit praying *inter alia* that the defendant be restrained from infringing its trademark, passing off, unfair competition, damages, rendition of accounts, delivery up etc.
2. Summons were issued in the suit on 03.02.2015. On the same date, an ex-parte ad interim injunction order was passed restraining the defendant, its proprietors, partners, franchisees, officers, servants, agents etc. from using the plaintiff's registered Crescent Design Logo or any variety thereof including the impugned logo in any manner including the social media amounting to infringement of the trademarks of the plaintiff.
3. It was recorded on 11.05.2015 that the defendant had refused

service of the summons on 11.04.2015 and as a result, they were deemed to be served. If the date of refusal is taken as 11.04.2015, then at best, the defendant ought to have filed its written statement within 90 days from the said date, which would have expired on 10.07.2015. However, the defendant has neither entered appearance, nor filed the written statement. Accordingly, the defendant is proceeded against ex-parte.

4. Counsel for the plaintiff submits that he has filed an application under Order VIII Rule 10 CPC, (I.A. 16927/2015) praying *inter alia* that having failed to file the written statement, the suit may be decreed against the defendant and in favour of the plaintiff limited to the relief of permanent injunction, prayed for in paras 39(a), (b) and (c) of the plaint. He submits that the plaintiff is ready and willing to give up the remaining reliefs at paras 39(d) to (h) of the plaint, while reserving its rights to seek its remedies against the defendant if a fresh cause of action arises in the future.

5. The facts of the case as averred in the plaint are that the plaintiff is a company having its principal place of business in Florida, USA. It was founded in the year 1954, when it had commenced its business with one restaurant in Miami, Florida under the name and style of "BURGER KING". The plaintiff has an international and national

reputation and operates a worldwide chain of over 13500 fast food restaurants, serving more than 11 million customers on a daily basis in 100 countries and US territories worldwide. It is the second largest fast food hamburger company and employs over 30,300 people directly and through its franchisees.

6. The plaintiff's "BURGER KING" trademark, which is the subject matter of the present suit, is depicted in a logo comprising of a crescent design, which is reproduced hereinebelow:-



7. The aforesaid logo is registered in favour of the plaintiff in over 122 countries worldwide including in India. Apart from the aforesaid logo design, the plaintiff owns over 4000 trademarks and service marks across the world including in India. The trademark, "BURGER KING" and the Crescent Design Logo are well known marks that have been used continuously and extensively in relation to the plaintiff's fast food restaurant services globally. The plaintiff's first Indian "BURGER KING" restaurant was opened at New Delhi on 09.11.2014 and its second "BURGER KING" restaurant was opened in Mumbai in

December, 2014, whereafter the plaintiff has expanded its presence in India with 10 more outlets opened/scheduled to be opened in Delhi, Mumbai, Pune and Bangalore. The plaintiff has a website, www.burgerking.com and the said domain name was registered in its favour in November, 1994. It also operates in the social media forum, www.facebook.com, pertaining to its business conducted in India.

8. The revenue sales generated worldwide by the plaintiff's "BURGER KING" restaurants for the years 2004-2013, have been tabulated and placed in para 20 of the plaint. The consolidated global system advertising expenses including franchisee contributions between the years 2004-2013 have been tabulated and placed in para 21 of the plaint. It is stated by learned counsel that the plaintiff's "BURGER KING" brand including the Crescent Design Logo has acquired an enviable reputation and goodwill in the market and the customers in India identify the plaintiff's "BURGER KING" and Crescent Design Logo with its restaurant services.

9. Coming to the defendant here, learned counsel submits that the defendant is a fast food restaurant trading under the name and style of "BURGER PLACE", that is located in Omaxe Mall, Sohna Road, Gurgaon. In or around November, 2014, the plaintiff had learnt of the existence of the defendant's restaurant operating under the name and

style of "BURGER PLACE" and was alarmed to note that the defendant had adopted a device comprising of a crescent design enclosing the mark "BURGER PLACE" which is virtually identical to the plaintiff's Crescent Design Logo. The infringing logo is reproduced hereinbelow for ready reference:-



10. Immediately thereafter, the plaintiff had served a cease and desist notice dated 14.11.2014 on the defendant calling upon it to cease from using the infringing logo. On 25.11.2014, the plaintiff's attorneys were telephonically contacted by one Mr. Shiv Kumar, who had claimed to be the proprietor of the defendant and he had confirmed that he had received the cease and desist notice and was willing to remove the infringing logo from his premises. He had further requested the plaintiff that he be granted one month's time to make the necessary changes. Learned counsel states that the plaintiff had acceded to the said request on the condition that the defendant shall

execute an undertaking not to use the impugned logo in the future. Mr. Kumar had promptly agreed to the said condition and had also agreed to phase out all use of the impugned logo and provide proof thereof to the plaintiff's counsel by 25.12.2014. However, the plaintiff did not receive any undertaking or communication from the defendant thereafter and when its counsel was able to contact Mr. Kumar on 06.01.2015, he stated that he was no longer willing to cease and desist from using impugned logo.

11. Subsequent enquiries had confirmed that the defendant has been continuously using the impugned logo and variants thereof as detailed in para 30 of the plaint and displayed hereinbelow:-

PLAINTIFF'S CRESCENT DESIGN LOGO	DEFENDANT'S IMPUGNED LOGOS
	
	



12. It is submitted by the counsel for the plaintiff that the defendant's impugned logo for its "BURGER PLACE" restaurant is identical to the plaintiff's Crescent Design Logo, which is registered in its favour and having regard to the fact that the defendant is using the said logo for identical goods/services, i.e., restaurant services, it is a clear case of passing off. It is urged on behalf of the plaintiff that the defendant's use of the impugned logo, which is identical to the plaintiff's Crescent Design Logo, is bound to cause confusion amongst the relevant class of consumers and mislead them into believing that its services and goods originate from the plaintiff or that it is in some way associated with the plaintiff, which is factually erroneous. Learned counsel submits that the defendant has deliberately adopted the impugned logo in bad faith after the plaintiff had entered the Indian market and after registration of the Crescent Design Logo in its favour in India. The said dishonest adoption disentitles the defendant from using the impugned logo for its services. Owing to the aforesaid

infringing acts on the part of the defendant, the plaintiff has instituted the present suit.

13. As noted above, attempts were made to effect service on the defendant but the office report is that it had refused service through speed post and the same has been held to be a valid service. On 03.02.2015, when summons were issued in the suit, an ex-parte ad interim injunction order was passed on the interim application filed by the plaintiff (I.A. 2317/2015), whereby the defendant, its proprietors, partners, franchisees, officers, servants, agents etc. were restrained from using the plaintiff's registered Crescent Design Logo or any variety thereof including the impugned logo in any manner including the social media amounting to infringement of its trademark.

14. Based on the aforesaid uncontested averments made in the plaint, learned counsel states that a judgment be pronounced in its favour under Order VIII Rule 10 CPC, limited to the relief prayed for in paras 39(a), (b) and (c) of the plaint. He further submits that the present suit is commercial in nature and seeks an expeditious disposal thereof particularly when the plaintiff has given up the reliefs at prayer clause 39(d) to (h) of the plaint, while reserving its right to seek its remedies against the defendant, on a fresh cause of action arising in the future.

15. After the amendment to Order VIII Rule 1 CPC carried out by Act 22 of 2002, that came into operation w.e.f. 01.07.2002, the defendant has to present the written statement in its defense within 30 days from the date of service of the summons. Under the proviso to Rule (1), if the defendant fails to file the written statement within the prescribed timeline, he shall be allowed to file the same on such other day as may be specified by the Court for the reasons to be recorded in writing but it shall not be later than 90 days from the date of service. The consequences of default in filing the written statement have been spelt out under Order VIII Rule 10 CPC, which reads as below:-

“10. Procedure when party fails to present written statement called for by Court.- 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.”

16. The object of providing a time frame to file the written statement is to achieve speedy disposal of the case and to avoid unnecessary adjournments. Once there is default on the part of the defendant under Rule 1 of Order VIII and the extended time of 90 days from the date of service lapses, consequences thereof have been provided for under Rule 10, which contemplates that the Court shall

pronounce judgment against the defendant or make such orders in relation to the suit as it thinks fit. In cases of failure on the part of the defendant to file the written statement within the permitted time or the time fixed by the Court, the course of action that the Court may propose to adopt would depend on the facts and circumstances of each case. Where the case of the plaintiff is clear cut and the Court finds that on the basis of the averments made in the plaint supported by the documents filed by the plaintiff, it would be just, fair and equitable to pass a decree for the reason that in the Court's opinion, no further proof would be necessary, it may take recourse to passing a decree in favour of the plaintiff. In other cases, where the Court is not satisfied that the plaintiff has been able to make out a blemishless case in its favour entitling it to the relief prayed for in a suit, even in the absence of the written statement by the defendant, it is well entitled to direct the plaintiff to prove its case. In the alternate, given some special circumstances, the Court can grant the defendant time to file the written statement on terms and conditions that may be considered fit and proper in the circumstances of the case.

17. It can thus be seen that despite usage of the word "shall" in Rule (10) of Order VIII, the Court has been given the discretion to pronounce or to refuse to pronounce a judgment against the

defendant, even if a written statement is not filed. Depending on the facts of the case, the Court can pass such orders as it may think fit in relation to the suit. In the case of Kailash vs. Nankhu & Ors. reported as **(2005) 4 SCC 480**, where the Supreme Court had gone to great lengths to examine the historical background behind the introduction of the amended provisions of Order VIII of the Code and their effect, it was held as below:-

"41. Considering the object and purpose behind enacting Rule 1 of Order 8 in the present form and the context in which the provision is placed, we are of the opinion that the provision has to be construed as directory and not mandatory. In exceptional situations, the court may extend the time for filing the written statement through the period of 30 days and 90 days, referred to in the provision, has expired. However, we may not be misunderstood as nullifying the entire force and impact "the entire life and vigour " of the provision. The delaying tactics adopted by the defendants in law courts are now proverbial as they do stand to gain by delay. This is more so in election disputes because by delaying the trial of election petition, the successful candidate may succeed in enjoying the substantial part, if not in its entirety, the term for which he was elected even though he may lose the battle at the end. Therefore, the judge trying the case must handle the prayer for adjournment with firmness. The defendant seeking extension of time beyond the limits laid down by the provision may not ordinarily be shown indulgence. (emphasis added)

42. Ordinarily, the time schedule prescribed by Order 8 Rule 1 has to be honoured. The defendant should be vigilant. No sooner the writ of summons is served on him he should take steps for drafting his defense and filing the written statement on the appointed date of hearing without waiting for the arrival of the date appointed in the summons for his appearance in the Court. The extension of time sought for by the defendant from the Court whether within 30 days or 90

days, as the case may be, should not be granted just as a matter of routine and merely for the asking, more so, when the period of 90 days has expired. **The extension can be only by way of an exception and for reasons assigned by the defendant and also recorded in writing by the court to its satisfaction.** It must be spelled out that a departure from the time schedule prescribed by Order 8 Rule 1 of the Code was being allowed to be beyond the control of the defendant and such extension was required in the interest of justice, and grave injustice would be occasioned if the time was not extended. (emphasis added)

43. xxx xxx xxx

44. **The extension of time shall be only by way of exception and for reasons to be recorded in writing, howsoever brief they may be, by the court.** In no case, shall the defendant be permitted to seek extension of time when the court is satisfied that it is a case of laxity or gross negligence on the part of the defendant or his counsel. The court may impose costs for dual purpose: (i) to deter the defendant from seeking any extension of time just for the asking, and (ii) to compensate the plaintiff for the delay and inconvenience caused to him. (emphasis added)

45. However, no straitjacket formula can be laid down except that the observance of time schedule contemplated by Order 8 Rule 1 shall be the rule and departure there from an exception, made for satisfactory reasons only. **We hold that Order 8 Rule 1, though couched in mandatory form, is directory being a provision in the domain of processual law.**" (emphasis added)

18. Subsequently, in the case of Salem Advocate Bar Association, Tamil Nadu vs. Union of India reported as **2005 (6) SCC 344**, with respect to extending the time to file a written statement beyond the prescribed period of 90 days, the Supreme Court had made it clear

that the order extending the time to file the written statement ought not be made in routine, the time can be extended only in exceptionally hard cases and further, while extending the time, it has to be borne in mind that the legislature has fixed the upper time limit of 90 days and therefore, the Court ought not to exercise its discretion frequently and regularly so as to nullify the period fixed under Order VIII Rule 1 CPC. However, in the case of Smt. Rami Kusum vs. Smt. Kanchan Devi and Ors. reported as **(2005) 6 SCC 705** a note of caution was added by the Supreme Court that in the process of expediting the proceedings, the principles of natural justice cannot be thrown to the winds.

19. At the end of the day, the underlying principle laid down in all the aforesaid decisions is that the law of procedure provides a methodology that the Court ought to adopt while determining the rights of the plaintiff to a *lis*. Some of the provisions of the Code are directory and not mandatory in nature even though the legislature has used the word "shall" and that by itself will not be conclusive to determine whether the said provision is mandatory for the reason that the said provision could still turn out to be directory, depending on the nature of the provisions and the context in which it has been enacted.

20. In the instant case, the defendant had refused service of summons and was deemed to have been served on 11.04.2015. Even

thereafter, no effort was made by the defendant to enter appearance in the suit and file the written statement or contest the suit in any manner. On failure to file the written statement under Order VIII Rule 1 CPC, the Court is well empowered to pronounce a judgment against the defendant under Rule (10), if it is satisfied by the case set up by the plaintiff. As noted above, Mr. Anand, learned counsel for the plaintiff has volunteered to confine reliefs in the suit to prayers made in para 39 (a) (b) and (c) and has walked the Court through the material placed on record to urge that the plaintiff is an entitled to a decree under Order VIII Rule (10) CPC.

21. Keeping in view the need for expeditious trial of civil cases particularly when they are commercial in nature, which is a consideration that has persuaded the Parliament to undertake amendments from time to time in the Code and Civil Procedure so as to tighten the procedure and avoid delay, and further, keeping in mind the fact that commercial matters of the present nature ought to be treated on a different footing and cannot be kept lingering when there is no contest from the other side, in discharge of its duty to provide fair, quick and speedy justice, this Court is of the opinion that the plaintiff is entitled to invoke the provisions of Order VIII Rule (10) CPC in the facts of the present case.

22. Having perused the averments made by the plaintiff in the plaint that have gone uncontested, and on examining the documents placed on record and upon considering the submissions made by learned counsel for the plaintiff, it is deemed appropriate to dispense with the requirement of the plaintiff to file an affidavit by way of evidence in support of its pleadings. The plaintiff has been able to satisfactorily discharge its obligations by making out a case for passing a decree against the defendant, as prayed for in para 39(a) to (c) of the plaint.

23. Accordingly, a judgment is pronounced against the defendant under Order VIII Rule 10 CPC and the suit is decreed in favour of the plaintiff as prayed for in paras 39 (a) to (c) of the plaint. As the defendant has refused to accept service of the summons and has failed to contest the suit, which appears to be a deliberate act, the plaintiff is held entitled to costs of the suit and litigation expenses quantified at Rs.30,000/-. Decree sheet be drawn accordingly.

24. The suit is disposed of alongwith the pending applications.

HIMA KOHLI, J

SEPTEMBER 07, 2015

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