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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of decision: 07.12.2017

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CS(COMM) 1285/2016

M/S M.U EATING POINT & ANR.

... Plaintiffs

Through

Mr. Ashutosh Kumar, & Mr. Zuhaib
Khan Advocates.

versus

CAPT. AMAN AND ORS.

..... Defendants

Through

Respondents are Ex-parte.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. Arguments have been heard in this suit. Vide order dated 22.12.2014 Defendant No. 2 was proceeded ex-parte. Similarly, vide order dated 23.08.2017 defendant No. 3 was also proceeded ex-parte. None has appeared on behalf of the defendants even today. I may note that, vide order dated 19.2.2015 a consent decree has already been passed against defendant no. 1 in terms of prayer (a) & (b) of the plaint.

2. Plaintiff No.1, namely, M/s M.U Eating Point, is a sole proprietorship concern operated by one Mr. Mohammad Usman. Plaintiff No.2, Tunday Kababi Private Limited, is a private limited company incorporated in the year 2010 under the laws of India. Mr. Mohammad Usman is also a founding director of plaintiff No. 2. The name 'TUNDAY KABABI' is coined by the founder Mr. Haji Murad Ali in the year 1905 when he was offered the royal patronage from the Nawab of Lucknow. Accordingly, he started a corner at the junction of Gol Darwaza Street and Akbari Gate under the name 'TUNDAY KABABI' or 'TUNDAY KE

KABAB'. He had only one arm and hence, the name 'TUNDE KABABI' was adopted. Since, then he was being associated with same name. Mohammad Usman is said to be the grandson of the Mr.Haji Murad Ali.

3. It is the contention of the plaintiffs that they are using the trademark 'TUNDAY KABABI' and 'TUNDAY KABABI' logo from the year 1995 when Mr. Haji Rais Ahmad father of Mohammad Usman started another outlet in Aminabad, Lucknow. It is stated by plaintiffs that they are maintaining the original taste for as long as 90 years under the aforesaid trademark 'TUNDAY KABABI'.

4. It is again stated that the plaintiff has continuously and uninterruptedly used ' TUNDAY KABABI' and 'TUNDAY KABABI' Logo. The said pattern is exclusively associated as an emblematic symbol of plaintiffs. It is important to note here that the first trademark application for the said trademark was filed in the year 2009. Therefore, the trademark "TUNDAY KABABI' and TUNDAY KABABI Logo are registered in India in class 16, 42 etc. in favour of plaintiff No.1. The details of the same have been mentioned at para 9 & 10 of the plaint.

5. It is contended by the plaintiffs that by virtue of having coined the trademark 'TUNDAY KABABI'(word), devised the "TUNDAY KABABI" logo and due to priority in adoption, long and continuous use and extensive sale and advertising, the said trademark has come to connote the services of the plaintiff. It is further contended that the adoption and extensive use of the trademark has led to the said trademark as the source identifier of the services of the plaintiffs. The use of the said trademark or any trademarks similar to the said trademark, by any other entity without the consent or license of the plaintiffs will cause confusion as to source or origin.

6. It is contended by the plaintiffs that they have spent colossal amount of time, and money to promote and advertise the said trademark by various print and electronic media. The details of the expenses on advertisement of the plaintiffs are mentioned in para 12 of the plaint.

7. It is contended that in the month of October 2014, the Plaintiffs acquired knowledge of the fact that the Defendants have opened restaurants in Delhi and Kanpur under the infringing mark "LUCKNOW WALE TUNDAY KABABI" which is identical/deceptively similar to the Plaintiffs' registered and well known trade mark 'TUNDAY KABABI'. Furtherance to that the Plaintiffs have also acquired knowledge that the Defendants are also planning to open a new restaurant at Akbari Gate in Lucknow under the said Infringing Mark 'LUCKNOW WALE TUNDAY KABABI'.

8. It is contended by plaintiffs that the Defendant No.1, Capt. Aman, has recently opened a restaurant in Daryaganj, New Delhi in collaboration with Defendants No.2 &3 under the Infringing Mark 'LUCKNOW WALE TUNDAY KABABI'. Additionally, they have also opened restaurants under the same infringing trademark in Kanpur and Lucknow. It is further stated that defendant No. 3 is misrepresenting to the public that he is a legal heir of Haji Murad Ali and has a right to give franchise to use the Infringing Mark 'LUCKNOW WALE TUNDAY KABABI'.

9. It is also contended that defendant No.3 had filed a trademark application No. i.e. TM No.2608890 for the registration of the Infringing Mark, which is still pending. This application was filed much later than when the plaintiffs got their mark registered. The Infringing Mark **“LUCKNOW WALE TUNDAY KABABI”** contains the Plaintiffs' well known trade mark **“TUNDAY KABABI”** as a whole. It is stated that the

addition of the words "Lucknow wale" is insufficient to distinguish the Infringing Mark phonetically, visually or structurally. It is pleaded that the word "TUNDAY KABABI" as whole is the most essential/prominent/dominant features of plaintiffs' trademark.

10. It is also contended by the plaintiffs that they had also filed an infringement suit being CS(OS) no. 1899/2014 before this court against M/s Avadh Food Point through its sole proprietor Mohammad Asif and defendant No. 3 herein to restraint them from using plaintiffs registered trademark " TUNDAY KABABI" in relation to their restaurant at Ghaziabad, U.P. This court vide order dated 4.7.2014 passed an ex-parte ad interim injunction against defendants. The plaintiff also points out that defendant No.3 has also filed a suit before the Civil Judge (Senior Division), Lucknow praying that the plaintiff be restrained from interfering in the business of defendant No.3 and its franchisee. It has been pleaded that the plaintiff has also filed an ante suit injunction application in the suit and the same is pending.

11. It is reiterated by the plaintiffs that they are the only rightful and lawful owner of the trademark "TUNDAY KABABI" and "TUNDAY KABABI" Logo and defendants No. 2 & 3 are deliberately, malafidely infringing there registered trademarks not only to encash on their goodwill but also creating a situation of dilution of their registered trademarks. Thus, the defendants herein are seeking to misrepresent to the general public that they have some association or they have been licensed by the plaintiffs to use their trademarks.

12. The written statement of defendant No. 1 and defendant No. 3 is on record. It is pleaded by defendant No. 1 that he admits the fact that he was

approached by defendants No. 2 & 3 to open a restaurant in Delhi under the said infringing mark “LUCKNOW WALE TUNDAY KABABI”, though defendant No. 3 in his written statement has denied the same. It is also pleaded by defendant No. 3 that he is the maternal grandson of Haji Murad Ali and therefore being direct legal heir he is carrying on the family business. Accordingly, Mohd. Usman is a cousin brother of defendant No.3. It is further pleaded by defendant No.3 that Mr. Haji Murad Ali was issueless, and was looked after by his three real brothers. Since, he was issueless, Haji Murad Ali adopted the daughter of his brother being ‘Qaiser’ and also looked after her as a daughter. She was married to one Mohd. Hanif and defendant No.3 was born out of the said wedlock. Hence, he is one of the legal heir of Haji Murad Ali.

13. Mr. Mohammad Usman has led his evidence as PW 1/A. He has stated that his grandfather started using the name “TUNDAY KABABI” since year 1905 whereas they have adopted the distinctive mark since 1995. He also stated that they are using the aforesaid trademark in respect of the services under “TUNDAY KABABI” continuously and uninterruptedly since 1995. The copies of registration certificates of the trademark are exhibited as EX.PW1/7 to EX.PW1/11, franchisee agreement with TSK ventures are exhibited as EX.PW 1/12, a copy of GPA with TSK ventures are exhibited as EX.PW 1/13, documents proving goodwill attached with the aforesaid mark are exhibited as EX.PW 1/14(colly), EX.PW 1/15(colly), certain copies of balance sheets of plaintiffs from 2009 to 2013 are exhibited as EX.PW 1/16(colly), original certificate of accuracy of statement issued by plaintiffs C.A exhibited as EX.PW 1/17, copy of order dated 15.04.2014 exhibited as EX.PW 1/25. A copy of franchise

agreements dated 4.1.2014 and 25.8.2014 between defendant no. 1 and defendants No. 2 & 3 are exhibited as EX. PW1/19 & EX. PW1/20. A copy of pending application of infringing trademark of defendants is exhibited as EX. PW1/21. Further, he stated that the said trademark has become WELL KNOWN within the meaning of Section 2(zg) of Trade Marks Act, 1999.

14. Defendant No.3 has filed no evidence to support his contention as being legal heirs of late Sh.Haji Murad Ali. There is also nothing on record to support his contention that he has any right in the trade mark “TUNDAY KABABI” or logo “TUNDAY KABABI”.

15. In view of the averments made in the plaint and the un-rebutted evidence filed by the Plaintiffs, the Plaintiffs have established that they are the registered owner of the said trade mark “TUNDAY KABABI” and “TUNDAY KABABI” Logo. Thus they have a statutory right to the exclusive use of the same. The mark “LUCKNOW WALE TUNDAY KABABI” used by the defendants is structurally, visually and phonetically identical to the registered trade mark of the Plaintiffs. There is a clear violation of the statutory as well as common law rights of the Plaintiffs. It is manifest that the plaintiffs have been using its mark since 1995 and the act of Defendants No. 2 & 3 lacks bonafide.

16. Accordingly, a ex-parte decree is passed in favour of the plaintiffs and against defendants No. 2&3 in terms of Para 30(a) and (b)of the prayer.

17. The Plaintiffs shall be entitled to costs of the suit. Suit stands disposed of accordingly. All pending applications, if any, stands disposed of.

JAYANT NATH, J.

DECEMBER 7, 2017/rk