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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ C.A.(COMM.IPD-TM) 138/2022

DESERT FRIENDLY CAMPS PRIVATE LIMITED ..... Appellant

Through: Mr. Rahul Beruar and Ms. Jyotsana Sinha, Advocates.

versus

REGISTRAR OF TRADE MARKS ..... Respondent

Through: Mr. Harish Vaidyanathan Shankar, CGSC with Mr. Srish Kumar Mishra, Mr. Sagar Mehlawat and Mr. Alexander Mathai Paikaday, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

O R D E R

% 14.02.2023

1. Present appeal under Section 91 of the Trade Marks Act, 1999 [hereinafter "***the Act***"] impugns order dated 15th June, 2018 read along with Statement of Grounds of decision dated 29th June, 2018, both passed by Senior Examiner, whereby Appellant's application no. 1819402 filed on 18th May, 2009 for the device mark " THE SERAI JAISALMER " [hereinafter "***subject mark***"] for Classes 3, 9, 16, 24, 25, 29, 30, 32, 33, 35, 39, 41, 42, 43 and 44, has been refused. Relevant portion of Statement of Grounds of decision are extracted hereunder:

> *"With reference to the above and request on Form TM-M dated 22/06/2018. It has been decided by the Registrar of Trade Marks to inform*

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you that hearing in respect of above application was held on 24/05/2018 and the said application is refused on the following Grounds;

** 9 - Absolute grounds for refusal of registration.*
** 9(1)(a) - The trade mark is devoid of any distinctive character, that is to say, not capable of Distinguishing the goods or services of one person from those of another person:*
**9(1)(b) - The Trade Mark consist exclusively of marks or indications which serve in trade to designate the kind, quality, quantity, intended purpose, values, geographical origin or the time of production of the goods or rendering of the service or other characteristics of the goods or services.*
**11(1)(a) - Relative grounds for refusal of registration. - The said trade Mark is refused for registration because of its identity with an earlier trade mark and similarity of goods or services covered by the trade mark; or*
**11(1)(b) - Relative grounds for refusal of registration. The said trade Mark is refused for registration because of its similarity to an earlier trade mark and the identity or similarity of the goods or services covered by the trade mark there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.*

Application was examined and objections were raised under section 9 and 11 of Trade Marks Act, 1999. Reply filed, perused but found not satisfactory. Application proceeded for show cause hearing. Objection under Section (9) sustained. Application is devoid of any distinctive character. Further identical/similar valid trade marks are already on record. The objections raised in the Examination Report under section 9 and 11 of the Trade Marks Act, 1999 cannot be waived. After perusal of records and submissions by the attorney in this regard, the application for registration of Trade Mark is refused on merit."

2. Senior Examiner has determined that the subject mark lacks distinctive character and is incapable of differentiating the goods and services of one person from another. Additionally, subject mark is considered descriptive of the goods to which it is being applied. He has also invoked Section 11(1) (a) & (b) of the Act based on cited marks in the examination report, as a reason for refusing registration.

3. At the outset, Counsel for Appellant, on instructions, states that the present appeal is not being pressed for registration of the subject mark in

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Class 9. He states that a nearly identical mark " THE SERAI JAISALMER " has been registered since 1st April, 2016 *vide* application nos. 3226700 and 3226701 in Class 39 and 43, respectively. Senior Examiner overlooked the fact that the subject mark has gained a secondary meaning due to its continuous and extensive use since 2008, which is proved by an affidavit of use. Therefore, the mark qualifies for registration under the proviso to Section 9 (1) of the Act. Additionally, he argues that the cited marks had either lapsed or been refused, as on the date of passing of the impugned order, and thus, ground for refusal under Section 11 of the Act is not sustainable.

4. The Court has considered the afore-noted contentions. The subject mark comprises of the word "SERAI" which is suffixed to grammatical article "THE" to form a phrase – "THE SERAI", which is placed above the name of the city "JAISALMER". Emphasis in the subject mark, lies in the stylised font of the phrase – "THE SERAI" and "JAISALMER". Undisputedly, subject mark is being used by Appellant to provide services under Class 43 and for the other ancillary services covered by other classes mentioned in the application, provided at the resort/ luxury desert tents operated by Appellant. For this purpose, Appellant has relied upon an affidavit of use, indicating that Appellant's brand under the subject mark has been conferred felicitations and cited in several leading international/ national lifestyle, travel and tourism magazines, travel guides and newspapers, over the years, which evidences that subject mark has acquired a substantial goodwill and reputation.

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5. Considering the above, and the fact that a nearly identical mark 

, comprising of words "THE SERAI" and "JAISALMER" with additional illustration of a camel, has already been granted registration in Class 39 and Class 43, no ground arises to reject the application under Section 9(1)(a) & (b) of the Act. Further, the word "SERAI" contained in the subject mark, a word derived from the persian language meaning an "inn" or a "hotel", is being applied for goods under classes other than Class 43, to which it has no direct association or co-relation, and to that effect cannot be stated to be descriptive.

6. *Qua* objection under Section 11(1)(a) & (b) of the Act, it would be apposite to take note of the cited marks, which are as under:

LOCATION:
SECTION: EXM
REPORT: EXM007

WORD MARK SEARCH REPORT
APPLICATION NUMBER: 1819402
Class : —
TRADEMARK: 'THE SERAI JAISALMER (LABEL)'

USER : ANB
PAGE:1
DATE: 04/07/2011

APPL NO	CLASS	CONFLICTING MARK	JOURNAL No	PROPRIETOR NAME	PROPRIETOR ADDRESS	STATUS	TM IMAGE
GOODS SERVICES							
1617029	9	SERAI	1399	NARESH H. JESWANI	52/D, JYOTI ESTTE, OFF. CHOTANI ESTTE, PORCTOR ROAD, GRANDT ROAD, (E), MUMBAI-400 007.	Registered	
APPLICATION DATE 01/11/2007 12:53:10							
GOODS/SERVICE MOBILE & TELECOMMUNICATION INSTRUMENTS, HEADPHONES, EARPHONES, MICROPHONES, SMPS POWER SUPPLIERS, CHARGERS, AUDIO VIDEO APPARATUS AND ACFESSORIES.							
1093616	16	MEHBOOB KE SERAI	1328	SUNRYDGE INDIA HERITAGE PVT. LTD.	HAVELI NO.8, MEHRAULI, NEW DELHI - 110 030.	Registered	
APPLICATION DATE 09/04/2002 13:03:12							
GOODS/SERVICE PAPER AND PAPER ARTICLES, CARDBOARD AND CARDBOARD ARTICLES, CALENDARS, DIARIES, ALBUMS, PHOTOGRAPHS, TRANSPRENCIES, COMPUTER PRINTOUTS, COMPUTER PROGRAMS, MANUALS, OPERATING INSTURCTIONS, STAMP PADS, INSTURCTIONAL AND TEACHING METERIAL, BINDING MATERIAL, OFFICE BOOKS, OFFICE REQUISITES, NEWSPAPER AND PERIODICALS, PUBLICATIONS AND OTHER PRINTER MATTER RELATING TO TRADE SHOWS, SEMINARS AND BUSINESS TRADE AND COMMERICAL APPLICATIONS, PENS AND BALLPOINT PENS, RUBBER ERASERS, PENCILS, PAPER CUTTERS, STICKERS, STATIONERY ADHESIVE MATERIALS (STATIONERY), BROCHURES, CATALOGUES, GREETING CARDS, CHARTS, LETTER HEADS, ENVELOPES, MAGAZINE, PAMPHLETS AND ADVERTISEMENT, ADVERTISEMENT SHEETS.							
1093614	29	MEHBOOB KE SERAI	9999	SUNRYDGE INDIA HERITAGE PVT. LTD.	HAVELI NO 8, MEHRAULI, NEW DELHI - 110 030.	Registered	
APPLICATION DATE 09/04/2002 13:03:12							
GOODS/SERVICE meat, fish, poultry and game, meat extracts, preserved, dried and cooked fruits and vegetable, jellies, jams, eggs, milk and milk products, edible oils and fats, preserves.							
1093613	30	MEHBOOB KE SERAI	9999	SUNRYDGE INDIA HERITAGE PVT. LTD.	HAVELI NO. 8, MEHRAULI, NEW DELHI - 110 030.	Advertised bef acc	
APPLICATION DATE 09/04/2002 13:03:12							
GOODS/SERVICE coffee, tea, cocoa, sugar, rice, tapica, sago, artificial coffee, flour and preparations made from cereals, brea, pastry and confectionery, ices, honey, treacle, yeast, baking-powder, salt, mustard, vinegar, sauces (except said dressings), spices, ice included in class 30.							
1661929	42	THE SERAI		COFFEE DAY HOTELS AND RESORTS PVT. LTD.,	COFFEEDAY SQUARE, VITTAL MALLYA ROAD, BANGALORE-560 001.	Objected	The serai
APPLICATION DATE 07/03/2008 12:22:47							
GOODS/SERVICE PROVIDING FOOD AND DRINK; TEMPERORY ACCOMODATION; MEDICAL, HIGIENIC AND BEAUTY-CARE; VETERINARY AND AGRICULTURAL SERVICES, LEGAL SERVICES, SCIENTIFIC AND INDUSTRIAL RESEARCH; COMPUTER PROGRAMMING; SERVICES THAT CANNOT BE CLASSIFIED IN OTHER CLASSES							

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1662743 42 THE SERAI COFFEE DAY HOTELS AND RESORTS PVT. LTD., COFFEEDAY SQUARE, VITTAL MALLYA ROAD, BANGALORE-560 001. Objected

APPLICATION DATE 10/03/2008 14:59:21

GOODS/SERVICE PROVIDING OF FOOD AND DRINK; TEMPORARY ACCOMMODATION; MEDICAL, BEAUTY CARE; VETERINARY AND AGRICULTURAL SERVICES, LEGAL SERVICES, SCIENTIFIC A RESEARCH, COMPUTER PROGRAMMING; SERVICES THAT CANNOT BE CLASSIFIED IN OHTER

1678522 42 CARAVAN SERAII SERAII HOSPITALITY LTD. P.O. BOX 309 GT, UGLAND HOUSE, SOUTH CHURCH STREET, GEORGE TOWN, GRAND CAYMAN, CAYMAN ISLANDS. Objected

APPLICATION DATE 22/04/2008 12:31:23

10/10/2018 Examination Report

GOODS/SERVICE HOTELS, RENTAL OF SERVICE APARTMENTS, RENTAL OF TEMPORARY ACCOMMODATION, TOURIST HOMES, RESTAURANTS, SELF SERVICE RESTAURANTS AND CATERING, COFFEE SHOPS AND CAFETERIAS.

1678524 42 GRAND SERAII 1402 SERAII HOSPITALITY LTD. P.O. BOX 309 GT, UGLAND HOUSE, SOUTH CHURCH STREET, GEORGE TOWN, GRAND CAYMAN, CAYMAN ISLANDS. Registered

APPLICATION DATE 22/04/2008 12:31:23

"OODS/SERVICE HOTELS, RENTAL OF SERVICES APARTMENT, RENTAL OF TEMPORARY ACCOMMODATION, OURIST HOMES, RESTAURANTS, SELF RESTAURANTS AD CATERING COFFEE SHOPS AND CAFETERIAS.

1678525 42 ROYAL SERAII 1402 SERAII HOSPITALITY LTD. P.O. BOX 309 GT, UGLAND HOUSE, SOUTH CHURCH STREET, GEORGE TOWN, GRAND CAYMAN, CAYMAN ISLANDS. Registered

APPLICATION DATE 22/04/2008 12:31:23

GOODS/SERVICE HOTELS, RENTAL OF SERVICES APARTMENT, RENTAL OF TEMPORARY ACCOMMODATION, TOURIST HOMES, RESTAURANTS, SELF RESTAURANTS AD CATERING COFFEE SHOPS AND CAFETERIAS.

1678526 42 SERAII 1402 SERAII HOSPITALITY LTD. P.O. BOX 309 GT, UGLAND HOUSE, SOUTH CHURCH STREET, GEORGE TOWN, GRAND CAYMAN, CAYMAN ISLANDS. Registered

APPLICATION DATE 22/04/2008 12:31:23

GOODS/SERVICE HOTELS, RENTAL OF SERVICE APARTMENTS, RENTAL OF TEMPORARY ACCOMMODATION, TOURIST HOMES, RESTAURANTS, SELF SERVICE RESTAURANTS AND CATERING, COFFEE SHOPS AND CAFETERIAS.

1678527 42 SERAI 1402 SERAII HOSPITALITY LTD. P.O. BOX 309 GT, UGLAND HOUSE, SOUTH CHURCH STREET, GEORGE TOWN, GRAND CAYMAN, CAYMAN ISLANDS. Registered

APPLICATION DATE 22/04/2008 12:31:23

GOODS/SERVICE HOTELS, RENTAL OF SERVICE APARTMENTS, RENTAL OF TEMPORARY ACCOMMODATION, TOURIST HOMES, RESTAURANTS, SELF SERVICE RESTAURANTS AND CATERING, COFFEE SHOPS AND CAFETERIAS.

ANIRBAN GUPTA
For REGISTRAR OF TRADE MARKS

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7. Counsel for Appellant has indicated that all afore-said cited marks except for "SERAI" (application no. 1617029) in Class 9, have lapsed or been refused, as indicated in the table below:

Sl. No.	***Cited Trade Mark***	***Cited Appl. / TM No.***	***Status***
1.	*Mehboob Ke Serai*	*1093616*	*LAPSED on 9th April 2012*
2.	*Mehboob Ke Serai*	*1093614*	*LAPSED on 9th April 2012*
3.	MEHBOOB KI SERAI	*1093613*	*LAPSED on 9th April 2012*

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4.		*1661929*	*LAPSED on 7th March 2018*
5.		*1662743*	*LAPSED on 10th March 2018*
6.	*Caravan Seraii*	*1678522*	*REFUSED registration on account of non-prosecution.*
7.	*Grand Seraii*	*1678524*	*LAPSED on 22nd April 2018*
8.	*Royal Seraii*	*1678525*	*Same as above*
9.	*Seraii*	*1678526*	*Same as above*
10.	*Seraii*	*1678527*	*Same as above*

8. Considering the status of the afore-cited marks and since Appellant is not pressing the application for Class 9, in which the only remaining conflicting cited mark is registered, in the opinion of the Court, the subject mark must be accepted.

9. For the foregoing reasons, the present appeal is allowed with following directions:

(i) Impugned order dated 15th June, 2018 and Statement of Grounds of decision dated 29th June, 2018 are set aside.

(ii) Trademark Registry is directed to process the registration application for the subject mark.

(iii) Subject mark be advertised within a period of three months from today.

(iv) If there is any opposition, the same shall be decided on its own merits, uninfluenced by observations made hereinabove.

(v) No exclusive rights in the word "JAISALMER" shall vest in the Appellant. This disclaimer shall be reflected in the trade marks journal at the

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time of advertisement as also if the subject mark ultimately proceeds for registration.

10. With the above directions, the appeal is disposed of along with pending application(s), if any.

11. Registry is directed to supply a copy of the present order to the Trademark Registry at llc-ipo@gov.in for compliance.

SANJEEV NARULA, J

FEBRUARY 14, 2023/as

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