

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 14.03.2018

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

C.S.No.179 of 2015

M/s.Kalanjiyam Cut Piece,
represented by it partners

1.Mohammed Mohideen

2.M.Basheerudeen

3.M.Thajudeen

4.M.Jamaludeen

.. Plaintiff

Vs.

M/s.Kalanziam Tex,

Rep. by its Sole Proprietor/Partners,

No.37E, Pondy Bazaar,

T.Nagar, Chennai - 600 017.

.. Defendant

This Civil Suit is preferred, under Order VII Rule 1 C.P.C. Read with Order IV Rule 1 of Original Side Rules and Sections 11,29, 134 and 135 of the Trademarks Act, 1999 praying to

a) grant a permanent injunction restraining the defendant, by itself, its servants, agents, distributors, or anyone claiming through them from manufacturing, selling, advertising and offering for sale using the trade mark New Kalanziam Tex upon the goods or in any media and use the same in invoices, letter heads and visiting cards or by using any other trade mark which is in any way visually, phonetically or deceptively similar to the plaintiffs registered Trade Mark Kalanjiyam Cut Piece and Kalanjiyam or in any manner infringing the applicants/plaintiffs Registered Trade Mark No.690216, 1548035 and 1548038.

b) grant a permanent injunction restraining the Defendant by themselves, their servants, agents, men or anyone claiming through them from manufacturing, marketing, distributing, offering or advertising for sale of Textile Goods using the mark New Kalanziam Tex or similar sounding names in the course of their business and pass off their textile goods using the trade mark Kalanjiyam Cut Piece and Kalanjiyam as and for the Kalanjiyam Cut Piece

and Kalanjiam goods of the applicant or enable other to pass off.

c) direct the defendant to surrender to the Plaintiffs all the textile goods packing material, cartons, advertisement materials and hoardings, letter-heads, visiting cards, office stationery and all other materials containing/bearing the trade mark Kalanziam Tex or other deceptively similar trade marks in respect of above.

d) for a preliminary decree in favour of the plaintiffs, directing the defendant to render an account of profits made by them by the use of the Trade Mark Kalanziam Tex on the good referred and for a final decree in favour of the plaintiffs for the amount of the profits found to have been made by the defendants after the defendants have rendered accounts.

e) directing the defendant to pay to the Plaintiffs the costs to the suit and

f) pass such further or other order, as this Hon'ble Court may deem fit and proper in the circumstances of the case.

For Plaintiff : Mr.Ashok Kumar J Daga

For Defendant : Set exparte

JUDGMENT

Mr.Ashok Kumar J. Daga, counsel on record for the sole plaintiff is before this Commercial Division.

2. The main suit has been filed inter alia with prayers for injunction against infringement of registered trademark of the plaintiff and passing off. Besides these two prayers for injunction, there are also the usual prayers for surrender of offending material, accounts and costs besides a residuary limb of the prayer.

3. Nucleus of this suit are three registered trademarks in favour of the plaintiff bearing trademark Nos.690216, 1548035 and 1548038, which shall be hereinafter referred to collectively as 'suit TMs' for the sake of convenience and clarity.

4. The Legal Use Certificates of the aforesaid three trademarks have been marked as Exs.P1, P2 and P3. The details are as follows:

<i>S.No.</i>	<i>Trademark No.</i>	<i>Class and goods</i>	<i>Mark</i>
1	690216	24-Textile Piece Goods	
2	1548035	25-Brassieres, Chudhithar, Slips, Tops, Petty Coat, Skirt, Pant, Nightie, Falls, Shimmies, Panties, Jeans, Banians, Chappals and all other types of Readymade Garments included in Class 25	
3	1548038	24-All Kinds of Textile Piece Goods including Dhoties, Shirtings, Suitings, Lungies, Bed Sheet, Sarees, Blouse Materials, Towels, Chduithar Materials, Woven interlinings Cotton Textiles, Bed Table Pillow Covers and other Clothing materials included in Class 24	

5. The sole defendant in the suit, after being duly served with suit summons, has not chosen to come before this Court or enter appearance through a counsel. Therefore, the sole defendant was set *ex-parte* and the suit was set down for recording *ex-parte* evidence before the learned Additional Master - IV. One witness i.e., P.W.1 was examined on behalf of plaintiff and eight exhibits i.e., Exs.P1 to P8 were marked on 26.02.2018.

6. As mentioned supra, suit TMs have been marked as Exs.P1 to P3.

7. The case of the plaintiff in a nutshell is that they have commenced and started textile business in the name and style of 'Kalanjiyam Cut Piece' in the year 1978. In other words, plaintiff is claiming user of suit TMs from 1978. It is the further case of plaintiff that their adoption of the suit TMs is bonafide and that they have built a goodwill and reputation for their trading style Kalanjiyam Cut Piece. It is also the further say of the plaintiff that by virtue of long, continuous and uninterrupted use, the suit TMs have attained distinctive and secondary meaning and the public associate the suit TMs with the plaintiff and the plaintiff alone.

8. The plaint is predicated on the ground that the plaintiff came to know about the use of a deceptively similar mark i.e., Kalanziam Tex with regard to the same line of activity. On coming to know about the use of the

offending mark, the plaintiff caused a legal notice dated 04.09.2012 to be issued. Though the sole defendant has duly received the cease and desist notice dated 04.09.2012, the defendant has not chosen to either reply or respond.

9. Predicated on the above grounds, the suit has been filed with prayers, the details of which have already been alluded to supra.

10. With regard to goodwill, the plaintiff has elaborated on how the mark has evolved and ultimately is with the plaintiff besides details of annual turnover from 1978 which have all been articulated by the plaintiff in paragraph Nos.7 to 10 of the plaintiff. I deem it appropriate to extract the same, which read as follows:

“7. The plaintiffs predecessor Mr.Mohamed Yaseen commenced and started Textile Business under the Name and Style M/s.Kalanjiyam Cut Piece in the year 1978. When the business was started Mr.Mohamed Yaseen was Sole Proprietor. Thereafter M/s.Kalanjiyam Cut Piece was converted, changed and reconstituted as Partnership Firm under Deed of Partnership dated 06.04.1979 consisting of Two partners namely 1.V.Mohamed Yaseen, 2.M.Mohamed Mohideen. Thereafter Partnership dated 06.04.1979 was dissolved and reconstituted New Partnership Deed dated 03.03.1986 Consisting of Four Partners, namely 1.V.M.Mohamed Yaseen, 2.M.Mohamed Mohideen, 3.V.M.Mohamed Basheerudeen and 4.V.M.Mohamed Thajudeen. Subsequently partnership dated 03.03.1986 was

dissolved and reconstituted new deed of Partnership dated 04.01.1993 consisting of Eight Partners. Namely 1.V.M.Mohamed Yaseen, 2.M.Mohamed Mohideen, 3.V.M.Mohamed Basheerudeen, 4.V.M.Mohamed Thajudeen, 5.V.M.Rahima Bibi, 6.A.Jaibunisha Begum, 7.M.Mumtaz Begum and 8.V.M.Jamaludeen. Thereafter subsequently out of eight partners, six partners namely 1.V.M.Mohamed Yaseen, 2.M.Mohamed Mohideen, 3.V.M.Mohamed Thajudeen, 4.V.M.Rahima Bibi, 5.Jaibunisha Begum and 6.Mumtaz Begum retired from the partnership deed under retirement deed dated 31.03.2001. The continuing partner admitted two additional partners 1.Mohammed Basheerudeen and 2.Mohammed Jamaludeen. Therefore in the year 2006, the partnership Firm was reconstituted consisting of Four Partners under the Name and Style Kalanjiyam Cut Piece. The same partners are on date operating business under the Trade name Kalanjiyam Cut Piece.

8. The plaintiffs bonafidely adopted the trade name Kalanjiyam Cut Piece in the year 1978 and acquired good will and reputation for their trading style Kalanjiyam Cut Piece. The trade name Kalanjiyam Cut Piece earned high reputation and has attained popularity among the trade and public.

9. Plaintiff's Trade mark Kalanjiyam Cut Piece and Kalanjiyam by virtue of its long, continuous and uninterrupted use has made the Trade mark distinctive and acquired secondary meaning and the public started associating the Trade mark only with the plaintiffs.

10. The plaintiff's have developed an extremely well established and flourishing business under the Trade mark Kalanjiyam Cut Piece. The sales turnover of their business under the trade mark Kalanjiyam Cut Piece has increased every year since its inception in the year 1978 and runs into several

crores of Rupees annually. The sales turnover from 1977-2014 till date is given hereunder:

<i>Year</i>	<i>Sales Turnover (Rs.)</i>
1977-1978	22,149.60
1978-1979	233,400.50
1979-1980	201,597.40
1980-1981	370,766.95
1981-1982	353,064.74
1982-1983	829,067.69
1983-1984	863,695.01
1984-1985	907,231.20
1985-1986	1,088,347.03
1986-1987	1,030,727.35
1987-1988	1,214,634.70
1988-1989	1,505,840.24
1989-1990	1,164,975.15
1990-1991	1,978,907.73
1991-1992	1,033,173.52
1992-1993	1,033,354.75
1993-1994	2,304,018.23
1994-1995	3,290,524.81
1995-1996	3,407,072.64
1996-1997	3,429,375.65
1997-1998	3,454,367.80
1998-1999	3,590,383.25
1999-2000	3,625,618.30
2000-2001	3,809,763.70
2001-2002	5,988,448.80
2002-2003	10,234,609.50
2003-2004	12,614,997.85
2004-2005	13,980,772.94
2005-2006	19,803,185.00
2006-2007	23,230,710.00

<i>Year</i>	<i>Sales Turnover (Rs.)</i>
2007-2008	36,720,941.85
2008-2009	55,016,368.50
2009-2010	52,173,980.00
2010-2011	54,587,171.00
2011-2012	102,750,067.00
2012-2013	87,357,377.00
2013-2014	110,136,265.00

11. Mr. Ashok Kumar J. Daga learned counsel on record for plaintiff has taken me through the evidence of P.W.1, which is in the form of proof affidavit dated 26.02.2018. The deposition in the proof affidavit is cogent and is in tune with the plaint averments which have been set out supra.

12. The offending mark, which the defendant is using (according to the plaintiff) has been marked as Exs.P4 and P5. To be noted, Ex.P4 is an invoice and Ex.P5 is a carry bag. I have compared Exs.P4 and P5 with suit TMs as contained in Exs.P1 to P3. Considering that the product is the same and the line of activity is the same, I have no difficulty in coming to the conclusion that this will cause confusion and deception in the minds of the end-users and therefore, the plaintiff has made out a case of infringement and passing off.

13. I have compared the marks Exs.P1 to P3 on one side and Exs.P4 and P5 on the other side by following the time honoured principle in this regard

laid down in the celebrated judgment of Hon'ble Supreme Court in ***Parle Products (P) Ltd. Vs. J.P. and Co., [(1972) 1 SCC 618]***. I deem it appropriate to extract paragraph 9 of the said judgment which reads as follows :

“9. It is, therefore, clear that in order to come to the conclusion whether one mark is deceptively similar to another, the broad and essential features of the two are to be considered. They should not be placed side by side to find out if there are any differences in the design and if so, whether they are of such character as to prevent one design from being mistaken for the other. It would be enough if the impugned mark bears such an overall similarity to the registered mark as would be likely to mislead a person usually dealing with one to accept the other if offered to him. In this case we find that the packets are practically of the same size, the colour scheme of the two wrappers is almost the same; the design on both though not identical bears such a close resemblance that one can easily be mistaken for the other. The essential features of both are that there is a girl with one arm raised and carrying something in the other with a cow or cows near her and hens or chickens in the foreground. In the background there is a farm house with a fence. The word “Gluko Biscuits” in one and “Glucose Biscuits” on the other occupy a prominent place at the top with a good deal of similarity between the two writings. Anyone in our opinion who has a look at one of the packets today may easily mistake the other if shown on another day as being the same article which he had seen before. If one was not careful enough to note the peculiar features of the wrapper on the plaintiffs' goods, he might easily mistake the defendants' wrapper for the plaintiffs' if shown to him some time after he had seen the plaintiffs'. After all, an ordinary purchaser is not gifted with the powers of observation of

a Sherlock Homes. We have therefore no doubt that the defendants' wrapper is deceptively similar to the plaintiffs' which was registered. We do not think it necessary to refer to the decisions referred to at the bar as in our view each case will have to be judged on its own features and it would be of no use to note on how many points there was similarity and in how many others there was absence of it. “

14. To be noted, the word 'Kalanjiyam' is the prominent part of the suit TMs. I have taken this also into account while comparing the marks.

15. More importantly, as mentioned supra, on coming to know about the use of the alleged offending mark by the defendant, plaintiff caused a cease and desist notice dated 04.09.2012 to be issued. A copy of the cease and desist notice has been marked as Ex.P7. Ex.P8 is the postal acknowledgement card, which shows that the cease and desist notice has been duly received by the defendant. As mentioned supra there is no reply or response.

16. To be noted, one Mr.Mohammed Mohideen, a partner of M/s.Kalanjiyam Cut Piece has deposed as P.W.1.

17. Notwithstanding the fact that the plaint averments, deposition and exhibits remain undisputed and un-refuted, I have applied my mind to the pleadings, deposition and exhibits before me. I am satisfied that the plaintiff

has made out a case qua the plaintiff's prayers for injunctions against infringement and passing off and the prayers deserve to be acceded to. As prayer for injunction against passing off deserves to be acceded to, the other prayer for surrender of offending material, accounts and costs of this suit also deserve to be acceded to. With regard to costs of this suit, I notice that the suit has been presented on 09.03.2015. More importantly, the cease and desist notice has been issued on 04.09.2012 itself, without evincing a reply or response. Plaintiff has been compelled to carry the litigation to its logical end over a period of time and therefore, the plaintiff is certainly entitled to costs of this suit. In the residuary limb of the prayer, I deem it appropriate to make it clear that it is open to the plaintiff to sue for damages post accounts, if they chose to do so.

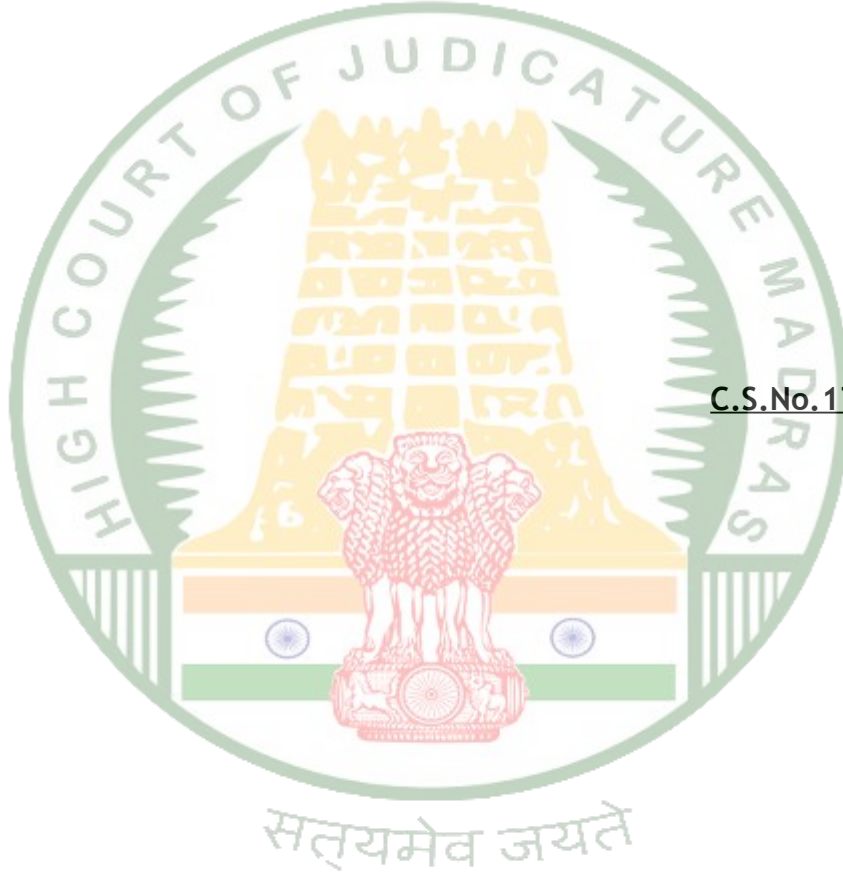
In the light of the narrative supra, this suit is decreed with costs.

14.03.2018

Speaking/Non-Speaking order
Index : Yes/No
vsm

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M.SUNDAR, J.
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