

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 31.01.2019

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

C.S.No.290 of 2017
and O.A.Nos.398 and 399 of 2017
and A.No.2351 of 2017

- 1.Mr.A.D.Padmasingh Isaac
Trading as Aachi Spices and Foods
Old No.4, New No.181/1,
6th Avenue, Thangam Colony,
Anna Nagar,
Chennai - 600 040.
 - 2.M/s.Aachi Masala Foods (P) Ltd.,
Old No.4, New No.181/1,
6th Avenue, Thangam Colony,
Anna Nagar,
Chennai - 600 040
Represented by its Director
Mr.Ashwin Pandian
 - 3.M/s.Heavenly Foods Pvt Ltd.,
Plot No.1926, 34th Street,
I Block, Ishwarya Colony,
Anna Nagar West,
Chennai - 600 040.
Represented by its Director
Mr.Gibson Gnanasiromani Vedamani
- Vs.
- .. Plaintiffs

Aachi Mess
No.92/1, Sankari Main Road,
Seetharampalayam,
Tiruchengodu 637 209,
Namkkal (DT)

.. Defendant

This Civil Suit is preferred, under Order IV Rule - 1 of the Original Side Rules and Order VII Rule of the Civil Procedure Code, 1908 Read with Sections 27(2), 29, 134 and 135 of the Trade Marks Act, 1999, Praying for

a) granting a permanent injunction, restraining the defendant, by himself, its agents or servants or anyone claiming through him from manufacturing, selling, advertising and offering for sale using the name **Aachi Mess** or any other similar Trade Mark name or similar sounding expression in any media and use the same in name board, invoices, letter heads and visiting cards or by using any other trade mark/name which is in any way visually or deceptively or phonetically similar to the 1st Plaintiff's trademark/ name **AACHI/AACHI CHETINAD RESTAURANT/AACHI KITCHEN** and use the same in pouches, packets or use the mark in invoices, letters heads and visiting cards or part of their Hotel/Restaurant name any other trade literature or Menu card by using any other trade mark which is in any way visually, or phonetically similar to the Plaintiffs' registered Trade mark Nos. 838786, 1116254, 1479159, 1715718 or in any manner infringing the 1st Plaintiff's registered Trade Marks referred herein.

b) granting a permanent injunction restraining the Defendant by itself, its agents or servants or anyone claiming through or under him any business marketing, selling advertising using in trade literature, menu cards, invoices, name boards, website, internet advertisements the mark/name Aachi Mess in relation to the Restaurant or with respect to or any other food preparation or any other business the impugned trademark/name which is in any manner deceptively or phonetically confusingly similar to the Plaintiff's Trade Mark/name **AACHI/AACHI CHETINAD RESTAURANT/AACHI KITCHEN** or in any other manner pass off their hotel, business or goods as and for that of the plaintiffs.

c) directing the defendant to surrender to the Plaintiffs all the packing material, cartons, advertisement materials and hoardings, letter-heads, visiting cards, office stationery and all other materials containing/bearing the name Aachi Mess or other identical trade mark used in the pouches and packets bearing the word **AACHI/AACHI HOTEL/AACHI CHETINAD RESTAURANT/AACHI KITCHEN**.

d) directing the defendant to render an account of profits made by them by the use of the impugned trademark Aachi Mess, on the service referred and decree the suit for the profits found to have been made by the defendant, after the defendant has 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 and thus render justice.

For Plaintiffs : Ms. Gladys Daniel

For Defendant : set *ex-parte*

JUDGMENT

There are three plaintiffs. Plaintiff No.1 is an individual i.e., a natural person. Plaintiff Nos.2 and 3 are Private Limited Companies i.e., juristic persons. Ms.Gladys Daniel, counsel on record for all the three plaintiffs is before this Commercial Division.

2. The sole defendant was duly served with suit summons on 23.05.2017, entered appearance through counsel, but said counsel reported 'no instructions' from defendant and no new counsel entered appearance on behalf of defendant. Therefore, the sole defendant was set *ex-parte* on 23.01.2019 and the suit itself was set down for recording *ex-parte* evidence before the learned Additional Master-II. One Mr.B.Gnana Sambandam deposed as P.W.1, on behalf of all the three plaintiffs and 24 exhibits i.e., Exs.P1 to P24 were marked through him.

3. Today, this suit is listed for arguments before this Commercial Division.

4. Before proceeding further, it is necessary to set out the case of the plaintiffs in a nutshell. Main thrust of plaintiffs' complaint is that the defendant is infringing and passing off qua four of their registered trademarks. The four trademarks are Trade Mark Nos.838786, 1116254, 1479159 and 1715718. These four trademarks have been marked as Exs.P18 to P21. These four trademarks shall hereinafter be referred to as 'suit TMs' for the sake of brevity, convenience and clarity. The details of the suit TMs can be tabulated and set out as below:

<i>S.No.</i>	<i>Trademark No.</i>	<i>Class and goods</i>	<i>Mark</i>
1	838786	30-Masala Powder and Spices	AACHI
2	1116254	30-All kinds of Food preparations for human consumption coffee, Tea, Coca, Sugar, Rice, Tapioca, Sago, Coffee Substitutes, Flour and Preparations made from cereals, Bread, Biscuits, Cakes, Pastry and Confectionery, Ice	
3	1479159	30-All kinds of Masala Powders and Spices, Honey, Crystallized Fruits, Dates, Fruit Jellies, Jams, processed peanut, pickle, potato chips and potato crisps, all kinds of flour, coffee, Tea cocoa, sugar, rice, tapioca and artificial powder, asafetida, turmeric powder, idly chilly powder appalams, orid dhall, Toor dhall, Moong Dhall and all kinds of Dhall, included in class 30	
4	1715718	43-Services for chain of restaurants, Providing of Food and Drink, Temporary Accommodation, canteen, catering, self service restaurants, fast food restaurants and snack bars	AACHI KITCHN

5. It is the case of the plaintiffs that somewhere in March 2017, they came to know about the alleged infringement of their suit TMs and passing off by the defendant. The instant suit vide plaint dated 03.04.2017 was presented/filed in this Court on 07.04.2017. Thereafter, this suit took the trajectory, which has been set out supra.

6. Today in the hearing, learned counsel for plaintiffs Ms.Gladys Daniel brings to my notice that the depiction of the suit TMs by the plaintiffs has been marked by way of a photograph being Ex.P22 and the same is as follows:



To be noted, one photograph is that of the Restaurant and the other is photograph of a Menu card. These two together constitute Ex.P.22. (Ideally it should have been marked as Ex.P22 series)



7. To buttress plaintiffs' complaint of infringement and passing off qua suit TMS, my attention is drawn to the alleged offending mark that

(according to plaintiffs) is being used by the defendant. Alleged offending mark has been marked as Ex.P 24. Ex.P 24 is as follows:



8. To be noted, in suit TMs, word 'AACHI' is a very prominent part of the mark. In any event one of the suit TMs is 'AACHI' itself.

9. Plaintiffs have set out the manner in which the suit TMs evolved. This is articulated in paragraph Nos.8 to 10 of the plaint, which read as follows:

“8. A proprietary concern Aachi Spices and Foods was registered on 28.12.2006. Aachi Masala Foods P Ltd., who acquired the trademark AACHI on 30.11.2016 from Abishek Enterprises and Naveen Products assigned the same in favour of the 1st plaintiff, trading as Aachi Spices And Foods on

30.03.2007. On 01.04.2007, the 1st plaintiff, trading as Aachi Spices and Foods executed a License User Agreement in favour of Aachi Masala Foods P Ltd. The sole proprietary concern of the 1st plaintiff owned the Intellectual Property Rights under the trademark AACHI. The Trademark AACHI expanded on its list of products. The business of AACHI was expanding in mammoth proportions. On 17.03.2010, Aachi Spices and Foods Private Limited were incorporated. At the time of incorporation of Aachi Spices and Foods Private Limited the Memorandum of Association of the company reiterated at Clause B-11 that the Trademark AACHI along with its right, title and interest were vested with the 1st plaintiff who already owned the Trademark AACHI. On 21.04.2010 the 1st plaintiff entered into a Licence User Agreement with Aachi Spices and Foods Private Limited to use the trademark AACHI. On 21.04.2010 the 1st plaintiff entered into a fresh License User Agreement with AACHI Masala Foods Private Limited.

9. The 1st plaintiff is the proprietor of the trademark AACHI. He continues to use the trademark AACHI through his Licensees AACHI Spices and Foods Private Limited and the 2nd Plaintiff. The 3rd Plaintiff is the licensee of the 1st Plaintiff's registered Trade Marks AACHI KITCHEN and AACHI CHETTINAD RESTAURANT.

10. The Plaintiffs have also diversified their business activities and started manufacturing and marketing various kinds of consumer goods, within a short span of 17 years. The Plaintiffs have now become one of the leading manufacturers of packaged masalas. Because of the efforts undertaken by the Plaintiffs in promoting and advertising their products through various mediums, their market share

in these products have risen considerably. The Plaintiffs have put in enormous effort, hard work and money towards advertising their products AACHI in all forms of media such as radio, newspapers, hoardings, magazines and television networks. The Plaintiffs have also received many prestigious awards for the quality of products and customer service.”

10. Plaintiffs have also mentioned about the manner in which they have used and promoted suit TMS, this is contained in paragraph Nos.13 and 14 of the plaint, which read as follows:

“13. The subject matter of this proceeding is in respect of 'AACHI' word mark. This word mark as whole has been used by the Plaintiffs since 1995 and has become a well known Trade Mark of the Plaintiffs. The Plaintiffs have honestly adopted the mark and have put in enormous amount of hard work and labour and invested huge sums of money, for advertisement and sales promotional expenses. Because of the efforts made by the Plaintiffs, the trade and the public, associate the mark with the Plaintiffs and none else. The Trade Mark of the Plaintiffs as used is registered.

14. The plaintiffs have been using this mark AACHI with respect to almost all the masala preparations from the commencement of its business. As a result of the efforts undertaken by the Plaintiffs its turnover has been increasing, substantially every year. The turnover and promotional expenditure incurred by M/s.Abishek Enterprises, M/s.Naveen Products, M/s.Nazareth Foods Pvt. Ltd. and M/s.Aachi Masala Foods Pvt. Ltd., since 1995 is given hereunder:

<i>S.No.</i>	<i>Year</i>	<i>Turnover (in Rs)</i>	<i>Advertising Expenditure (in Rs)</i>
1	1995-1996	3,96,420.00	9,983.00
2	1996-1997	4,37,568.00	4,691.00
3	1997-1998	5,10,755.00	352.00
4	1998-1999	14,68,159.00	15,820.00
5	1999-2000	20,27,457.00	16,775.00
6	2000-2001	52,03,979.00	57,676.00
7	2001-2002	64,12,491.00	2,13,512.00
8	2002-2003	1,69,44,334.00	6,62,290.00
9	2003-2004	9,00,05,884.00	19,63,479.00
10	2004-2005	24,46,95,540.00	1,13,28,450.00
11	2005-2006	79,47,99,230.00	4,63,96,880.00
12	2006-2007	1,36,54,50,781.00	5,68,45,817.00
13	2007-2008	2,07,85,55,508.00	7,87,06,261.00
14	2008-2009	4,14,12,42,106.00	9,40,86,979.00
15	2009-2010	4,73,98,26,852.00	10,76,86,530.00
16	2010-2011	6,40,40,50,524.00	11,63,97,497.00
17	2011-2012	7,59,35,14,309.00	12,42,15,050.00
18	2012-2013	8,82,91,64,390.00	13,72,06,476.00
19	2013-2014	11,27,06,92,876.00	19,57,87,446.00
20	2014-2015	13,20,61,70,537.00	21,00,17,044.00

11. From the aforesaid details, it comes to light that the plaintiffs have been expending/shelling out, substantial sums of money towards advertisement expenditure.

12. Be that as it may, learned counsel for plaintiffs brings to my notice that plaintiffs have been very diligently protecting their suit TMs as

well as the other trademark registrations in their favour. It is highlighted by learned counsel for plaintiffs that plaintiffs have been so diligent that they have taken immediate action against a person in California in the Trademark Trial and Appeal Board in United States of America. In this regard, an order dated 13.09.2016 has been marked as Ex.P23. This is being referred to, to emphasise that the plaintiffs have been very diligent in protecting their marks/'intellectual property rights' ('IPRs' for brevity) and particularly suit TMs. With regard to the *inter se* relationship between the three plaintiffs, it is to be mentioned that the first plaintiff, who is a natural person is the owner of the suit TMs. The second plaintiff, which is a juristic person and a company is a general licensee under the first plaintiff vide License User Agreement, which has been marked as Ex.P13. With regard to plaintiff No.3, which is also a juristic person, I am informed that plaintiff No.3 is a licensee with regard to one specific service i.e., Restaurant services and this License User Agreement between the first and third plaintiffs has been marked as Ex.P15.

13. Notwithstanding the fact that the defendant has not chosen to enter appearance and resist the suit (owing to which the defendant has been set *ex-parte* in this suit). I have perused the pleadings, deposition and exhibits/documents that have been placed before me. I find that the deposition of P.W.1 is in tune/ tandem with the pleadings in the plaint. In

other words, deposition of P.W.1 which is cogent and convincing supports the pleadings in the plaint.

14. I have also compared the two marks i.e., Exs.P18 to P21 on one side and Exs.P22 and P24 on the other side.

15. I find that plaintiffs have made out a clear and convincing case for infringement and passing off. In my considered opinion plaintiffs have proved their case. Therefore, the plaintiffs will certainly be entitled to the reliefs of injunctions qua infringement and passing off, which are sub-paragraphs (a) and (b) of plaint paragraph No.38. The other sub-paragraphs are (c) to (f). While sub-paragraphs (c) and (d) are usual prayers for surrender of offending mark and accounts respectively, sub-paragraph (e) is for costs of the suit. To be noted, sub-paragraph (f) is a residuary prayer limb.

16. In the light of the conclusion that the plaintiffs are entitled to injunctive reliefs qua infringement of suit TMs and passing off, it follows as a sequitur that the plaintiffs are entitled to surrender of offending materials as well as accounts as sought for in sub-paragraphs (c) and (d) of the plaint prayer paragraph.

17. With regard to costs prayer, on coming to know of the offending use by the defendant in March 2017, plaintiffs have diligently filed/presented the plaint dated 03.04.2017 on 07.04.2017 and carried it to its logical end by pursuing the matter sincerely. Therefore, the plaintiffs are entitled to costs.

18. Adverting to the residuary limb of the prayer paragraph being sub-paragraph (f), Ms.Gladys Daniel, learned counsel submitted that the trajectory of this suit will make it clear that plaintiffs are entitled to compensatory costs under Section 35-A of 'The Code of Civil Procedure, 1908' ('CPC' for brevity) as amended by 'The Commercial Courts Act, 2015' ('said Act' for brevity) and that this plea may please be considered under the residuary limb of the prayer i.e., sub-paragraph (f) of prayer paragraph.

19. For the purpose of abundant clarity, I deem it appropriate to extract/reproduce entire prayer paragraph i.e., paragraph 38. I do so and the same reads as follows:

'38. The plaintiffs, therefore, pray for a Judgment and Decree for:-

*a) granting a permanent injunction, restraining the defendant, by himself, its agents or servants or anyone claiming through him from manufacturing, selling, advertising and offering for sale using the name **Aachi Mess** or any other similar Trade Mark name or similar sounding expression in any*

media and use the same in name board, invoices, letter heads and visiting cards or by using any other trade mark/name which is in any way visually or deceptively or phonetically similar to the 1st Plaintiff's trademark/ name **AACHI/AACHI CHETINAD RESTAURANT/AACHI KITCHEN** and use the same in pouches, packets or use the mark in invoices, letters heads and visiting cards or part of their Hotel/Restaurant name any other trade literature or Menu card by using any other trade mark which is in any way visually, or phonetically similar to the Plaintiffs ' registered Trade mark Nos. 838786, 1116254, 1479159, 1715718 or in any manner infringing the 1st Plaintiff's registered Trade Marks referred herein.

b) granting a permanent injunction restraining the Defendant by itself, its agents or servants or anyone claiming through or under him any business marketing, selling advertising using in trade literature, menu cards, invoices, name boards, website, internet advertisements the mark/name Aachi Mess in relation to the Restaurant or with respect to or any other food preparation or any other business the impugned trademark/name which is in any manner deceptively or phonetically confusingly similar to the Plaintiff's Trade Mark/name **AACHI/AACHI CHETINAD RESTAURANT/AACHI KITCHEN** or in any other manner pass off their hotel, business or goods as and for that of the plaintiffs.

c) directing the defendant to surrender to the Plaintiffs all the packing material, cartons, advertisement materials and hoardings, letter-heads, visiting cards, office stationery and all other materials containing/bearing the name Aachi Mess or other identical trade mark used in the pouches and packets bearing the word **AACHI/AACHI HOTEL/AACHI CHETINAD RESTAURANT/AACHI KITCHEN**.

d) directing the defendant to render an account of profits made by them by the use of the impugned trademark Aachi Mess, on the service referred and decree the suit for the profits found to have been made by the defendant, after the defendant has 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 and thus render justice.'

20. A perusal of the chronicle/dates, which give the trajectory of this suit, according to learned counsel for plaintiffs, will reveal that defendant has clearly adopted vexatious means of defending this suit. Learned counsel pointed out that this Commercial Division has held that the expression 'vexatious defence' occurring in Section 35-A of CPC will include vexatious means that may be adopted by defendants in defending this suit. There is no difficulty in accepting this submission, as the defendant after being duly served with suit summons on 23.05.2017, entered appearance, but thereafter the counsel reported 'no instructions' and defendant took no steps or no efforts to engage a new counsel. In other words, the defendant has compelled the plaintiffs to carry the suit to its logical end by expending time, money, energy and effort. Receiving suit summons, entrusting the matter to a counsel, thereafter not giving instructions to the counsel putting the counsel to the embarrassment of reporting 'no instructions' and

thereafter not taking any steps to engage a new counsel clearly demonstrates vexatious means of defending this suit and therefore, I have no difficulty in agreeing with the submission of learned counsel for plaintiffs that this is a fit case for imposing compensatory costs.

21. Considering all parameters and determinants, this Commercial Division considers it appropriate to impose compensatory costs of Rs.5,00,000/0 (Rupees Five Lakhs only). To be noted, learned counsel brought to the notice of this Commercial Division that Section 35-A of CPC has been amended by said Act and by virtue of amendment to Section 35-A, brought in by said Act now there is no upper limit or financial cap for imposition of compensatory costs, once this Commercial Division is convinced that plaintiff is entitled to same. There is no difficulty in accepting that this is the obtaining legal position.

22. In the light of the narrative supra, it follows as a necessary sequitur that this suit deserves to be decreed with costs and compensatory costs.

23. Suit is decreed with costs and compensatory costs. Consequently, connected miscellaneous petitions are closed.

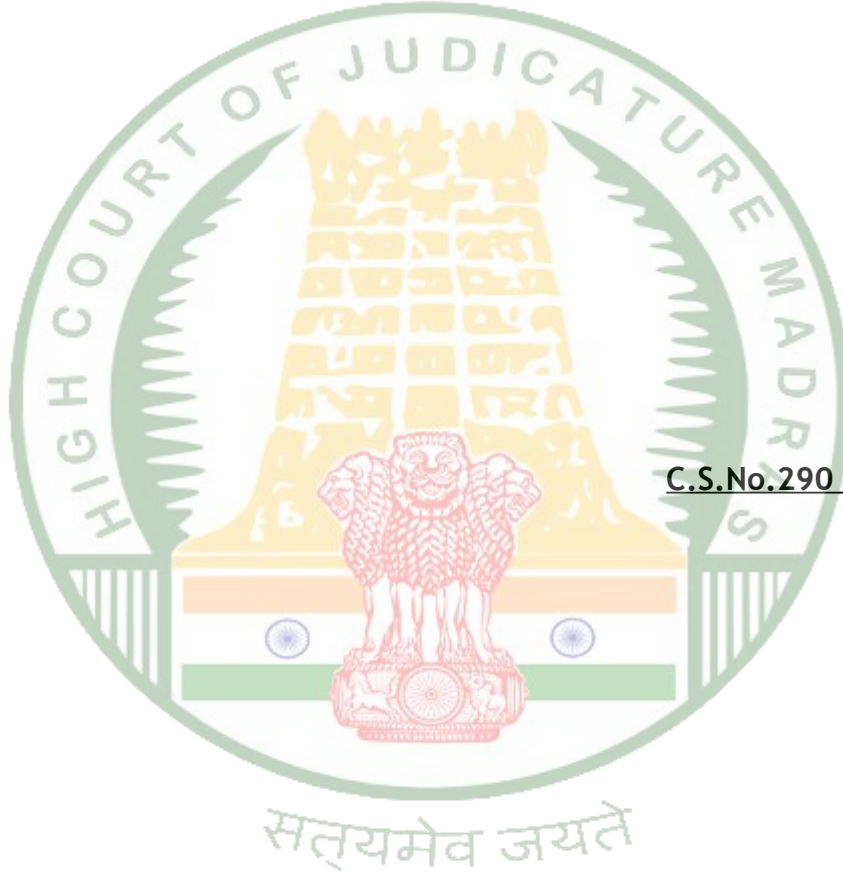
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Speaking order

Index : Yes/No

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M.SUNDAR, J.
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