THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

CIVIL MISCELLANEOUS APPEAL No.945 of 2015

JUDGMENT:

This civil miscellaneous appeal, under Order LXIII Rules 1 and 2 of the Code of Civil Procedure, 1908, ('the Code', for brevity) by the respondents-defendants is directed against the order, dated 24.11.2015, of the learned VIII Additional District Judge, Vijayawada, passed in IA.no.626 of 2015 in OS.no.277 of 2015 filed by the petitioners-plaintiffs under Order XXXIX Rules 1 and 2 read with Section 151 of the Code for grant of a temporary injunction to restrain the respondents-defendants, its partners, servants & agents, distributors, franchisees, representatives, officers or persons claiming through or under it from either directly or indirectly using the plaintiff's Trademark, "SWEET MAGIC", or any trademark either identical or phonetically or deceptively similar to the plaintiff's trademark and direct not to infringe the trademark or copyright and pass off the plaintiff's trade mark, "SWEET MAGIC".

2. I have heard the submissions of Sri S. Niranjan Reddy, learned senior counsel appearing for Ms. Rubaina S. Khatoon, learned counsel for the appellants-defendants ('the defendants', for brevity) and of Sri Ashok Ram Kumar, learned counsel for the respondents-plaintiffs ('the plaintiffs', for brevity). I have perused the material record.

3. It is necessary to first refer to the pleadings and submissions of the parties.

3.1 The pleaded case of the plaintiffs and the submissions made on their behalf, in support of the request for grant of temporary injunction prayed for, in brief, are as follows:

The 1st plaintiff is a registered partnership firm and the plaintiffs 2 and 3 are its partners. It is carrying on business under the brand 'Sweet Magic'. The mark 'Sweet Magic' is being used as a brand to sell its products viz., sweets, savouries, bakery foods, confectionaries and other food items from its place of business at Patamata, Vijayawada. The 2nd plaintiff, 1st defendant and one Atluri Ravi are brothers and sons of late A.V.S.R. Anjaneyulu. The plaintiffs 2 & 3 and the defendants 1 & 2 along with late A.V.S.R. Anjaneyulu, Atluri Ravi and Atluri Srilatha, *vide* partnership deed, dated 19.10.2001, initially formed into a partnership firm under the name and style M/s Sweet Magic in the year 2001. Copy of the said partnership deed is exhibit P1. Thereafter, a supplementary deed was entered into between the partners, on 01.04.2002, whereby clause 9 of the original partnership deed was amended defining the role of working partners and their remunerations. 1st plaintiff along with Atluri Ravi and the 1st defendant have been constituted as working partners of the said firm and were conferred the authority to look after the day to day business of the said firm. In consideration of such an active participation of the working partners and devotion of time and attention to the business by them, it was mutually agreed that they shall be entitled to draw remunerations @ of Rs.60,000/- per annum. Copy of the supplementary deed of partnership is exhibit P2. While so, in the year 2006, the partnership firm as it stood then sought for the registration of the Trademark 'Sweet Magic'; and, applied for registration *vide* application no.1437087 under class 35, filed before the Registrar of Trademarks, Chennai. The said application was prosecuted by the firm before the Registrar of Trademarks; and, after the process of examination and hearing, the mark was registered in the name of the firm with effect from 21.03.2006, that is, the date of the application. A certificate, dated 19.02.2009, was also issued to the plaintiff firm. For the purpose of trademark, 2nd plaintiff is designated as Proprietor of the trademark and the same was recorded in the certificate and other documents. Due to certain policy changes, the partners viz., Atluri Ravi, Atluri Sai Leela Prasad (1st defendant), Atluri Annapurana (2nd defendant), Atluri Srilatha and Atluri

Venkata Seetha Ramanjaneyulu, retired from the partnership business *vide* retirement deed, dated 01.04.2007. Exhibit P4 is the retirement deed. The said deed of retirement was registered with the Registrar of firms in accordance with Rule 4 of A.P. Partnership (Registration of Firms) Rules, 1951, so as to statutorily register the change in the constitution of the firm. The said retiring partners released and relinquished their shares in the assets of the partnership firm to and in favour of the continuing partners, Atluri Venkata Satya Vara Prasad (2nd plaintiff) and Atluri Sudha Rani (3rd plaintiff). The retirement deed states that the retiring partners 'expressed their desire to retire from the partnership w.e.f 01.04.2007'. The said statement was given on the own free will and volition of the retiring partners. Under the deed of retirement all the retiring parties including the defendants herein have completely released and relinquished their share in the firm and also in the assets of the firm apart from their rights and goodwill in the said business. Thus, the continuing partners are entitled to continue and carry on the business under the name and style of 'M/s Sweet Magic' and use the brand 'Sweet Magic'. As per the understanding of the plaintiffs with the defendants and as a matter of benevolent and responsible gesture, the rented premises situate in Adhikari Hotel, which was under the control of the old firm, was given to the 1st defendant enabling him to do his business. Further, at the request of the 1st defendant, the plaintiffs granted permission for a business arrangement whereunder the plaintiffs agreed to supply to the 1st defendant sweets, savouries, bakery foods and other food material prepared at the plaintiffs' sweet house at prices that could be fixed from time to time. Evidencing such supply, VAT registration certificate is filed under exhibit P8. At the request of the 1st defendant, an oral permission was granted by the 1st plaintiff whereunder the defendants were permitted to use the name 'Sweet Magic' on the name board at the defendant's business premises and sell the products supplied by the 1st plaintiff in containers and packing containing the name of the plaintiffs' mark, 'Sweet Magic'. The 1st plaintiff also has a copyright in the said artwork of the logo. While so, all of a sudden, that is, from 10.08.2014, the defendants stopped buying the products of the 1st plaintiff and violated the oral understanding. It was found by the plaintiffs that the defendants were carrying on and are still continuing to conduct their business under the name of 'Sweet Magic' and that they were not only sourcing material from the third parties but were also getting the packing material printed under the name and style of 'Sweet Magic' and then selling the products giving an indication to the general public that these are from the shop of the plaintiffs. The defendants had relegated all the rights in the business and assets as well as mark 'Sweet Magic' to the plaintiffs. Subsequent to the retirement from the partnership, the defendants started using the words 'Sweet Magic Mithai Shop' and the plaintiffs reliably came to know that the defendants have also obtained VAT registration under the said name. Thus the defendants are using the entire registered mark of 'Sweet Magic' in their shop name 'Sweet Magic Mithai Shop'. The plaintiffs also came to know that the defendants are also using the name 'Sweet Magic Restaurants'. Cash bills, invoices and packing material; photographs of the display together, is exhibit P9. On coming to know of such fraud being played by the defendants, the plaintiffs requested the defendants neither to display the signboards of 'sweet magic' nor to sell any of the food products under the brand 'Sweet Magic'. It is reliably learnt that the defendants are procuring the food stuff from sub-standard suppliers and were selling the same to the general public in Vijayawada. Thus, while riding upon the repute, goodwill and brand image of the plaintiffs, the registered owner of the mark, the defendants have been pushing into the market sub-standard sweets and other food stuff. Some consumers, who bought sweets and food stuff from the defendants believing that they were the products of the plaintiff, complained to the plaintiffs by mails after having found that the products are of inferior quality. Copy of one such mail is exhibit P10. The products of the plaintiffs under the brand 'Sweet Magic' are very well recognised for their quality, standard, hygienic preparation, exact measure and delicious taste, which are all the indicators of a very good brand. The brand has achieved its popularity because of the parameters of its standards and quality, which the plaintiffs have always been meticulously maintaining. The mark that is being used since 2006 is the proprietary registered mark of the plaintiffs and the plaintiffs alone have the right to use the same under Section 28 of the Trademarks Act. The registration of the mark conferred certain rights in favour of the plaintiffs, one of them being the exclusive right to use the Trademark that has been granted to them. The legal and economic basis for the grant of a mark under the Trademarks Act is to provide a protection for the right to the property, namely, the Trademark 'Sweet Magic'. Anyone else using a mark, which is similar, deceptively similar or confusingly similar would be committing infringement or passing off of the Trademark. The defendants are using this mark for sweets and food items etcetera manufactured by them or procured from other traders. The intention of the defendants is to defraud with dishonesty and make undue gain by means of the fraudulent intention. Subsequent to the retirement deed entered into between the plaintiffs, the defendants and other parties, the propriety in the mark devolved upon the plaintiffs. Upon the devolution of titles, the plaintiffs also filed a request before the Registrar of trademarks to register the names of the plaintiffs 1 and 2 as subsequent proprietors. The said application, TM 24 along with its enclosures is exhibit P11. Plaintiffs also incurred huge expenditure towards advertisement and publicity for the sale of the sweets and food stuff and on overall promotion of the brand. It is in this mode the plaintiffs achieved excellent reputation and goodwill with all classes of people and the plaintiffs' shop is the most popularly known Sweet shop in Vijayawada and surrounding Districts. Certificate of Chartered Accountant indicating the sales achieved and advertisement expenses incurred is exhibit P12. On

19.10.2014, the plaintiffs issued a legal notice to the defendants demanding them to stop using the mark of the plaintiff/s. The defendants issued reply making false allegations and justifying their illegal acts. The plaintiffs issued a rejoinder asserting the contents of the original notice and clarifying the wrong stand of the defendants. Copies of notices exchanged are exhibits P13 to P15. After exchange of notices, at the intervention of D. Srinivasa Rao, Krishnaji and Venkta Rao, an oral understanding was arrived at between the parties whereby the defendants agreed to open a second shop subject to the condition that the existing shop and the new shop to be opened would be the franchisees of the plaintiffs and would only sell the products supplied by the plaintiffs. The plaintiffs never suspected the *bona fides* of the defendants and the mediators and had kept quiet. However, to the shock and surprise of the plaintiffs, the defendants refused to place orders and buy the products from the plaintiffs and thereby violated the oral understanding. Thus the defendants with ulterior motives played fraud on the plaintiffs and mislead the mediators also, to infringe the mark of the plaintiffs and make wrongful gain. The plaintiffs over a period of one and half decades acquired immense reputation and goodwill as a prior and registered user for the brand 'Sweet Magic' and have meticulously built repute, which cannot be taken advantage or usurped by anybody by simply copying the mark or using any deceptive or confusing variants of the mark. Such acts would amount to infringement and passing off. The brand is known for its consistent quality and innovative nature of the techniques, being implemented by the plaintiffs while offering superior quality services to the public. The plaintiffs diligently followed stringent quality assurances at every level of disseminating their services. Since the plaintiffs mark is a well known mark within the meaning of the Trademarks Act, 1999, inherent right rests with the plaintiffs to stop any third party using similar or deceptively similar mark even for other goods and services in which the plaintiffs do not have business. Using of the same mark by the defendants is being done with a *mala* *fide* and fraudulent intention of deception and misrepresentation and with the intention to take advantage of the name, fame, repute & goodwill and cause wrongful loss besides financial loss to the plaintiffs' business. Such sort of *mala fide* adoption of the exactly similar mark is completely detrimental to the business of the plaintiffs and if continuation of the same is allowed, it would continue to expose the plaintiffs to suffering and irreparable loss. In many cases the Supreme Court held that in an action of infringement, where the defendants' trademark is identical with that of plaintiffs, an enquiry need not be conducted; where the infringement is likely to deceive and cause confusion, an injunction must follow as contemplated under Section 135 of the Trademarks Act, 1999. In case of infringement, the balance of convenience lies in favour of the plaintiffs and injunction is liable to be issued since a case of infringement cannot be sufficiently compensated. A visual comparison of the plaintiffs' trademark with that of the defendants' trademark clearly establishes the fact that the trademark of the defendants is an exact imitation of the trademark of the plaintiffs. The deceptive and *mala fide* intentions of the defendants further stand established as they are in the same field of business as that of the plaintiffs and they are well aware of the adoption, use, goodwill and reputation of the trade mark, 'Sweet Magic' of the plaintiffs. The defendants' trade mark is visually, structurally and phonetically exactly the same as that of the plaintiffs' trade mark. The defendants wilfully and with a *mala fide* intention have adopted the trade mark with an avowed intention to cause confusion and deception in the minds of customers about the source of the services and to mislead the customers that the defendants' counterfeit services are the genuine services being provided by the plaintiffs. The defendants have no justification or cause whatsoever for adopting and using the trade mark, 'Sweet Magic', and to take undue and illegal advantage of the reputation and goodwill of plaintiffs' trademark and to indulge in deceptive practice of infringement and passing off, especially after retiring from the firm and after unilateral termination of the oral agreement. Therefore, the suit and the present application for temporary injunction are filed. If the defendants are not restrained by an injunction directing them to stop selling their products and services under the name and style of 'Sweet Magic', the plaintiffs will suffer irreparable loss and hardship and loss of goodwill and reputation.

3.2 Per contra, apart from denial of the material allegations made in the pleadings of the plaintiffs, the case of the respondents/defendants and the submissions made on their behalf, in brief, are as follows:

The plaintiffs suppressed the facts and filed the present suit on a distorted version. The plaintiffs have no right whatsoever over the title 'Sweet Magic'. The 2nd plaintiff has not devoted any time or energies to create such title or to gain goodwill in the public. 2nd plaintiff is the elder brother of the 1st defendant. Atluri Venkata Seetha Ramanjaneyulu and Koteswaramma had four sons viz., Vijaya Venkata Prasad, Venkata Satya Vara Prasad (2nd plaintiff), Ravi and Sai Leela Prasad (1st defendant). Ramanjaneyulu and Koteswaramma are small farmers having rural and agricultural background. They shifted to Vijayawada in or about 1982. After shifting to Vijayawada, Ramanjaneyulu secured petty jobs and used to maintain the family. As the income from the said jobs is not catering to the minimum needs of the family, in the year 1987, he started, in a small shop, video cassette lending business under the name and style of 'Vijay Video'. The 1st defendant, Ravi and Ramanjaneyulu used to look after the said business. At that time AVV Prasad was studying M.Tech., at IIT, Delhi, and the 2nd plaintiff was studying MBA at Machilipatnam. The 1st defendant was studying B.Com in Sathavahana College. On 12.12.1990, the 1st defendant and his brother Ravi and their father started another shop in the name and style of 'Drushya video'. The 1st defendant, his brother Ravi and their father, Ramanjaneyulu, used to manage and look after both the said businesses. They used to contribute money for the educational expenses of the said Vijaya Venkata Prasad and the 2nd plaintiff. After completion of education, 2nd plaintiff started business at Hyderabad with one Venkateswar Rao and sustained losses in the said business. 1st defendant and Ravi advanced amounts earned by them from the above said businesses to the 2nd plaintiff. 2nd plaintiff shifted to Vijayawada. The 1st defendant and his brother Ravi intended to start a Bakery. The 2nd plaintiff, 1st defendant and the said Ravi started Seasons Bakery in the name of the 2nd plaintiff in a tenanted premises; it was started with the monies earned by the 1st defendant and Ravi from the aforesaid businesses. On 17.08.1995, the said Ravi and the 1st defendant started business in the name and style 'Sweet Magic Mithai Shop' at Adhikari Hotel Complex, Bandar Road, Vijayawada. They took the said premises on lease from Adhikari Ranga Rao, landlord, for the period from 10.05.1995 to 09.11.1999. Since then the lease was being extended from time to time. Now also the said business is continuing in the same premises. They also started Sweet Magic Restaurant in the same premises by obtaining some more area on lease in the year 1998. In the year 1998, as per the advise of the elders of the family, the 2nd plaintiff, Ravi and the 1st defendant agreed to run their businesses jointly with an intention to gain more profits and to do the business on a bigger scale and floated a partnership firm in the name and style 'Sweet Magic'. The shop of the 2nd plaintiff 'Seasons the Bakery' and 'Sweet Magic Mithai Shop', business of the 1st respondent and Ravi were merged in the said firm and they continued their business. Subsequently the family members expanded their business and started some other branches in the same name, that is, 'Sweet Magic' and also in the name and style of 'Cross Roads'. They started restaurant at Kaleswara Rao Road, Near Besant Road Cross, in the year 2001. Subsequently, on 04.10.2001, they purchased 325 sq.yards of site at Patamata and started another branch in the name of 'Sweet Magic'. The 2nd plaintiff and Ravi used to maintain the shop at Patamata; the 1st defendant used to maintain the Sweet Magic Mithai shop and Sweet Magic Restaurant at

M.G. Road, Adhikari Hotel Complex. In the said premises they also started Sweet Magic Restaurant in the year 2002. Their father, Ramanjaneyulu, was also one of the partners; and, he joined as a partner on 19.10.2001. The said businesses, which are mentioned above and which were started by Ravi and the 1st defendant are converted into a family business for the benefits of all the family members by adding other family members as partners of the said businesses. All of them also filed necessary applications for registration of trade name Sweet Magic. In or about 2006, all the three brothers intended to run the businesses independently by themselves. At that time, the 2nd plaintiff advised to enter into a deed of retirement. All the brothers got independent business concerns; the 2nd plaintiff got the shop at Patamata, Seasons Bakery and the Governorpet Sweet Magic Shop; the 1st defendant got the Sweet Magic Mithai Shop and Sweet Magic Restaurant situate at M.G. Road, Vijayawada; and Ravi got the Cross Roads Restaurant. These defendants and Ravi being the younger brothers of the 2nd plaintiff signed the documents as desired by the 2nd plaintiff. As such, the 2nd plaintiff obtained the signatures of these defendants and others on the alleged retirement deed. As per the partition affected between the brothers, these defendants are entitled to continue the Sweet Magic Mithai shop and Sweet Magic Restaurant as their own businesses; Ravi is entitled to continue the business of Cross Roads Restaurant; and the 2nd plaintiff is entitled to continue the shop at Patamata, Seasons the Bakery and Governorpet shop. They are also entitled to expand their businesses and the name of Sweet Magic can be used by these defendants so also by the 2nd plaintiff. 2nd plaintiff has no exclusive rights over the said mark 'Sweet Magic'. After the partition also the brothers are running their own businesses individually as per their likes and it is nothing but continuation of their previous business and as such the question of permitting the 1st defendant to use the name 'Sweet Magic' or permitting him to run the business as franchise of the 1st plaintiff firm does not arise. This defendant has been using the said name as of right is within the knowledge of the plaintiffs. In fact the said shop is there since 17.08.1995 with the same name board and with the same name and with the same description or articulation. Subsequently, the 1st defendant also started 'Sweet magic Biyrani Express' and another 'Sweet Magic Mithai Shop' and 'Sweet Magic Restaurant' at Mahanadu Road in the name and style 'Sweet Magic Classic'. The 1st defendant and his brother Ravi with their handwork, skill and exertion created the name 'Sweet Magic'. The 2nd plaintiff is not at all a party to the business at the initial stages and after gaining goodwill and image to the Brand 'Sweet Magic' he joined as a partner. After partition of the businesses, these defendants also created a great goodwill to the said business. In-fact all the customers used to treat the shop of these defendants as the head office of Sweet Magic and other shops as branches of this shop. Sweet Magic Mithai Shop and the Sweet Magic Restaurant, which are being maintained by these defendants, are recognised as the reputed concerns. Till now the people in and around Vijayawada recognize the 'Sweet Magic' as a family concern but not as the property of the plaintiffs. The plaintiffs and the defendants are not rivals and there are no rival claims. They are the joint proprietors of the trademark 'Sweet magic' and it confines to their family. As such, the said trademark has to be used for the benefit of all the family members, but, not for and by the plaintiffs themselves. Even as per the alleged registration of the trademark, the name of the 1st defendant was also mentioned. The plaintiffs are not mentioned as the Proprietors of the trademark Sweet Magic. The plaintiffs themselves never submitted any application and it was submitted along with the 1st defendant and others. At the time of partition of the properties it was not registered and after partition the plaintiffs never claimed the said trademark as their own property and they also treated it as the property of all the family members. The claim of the plaintiffs is in the nature of mandatory injunction but not as interim injunction. The 1st defendant has been running the same business in the name and style of

'Sweet Magic' and he is the prior user of the said name. As these defendants are using the said name since 1995, no interim injunction can be granted as claimed by the plaintiffs in the year 2015. The balance of convenience is in favour of the defendants but not in favour of the plaintiffs. There is no violation of any legal right and the object of the interim injunction is to protect against the injury by violation of the rights of the plaintiffs for which he could not adequately be compensated in damages recoverable in the action. As such also the plaintiffs are not entitled for interim relief. The plaintiffs suppressed the facts and filed the present suit and petition by misleading the Court. As such they approached the Court with unclean hands; on the said ground also they are not entitled for the interim injunction.

4. At the hearing before the trial Court, the following exhibits are marked.

Exhibit P1, Xerox copy of partnership deed; exhibit P2, Xerox copy of supplementary deed; exhibit P3, Xerox copy of acknowledgment of registration of firms; exhibit P4, retirement deed; exhibit P5, Form V recording of partners before the Registrar; exhibit P6, Xerox copy of registration certificate; exhibit P7, trademark registration certificate; exhibit P8, Xerox copy of VAT registration certificates; exhibit P9, cashable, invoices, packing material photographs along with receipts; exhibit P10, Xerox copy of e-mail message; exhibit P11, TM 24; exhibit P12, Xerox copy of income tax returns from 2011-12 to 2014-15; exhibit P13, legal notice issued by the plaintiff; exhibit P14, reply notice issued by the defendants; exhibit P15, rejoinder issued by the plaintiff; exhibit P16, specimen mark of the plaintiff for comparison; exhibit P17, bill of products supplied to defendant by plaintiff.

Exhibit R1, lease agreement in favour of Atluri Ravi; exhibit R2, Form D certificate; exhibit R3, telephone connection bill; exhibit R4, Eenadu, Vijayawada edition; exhibit R5, photo of inauguration; exhibit R6, invitation card, exhibit R7 photo videoshop Drushya; exhibits R8 to R10, trade licences of

Sweet Magic in the name of A. Ravi; exhibits R11 to R13, notices issued by VMC in the name of A. Ravi; exhibits R14 to R16, Trade licences of Sweet Magic in the name of A. Ravi; exhibit R17, trade licence of ALS Prasad Biriyani express; exhibit R18, complaint registration details issued by VMC; exhibits R19 to R21, income tax returns of D1 for the years 2014-15, 2013-14 and 2011-12; exhibits R22 to R25 income tax returns of D2 for the years 2014-15, 2013-14, 2012-13 and 2011-12; exhibits R26 to R28, monthly returns for value added tax (from VAT 200) in the name of Sweet Magic Mithai Shop respectively for the months of June, 2015, May, 2015 and April, 2015; exhibits R29 to R31, monthly returns for value added tax (from VAT 200) in the name of Sweet Magic Restaurant respectively for the months of June, 2015, May, 2015 and April, 2015; exhibits R32 to R34, monthly returns for value added tax (from VAT 200) in the name of Sweet Magic Biriyani express respectively for the months of June, 2015, May, 2015 and April, 2015; exhibits R35 to R37, monthly returns for value added tax (from VAT 200) in the name of Sweet Magic classic respectively for the months of April, 2015, May, 2015 and June, 2015; exhibits R38 to R41, VAT registration certificates of Sweet Magic restaurant, Sweet Magic Biryani express, Sweet Magic Mithai shop and Sweet Magic Classic respectively; exhibit R42, Certificate of excellance, 2013 issued by Trip adviser along with opinions of customers; exhibits R43 to 60, advertisements contained in various District Editions of Eenadu, Andhra Jyothi, Sakshi and the Hindu; exhibits R61 to 64, advertisement bills in the name of Sweet Magic; and Rs.65, Photo of Vijay Video.

5. Pending this CMA, the appellants/defendants filed CMA.MP.Nos.210 of 2016, 1412 of 2016 and 119 of 2017 requesting to receive on the file, respectively, the following documents, as additional evidence.

Rental agreements dated 01.08.1999 and 05.08.2004 (2) in number in favour of Atluri Ravi; Rental agreements dated 01.06.2006, 10.03.2010 and 30.05.2014 (3) in number in favour of A.S.L.Prasad; Monthly returns for value added tax (from VAT 200) in the name of Sweet Magic Mithai shop for the assessment years 2007-08, 2008-09, 2009-10, 2010-11, 2011-12, 2012-13, 2013-14, 2014-15 and 2015-16 (total 9 in number); Monthly returns for value added tax (from VAT 200) in the name of Sweet Magic Restaurant for the assessment years 2009-10, 2010-11, 2011-12, 2012-13, 2013-14, 2014-15 and 2015-16 (total 7 in number); Copy of VAT returns for the year 2015-16 of M/s.Sweet Magic Mithai Shop; Copy of VAT Certificate issued by CTO, Benz Circle, Vijayawada, to M/s.Sweet Magic Restaurant; copy of notification of amended VAT registration certificate issued by CTO, Benz Circle, Vijayawada, to M/s.Sweet Magic Restaurant; copy of Form 5A issued in favour of Sweet Magic Mithai Shop; copy of Form 5A issued in favour of Sweet Magic Restaurant; Copy of loan sanction granted by Fullerton India in favour of M/s. Sweet Magic; Certified copy of application for rectification of register; Commercial Tax Department Registration Certificates dated 21.09.1998, 28.04.2007, 01.08.2009, 19.02.2010 & 27.10.2014 (total five in number); monthly returns from April, 2002 to December, 2002; January, 2003 to December, 2003; April, 2004 to December, 2004; January, 2005 to December, 2005; January, 2006 to December, 2006; January, 2007 to December, 2007; January, 2008 to December, 2008; January, 2009 to November, 2009; April, 2010 to December, 2010; January, 2011 to December, 2011; January, 2012 to December, 2012; January, 2013 to December, 2013; January, 2014 to December, 2014; January, 2015 to December, 2015; and, January, 2016 to November, 2016 (total 15 in number); bunch of bills (of various dates from 08.06.2009 to 17.04.2014) issued to Sweet Magic Mithai Shop; consent statement of Brand Ambassador Mr. M. Ali for the period from 01.04.2014 to 31.03.2016; Newspaper article showing the brand ambassador Mr. M. Ali; advertisements bills from 2012 till 2014; and various purchase orders and bills issued to supermarkets and famous retail stores.

5.1 As both the sides requested for taking the said documents as additional evidence, the afore-said MPs are allowed and the said documents are received on file. Since both the sides advanced arguments, in detail, referring to the documents including the additional documents filed before this Court, this Court is of the view that the documents can be referred to in the present orders without the necessity of giving further opportunity to both the sides by remitting the matter to the trial Court. Hence, accordingly, this Court is of the view that this CMA can be disposed of by adverting to all the documents. The additional documents filed are exhibited as exhibits R66 to R118.

5.2 CMA.MP.No.1989 of 2015 is filed requesting to take on record the accompanying photographs (5) in number as additional evidence. They are marked just for identification as exhibits R.119 to R.123.

6. As already noted, on merits and by the orders impugned in this appeal, the trial Court while allowing the application for temporary injunction filed by the plaintiffs granted a temporary injunction restraining the defendants and their men, from 15.12.2015 onwards, from using either directly or indirectly the plaintiffs trade mark, 'Sweet Magic', or any trade mark identical to or phonetically or deceptively similar to that of the plaintiffs trade mark. Therefore, the core dispute is about the plaintiffs' entitlement to the use of the trade mark 'Sweet Magic' to the exclusion of the others including the defendants.

7. To begin with, it is apt to refer to the settled legal position in general with regard to temporary injunctions and in particular with regard to granting or refusal of temporary injunctions related to infringement of trade mark or passing of action arising out of use of trade mark by the defendants, which is identical or phonetically or deceptively similar to the plaintiff's trademark, whether registered or unregistered. Ordinarily, the following three main principles govern the grant or refusal of injunction: a) prima facie case; b) balance of convenience; and, c) irreparable injury. (See: Hindustan Petroleum Corporation Ltd., v. Srimannarayan [(2002) 5 SCC 760]). In grant or refusal of

injunction, pleadings and documents play a vital role. In the broad category of *prima facie* case, it is imperative for the Court to carefully analyse the pleadings and the documents on record and only on that basis the Court must adjudge the existence or otherwise of a *prima facie* case. The Court while granting or refusing to grant injunction should exercise sound judicious discretion to find out the amount of substantial mischief or injury which is likely to be caused to the plaintiffs, if the injunction is refused, and compare it with that which is likely to be caused to the other side, if the injunction is granted. Only on weighing competing possibilities or probabilities of likelihood of injury, an injunction would be issued. In addition to the three basic principles, a Court while granting injunction must also take into consideration the conduct of the parties. A person who had kept quiet for a long time and allowed others to deal with the property exclusively would not be entitled to an order of injunction. The Court should not interfere only because the property is a very valuable one. (See: Mandali Ranganna and Ors. v. T. Ramachandra [AIR 2008 SC 2291]). Grant or refusal of injunction would have serious consequences depending upon the nature thereof. In dealing with such matters the Court must make all endeavour to protect the interest of the parties by balancing the conveniences and inconveniences. In addition, temporary injunction being an equitable relief, the discretion to grant such relief will be exercised only when the plaintiff's conduct is free from blame and he approaches the court with clean hands. (See: Seema Arshad Zaheer and Ors. v. Municipal Corporation of Greater Mumbai and Ors. [(2006)5 SCC 282]). Now I shall revert to the facts of the case.

8. In the first place, it is to be noted that the plaintiffs came to Court, *inter alia,* pleading as follows: 'The 1st plaintiff is a registered partnership firm and that the plaintiffs 2 and 3 are its partners. The 1st plaintiff firm is carrying on business under the brand 'Sweet Magic'. The said mark is being used as a brand to sell its products viz., sweets, savouries, bakery foods, confectionaries

and other food items from the place of its business at Patamata, Vijayawada. Initially, a partnership firm under the name and style M/s. Sweet Magic was constituted in the year 2001 *vide* partnership deed, dated 19.10.2001. In the said firm, the 2nd plaintiff, 1st defendant and one Atluri Ravi and their father late A.V.S.R. Anjaneyulu, 3rd plaintiff, 2nd defendant and Atluri Srilatha were partners. The photostat copy of the said partnership deed is exhibit P1. However, on 01.04.2002, a supplementary deed was executed between the said partners. Under the said supplementary deed, clause 9 of the original partnership deed was amended defining the role of working partners and their remunerations. 1st plaintiff along with Atluri Ravi and the 1st defendant thus became working partners of the said firm. The said facts are evident from exhibit P2, the photostat copy of the supplementary deed. However, in the year 2006, the partnership firm as it stood then sought for registration of the trade mark 'Sweet Magic' and applied for registration to the Registrar of trade marks, Chennai. The said application was prosecuted by the firm before the said Registrar. The trade mark was registered in the name of the firm with effect from 21.03.2006, that is, the date of application filed before the said Registrar. For the purpose of trade mark, 2nd plaintiff was designated as proprietor of the trade mark and the same was also recorded in the certificate and other documents. Thereafter, the partners namely, Atluri Ravi, 1st defendant, 2nd defendant, Atluri Srilatha and late A.V.S.R. Anjaneyulu retired from the partnership business *vide* retirement deed, dated 01.04.2007. The retirement deed was registered with the Registrar of Firms so as to statutorily register the change in the constitution of the firm. All the said retiring persons released and relinquished their shares in the assets of the partnership firm in favour of the firm and the continuing partners, that is, plaintiffs 2 and 3. The retirement deed clearly postulates that retiring persons expressed their desire to retire from the partnership with effect from 01.04.2007. Thus, the plaintiffs, that is, the 1st plaintiff firm and its continuing partners, that is, plaintiffs 2 and 3 are alone entitled to continue and carry on the business under the name and style M/s. Sweet Magic and use the brand name 'Sweet Magic'.'

8.1 On the above core contentions, the plaintiffs now contend that the defendants cannot use the trade mark or brand name 'Sweet Magic' for running their businesses. Be that as it may. Even as per the admissions in the pleadings of the plaintiffs on which the defendants place reliance, the rented premises situate in Adhikari hotel was given to the 1st defendant enabling to do his business with the same trade mark/brand name. On one hand, the plaintiffs contend that as per an understanding between the parties and as a matter of benevolence and responsible gesture, the premises situate in Adhikari hotel which was under the control of the old firm was given to the 1st defendant to enable him to do his business and that the said course was adopted at the request of the 1st defendant under a business agreement with him whereunder the plaintiffs agreed to supply sweets, savouries, bakery food and other food material etc., prepared by the plaintiffs' sweet house to the 1st defendant's sweet house at prices that could be fixed from time to time and that exhibit P8 Photostat copy of VAT registration certificate evidences such supplies. The plaintiffs also contend that the 1st defendant's request for oral permission was granted by the plaintiffs and the defendants were accordingly permitted to use the name 'Sweet Magic' on the name board at the said defendant's premises and sell only the products supplied by the 1st plaintiff in containers and packing containing the name of the plaintiffs mark 'Sweet Magic'. It is also the case of the plaintiffs that the 1st plaintiff firm also has a copy right in its art work of the logo.

8.2 In this backdrop of the plaintiffs contentions, the grievance of the plaintiffs is this: "That the defendants suddenly stopped buying the products from the 1st plaintiff-firm's shop being run under the trade name/brand name 'Sweet Magic' from 10.08.2014 onwards and violated the understanding and are using the same trade name/brand name 'Sweet Magic' and are carrying on and continuing the business under the name of 'Sweet Magic' by not only outsourcing the material for sale from 3rd parties and by also using packing material printed under the name and style 'Sweet Magic' and are continuing to sell the products, which are not supplied by the 1st plaintiff firm, by giving an indication to the general public that the products being sold by them are from the shop of the 1st plaintiff firm. As per the oral understanding and arrangement the defendants are only entitled to purchase the products/sweets etcetera from the 1st plaintiff firm only and sell the same in their business premises at Adhikari hotel by making use of the trade name/brand name 'Sweet Magic' but they cannot violate the said oral understanding and sell some other products from other sources in their shop by continuing to make use of the trade name/brand name 'Sweet Magic' and also the logo of the 1st plaintiff firm. In-fact, the defendants gave up all their rights in the business assets as well as the mark 'Sweet Magic' to the plaintiffs by virtue of the retirement deed executed at the time of retirement from partnership and therefore the use of the words 'Sweet Magic Mithai shop' by the defendants in violation of the oral understanding and by obtaining vat registration under the said name and the further acts of the defendants in using the same name 'Sweet Magic' for their Sweet Magic Restaurants is a clear infringement of the trade name/brand name of 'Sweet Magic' of the plaintiffs. In fact, the defendants are selling from their shops products of inferior quality and in that regard the plaintiffs received a complaint by mail under exhibit P10 from one of its customers complaining about the products sold by the 1st defendant by making use of the trade name/brand name 'Sweet Magic'. The plaintiffs acquired repute and achieved popularity by following high standards and maintaining high quality meticulously and the plaintiffs products being sold under the trade name/brand name 'Sweet Magic' are well known for their quality, standard, hygienic preparation, exact measure and delicious taste. Registration of the trade mark also conferred certain rights in favour of the plaintiffs. One of such rights is the plaintiffs' entitlement to use the trade mark exclusively and protect the same as if it is a right to property. By the acts which the defendants are committing the plaintiffs are suffering loss of fame, reputation and good will besides financial loss. In-fact, at one point of time at the intervention of D. Srinivasa Rao, Krishnaji and Venkata Rao, an oral understanding was arrived at whereby the defendants agreed to open a second shop subject to the condition that the existing shop and the new shop to be opened would be the franchisees of the plaintiffs and would only sell the products supplied by the plaintiffs. At that time the plaintiffs never suspected the bona fides of the defendants and the mediators and therefore kept quiet. Further, the defendants refused to place orders and buy products from the plaintiffs and violated the understanding."

9. From the pleadings, documents and admitted facts it emerges that the trade name/brand name 'Sweet Magic' was not first used by the 1st plaintiff firm or the earlier partnership firm under the partnership deed, dated 19.10.2001. In fact Atluri Ravi, who is one of the sons of late A.V.S.R. Anjaneyulu and the brother of the 2nd plaintiff and 1st defendant, along with the 1st defendant having intended to start a bakery started Seasons Bakery along with the 2nd plaintiff; however in the name of the 2nd plaintiff in a rented premises. On 17.08.1995, the said Ravi and 1st defendant also started business in the name and style Sweet Magic Mithai Shop at Adkhikari hotel complex, Bandar Road, Vijayawada, where the defendants are presently carrying on business to which the plaintiffs are raising an objection. That business was started by taking the premises at that place on lease and the same is being continued on extension of term of lease from time to time. It is not in dispute that the business is continuing in the same premises even as on today with the same name and the said business with the trade name 'sweet magic' was first started at Adkhikari hotel complex. In-fact, Sweet Magic Restaurant was also

started in the year 1998, in the same premises by obtaining additional area on lease. Thus, the trade name/brand name 'Sweet Magic' was first used by Atluri Ravi, one of the three brothers way back in the year 1995 is admitted. The said fact is also evident from a registration certificate which is filed before this Court. Subsequently, on 25.07.1998, there was another partnership which in-fact was referred to in the partnership deed, dated 19.10.2001, copy of which is marked as exhibit P1. That partnership was entered into between the defendants herein and the plaintiffs 2 and 3. Subsequently, for expanding business and gain more profits, the defendants 2 and 3 and the plaintiffs 1 and 2 along with other family members constituted firm along with late A.V.S.R. Anjaneyulu *vide* partnership deed, dated 19.10.2001. Thus, the said firm came to use the same trade name/brand name 'Sweet Magic' long after it was coined in the year 1995 and gained fame, reputation and good will. Thereafter, the supplementary partnership deed was executed in the year 2002 and the retirement deed was executed in the year 2007 and some of the partners in the firm of the year 2001 retired along with the defendants 1 and 2 herein.

10. In view of the said chronology of events, the defendants contend that the plaintiffs suppressed material facts and therefore are not entitled to the equitable relief of injunction. The defendants also claim the benefit of prior user. The defendants also raised the defences of acquiescence, estoppel and standing by. The defendants also contend that the delay in coming to Court and in seeking the equitable relief disentitles the plaintiffs to the relief of injunction. The defendants alternately contend that a continuing business cannot be injuncted and that when compensation is an adequate remedy, no injunction can be granted.

11. Taking up the first aspect of prior user, it is necessary to restate the facts or chronology of events in brief. In August, 1995, Sweet Magic Mithai Shop was established by Atluri Ravi, who is now not a party to the present *lis,*

by taking a premises on lease at Adhikari hotel. The said fact is undisputed and is evident from exhibit R1, lease deed entered into between Atluri Ravi and the lessor, and exhibit R2 certificate of registration issued in the name and style Sweet Magic Mithai Shop by the commercial taxes department and various other exhibits. Subsequently, the 2nd plaintiff intended to join the said business and joined the said business. Thereafter, Atluri Ravi and others, that is, 2nd plaintiff, 1st defendant, 3rd plaintiff, 2nd defendant, Atluri Srilatha formed into a partnership firm under the name and style 'Sweet Magic' as per a partnership deed, dated 25.07.1998. Thereafter, another partnership firm was constituted in the year 2001, as already noted, by virtue of the partnership deed of the year 2001. After retirement of some of the partners by virtue of the retirement deed, dated 01.04.2007, now the 1st plaintiff firm was reconstituted and is continuing business under the same name M/s. Sweet Magic with the plaintiffs 2 and 3 as its partners. Placing reliance on this chronology of events, the defendants contend that the defendants are prior users of the trade name/brand name 'Sweet Magic'.

12. In reply, the plaintiffs specifically contend that Atluri Ravi was the prior user in any view of the matter and that later the name was used by the partners of various partnership firms and, therefore, the plea of prior user does not inure to the benefit of the defendants. The plaintiffs further contend that by virtue of retirement deed in the year 2007, the defendants relinquished assets and right to property including the right to intellectual property namely the trade name/brand name 'Sweet Magic' and that the defendants abandoned their right and that in view of the abandonment also, the plea of prior user is not open to the defendants. In the well considered view of this Court, since the defendants never exclusively used the trade name in question and that only Atluri Ravi first used the said trade name, the said plea of the defendants need not be countenanced, at this stage, and the said issue has to be adjudicated after full fledged trial. No doubt the learned counsel for the defendants

placed reliance on certain decisions including the following decisions on the aspect of prior user: (i) S. Syed Mohideen v. P. Sulochana Bai[1] and (ii) Neon Laboratories Ltd. v. Medical Technologies Ltd.[2] Though there is no dispute with the legal propositions in the said decisions, on facts, in view of the peculiar facts of the present case, the ratios in the cited decisions are not helpful to the defendants.

13. Turning to the twin pleas viz., (i) delay disentitles the plaintiffs to the equitable relief of injunction; and, (ii) acquiescence, estoppel and standing by raised by the defendants, the defendants in support of the said pleas contended that even from the plaint averments, the deed of retirement was executed on 01.04.2007 and from that day onwards the defendants are not entitled to use the trade name/brand name 'Sweet Magic'. Despite the said fact, the plaintiffs fairly submit that the 1st defendant was allowed to continue to use the brand name 'sweet magic' and continue the business in the premises at Adhikari Hotel. This submission is coupled with the further submission of the plaintiffs that there is an oral understanding and that as per the oral understanding and out of benevolence and responsible gesture the plaintiffs allowed the 1st defendant to carry on the business and that by an oral permission the defendants were permitted to use the name 'Sweet Magic' in the name board at the defendants premises and sell the products supplied only by the 1st plaintiff firm in containers and packing containing the trade name/brand name 'Sweet Magic'. Even according to the plaint averments, the defendants stopped buying the products from the plaintiffs firm from 10.08.2014. There was also a mediation by elders whose names were mentioned in the pleadings of the plaintiffs; and, the plaintiffs also pleaded that after such settlement before elders, the 1st defendant opened 2nd shop and the plaintiff did not object to the same and in-fact consented for the same and

[1] 2015 SCC Online SC 1084
[2] 2016(1) ALD 97 (SC)

the 1st defendant also started Sweet Magic Biryani Express, Sweet Magic Mithai Shop and Sweet Magic restaurant at Mahanadu Road under the name and style 'Sweet Magic Classic'. Though the plaintiffs contended that the 2nd shop and the 1st shop are franchisees of the 1st plaintiff firm, there is no further pleading that for the sale at the second shop plaintiffs are supplying their products. After the deed of retirement, as per plaintiffs' contentions the defendants are allowed to continue the business in the existing premises by selling the products supplied by the plaintiffs. If that is so, the plaintiffs must be having voluminous records like a number of receipts evidencing sale of products by the 1st plaintiff firm to the defendants' shop from the date of the deed of retirement, that is, 01.04.2007 till the defendants stopped purchasing the products from 10.08.2014. No receipts of such supplies immediately after retirement from the partnership firm, that is, subsequent to 01.04.2007 are filed to show that the defendants sold at their shop premises at Adhikari hotel the products supplied by the plaintiffs only. Thus, to substantiate *prima facie* the plea of oral understanding/arrangement, the plaintiffs could not produce any documents except a few documents, viz., exhibit P17 whereunder products worth less than Rs.1,700/-, Rs.5,000, Rs.4,000/- and Rs.9,000/- were respectively sold in June, 2014, May, 2014, August, 2014 and August, 2014. However, learned counsel for the plaintiffs forcefully contends that out of close relationship only an oral understanding was arrived at and that if really the defendants are carrying on business with the trade name/brand name 'Sweet Magic' there was no need for them to purchase any products from the plaintiffs firm and that the receipts produced sufficiently lay bare that the products are purchased by the defendants' shop from the 1st plaintiff firm's shop and that the same is sufficient to establish the oral understanding. In the absence of production of any documentary evidence such oral assertion based on receipts under exhibit P17, receipts of the year 2014, needs no countenance. He would further contend that after intervention of elders, the second shop was opened with the consent of the plaintiffs and that the two shops were only franchisees of the 1st plaintiff firm with a right to sell plaintiffs products in the two shops using the plaintiffs trade name/brand name 'Sweet Magic' and therefore there is no need to further plead that the defendants are required to sell the products of the plaintiffs and they were selling the products of the plaintiffs till they stopped buying the plaintiffs products. Be it noted that the plaintiffs pleaded in the plaint that the defendants stopped purchasing products from their shop from 10.08.2014 but continued to use the trade name of the 1st plaintiff firm and selling products of others instead of those supplied by the 1st plaintiff firm. The second shop was admittedly opened on 17.11.2014, that is, after 10.08.2014, at Mahanadu road. Be that as it may. In the notice which was issued, on 06.09.2014, the plaintiffs stated that after some of the partners retired and the 1st plaintiff firm was reconstituted by virtue of retirement deed, dated 01.04.2007, and after all the retiring partners including the defendants relinquished their rights in favour of the 1st plaintiff firm and its continuing partners, that is, plaintiffs 2 and 3, the plaintiffs are alone entitled to carry on business with the trade name/brand name 'Sweet Magic' but as per the understanding with the defendants, the rented premises at Adhikari hotel was given to the 1st defendant for the purpose of doing business and that the plaintiffs granted franchisee as per oral agreement and that under the agreement the plaintiffs agreed to supply sweets etcetera to the defendants shop on prices that may be fixed from time to time and that accordingly, the defendants were used to use the name 'Sweet Magic' on the name board and also packing material and sell the products supplied by the 1st plaintiff firm and that the plaintiffs continued the business like that till 10.08.2014 but all of a sudden the defendants stopped buying the food products from the plaintiffs but continued to carry on the business under the name 'Sweet Magic' and continued to sell the products by procuring from other sources but with the same trade name/brand name 'Sweet Magic' and with the same packing material with the logo of the plaintiffs and by displaying the same sign board with the same trade name 'Sweet Magic' and that the defendants thus misused the trade name. The defendants issued a reply, dated 09.10.2014, denying the allegations of the plaintiffs, and, *inter alia* stating that as per the understanding the defendants can continue the business at Hotel Adhikari premises as they are having an independent business since 1995 even prior to the partnership business and that the contention that the plaintiffs granted franchisee to the defendants as per oral agreement and that under such agreement the plaintiffs are required to supply sweets etcetera on the prices that may be fixed from time to time and that on that understanding the defendants are permitted to use the trade name on the name board and packing material etcetera are far from truth and are lies. The plaintiffs issued a rejoinder notice, dated 19.10.2014, reiterating their stand. Even according to the plaintiffs, no action was taken immediately thereafter after exchange of notices. However, the plaintiffs plead that after exchange of notices there was an intervention by some well wishers of the family and that both the parties agreed for the defendants opening a second shop on the condition that the existing shop and the new shop would be the franchisees of the plaintiffs and that the defendants shall sell the products supplied by the plaintiffs in the two shops and that at that time the plaintiffs never suspected the *bona fides* of the defendants. Subsequent to the said arrangement at the intervention of elders, the defendants admittedly opened the second shop and various other outlets viz., Sweet Magic Biryani Express, Sweet Magic Mithai Shop, Sweet Magic Restaurant and Sweet Magic Classic and no supplies were made by the plaintiffs firm to the said outlets of the defendants and the defendants admittedly did not purchase any products from the plaintiffs after 10.08.2014. Even thereafter the plaintiffs kept quiet. Thus, for quite a number of months even subsequent to the exchange of notices, the defendants carried on business under the trade name/brand name 'Sweet Magic' without reference to the plaintiffs. As already noted, the plaintiffs came to Court in July, 2015. Except few receipts of the year 2014 for paltry sums, the plaintiffs could not produce any documents worth any weight to show *prima facie* that till the disputes arose, the plaintiffs supplied products to the defendants' existing shop and the supplied products were only sold by the defendants at their shop. In that view of the matter, the pleas viz., delay disentitles the plaintiff to a temporary injunction which is an equitable relief and that the plaintiffs are not entitled to the equitable relief of temporary injunction on the ground of acquiescence, estoppel and standing by, assumes importance.

14. In this regard, it is appropriate to refer to the decision in Power Control Appliances v. Sumeet Machines[3] wherein the Supreme Court having referred to earlier decisions held as follows:

> 'Acquiescence is one facet of delay. If the plaintiff stood by knowingly and let the defendants build up an important trade until it had become necessary to crush it, then the plaintiffs would be stopped by their acquiescence. If the acquiescence in the infringement amounts to consent, it will be a complete defence as was laid down in Mouson (J.G) & Co. v. Boehm [(1884) 26 Ch D 406]. The acquiescence must be such as to lead to the inference of a licence sufficient to create a new right in the defendant as was laid down in Rodgers v. Nowill [(1847) 2 De GM & G 614].'

15. In the case on hand, it cannot be said that the plaintiffs are not aware of the defendants carrying on trade in the same products with the same trade name/brand name as even according to the plaintiffs an oral understanding was violated by the defendants even by August, 2014, and even thereafter despite exchange of notices there was no action and that on the other hand, there was a settlement at the intervention of the elders and the defendants opened a second shop with the same trade name and continued business till the filing of the suit. Though the plaintiffs alleged that as per the understanding before the elders the defendants are required to sell the products supplied by the plaintiffs in the existing and also the new shop to be opened and that the shops of the defendants are franchisees, not even a single document is produced that

[3] (1994) 2 SCC 448

after such understanding the plaintiffs supplied their products to the defendants for sale in their existing and newly opened shops.

16. Viewed thus, this Court finds that on the grounds of delay and acquiescence, estoppel and standing by, the defendants can successfully contend that the plaintiffs are not entitled to the equitable relief of injunction. At this juncture, it is also to be noted that the defendants are carrying on business for whatever reasons from the date of retirement from the partnership firm, that is, from 01.04.2007, till date in the same trade name/brand name and at the same original place and other places. Further, the plaintiffs could not establish *prima facie* any loss much less loss of reputation, fame and good will, on account of the defendants continuing their business with same trade/brand name. The plaintiffs could not *prima facie* show that they suffered loss of reputation and it is not their pleaded case that their goodwill was affected adversely and their business profits have come down in the later years. Though the plaintiffs relied upon a mail said to have been received from a customer stating that the defendants sold from their outlet sub-standard products, that e-mail which is only one complaint in isolation, which is inconsequential, pales into insignificance as the said mail emanated after exchange of notices and the disputes. Thus there is no material to safely hold that the plaintiffs established a *prima facie* case.

17. Before summing up, it is to be noted that the following decisions relied upon are of no assistance for adjudication as in the instant case the findings supra are arrived at purely on facts peculiar to the case.

i) Manohar Singh Chadda v. Sheetal Sweets[4]

ii) Dwaraka Industries v. Adithya Aromatics[5]

iii) Ganesha Enterprises v. Sandeep Gullah[6]

---

4 2000 (20) PTC 320
5 LNIND 2012 MAD 3585
6 2012 Indlaw DEL 2416

iv) Sivaramakrishna Traders v. Kamal Traders[7]

v) M/s.Hindustran Pencils Pvt., Ltd., v. M/s.Inida Stationery Products Co., and another[8]

vi) PARKSONS Cartamundi Pvt., Ltd., v. Suresh Kumar Jasraj Burad[9]

vii) Minochar @Minoo Aspandyar Irani v. Deenyar Sheriar Jehani and others[10]

viii) Kalinga Gudakhu Udyog v. Konark Gudakhu Factory[11]

ix) M/s.Aviva FIber v. Aviva Fibertech Pvt., Ltd.,[12]

x) Ruston & Hornsby Ltd., v. The Zamindara Engineering Co.,[13]

xi) K.R. Mohan Reddy v. M/s.Net work Inc[14]

xii) Andisamy Chettiar v. Subburaj Chettiar[15]

xiii) North Eastern Railway Administration v. Bhagwan Das[16]

xiv) Union of India v. Ibrahimuddin[17]

18. To sum up: Going by the plaint averments, initially almost all the family members formed into a partnership firm under the name and style M/s Sweet Magic in the year 2001, *vide* partnership deed, dated 19.10.2001, the copy of which is exhibit P1 and that the said partnership firm carried on business under the trade name/brand name 'Sweet Magic' and that on retirement of a major number of partners including the 1st defendant, the present 1st plaintiff firm was reconstituted with the plaintiffs 2 and 3 as its partners and that by virtue of the retirement deed, dated 01.04.2007, the copy of which is marked as exhibit P4, the plaintiffs are alone having title and are entitled to use the brand name Sweet Magic. Even before the retirement deed, the trade mark was got registered vide application dated 21.03.2006. Be it also noted that the firm constituted in the year 2001 applied for registration of the trade mark when all the partners including the present disputing parties are its partners.

[7] 2003 (2) ALD 375
[8] AIR 1990 DELHI 19 (1)
[9] Order dated 21.03.2012 of Bombay High Court in Appeal No.57 of 2012
[10] 2014 Indlaw MUM 1009
[11] 1990 (10) PTC 216 (DEL)
[12] AIR 1998 DELHI 121
[13] 1970 AIR 1649
[14] (2007) 14 SCC 257
[15] AIR 2016 SC 79
[16] (2008) 8 SCC 511
[17] (2012) 8 SCC 148

Therefore, whether the present 1st plaintiff firm can exclusively claim the benefit of registration of the trade mark has to be decided after full fledged trial. Registration of a trade mark was granted from the date of the application, that is, 21.03.2006. By the time the firm constituted in the year 2001 is continuing with all its partners. Though the deed of retirement is dated 01.04.2007, the defendants never discontinued to use the trade name/brand name 'Sweet Magic' till date and in fact opened new establishments with the same name. Therefore, whether such registration of the trade mark prior to the retirement of some of the partners of the firm inures to the exclusive benefit of the 1st plaintiff firm has to be decided only after full fledged trial. Be that as it may. Despite the terms of the retirement deed, the 1st defendant was allowed to continue to use the brand name 'Sweet Magic' and continue the business at the original premises at Adhikari hotel. For such continuation, the vital submission of the plaintiffs is that there was an oral understanding and that out of benevolence and as a measure of responsible gesture the defendants were permitted to use the name Sweet Magic and sell the products supplied by the 1st plaintiff firm in the containers and packing containing the trade name/brand name Sweet Magic. Therefore, it is for the plaintiffs to establish *prima facie* the said understanding. However, subsequent to the retirement deed, dated 01.04.2007, no receipts or other documents are filed by the plaintiffs to show that for price agreed to between the parties, the plaintiffs supplied products to the defendants for sale from their outlet. As already noted, to substantiate *prima facie* the plea of oral understanding, the plaintiffs could produce exhibit P17 only whereunder products worth less than Rs.1,700/-, Rs.5,000, Rs.4,000/- and Rs.9,000/- were respectively sold in June, 2014, May, 2014, August, 2014 and August, 2014. Without producing any receipts or any other authenticated documents right from 01.04.2007 onwards, the plaintiffs contention that exhibit P17 establishes the oral understanding cannot be countenanced more particularly in the absence of vital evidence for the long period from April, 2007 onwards. Further, the defendants were allowed to open the second shop on 17.11.2014 even though the plaintiffs' case is that from 10.08.2014 the defendants stopped purchasing products from the 1st plaintiff – firm's shop. The defendants further opened outlets with the same name Sweet Magic Biryani Express, Sweet Magic Mithai shop, Sweet Magic Restaurant and Sweet Magic Classic and no evidence even of a *prima facie* nature was produced to show that the second shop and the first shop are franchisees of the 1st plaintiff firm and that through the said shops the defendants sold only the products supplied by the 1st plaintiff – firm's shop. When the vital aspect of oral understanding *prima facie* is not established and on the other hand, the fact that the 1st defendant continued the business at the premises at Adhikari hotel despite deed of retirement, dated 01.04.2007,, and further opened the second shop and other outlets and continued the business and that the plaintiffs kept quiet till July, 2015, would amply and *prima facie* support the plea of waiver, standing by and estoppel raised by the defendants. Therefore, the absence of *prima facie* proof of oral understanding as well as the plea based on franchisee coupled with the acts of acquiescence and standing by on the part of the plaintiffs, disentitle the plaintiffs to the equitable relief of temporary injunction. In that view of the matter this Court holds that the plaintiffs failed to establish a *prima facie* case which is a *sine qua non* or irreparable loss besides likelihood of loss in future, which cannot be compensated in terms of money. Further, as rightly pointed by the learned counsel for the appellants-defendants, this Court, having noted that the appellants-defendants were and are doing business in the name of 'Sweet Magic' from 2013 onwards, ordered both the parties to maintain *status-quo* obtaining as on 10.12.2015 and further directed the appellants-defendants not to open new shops by using the trademark 'Sweet Magic'. Therefore, the defendants are continuing their business uninterruptedly from the inception till date and that in that view of the matter, a business which was being carried on since decades need not be injuncted as such a course would cause relatively more hardship to the defendants if the injunction is granted rather than the hardship that would be caused to the plaintiffs if injunction is refused. Having regard to the said submission, which merits consideration, this Court finds that the balance of convenience is also not in favour of the plaintiffs.

19. On the above analysis this Court finds that the defendants cannot be injuncted temporarily from using the trade name/brand name in the well considered view of this Court. For all the above reasons, this Court finds that the order of the trial Court is unsustainable and calls for interference.

20. In the result, the Civil Miscellaneous Appeal is allowed, however, without costs and the order, dated 24.11.2015, of the learned VIII Additional District Judge, Vijayawada, passed in IA.no.626 of 2015 in OS.no.277 of 2015 is hereby set aside and the said application is dismissed without costs. Considering the subject matter and the nature of the *lis* and the fact that the parties are closely related, this Court is of the considered view that this may be a fit case for settlement through mediation. Accordingly this Court directs the trial Court to make an endeavour to impress upon the parties to make a sincere attempt to settle the matter amicably and then refer the matter for settlement through mediation by following the procedure established by law. Needless to state that only on the failure of the settlement through mediation, the trial Court may take up the suit for disposal on merits. The exercise in this regard, if possible, shall be completed as expeditiously as possible and preferably within one month from the date of receipt of a copy of this judgment.

Miscellaneous petitions, if any, pending, shall stand closed.

M.Seetharama Murti, J

13.04.2017
Vjl

Appendix of evidence:

Witnesses examined

For appellants: For respondents:

NIL NIL

Documents marked on behalf of the appellants-defendants:

Exhibit R66: Rental agreement dated 01.08.1999 in favour of Atluri Ravi

Exhibit R67: rental agreement dated 05.08.2004 in favour of Atluri Ravi

Exhibit R68: rental agreement dated 01.06.2006 in favour of A.S.L.Prasad

Exhibit R69: rental agreement dated 10.03.2010 in favour of A.S.L.Prasad

Exhibit R70: rental agreement 30.05.2014 in favour of A.S.L.Prasad

Exhibits R71 to R79: Monthly returns for value added tax (from VAT 200) in the name of Sweet Magic Mithai shop respectively for the assessment years 2007-08, 2008-09, 2009-10, 2010-11, 2011-12, 2012-13, 2013-14, 2014-15 and 2015-16 (total 9 in number).

Exhibits R80 to R86: Monthly returns for value added tax (from VAT 200) in the name of Sweet Magic Restaurant respectively for the assessment years 2009-10, 2010-11, 2011-12, 2012-13, 2013-14, 2014-15 and 2015-16 (total 7 in number).

Exhibit R87: Copy of VAT returns for the year 2015-16 of M/s.Sweet Magic Mithai Shop.

Exhibit R88: Copy of VAT Certificate issued by CTO, Benz Circle, Vijayawada, to M/s.Sweet Magic Restaurant.

Exhibit R88: Copy of notification of amended VAT registration certificate issued by CTO, Benz Circle, Vijayawada, to M/s.Sweet Magic Restaurant.

Exhibit R90: Copy of Form 5A issued in favour of Sweet Magic Mithai Shop.

Exhibit R91: Copy of Form 5A issued in favour of Sweet Magic Restaurant.

Exhibit R92: Copy of loan sanction granted by Fullerton India in favour of M/s. Sweet Magic.

Exhibit R93: Certified copy of application for rectification of register;

Exhibits R94 to R98: Commercial Tax Department Registration Certificates dated 21.09.1998, 28.04.2007, 01.08.2009, 19.02.2010 & 27.10.2014 (total five in number).

Exhibits R99 to R.113: monthly returns respectively from April, 2002 to December, 2002; January, 2003 to December, 2003; April, 2004 to December, 2004; January, 2005 to December, 2005; January, 2006 to December, 2006; January, 2007 to December, 2007; January, 2008 to December, 2008; January, 2009 to November, 2009; April, 2010 to December, 2010; January, 2011 to December, 2011; January, 2012 to December, 2012; January, 2013 to December, 2013; January, 2014 to December, 2014; January, 2015 to December, 2015; and, January, 2016 to November, 2016 (total 15 in number);

Exhibit R.114: Bunch of bills (of various dates from 08.06.2009 to 17.04.2014) issued to Sweet Magic Mithai Shop.

Exhibit R115: Consent statement of Brand Ambassador Mr. M. Ali for the period from 01.04.2014 to 31.03.2016.

Exhibit R116: Newspaper article showing the brand ambassador Mr. M. Ali;

Exhibit R117: Bunch of advertisements bills from 2012 till 2014.

Exhibit R118: Various purchase orders and bills issued to supermarkets and famous retail stores.

Exhibits R119 to R.123: photographs (5) in number

<u>Documents marked on the side of the respondents-plaintiffs:</u>

NIL

M.S.R.M, J