

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 21.09.2020

PRONOUNCED ON: 30.09.2020

CORAM:

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

A.No. 9879 of 2019

IN

C.S.No.503 of 2019

A.No. 9879 of 2019:

New Pattukottai Kamatchi Mess

Represented by its Proprietor G.Sudhakar

No.22, Govindhan Street,

T.Nagar, Chennai – 600 017.

... Applicant/Defendant

Vs.

New Pattukottai Kamatchi Mess – Nunpahal Unavagam LLP

Represented by its Designated Partner, Mr.K.Selvakumar

No.119, 3rd Avenue, Bharathi Puram,

Anna Nagar, Chennai – 600 102.

...Respondent/Plaintiff

This application filed under Order XIV Rule 8 of O.S Rules R/w. Section 8 of Arbitration and Conciliation Act to refer the parties to this suit to arbitration proceedings as per clause 31 of the limited liability partnership agreement dated 28.09.2018 and consequently, dismiss the suit.

For Applicant : Mr. Mari Shankar
Senior Counsel for
Mrs.Kavitha Rameshwar

For Respondent : Mr.T.S.Baskaran

ORDER

Application filed under Section 8 of the Arbitration and Conciliation Act 1996 seeking to refer the parties to the suit to arbitration proceedings as per clause 31 of the Limited Liability Partnership Agreement dated 28.09.2018 and consequently, dismiss the suit.

2. In the affidavit filed in support of the said application, the applicant had stated that the suit had been filed suppressing crucial material facts. It had been stated that the applicant and the respondent had entered into a partnership on 14.10.2017 for carrying on restaurant business in the name and style of “New Pattukottia Kamatchi Mess”. It was started in T.Nagar. Thereafter, a Limited Liability Partnership was formed on 28.09.2018. By Supplemental Agreement dated 12.10.2018, further partners were included. It was stated that the goodwill in the trademark “New Pattukottai Kamatchi Mess”, logo, trademark and combination of recipes, cannot be used by any other partner except with the written consent of the applicant. It had been stated that the suit had been filed holding out

that the applicant had infringed the registered Trademark of the Limited Liability Partnership by opening a restaurant under the name “New Pattukottai Kamatchi Mess” . It was however stated that the respondent himself is running a restaurant in the name of “New Pattukottai Kamatchi Mess” and that the said fact had been suppressed in the plaint. It was also claimed that the applicant was the absolute owner of the Trademark, Logo and the recipe. It was further stated that under the agreement, Clause 33 provided as follows:-

“Arbitration (1) – All the matter not expressly provided in this agreement, shall be decided by the consent of all the parties by writing. Failing that all disputes and questions about and in connection with the LLP under this agreement arising between the partners or between any of them and the legal representatives of the partners or with the LLP at any time and time to time, shall be settled by conciliation or by arbitration as provided under the Arbitration and Conciliation Act, 1996 as if the parties to the dispute have consented in writing for determination of the same as aforesaid and the provisions of the said act apply accordingly.”

3. It was therefore stated that since all disputes are to be referred to arbitration, and when the respondent had failed to furnish accounts of the firm and had also issued a show cause notice of expulsion of the applicant from the partnership, the applicant had filed O.A.Nos. 591 & 592 of 2019 and the respondent had filed O.A.Nos. 551 & 552 of 2019. It was stated that all the applications were disposed of by a common order dated 28.09.2019 referring the disputes to arbitration. Injunctions were also granted. It was further stated that the dispute regarding usage of Trademark by one of the partner against the other partners is covered under clause 10 of the agreement which is as follows:-

“The party of Second Part ie., G.Suthakar is having cooking skills, long experiences, developed recipe and other support services in running of Noon time restaurant. Hence, the name, logo, trademark of the restaurant, combination of recipe cannot be used by other partners any additional branch opening other than the proposed two branches cannot be carried out without the written prior concurrence of G.Suthakar.”

4. It was stated that in the instant suit, interim orders in O.A.Nos. 784 & 785 of 2019 had been granted till the disposal of the arbitration proceedings. It was further stated that the disputes regarding usage of the Trademark can also be referred to arbitration. It was therefore stated that the present suit is barred since there was an arbitration clause provided in the LLP Agreement. It was therefore stated that the application should be allowed and the issues must be referred to arbitration and the suit should be dismissed.

5. A counter has been filed on behalf of the respondent/plaintiff in which it had been stated that after the incorporation of the Limited Liability Partnership, an application for registration of the Trademark of the LLP (word mark and symbol) was filed before the Registrar of Trademarks, Chennai on 16.11.2018 by both the applicant and the respondent herein. After following due procedure, the Registrar of Trademarks has also issued registration certificate on 09.05.2019 for class 43 wherein the Trademark was registered in favour of the LLP with the word mark “New Pattukottai Kamatchi Mess – Nunpahal Unavagam LLP” along with a symbol with the letters 'PKM'. It was stated that the respondent was the registered proprietor of the Trademark. It was stated that disputes had arisen with respect to the

Nagar restaurants. Notices were also exchanged. The applicant had also stopped signing cheques of the joint bank account, thereby causing further difficulties. It was under these circumstances that applications had been filed under the provisions of the Arbitration Act. It was stated that common orders were passed in O.A.Nos. 551 & 552 of 2019 and O.A.Nos. 591 & 592 of 2019 and parties were referred to arbitration. It was stated that in the interregnum period from the date when the orders were reserved and the orders were pronounced, the applicant herein had opened a new restaurant under the name “New Pattukottai Kamatchi Mess” and it under that circumstance the suit had been filed by the LLP / plaintiff taking advantage of Sections 27, 29, 134 and 135 of the Trade Marks Act 1999 seeking protection from infringement of the registered Trademark.

6. It was also stated that applications seeking interim injunctions were heard by the learned Single Judge and injunctions restraining the applicant from using the said Trademark were also granted pending arbitral proceedings. It was also stated that the applicant herein had also applied for the Trademark in his individual name which was opposed and therefore, the Trademark was not granted in his favour. It was stated that the rights conferred by registration of the Trademark shall include a right to exclusive usage of the Trademark relating to the goods or services for which the

Trademark was registered and also to obtain the relief of infringement which is a right in rem and is a statutory right. It was stated that the identity of the underlying intellectual property rights are not arbitral. It was stated that the issues raised in the suit cannot be the subject matter of arbitration and only a Civil Court can examine the reliefs sought. It was stated that the application should be dismissed.

7. Heard arguments advanced by Mr.T.S.Baskaran, learned counsel on behalf of the applicant/defendant and Mr.C.Mani Shankar, learned Senior Counsel on behalf of the respondent/plaintiff.

8. The application has been filed by the defendant in the suit. For the sake of convenience, the parties will be referred as plaintiff and defendant.

9. “New Pattukottai Kamatchi Mess- Nunpahal Unavgam LLP” represented by its designated partner K.Selvakumar had instituted the suit under Sections 27, 29, 134 and 135 of the Trademarks Act 1999 seeking a Judgment and Decree against the defendant “New Pattukottai Kamatchi Mess” represented by its Proprietor G.Suthakar, for a permanent injunction restraining the defendant from using the mark/words “New Pattukottai

Kamatchi Mess” or any other mark which is identical or deceptively similar to the registered Trademark of the plaintiff, namely, “New Pattukottai Kamatchi Mess- Nunpahal Unavgam LLP” and for a permanent injunction restraining the defendant from passing off their food products as that of the plaintiff and also for a direction to pay a sum of Rs.10/- lakhs together with interest at 18% p.a., for harm caused to the reputation of the plaintiff in the existing market along with delivery-up of all infringing labels and marks for destruction or erasure and also for costs of the suit.

10. Before examining whether the reliefs sought are arbitral in nature or not the relationship between the designated partner of the plaintiff K.Selvakumar and the Proprietor of the defendant G.Suthakar will have to be examined.

11. On 14.10.2017, a partnership agreement had been entered into between K.Selvakumar and G.Suthakar to start a business in partnership to set up a chain of cafes, restaurants and eating houses and the partnership was deemed to have been commenced with effect from 14.10.2017 under the name “New Pattukottai Kamatchi Mess” at Old No.3, New No.4, Dr.Singaravelu Street, T.Nagar, Chennai – 600 017. The capital of Rs.20,00,000/- was entirely contributed by K.Selvakumar. The other partner G.Suthakar was categorised as working partner. It was stated that

any further capital requirement would be brought by K.Selvakumar, but the finances for the purpose of partnership business would be contributed by both the parties in equal proportions. There was also further clauses relating to remuneration, retirement, death, disbursement all with respect to interse relationships between the two partners. The good will was also agreed to be shared in the ratio of the capital. It was finally provided under clause 17 that “any dispute or dispute between the partners shall be settled by arbitration only.” To the extent to which the partnership agreement had been examined by this Court, there was no agreement to register the name of the partnership, as a Trademark or tradename under the provisions of the Trademarks Act 1999.

12. The two individuals, K.Selvakumar and G.Suthakar thereafter entered into a LLP agreement on 28.09.2018. They called themselves designated partners and on incorporation of the Limited Liability Partnership registered the same under the Limited Liability Partnership Act 2008. The address of “New Pattukottai Kamatchi Mess- Nunpahal Unavgam LLP” business was at Plot No.4, Sri Krishna Nagar, 27/7th Street, Maduravoyal Village, Thiruvallur, Tamil Nadu. The capital of the partnership was Rs.30,00,000/- and K.Selvakumar contributed Rs.29,99,000/- and G.Suthakar contributed Rs.1000/-. It was stipulated that

if further capital was required then K.Selvakumar was to contribute the same. It was very specifically covenanted as follows:-

“All the assets owned by or belonging to the LLP including but not limited to the intellectual property rights (Inspectors) of whatever kind shall be the property of the LLP and no partner shall be entitled to use for himself any such property otherwise than as a client or customer.”

13. A reading of the above shows that both K.Selvakumar and G.Suthakar cannot claim any individual right over the intellectual property rights, namely, the trade name and Trademark “New Pattukottai Kamatchi Mess- Nunpahal Unavgam LLP”.

14. This suit has been filed complaining that the defendant G.Suthakar has infringed the Trademark “New Pattukottai Kamatchi Mess” thereby directly encroaching upon the rights of the Limited Liability Partnership “New Pattukottai Kamatchi Mess- Nunpahal Unavgam LLP” by using the words “New Pattukottai Kamatchi Mess” which would cause confusion in the minds of the customers, who would be misled into thinking the said “New Pattukottai Kamatchi Mess” started by the defendant is an

expansion or a branch of “New Pattukottai Kamatchi Mess- Nunpahal Unavgam LLP”.

15. It was further provided in clause 10 as follows:-

“The party of Second Part ie., G.Suthakar is having Cooking skills, Longs Experiences, developed recipe and other support services in running of Noon time restaurant. Hence, the name, logo, trademark of the restaurant, combination of recipe cannot be used by other partner and any additional branch opening other than the proposed two branches cannot be carried out without the written prior concurrence of G.Suthakar.”

16. According to the clause, the cooking skills and expertise of G.Suthakar was recognised and it was therefore stated that the other partner cannot use the trademark or any additional branch be opened without the prior written concurrence of G.Suthakar.

17. A combined reading of clause 8 and clause 10 would imply that both, K.Selvakumar and G.Suthakar cannot independently use or claim

rights over the Trademark and tradename or logo. The intellectual property rights vested on the Limited Liability Partnership and more specifically the other partner cannot use the said name/logo/Trademark and additional branches cannot be opened without the prior written concurrence of G.Suthakar.

18. In the said agreement, there was also an 'interpretation' clause. It provided that a 'designated partner' would mean those who are designated as such. In the instant case, both K.Selvakumar and G.Suthakar have been termed as 'designated' partners.

19. A 'partner' would mean any person, who becomes a partner in the LLP in accordance with agreement. This would include the existing partners or designated partners and also every newly included partner. Therefore, the restriction under clause 10 would apply to both designated partners and to newly added partners of the LLP. By clause 8 none of the partners including designated partners or newly added partners, can claim any right over the Trademark, logo or name. There were further clauses relating to withdrawal of loans, drawings, audit, remuneration, management, expulsion, termination and dissolution and finally arbitration. Under class

“33. Arbitration – (1) *All the matters not expressly provided in this agreement shall be decided by the consent of all the partners in writing. Falling that all disputes and questions about and in connection with the LLP under this Agreement arising between the partners or between any one of them and the legal representative of the partners or with the LLP at any time and from time to time, shall be settled by conciliation or by arbitration as provided under the Arbitration and Conciliation Act, 1996 as if the parties to the dispute have consented in writing for determination of the same as aforesaid and the provisions of the said Act apply accordingly.*

(2).. if any question arises whether the dispute relates to formation, management or business of the LLP, the question shall be referred to the arbitrator, whose decision thereon shall be final.”

20. A reference to clause 27 is also required. Clause 27 is as follows:-

“27. Acts forbidden – without the consent given in writing of the other partners, no partner while he is a partner for the time being of the LLP shall -

Submit a dispute relating to the LLP's business to arbitration;

.....

.....”

21. A combined reading of clause 33 and clause 27 would indicate that disputes relating to the business of the LLP can be referred to arbitration only by the consent given by other partners and disputes in connection with the LLP shall be settled by conciliation or by arbitration as provided under the Arbitration and Conciliation Act 1996 and if a question arises whether any dispute relates to either formation or Management or business of the LLP that question shall also be referred to the arbitrator.

22. These clauses are very heavily relied by the defendant by stating that the disputes raised in the present suit must be referred to arbitration as even the order of interim injunction in the present suit had

been granted only till the pendency of the arbitral proceedings.

23. It is also seen from a perusal of the records that on 12.10.2018, a Supplemental LPP Agreement was entered into whereby three partners were inducted, namely, K.Janani, S.Devaraj, K.Selvakumar and they brought in an additional contribution of Rs.25/- lakhs, Rs.25/- lakhs and Rs.5/- lakhs respectively. The capital contribution was increased to Rs.1/- crore for the LLP. It was provided in clause 8 of the Supplemental Agreement as follows:-

“(8) All the assets owned by or belonging to the LLP including but not limited to the Intellectual Property Rights (Inspectors) of whatever kind shall be the property of the LLP and no partner shall be entitled to use for himself any such property otherwise than as a client or customer.”

24. It was also provided clause 10 as follows:-

“The party of Second Part ie., G.Suthakar is having Cooking skills, Longs Experiences, developed recipe and other support services in running of Noon time restaurant. Hence, the name, logo, trademark of the restaurant, combination of recipe cannot be used by other partner and any additional branch opening other than the proposed two branches cannot be carried out without the written prior concurrence of G.Suthakar.”

25. The said two clause are a direct copy and paste of the agreement dated 12.10.2018.

26. Clause 27 is as follows:-

*“27. **Acts forbidden** – without the consent given in writing of the other partners, no partner while he is a partner for the time being of the LLP shall -*

Submit a dispute relating to the LLP's business to arbitration;

.....
”

27. Finally, the clause relating to arbitration is as follows:-

“33. Arbitration – (1) *All the matters not expressly provided in this agreement shall be decided by the consent of all the partners in writing. Falling that all disputes and questions about and in connection with the LLP under this Agreement arising between the partners or between any one of them and the legal representative of the partners or with the LLP at any time and from time to time, shall be settled by conciliation or by arbitration as provided under the Arbitration and Conciliation Act, 1996 as if the parties to the dispute have consented in writing for determination of the same as aforesaid and the provisions of the said Act apply accordingly.*

(2).. *if any question arises whether the dispute relates to formation, management or business of the LLP, the question shall be referred*

to the arbitrator, whose decision thereon shall be final.”

28. The Limited Liability Partnership, “New Pattukottai Kamatchi Mess-Nunpahal Unavagam LLP” applied for Trademark registration and Trademark No. 3999735 was also granted under class 43 which included services for providing food and drink, restaurants, hotels, cafes, cafeterias and also food and drinking catering with effect from 16.11.2019 for the Trademark “New Pattukottai Kamatchi Mess-Nunpahal Unavagam LLP”, service provider Limited Liability Partnership (LLP).

29. Since disputes arose among partners, K.Selvakumar filed O.A.Nos. 551 of 2019 seeking an order of injunction against G.Suthakar from interfering with the business “New Pattukottai Kamatchi Mess” at Old No. 3, New No.4, Dr.Singaravelu Street, T.Nagar, Chennai – 600 017 which was an existing business. K.Selvakumar, S.Devaraj, K.Janani and Saraswathy, filed O.A.No. 552 of 2019 seeking an order of injunction restraining G.Suthakar from interfering with the business and day to day operations of “New Pattukottai Kamatchi Mess – Nunpahal Unavagam

K.Selvakumar seeking an order of injunction restraining him from carrying on any business in the name of “New Pattukottai Kamatchi Mess” and also filed O.A.No. 592 of 2019 against all the other partners K.Selvakumar, S.Devaraj, K.Janani and Saraswathi restraining them from carrying on the business “New Pattukottai Kamatchi Mess-Nunpahal Unavagam LLP”.

30. Arguments were advanced and the applications were reserved for orders on 08.08.2019 and orders were pronounced on 28.08.2019. Finally it was ordered as follows with respect to O.A.Nos. 551 of 2019 and 591 of 2019:-

“23. I am therefore of the considered opinion that the Original Application No.551 of 2019 and 591 of 2019 could be disposed of with a direction to the applicant in the Original Application No.551 of 2019 to maintain proper accounts regarding the business that is carried at New No.4, Dr.Singaravelu Street, T.Nagar, Chennai 600 017, in the name and style of “New Pattukottai Kamatchi Mess” till the disposal of the Arbitration proceedings. The rights of the parties could be finally determined in the Arbitration proceedings. I, therefore, see no

ground for grant of an order of injunction as prayed for by the applicant in OA No.591 of 2019, wherein, he seeks to restrain the OA.Nos.551 & 552 of 2019 & OA Nos.591 & 592 of 2019 respondent from carrying on or commencing business in the name and style of “New Pattukottai Kamatchi Mess”. While I make it clear that there will be no injunction restraining the respondent for carrying on the business at New No.4, Dr.Singaravelu Street, T.Nagar, Chennai 600 017, he shall not commence any new business or open a new branch with the same name i.e. “New Pattukottai Kamatchi Mess” pending the Arbitration proceedings.

24. The Original Application in OA Nos.551 of 2019 and 591 of 2019 are disposed of with the above directions.”

31. With respect to O.A.Nos. 552 of 2019 and 592 of 2019, it was ordered as follows:-

“38. It will be pertinent to point out Clause 30 of the LLP agreement which prohibits partners from breaking away except under mutual agreement after giving advance notice of two

months in writing. In view of the said Clause, I am of the considered opinion that the applicants in OA No.552 of 2019 would not be entitled to start a new business or a new branch using the Name, Logo, Trademark of the restaurant, Combination of the recipe, pending disposal of the Arbitration proceedings. At the same time, the applicant in Application No.592 of 2019 cannot prevent the respondents therein from continuing the business which is now being OA.Nos.551 & 552 of 2019 & OA Nos.591 & 592 of 2019 carried on in the name of the LLP, subject of course to the respondents in Application No. 592 of 2019 maintaining true and proper accounts for the business that are being carried on Application Nos. 552 of 2019 and 592 of 2019 are disposed of as follows:

There will be an injunction, restraining the respondents in Application No.592 of 2019 from starting any other branch or similar business using the Name, Logo, Trade Mark of the Restaurant, Combination of the recipe, pending disposal of the Arbitration proceedings. They are also directed to maintain true and proper accounts for the businesses that are

now being carried out. Since I have concluded that the applicant in OA No.592 of 2019 continues to be a partner of the LLP, he would be entitled to periodical inspection of the accounts. He shall, however, not interfere with the day-to-day running of the business till the disposal of the Arbitration Proceedings.”

32. The cause of action for institution of the present suit arose on 14.08.2019, in the interregnum period between the date on which the applications were reserved for orders and the date on which the orders were actually pronounced. On 14.08.2019, the defendant inaugurated a restaurant under the name “New Pattukkottai Kamatchi Mess” at No.22, Govindhan Street, T.Nagar, Chennai – 600 017 along with the suit. The plaintiff is the registered Trademark holder. It is to be noted that the defendant G.Suthakar is a partner of the LLP and the complaint of the plaintiff is that he had infringed on the registered trademark by opening the said restaurant under a deceptively similar name.

33. O.A.Nos. 784 & 785 of 2019 were also filed in the instant suit seeking an interim injunction against the defendant from passing off their food products as that of the plaintiff and restraining the defendant from

identical or deceptively similar to the registered Trademark of the plaintiff “New Pattukkottai Kamatchi Mess – Nunpagal Unavagam LLP”. Arguments were advanced on 12.09.2019 and orders were pronounced on 19.09.2019. After examining the facts, it had been finally ordered as follows:-

“19. Having regard to the above judgments, the fact that the respondent has opened the restaurant when the earlier applications were reserved and before passing the order he opened the restaurant as long as he continued as partner of LLP as per earlier orders, he cannot use the trade mark in the name of firm for his individual business.

20. Considering the above, this court is of the view that there is a prima facie made out by the plaintiff and the balance of convenience is also in his favour. If the respondent/defendant is not restrained by order of injunction it will lead to irreparable injury. Therefore, this Court is of the view that the respondent is not certainly entitled to use the trade mark of LLP. Since the entire dispute has been referred to the arbitral proceedings, the entitlement of parties to use the trade mark would be decided only in the arbitral proceedings. Till such time, the

respondent is not entitled to use the trade mark of the LLP for his individual business. Accordingly, there will be an order of injunction restraining the respondent/defendant from in any way using the trade mark/words ‘New Pattukkottai Kamatchi Mess & Nunpahal Unavagam LLP’ or any other mark which is identical or deceptively similar to the registered trade mark of the Plaintiff, till the disposal of the Arbitral Proceedings.

21. In the result, the Original Applications are ordered.”

34. Now the defendant has filed the present application seeking to refer the issues raised in the plaint to arbitration. The facts as culled out above shows the following chronology of the events:-

(i) Formation of a partnership agreement between K.Selvakumar and G.Suthakar on 14.10.2017 to run a partnership business “New Pattukkottai Kamatchi Mess”;

(ii) Formation of a Limited Liability Partnership on 28.09.2018 converting the existing business as a Limited Liability Partnership under the name “New Pattukkottai Kamatchi Mess- Nunpagal Unavagam LLP” with the same two partners K.Selvakumar and G.Suthakar'

(iii) Induction of three further partners K.Janani, S.Devaraj and T.Saraswathi by a Supplemental Agreement dated 12.10.2018;

(iv) Disputes between K.Selvakumar, S.Devaraj, K.Selvakumar and T.Saraswathi on the one hand and G.Suthakar on the other hand leading to filing of:-

(a) O.A.Nos. 551 & 552 of 2019 restraining G.Suthakar from interfering with the businesses “New Pattukkottai Kamatchi Mess” and “New Pattukkottai Kamatchi Mess-Nunpahal Unavagam LLP”;

(b) O.A.Nos. 591 & 592 of 2019 by G.Suthakar restraining K.Selvakumar from running the business “New Pattukkottai Kamatchi Mess” and all the other partners from running the business “New Pattukkottai Kamatchi Mess – Nunpahal Unavagam LLP”.

35. After arguments were advanced in the four original applications in which both sides sought an order of injunction as against the other from running any business either under the name “New Pattukkottai Kamatchi Mess” or “New Pattukkottai Kamatchi Mess- Nunpahal Unavagam LLP” and when orders were reserved on 08.08.2019 and before the orders were delivered on 28.08.2019 G.Suthakar, the defendant herein had opened a

restaurant “New Pattukkottai Kamatchi Mess” at No.22, Govindan Street, T.Nagar, Chennai.

36. This has caused the proprietor of the registered Trademark, namely, “New Pattukkottai Kamatchi Mess-Nunphal Unavagam LLP” to institute this suit complaining about the infringement of the words “New Pattukkottai Kamatchi Mess”, as separate and independent cause of action. This suit had been instituted under the provisions of the Trademarks Act 1999.

37. Section 27 of the Trademarks Act is as follows:-

“27. No action for infringement of unregistered trade mark.—

(1) No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark.

(2) Nothing in this Act shall be deemed to affect rights of action against any person for passing off goods or services as the goods of another person or as services provided by another person, or the remedies in respect thereof. “

38. Section 29 (2)(c) of the Trademarks Act is as follows:-

“29. Infringement of registered trade marks.—

(1) A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which is identical with, or deceptively similar to, the trade mark in relation to goods or services in respect of which the trade mark is registered and in such manner as to render the use of the mark likely to be taken as being used as a trade mark.

(2) A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which because of

(a)

(b)

(c) its identity with the registered trade mark and the identity of the goods or services covered by such registered trade mark, is likely to cause confusion on the part of the public, or which is likely to have an association with the registered trade mark.

(3)

(4) ”

39. Under Section 27 anybody not necessarily the defendant herein can be prevented from passing off their business as if it is the business of the “New Pattukkottai Kamatchi Mess-Nunphal Unavagam LLP”. It is a right claimed in the rem. Incidentally in this case, the defendant himself has violated the registered Trademark and was complained to be passing off his business as that of the business of the plaintiff. The Court has also granted injunction.

40. According to Section 29(2)(c) where identity of the registered Trademark and the validity of the goods or services are similar then under Section 29(3), the Court shall presume that it is likely to cause confusion.

“29. Infringement of registered trade marks.—

(1)

(2)

(a)

(b)

(c)

(3) In any case falling under clause (c) of sub-section (2), the court shall presume that it is

likely to cause confusion on the part of the public.

(4) ”

41. In a suit for infringement, the plaintiff will have to establish that they are the registered Trademark holders of the mark complained. They will have to establish that the defendant has opened a similar business using a similar or deceptively similar Trademark. If that is established then the Court shall presume that there will be confusion in the minds of the customers. This requires evidence. It requires rebuttable evidence only with respect to similarity or identity of the mark or business. These are not issues which can be resolved through arbitration.

42. The plaintiff has also sought damages of Rs.1/- lakh and also for delivery up of all the name boards under the name “New Pattukkottai Kamatchi Mess”. This will be a consequential order to any decree passed by the Court.

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43. The learned counsel for the defendant has placed reliance on a Judgment of the Division Bench of this Court in ***Lifestyle Equities CV Prins Bernhardplein Vs. QDSeatoman Designs Pvt. Ltd.***, reported in **2018 (1) CTC 450** wherein the Division Bench had stated that a right in personam

44. In that case, both the contesting parties claimed a better right of usage vis-a-vis the other and therefore it was determined that it was a dispute in personam and not a dispute in rem. Here, the plaintiff is the registered proprietor of the Trademark “New Pattukkottai Kamatchi Mess-Nunphal Unavagam LLP”. They claim a right for protection of the Trademark as against anybody, who is not a registered proprietor from using a deceptively similar Trademark under a deceptively similar name for the very same business. The defendant happens to use it by opening a restaurant “New Pattukkottai Kamatchi Mess”. It must also be pointed out that the defendant himself is a partner in “New Pattukkottai Kamatchi Mess-Nunphal Unavagam LLP”. He has been specifically enjoined from starting any restaurant under the name “New Pattukkottai Kamatchi Mess” by way of the orders in O.A.Nos. 551, 552, 591 & 592 of 2019. All the partners have been so enjoined. When the defendant violates such an order of injunction, then the issue cannot be referred to arbitration.

45. This is not a suit relating to disputes in connection with the LLP or relating to the formation, management or business of LLP. This is a suit instituted by the LLP to prevent infringement of its registered

Trademark. It is only incidental that the defendant happens to be a partner of

the LLP. The defendant could have been any entity or individual. Protection of a registered Trademark is a right in rem. If any third party had opened a similarly named restaurant, then the defendant would have joined with the plaintiff to seek an order of injunction. The plaintiff is the Limited Liability Partnership. It had sued the defendant complaining infringement. I hold that the plaintiff is seeking a right in rem. This right to sue is available not only against the defendant but also against any individual from infringing the registered mark “New Pattukkottai Kamatchi Mess”. The defendant himself should be interested in ensuring that the LLP exercises such a right since as a working partner, he would also be directly put to loss if a rival business is started under the same name.

46. I hold that the issues raised will have to go through the process of trial and are not arbitrable.

47. For all these reasons, I hold that the application is misconceived and is accordingly dismissed. No orders as to costs.

Sd/.C.V.K.J.
30.09.2020

//Certified to be a true copy//

Dated this the _____ day of _____ 2020.

S.U./06.10.2020

COURT OFFICER(O.S.)

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.