IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

INTERIM APPLICATION NO. 11936 OF 2024
IN
COMMERCIAL FIRST APPEAL ST. NO. 23989 OF 2024

BURGER KING CORPORATION ..APPLICANT
(ORG. PLAINITFF)

In The Matter Between

BURGER KING CORPORATION ..APPELLANTS
(ORG. PLAINITFF)

Vs.

Ms. ANAHITA IRANI & Anr. ..RESPONDENTS

Adv. Hiren Kamod a/w. Adv. Raunaq Kamath, Adv. Alhan Kayser i/b. Adv. Avesh Kayser for the applicant/appellant.

Adv. Abhijit Sarwate a/w. Adv. Rahul Pardeshi for respondents.

Coram : A. S. Chandurkar & Rajesh S. Patil, JJ.
Date on which the arguments were heard : 1st October 2024.
Date on which the order is pronounced : 2nd December 2024.

ORDER (PER : Rajesh S. Patil, J.)

1. Appellants (original plaintiffs) have filed this Interim Application in Commercial First Appeal, seeking stay to the effect, operation, implementation and enforcement of the impugned judgment and order dated 16th July 2024, passed in Regular Civil Suit No. 2 of 2011, and also seeking a relief that pending the hearing and final disposal of the Commercial First Appeal, an order be passed restraining the respondents from using the appellant's well known trade mark 'BURGER KING' in any manner whatsoever.

2. The Commercial First Appeal is filed under Section 13 of the Commercial Courts Act, 2015 challenging the judgment and order dated 16th July 2024 passed by the trial Court, whereby the appellant's suit for infringement of Trademarks and copyrights, has been dismissed resulting in *inter alia* the cessation of an interim injunction which has been in operation in trial Court since 5th March 2011.

FACTS

3. The Appellants were the plaintiffs before the trial Court and the Respondents were the defendants in trial Court. The parties are hereinafter referred for convenience as per their nomenclature before the trial Court.

4. The plaintiffs claim in the suit to be a firm founded in the year 1953 in Miami, U.S.A. It commenced business with one restaurant under the name 'BURGER KING' and now manages and operates a worldwide chain of 13000 fast food restaurants in more than 100 countries and US territories worldwide. It claimed that it has approximately 4000 trade mark and service mark applications and approximately 1040 domain name registrations around the world. First of such registration mark in India, is of 25th April 1979 in Class 16, 29, 30 and 32. As the plaintiff became aware of a trade mark

application, in the name of defendant for the trade mark 'BURGER KING' through a database search of the records of the Trademarks Registry, India in the year 2008, to safeguard its rights, the plaintiff filed caveat through its advocate. As the plaintiff learnt about the existence of the defendants' restaurant under the name 'BURGER KING' on two places in Pune, the plaintiff issued a cease and desist Notice to the defendant in the month of June 2009.

5. On receiving cease and desist notice, the defendant sent its reply dated 3rd July 2009 denying the submissions made in the cease and desist notice. They further stated that the plaintiff's restaurant did not exist in India, therefore, they cannot claim any common law rights.

6. As the defendants rejected the contents of cease and desist notice issued by the plaintiffs, on 3rd January 2011 the plaintiffs filed a suit in the District Court, Pune for permanent injunction restraining the defendant from infringement of trade mark and passing off as well as for damages. Along with the suit the plaintiffs also preferred 'Exh.5' Application, thereby seeking an order restraining the defendant from using the trade mark 'BURGER KING' till the final disposal of the suit.

7. By an order dated 5th March 2011, the trial Court granted

interim orders in 'Exh. 5' application restraining the defendants from using the trademark 'BURGER KING'. The defendants soon thereafter filed application Exh.16 for return of plaint and for setting aside the ad interim reliefs. The said application was rejected by order dated 1st April 2011.

8. After the defendants filed their reply to the 'Exh.5', the trial Court heard both the parties and by its order dated 20th January 2012 allowed 'Exh.5' application thereby restraining the defendants from using the trade mark 'BURGER KING', till final disposal of the suit.

9. The defendants being dissatisfied with the order dated 20th January 2012 passed by the trial Court preferred an Appeal From Order before the High Court. The said Appeal From Order No.562 of 2012 came up before the learned Single Judge of this Court for hearing and by its order dated 6th December 2012 the learned Single Judge, did not alter the order passed by the trial Court. The defendants thereafter stopped using the trademark 'BURGER KING' for their restaurant.

10. In the month of July 2013, the defendants preferred application u/s.124 of the Trademarks Act, seeking stay to the suit in order to permit the defendants to challenge the Plaintiffs registration of Trademarks. The said application was allowed. Pursuant thereto

defendants approached Intellectual Property Appellate Board, challenging Plaintiff's one of such trademark registration. However, the said application for cancellation was withdrawn.

11. On 8th April 2015, the defendants preferred application seeking injunction against the plaintiffs from not using the trademark 'BURGER KING' in Pune. By an order dated 11th August 2015 defendants application was dismissed.

12. The defendants thereafter filed their Written Statement and Counterclaim to the suit. Both the parties led their evidence by examining their witnesses and producing on record various documents. The learned trial Court thereafter, heard both the parties and after going through the evidence and documents on record by its Judgment and Order dated 16th July 2024 dismissed the suit filed by the plaintiff. So also, the defendants' counterclaim was dismissed.

13. Being aggrieved by the Judgment and Order dated 16th July 2024 passed by the trial Court, the defendants have preferred the present Commercial First Appeal before the Appellate Bench of this Court, challenging the dismissal of the suit.

SUBMISSIONS

14. Mr. Hiren Kamod, the learned counsel appeared on behalf of the appellant (original plaintiff) and made his submissions:-

(a) He submitted that the plaintiff is the exclusive proprietor of trademark 'BURGER KING' which has been coined and adopted by the plaintiff in the year 1954. The plaintiff is the world's second largest hamburger quick service restaurant company and operates well over 15000, 'BURGER KING' restaurants in more than 100 countries and U.S.territories . Hence, plaintiff's trademark has worldwide reputation and goodwill.

(b) He further submitted that the plaintiff has also significant Indian presence and rights in the trademark 'BURGER KING' in India which dates back to the year 1979. The plaintiff registered its 'BURGER KING' trademark and secured its statutory rights for the first time in India in 1979, hence, even prior to launch of its 'BURGER KING' restaurant in India, the Indian public were well aware of the plaintiff's restaurants and rights in trademark 'BURGER KING'. As such, the plaintiff launched its first 'BURGER KING' restaurant in India in 2014.

(c) It was further argued that defendant has adopted the plaintiff's trademark 'BURGER KING' around 1992. Therefore, it cannot be said that the defendant is prior user of the trademark in question. Defendants are engaged in identical activities as that of plaintiff. Like the plaintiff, defendants are operating a quick service restaurant

under the name 'BURGER KING' and are offering fast food namely burgers, to customers under the plaintiff's registered trademark. So, the plaintiff and defendants are using identical marks i.e. 'BURGER KING' in relation to identical services i.e. restaurant services.

(d) He further submitted that the existence of the registrations of plaintiff was admitted by defendants when they filed an application under section 60 seeking permission to challenge the validity of the plaintiff's trademark, under section 124 of the Trademarks Act. However, defendants had withdrawn the application for cancellation of plaintiff's registration before IPAB and, therefore, the existence and validity of all 13 registrations of plaintiff's remain intact. So, defendants cannot dispute the statutory rights of plaintiff over the trademark 'BURGER KING'.

(e) He submitted that by virtue of registrations, the plaintiff is entitled to use the 'BURGER KING' trademark to the exclusion of all others including the defendants. The plaintiff has a statutory right to the exclusive use of 'BURGER KING' trademark under Section 28 of the Trademarks Act and thereby entitles to obtain relief against the defendants from infringing their registered trademark in relation to their goods, services. Even infringement of plaintiff's registered trademark is covered by Section 29. Due to use and adoption of

similar trademark by defendants and providing service identical like plaintiff that creates confusion in the mind of customers regarding plaintiff's trademark and therefore, loss is being caused to the plaintiff. So under such circumstances as per Section 29 (3) of the Trademarks Act, there is a presumption of confusion among consumers.

(f) He submitted that on behalf of plaintiff initially Ms.Cecilia Dempsey being a Principal Officer of the plaintiff Corporation at the time of institution of suit was duly authorized to sign and verify the plaint. Therefore, the suit has been properly instituted in accordance with Order 29 Rule 1 of CPC. Subsequent to that, after amendment in plaint, the amended plaint has been filed which was signed and verified by Pankaj Pahuja, who was also authorized to do the same. Since authorization may be express or implied or even in absence of documentary evidence, the Court may conclude that the suit was filed by duly authorized person of plaintiff by taking all facts into consideration.

(g) He submitted that it is well settled position that anybody can come and given evidence in Court provided that he is acquainted with the facts of that case. No power of attorney or authorization is necessary for any witness to give evidence in Court. It may be for

filing the plaint, or signing the plaint or signing a written statement an authorization may be necessary, but to give evidence on oath, anybody who is acquainted with the facts can give evidence.

(h) It is also submitted that since plaintiff is a prior user of its trademark 'BURGER KING' and having reputation and goodwill and worldwide publicity, therefore, the defendant is not authorized to adopt and use the plaintiff's trademark to provide the restaurant services by merely taking the defence that the plaintiff has started restaurant service under trademark 'BURGER KING' in India for the first time in 2014 and prior to that defendants were in use of trademark to provide restaurant services in India.

(i) He submitted that ultimate test is, who is first in the worldwide market and not who is first in India. Hence, defendants cannot make much capital about their prior user of trademark in India than that of plaintiff.

(j) He further submitted that on 5th March 2011 ad-interim reliefs were granted in favour of the Plaintiffs, which were confirmed on 20th January 2012 by trial Court. The said reliefs were not disturbed by High Court, and the same continued till the disposal of the suit. He submitted that there is no explanation how defendant adopted the name 'BURGER KING'.

(k) He submitted that defendants application seeking injunction restraining the Plaintiff from using the trademark 'BURGER KING' was rejected by trial Court and also by High Court. Therefore, there was no case for defendants, and the plaintiffs' suit should have been decreed.

(l) He submitted that the findings recorded by trial Court on Issue no.2 to 5 are perverse, and the same are required to be set aside.

(m) He submitted that all the relevant documents including the documents authorising the principal officers to sign and lead evidence on behalf of plaintiff's, however the trial Court did not consider the same in its proper perspective.

(n) To buttress his submissions, he relied upon the following judgments.

i] United Bank of India Vs. Naresh Kumar (1996)6SCC 660.

ii] Union of India Vs. Ibrahim Uddin – (2012) 8 SCC 148.

iii] SKF India Ltd. Vs. Banarasi Lal Madan – Bombay High Court - Summary Suit no.5 of 2003.

iv] Kabushhiki Toshiba Vs. Tosiba Appliances – 2024 SCC Online Del 5594.

v] Central Bank of India Vs. Tarseema Compress Wood Manufacturing Company, - 1996 SCC Online Bom 565.

vi] Daiwa Pharmaceutical Co. Ltd. Vs. Daiwa Pharmaceutical Pvt. Ltd. - 2024 SCC Online Bom 1078.

(o) He submitted that the Interim Application be made absolute in terms of prayer clause (a).

15. Mr. Abhijit Sarwate, the learned counsel appeared for the defendants and made the following submissions:-

(a) He submitted that the present suit has not been filed by the person who has been duly authorized. Therefore, the suit which is instituted wrongly is not maintainable.

(b) He submitted that the plaintiff is not well known trademark in India particularly in the year 1991-92 when defendants started using the name Burger King for their Restaurant. Defendant's being known trademark in the territories of Pune, hence they being prior user of trademark in question are honest user. Defendants never infringed plaintiff's trademark as alleged. Defendants' restaurant's name being used by them before registration of trademark by the plaintiff company for its restaurant under class 42.

(c) He submitted that there is no similarity in both trademarks, so there is no question of deception or confusion in the mind of customers.

(d) He submitted that the plaintiff has not proved that initially the plaint was signed and verified by Cecilia Dempsey to whom proper

authorization was given by the plaintiff company. Similar case is with respect to Pankaj Pahuja who had signed and verified the amended plaint subsequently. In short, due to non authorization there is wrong institution of suit and so it is not maintainable.

(e) He submitted that even PW-1 Vincent Jose was not duly authorized on behalf of plaintiff to give evidence on its behalf and, therefore, for want of proper authorization his evidence cannot be considered. In addition to it, even it is decided to consider his evidence then it appears that he doesn't know anything about facts, circumstances, cause of action of the suit and on that count also his evidence is not helpful to support or prove the allegations made in the plaint and documents relied upon.

(f) He submitted that there is no proper verification of evidence affidavit of PW-1 Vincent Jose in accordance with Order 19 Rule 3 of CPC. Therefore, the said evidence affidavit is not evidence affidavit in the eye of law.

(g) He submitted that the evidence of PW-1 Vincent Jose is not helpful to prove the documents placed on record by the plaintiff and further mere exhibition of documents without proving the same as per provisions of Indian Evidence Act, those exhibited documents cannot be read in evidence.

(h) He submitted that thus, the cumulative effect of the above referred circumstances is that apparently there is no oral or documentary evidence on behalf of plaintiff to prove its claim. Therefore, the plaintiff's suit is liable to be dismissed.

(i) He further submitted that apparently there is no evidence on record to show that due to alleged infringement of trademark and act of passing off business of plaintiff by defendants, the plaintiff has caused loss or damage. If actual loss or damage is not proved then the plaintiff is not entitled to get damages as prayed.

(j) It is submitted that suit is liable to be dismissed with costs and defendants being prior user of trademark in question in India and subsequently the plaintiff had started to provide services through restaurants under Burger King trademark.

(k) He submitted that it is not the law, that merely because there was injunction during proceedings, since 2012, till the date of decision of trial Court, the order of injunction should continue in Appellate Court.

(l) To buttress his submissions, he relied upon the following judgments.

i] Kashi Math Samsthan & Anr. Vs. Shrimad Sudhindra Thirtha Swamy & Anr. (2010) 1 SCC 689.

ii] State of Assam Vs. Barak Upatyaka D.U. Karmachari Sanstha – 2009(3) Supreme 281.

iii] Toyoto Jidosha Kabushhiki Kaisha Vs. M/s. Prius Auto Industries Ltd. - AIR 2018 SC 167.

iv] Cluett Peabody and Company Inc. Vs. Arrow Apparels - 1998 PTC (18).

v] New Shelter Enterprises Vs. Meenakshi w/o Sudhir Gupta – 2018(2) Mh.L.J.199.

vi] State Bank of Travancore Vs. M/s. Kingston Computers (I P. Ltd., - 2011 AIR SCW 1948.

vii] Sait Tarajee Khimchand and others Vs. Yelamarti Satyam alias Satteyya and others reported in (1971) AIR (SC) 1865.

viii] L.I.C. of India and another Vs. Ram Pal Singh Bisen - AIR 2010 SC (Supp) 753.

ix] Padhiyar Chenaji Vs. Maniben Jagmalbhai – AIR Online 2022 SC 232.

ANALYSIS AND CONCLUSION

16. The Appellant's/Plaintiff's case in the suit for infringement of Trade Mark and Passing off, filed before the District Court, Pune, is that it is a firm founded in the year 1953 in Miami, U.S.A. It commenced business with one restaurant under the name 'BURGER KING' and now manages and operates a worldwide chain of 13,000 fast food restaurants in more than 100 countries and US territories. It claimed that it has approximately 4,000 Trade Mark's and Service

Mark's Applications and approximately 1040 Domain Name Registrations around the world. First of such registration of Trade Mark in India, is of 25th April 1979, in Class 16, 29, 30 and 32, which is much prior to Defendant starting its business in the name of 'BURGER KING' in Pune. Defendant's opened their restaurant in the year 1989 and adopted the trade name 'BURGER KING' for their restaurant only in the year 1992.

17. In the said suit for infringement of Trade Mark and passing off, the plaintiffs preferred 'Exh.5' application for interim reliefs. On 5th March 2011, there was ad-interim injunction relief granted by trial Court in favour of Plaintiffs, on 'Exh.5', thereby restraining the defendants from using the trademark 'BURGER KING'.

18. The Defendants, thereafter, preferred application 'Exhibit 16' for return of plaint for compliance of conditions precedent to institute the suit and for setting aside the ad-interim reliefs granted on 'Exh.5'. The said application 'Exhibit 16' of the defendant was rejected by trial Court's order dated 1st April 2011.

19. The plaintiffs 'Exh.5' application was thereafter heard for interim reliefs by trial Court and by Order dated 20th January 2012 was allowed. The defendants challenged the interim relief granted by

trial Court on 'Exh.5', before the High Court by way of Appeal from Order. Single Judge of this Court by his Order dated 6th December 2012, passed in Appeal from Order no.562 of 2012, had not altered the reliefs which were granted by the trial Court in favour of the Plaintiff. The defendants thereafter stopped using the Trade mark 'BURGER KING' for their restaurant. The said Order dated 20th January 2012, eventually continued till disposal of the infringement suit i.e. 16th July 2024. By our Order dated 26th August 2024, in the present Interim Application, we have continued the interim relief granted by trial Court.

20. As the suit proceeded, the defendants filed application u/S.124 of Trade Marks Act, seeking stay of the plaintiff's suit and to challenge the Plaintiff's Trade Mark Registration. By an Order dated 31st August 2013, trial Court allowed the defendants' application. Pursuant thereto out of Plaintiffs 13 Trade Mark registrations, the defendants preferred application for cancellation of Plaintiff's one Trade Mark registration bearing no.927122, before the Intellectual Property Appellate Board (*for* short 'IPAB'). For the rest of Plaintiff's Trade Mark Registration Certificates, defendants did not take any steps. Moreover, the defendants eventually also withdrew their cancellation application for Plaintiff"s Trade Mark registration

no.927122, filed before the IPAB. Hence, at this stage we are of a view that this meant that the Defendants accepted all of the Plaintiff's Trade Mark Registrations.

21. In the infringement suit the defendants thereafter filed counterclaim and preferred application, seeking an injunction restraining the Plaintiff from using the trademark 'BURGER KING'. The said application of the defendants was dismissed by the trial Court. An Appeal from Order preferred by the Defendants in High Court, was also dismissed by Order dated 7th June 2016. There was no further challenge to the said Order dated 7th June 2016, as a result the said Order attended finality.

22. The trial Court thereafter proceeded further and framed Issues in the suit. Here it will necessary to note the *Issue* no.1, which reads as under :

> "Whether plaintiff proves that plaintiff is validly holding trade mark in the name of BURGER KING in the field of hamburger, sandwich, chicken etc. food articles.".

The defendant by filing pursis conceded to the *Issue* no.1, hence the trial Court recorded affirmative findings on Issue No.1.

23. By holding *Issue No.*1 in favour of the Plaintiff the trial Court recognised the plaintiff's trademark 'BURGER KING'. However, the

trial Court held against the plaintiff, *Issue No.* 2 - thereby holding that the petitioner is not able to prove that the defendant infringed trademark of the petitioner 'BURGER KING' while naming their restaurant.

24. The defendants had filed their Counter Claim in the suit, and had sought to restrain the Plaintiff from using its Trade Mark "BURGER KING" in relation to restaurant services, in Pune. Defendants' interim application to that effect was rejected upto High Court. While the suit had proceeded for evidence the defendant examined two witnesses to prove their Counter Claim. The trial Court answered *Issue no.*6 and 7 against the defendants, thereby holding that the defendant is not able to prove that their right is damaged due to act of plaintiff, and that the plaintiff is liable to pay Rs.20 lakhs by way of damages. At this stage according to us the Defendants seeking such a relief in Counter Claim will mean that the Defendants are apprehending that the trademarks of Plaintiff's and defendants' are likely to cause confusion in the mind of customers. In these circumstances where the trial Court answered Issue no. 6 and 7 against the defendants, and Issue no.1 in favour of the Plaintiff, the question would be whether the trial Court could have answered Issue no.2 against the plaintiff.

25. It will be necessary to consider Section 31 of the Trade Marks Act, 1999, which reads as under :-

> **Section 31 – Registration to be prima facie evidence of validity**.-
>
> (1) In all legal proceedings relating to a trade mark registered under this Act (including applications under section 57) , the original registration of the trade mark and of all subsequent assignments and transmissions of the trade mark shall be prima facie evidence of the validity thereof.
>
> (2) In all legal proceedings as aforesaid a registered trade mark shall not be held to be invalid on the ground that it was not a registrable trade mark under section 9 except upon evidence of distinctiveness and that such evidence was not submitted to the Registrar before registration , if it is proved that the trade mark has been so used by the registered proprietor or his predecessor in title as to have become distinctive at the date of registration.
>
> *[Emphasis supplied]*

Therefore, taking into consideration the registration of plaintiff's Trade Marks in India in the year 1979, which are not challenged by defendants, and in view of Section 31, the plaintiff's registered Trade Marks are *prima facie* evidence of their validity.

26. As regards the issue of authority to file suit, the plaintiff's relied upon the document titled Apostille, issued by the State of Florida, USA. The said document mentions that it is a public document which has been certified and bears signature and seal of the Secretary of the State, State of Florida, USA. Along with the said document there are documents which includes certificate of the

Assistant Secretary of Burger King Corporation which certifies attached documents as true and correct being copy of the Resolutions adopted unanimously written consent by the Board of Directors of Burger King Corporation. The Resolution adopted unanimously written consent dated 12th February 2009, by which plaintiff's company granted Ms.Cecilia Dempsey authority to protect and prosecute the Trademark.

26.1 The plaintiff also relied upon the interim order passed by the trial Court on 1st April 2011 below application (Exhibit 16), which was preferred by the defendant, challenging the authority of Ms. Cecilia Dempsey, to lodge suit on behalf of the plaintiff. The said application (Exhibit 16) was dismissed by the trial Court holding that the suit is properly instituted. So also, the trial Court arrived at the finding that the documents of authorisation produced by the plaintiff *prima facie* shows that a suit is instituted by proper documentation. The trial Court relied upon the judgment of Supreme Court in *United Bank of India (supra)*. The said order of the trial Court dated 1st April 2011 was not challenged by the defendants any further.

26.2 It is also the plaintiff's case that on 11th January 2019, the affidavit of evidence of plaintiff's witness Vincent Jose was tendered.

On 13th January 2020, the trial Court passed order below Exhibit 151, for exhibiting the documents. Paragraph 5 of the said order records that "Plaintiff has filed pursis Exh. 190 contending that, he is relying on the documents filed along with Exh.3, Exh. 151 and Exh.174A. The documents filed along with Exh.3 and 174A are xerox one. So far as document filed along with Exh.151 are concern it seems that the documents are certified and original copies."

Hence, according to plaintiff, their case was proved by the affidavit of evidence of their witness Vincent Jose and the documents tendered under application (Exhibit 151). In our view the documents and the proof of the contents of the documents could be considered even at the stage of final hearing of Appeal, in exercise of powers under the provisions of Order 41, Rule 27(b) of the Code of Civil Procedure.

26.3 Supreme Court in the judgment of United Bank of India (Supra) in para no.9 and 10, held that authorisation is technicality and public interest should not be defeated. Principal officers of a company may institute suit on behalf of company even in the absence of any authorisation documents. In the judgment of Ibrahim Uddin (Supra) Supreme Court in paragraph nos. 48 to 52 held that the

provisions of O.41, R.27(b), can be considered at the final hearing of the Appeal and not at admission stage of the Appeal. The ratio of Ibrahim Uddin (Supra) was also considered in SKF India (supra) by a Single Judge of this Court. Considering the facts of the present proceedings the ratio laid down in the judgments are squarely applicable to the present matter as in the present proceedings we are considering the Appeal at admission stage. In Daiwa Pharmaceutical (supra) this Court held that the test of transborder reputation as held in NR Dongre remains the test. It also reinforces the first in the world mark principle from Milmet Oftho, which is a Supreme Court decision.

27. In the judgment of Bombay High Court in New Shelter (Supra) as regards authority to file suit was not produced neither there was any pleadings in the plaint. Therefore the facts in New Shelter (Supra) were quite different from the present proceedings. Similarly in State Bank of Travancore (Supra) there was no board resolution passed authorising the signatory to sign the plaint, only on the basis of letter of authority, suit was filed. In the present proceedings there is reference to board resolution to file suit. Therefore the ratio laid down in both the above judgments will not be applicable to the present proceedings.

28. In Toyoto Jidosha (Supra) the Supreme Court was dealing with the facts where the defendants were the registered proprietors of trade mark in India. However, in the present proceedings the Defendants have no registered trademark in their favour. Cluett Peabody (supra) dealt with a case where the Court considered plaintiff's goodwill and reputation in India prior to defendants adoption of mark. In the present proceedings the plaintiff's trademarks were registered in the year 1979, and they had adopted the trademark internationally in the year 1954, hence the findings of Cluett Peabody (supra) are not applicable to the present proceedings. The judgment of Sait Tarajee (supra) and Ram Pal Singh (Supra) dealt with the issue of mere marking of documents does not dispense with proof. In the present proceedings the Plaintiffs had produced the documents of Authority granted by plaintiff's to its principal officer. The said document was exhibited. The plaintiffs trademark registration certificates were produced and marked in evidence. The defendants had not denied the registration of plaintiffs trademark certificates, hence the ratio of these two judgments are not applicable to the present proceedings. The defendants have also relied upon the judgments of Kashi Math (Supra) and State of Assam (Supra), in these judgments the Supreme Court held that the injunction granted

in trial Court doesn't automatically continue in Appellate Court. In the present proceedings the Issue no.1 was answered in favour of the Plaintiffs, hence the trademark "BURGER KING" was recognised by trial Court as that of Plaintiffs. There was interim relief in favour of plaintiffs from 20th March 2012 . As the facts in the present proceedings are quite different from that of Kashi Math (Supra) and State of Assam (Supra), the ratio of these two judgments will not be applicable to the present proceedings.

29. Plaintiff's mark is well known all over the world. In India plaintiff got a registered Trade mark 'BURGER KING' in the year 1979, and admittedly the defendants have adopted trademark 'BURGER KING' in the year 1992. We are unable to find any justifiable explanation how defendant adopted the name "BURGER KING' , hence at this stage we are of the view that the defendant could not have adopted plaintiff's trade mark. Therefore the *Issue* no.2 could not have been answered in negative. The board resolution was duly exhibited. The question whether exhibiting the documents board resolution, power of attorney was enough to prove that the Cecilia Dempsey and Pankaj Pahuja had power to file proceedings, will be decided at the hearing of the Commercial First Appeal. Whether it is necessary for the person who affirmed the plaint, to

step into the witness box and whether the Suit is not maintainable in present form due to non filing of the same by authorised person, would be considered at the time of hearing of the Commercial First Appeal. The findings recorded that defendant is prior user of trade mark according to us is perverse, as Plaintiff's mark is registered outside India in the year 1954 and in India on 25th April 1979.

30. Considering the facts of the present proceedings, and the continuous operation of interim reliefs during the trial from 20th January 2012, hence at this stage till the Commercial First Appeal is heard and disposed off, we consider it appropriate to continue the interim reliefs granted on 20th January 2012, by the trial Court, during the pendency of Commercial First Appeal.

31. The Division Bench of this Court in Commercial First Appeal will be the last fact finding Court where the entire evidence will be looked into at the time of final hearing of the First Appeal. Therefore until the disposal of the Commercial First Appeal, the interim reliefs granted by the trial Court requires to be continued. Hence the following order:

> a) pending the hearing and final disposal of the commercial First Appeal, the effect, operation, implementation of the Impugned Judgment and Order dated 16th July 2024 passed in Regular Civil Suit No.2 of 2011, is stayed.

b) pending the hearing and final disposal of the Commercial First Appeal, the Order dated 20th January 2012 passed below Exhibit '5' in R.C.S. No.2 of 2011 shall continue to operate .

32. We however make it clear whatever observations/findings that we have made in this order are only for the limited purpose of deciding the present Interim Application, which is preferred for the purpose of continuing the interim reliefs pending the hearing of First Appeal. During pendency of the appeal, both the plaintiff and defendants are directed to maintain and preserve their Books of Accounts along with Balance-sheets and Income Tax Returns for the business done by them in Pune, for the period of last 10 years and for the Assessment Year/s henceforth, until hearing and disposal of Commercial First Appeal.

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33. Admit. Call for record and proceedings.

34. The hearing of the Commercial First Appeal is hereby expedited.

[RAJESH S. PATIL, J.] [A.S. CHANDURKAR, J.]

Signed by: Diksha Rane
Designation: PS To Honourable Judge
Date: 02/12/2024 19:37:58