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IN THE COURT OF DISTRICT JUDGE - 2
PUNE AT PUNE

[Presided by : Sunil G. Vedpathak]

REG. CIVIL SUIT NO.-02/2011
CNR NO.MHPU010018472011
EXH NO.-321.

BURGER KING CORPORATION,
A Company incorporated under the
Laws of States of Florida,
Having its Principal place of business
at :-5505, Blue Lagoon Drive,
Miami, Florida 33126
United States of America
Through its authorized representative,
Mr. Pankaj Pahuja,
Age :- Adult, Occupation :- Service,
Office at:- B-41, Nizamuddin East,
New Delhi - 110013

... ... Plaintiff

Vs.

1. **Ms. ANAHITA IRANI,**
Trading as:- M/s. Burger King,
2394, Modi Khana,
East Street, Camp Cantonment,
Pune 411 001
2. **MR. SHAPOOR IRANI,**
Trading as:- M/s. Burger King,

2394, Modi Khana,
East Street, Camp Cantonment,
Pune 411 001

Also at:-M/s. Burger King
Survey No.35A/1, Ghorpadi,
End of North main Road,
Koregaon Park, Pune 411 001

... .. Defendants

**Suit for Permanent Injunction restraining infringement of
Trademark, Passing off, Damages / Rendition of accounts,
Delivery up, etc.**

Appearances :-

Learned advocate Shri. S. P. Pathak for Plaintiff.
Learned advocate, Shri. A. D. Sarwate a/w Adv. Srushti
Angane, Adv. Rahul Pardeshi for Defendants.

J U D G M E N T
(Delivered on 16.07.2024)

This is suit for permanent injunction
restraining infringement of Trademark, Passing off, as well
as Damages / Rendition of accounts etc.

BRIEF FACTS :-

2] The plaintiff, Burger King is a company
incorporated under the laws of the State of Florida having
its principal place of business at 5505, Blue Lagoon Drive,
Miami, Florida 33126, United States of America. At the
time of institution of suit, Ms. Cecilia Dempsey was duly
authorized to institute the present suit and to sign and

verify the plaint by virtue of Power of Attorney dated 12th February 2009. Subsequently, the plaintiff executed a fresh Power of Attorney in favour of Mr. Pankaj Pahuja. So, he is authorized to sign and verify the amended plaint on behalf of plaintiff company.

3] The plaintiff firm was founded in 1954 by James McLamore and David Edgerton. It has 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 worldwide. Almost 97% of the plaintiff's restaurants are owned and operated by independent franchisees. The plaintiff is presently the second largest fast food hamburger company in the world employing 30,300 people. The first BURGER KING franchised restaurant in Asia was opened in 1982 and there are currently over 1200 of these restaurants in Asia.

4] The trade mark and trade name BURGER KING have been used by the plaintiff since 1954 and is registered in over 122 countries of the world including 22 countries in the Asia Pacific and South-East Asia regions. The trade mark BURGER KING is a well known mark having been used continuously and extensively for fast food restaurant services in a wide expanse globally.

WHOPPER, HUNGRY JACK'S and HAVE IT YOUR WAY are the other trade marks of the plaintiff used in the course of business. The plaintiff owns approximately 4000 trade mark and service mark applications and approximately 1040 domain name registrations around the world. The trade mark BURGER KING is a completely arbitrary combination of two English words, where "Burger" refers to the shorter form of hamburger.

5] The trade mark BURGER KING is registered in various jurisdictions all over the world, including in India. The details of the plaintiff's registered trade marks in India are as follows :-

Mark	Registration No.	Class	Date of Application	Goods
BURGER KING	348560B	16	April 25, 1979	Paper and paper products included in class 16. printed matter
BURGER KING	348561	29	April 25, 1979	Meat, Fish, Milk and other dairy products, edible oils, fats and pickles.
BURGER KING	348562	30	April 25, 1979	Coffee, tea, cocoa, sugar, coffee substitutes, breads, pastry, ices, mustard, pepper and sauces.
BURGER KING	348563	32	April 25, 1979	Beer, ale and porter, mineral and aerated waters and other non-alcoholic drinks, syrups and other preparations for

				making beverages
BURGER KING	828558	16	November 20, 1998	Paper goods and printed matter, paper, cardboard and goods made from these materials including BKC's packaging, advertising. promotional items.
BURGER KING	828559	29	November 20, 1998	Meat and processed foods, meat, fish, poultry and game, meat extracts, preserved, dried and cooked fruits and vegetables, jellies, jams, fruit sauces, eggs, milk and milk products, edible oils and fats, including meat, fish, poultry, eggs used in sandwiches.
BURGER KING	828560	30	November 20, 1998	Staple foods, coffees, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee, flour and preparations made from cereals, bread, pastry and confectionery, ices, honey. treacle, yeast, baking powder, salt mustard, including bees sandwich products and coffee and tea drinks
BURGER KING	828561	32	November 20, 1998	Light Beverages, Beers Mineral And Acrated Waters And Other Non- Alcoholic Drinks, Fruit Drinks And Fruit Juices, Syrups And Other Preparations For

				Making Beverages
BURGER KING	927122	30	May 24, 2000	Hamburger Sandwiches Chicken Sandwiches; Sandwiches; Fish Breakfast Sandwiches: Bakery Goods; Fruits Pies; Coffee, Rice, Pasta: Cereals And Cereal Preparations Tea, Coffee, Cocoa, Coffee Essence, Coffee Extracts, Mixtures Of Coffee And Chicorry. Chiory And Chiory Mixture. All For Use As Substitutes For Coffee; Non-Medicated Confectionery; Pastries, Cakes, Biscuits, Ices, Ice Cream, Products, Ice Confections: Cream Frozen Chilled Desserts, Mousses, Sorbets; Bread; Pastry: Drinks, Fillings, Sweets Restaurant Services
BURGER KING	1494246	42	October 06, 2006	Restaurant Services

6] In addition to the above, the plaintiff has also copyright registration no.VA/1348-438 for the BURGER KING and Crescent Design logo.

7] The mark BURGER KING of the plaintiff has acquired fame in India to the extent that the plaintiff has received number of franchise inquiries from unrelated

third parties all over the world including proposals from parties/individuals in India in relation to opening up of restaurants under the mark BURGER KING in India. The plaintiff's division in Asia has also entered into a license agreement with the Inventure Group for developing, designing, manufacturing, distributing, selling and offering for sale the products of the plaintiff. In this respect, the Inventure Group has exported samples of the plaintiff's products incorporating the mark BURGER KING to India due to the encouraging response of the Indians and the popularity of the mark BURGER KING in India. The plaintiff's products have been well within the public eye in India as the same is also displayed in USDA India Trade Mission 2009. The plaintiff has its presence and has trademark in various countries and same has been duly registered.

8] The plaintiff's first Indian BURGER KING restaurant was opened in New Delhi on November 9, 2014 which was a resounding success and received an enthusiastic response from the Indian public, especially since the plaintiff choose to offer a beef free menu at all its restaurants in India to cater to Indian sensibilities. Since then, the plaintiff has launched five more BURGER KING restaurants in New Delhi/NCR with an additional six BURGER KING restaurants operating in Mumbai as well as

a restaurant in Pune which was launched in April, 2015. The plaintiff is intending to open its restaurants throughout India.

9] The plaintiff's restaurant business under BURGER KING trademark has been expanded worldwide and it has got tremendous popularity and reputation. The plaintiff has had tie ups with the entertainment industry and its products have been evidently advertised in popular movies which were released in India as well and the Indian public was exposed to the products of the plaintiff carrying the mark BURGER KING. The plaintiff's trademark has become accessible to all over the world through internet website located at <http://www.burgerking.com> for which the domain name was registered as early as 14th November 1994. As such, the plaintiff's global sales turnover for the past 5 years are as follows:

Year	Gross System Sales (In US Dollars millions)
2006	2,047.8
2007	2,233.7
2008	2,454.7
2009	2,537.4
2010 (ending 30 June 2010)	2,502.2

The sales shown in above chart represent Gross Sales i.e. of franchise plus company owned BURGER KING outlets.

10] The advertisement expenses of the plaintiff which were around U.S. \$ 14 million in the years 1993-1994 rose to U.S. \$ 13.88 million in Asia (excluding Australia) alone in the year 2007. Total worldwide system wise advertising expense, net of franchisee contributions, total \$ 91.3 million for the year ended June 30, 2010, \$ 93.3 million for the year ended June 30, 2009, \$ 91.5 million for the year ended June 30, 2008, \$ 87.5 million for the year ended June 30, 2007 and \$ 74 million for the year ended June 30, 2006.

11] Apart from the statutory rights enjoyed by the plaintiff in India in the trade mark BURGER KING, it has also strong and vested common law rights by virtue of a spillover reputation on account of the factors as aforesaid as well as innumerable write-ups and advertisements that have appeared over the years in Indian publications or publications having a circulation in India. However, due to globalization and transformation in the Indian development coupled with the encouraging response of the Indians and the popularity of the mark BURGER KING in India, the plaintiff has entered the Indian market and operates several BURGER KING outlets throughout India.

12] The plaintiff in order to safeguard its rights and interest in mark BURGER KING obtained reliefs from

Courts of Law in India. It had instituted a suit against an entity in Mumbai being suit no.2446 of 2008 (**Burger King Corp. Vs. Shiraz Nagani**), which was decreed in favour of the plaintiff after a compromise was entered between the parties.

13] The mark BURGER KING has adopted by the plaintiff in relation to its business is not bonafidely required by third parties for commercial use. Hence, the mark is inherently distinctive of the business and products of the plaintiff. Due to such long, continuous and widespread use internationally as well as in India, the trade mark BURGER KING has come to acquire a high degree of distinctiveness and is associated exclusively with the plaintiff.

14] The plaintiff also became aware of a trade mark application in the name of defendant no.1 under number 1209146 for the trademark BURGER KING through a data base search of the records of the Trademarks Registry, India in the year 2008. In order to safeguard its prior statutory rights, the plaintiff has filed caveat through its advocate.

15] The plaintiff has also learnt about the existence of the defendant's restaurants under the name **Burger King**

at 2394, Modi Khana, East Street, Camp, Cantonment, Pune and also at Koregaon Park, Pune. On the discovery, the plaintiff immediately sent a cease and desist notice in June 2009 through its advocates/agents, in order to attempt to amicably settle the matter without resorting to legal proceedings. The defendant's agent sent a strongly worded reply dated 3rd July 2009 to the plaintiff's letter, denying its legal rights and defiantly insisting on using Burger King for its restaurant and stated that the plaintiff's restaurants do not exist in India and, therefore, they cannot claim any common law rights.

16] The high quality of products and services offered by the plaintiff, the mark BURGER KING has gained tremendous reputation and goodwill, which reputation has spilled over to India as well and to public at large who are well aware of the mark BURGER KING as that of belonging to the plaintiff.

17] Thus, owing to all the factors, any adoption or use of an identical mark or a deceptively similar mark by any trader would be dishonest, malafide and therefore contrary to law. According to plaintiff, the likely losses, damage and harm to its goodwill and business and reputation due to the unlawful acts of the defendants are unquantifiable and irreparable. The formidable reputation

of the trademark and trade name BURGER KING stands to be severely undermined by the defendants by their unauthorized acts. Since defendants blankly rejected the cease and desist notice issued by the plaintiff. Therefore, the plaintiff invokes the legal protection for the preservation and enforcement of its statutory and common law rights which can be achieved through an order of injunction.

18] As such, cause of action for filing present suit arose in 2008 when plaintiff came to know about the existence of the trademark application of the defendant no.1 under no.1209146 for BURGER KING. The cause of action further arose when the plaintiff discovered that the defendants are also operating a restaurant under the name Burger King in Pune and sent them a cease and desist letter / notice. If further arose on 3rd July 2009 when the defendants' agent replied cease and desist notice denying the legal rights of the plaintiff and defiantly insisting on using Burger King for its restaurant. So, the cause of action is a continuous and subsist until the defendants are restrained by an order of this court. As such, this suit is filed for permanent injunction, for damages, rendition of accounts of profits directly or indirectly earned by defendants from infringing activities and conduct of passing off and the order for delivery up to the plaintiff by

defendants of all infringing goods, stationary, cartons, containers, packaging and advertising material, crockery, cutlery, signage, blocks, dies, negatives etc. bearing the trademark BURGER KING in any manner or any trademark deceptively similar to BURGER KING for the purposes of erasure/destruction. Hence, this suit.

19] Defendants have contested the suit by filing their written statement along with counter claim below Exh.33, additional written statement to the amended petition below Exh.111.

20] It is contended by defendants that suit is malafide and with an intent to discourage business people who are bonafide users and retailers.

21] The legal objection raised by defendants is that the plaint is not properly instituted. Burger King Corporation is a corporate entity. So, it is run by Directors who are primary caretakers of the company. While instituting the plaint on behalf of plaintiff company the provisions of Order 29 have to be considered. As per procedure, the resolution of company has to be signed by all the Directors to make it valid and legal with respect to authorize any person to sign, verify and present plaint on behalf of plaintiff company. The document of apostle only

makes a document a true copy, which is akin to the act of attestation, which does not bear the signatures of the Directors. In short, according to defendants, the resolution dated 12th February, 2009 authorizing Ms. Cecilia Dempsey to institute the plaint in India is not as per the Indian Law. The same does not bear the signature of any of the Directors nor official seal of the company. Even certificate of Assistant Secretary of Burger King executed by Ms. Lisa Giles-Kline vouching for the correctness of resolution is without any legal sanction. Further more, so called power of attorney is not properly stamped nor it bears official seal of the company.

22] It is also submitted that the plaintiff's suit is filed with insufficient stamp. Defendants have specifically denied the averments made in the suit against their interest and rights. They have specifically submitted that the facts pleaded in para nos.1, 2 and 3 of the plaint are beyond their knowledge. Whatever the pleadings made by the plaintiff about its 3700 trademarks is false. It is also denied that the trade mark Burger King is well known in wide expanse globally, it is famous and it has achieved tremendous popularity, reputation and goodwill. They have specifically denied to have committed an act of infringement of plaintiff's trademark or its passing off. As such, it is submitted that the plaintiff is not entitled to

have any of the reliefs claimed.

23] Further it is contended by defendants that the act is applicable to the territories of India as per section 1 of the Trade Marks Act, 1999. The plaintiff is proposed user of the Trade Mark in regards to its goods. It has not used any of the trade mark in regards to any goods in India. The trade mark of India is not extra-territorial. Therefore, use abroad under foreign registration does not mean use in India under the Trade Mark Act.

24] As per defendants, there is no similarity in plaintiff's trade mark and the usage of defendant's shops name Burger King. There is no similarity in the design used for the usage of name Burger King. The degree of dissimilarity in the usage of word Burger King is absolute. The design used by the plaintiff is of the word Burger King between two semi circles. The combination of colours i.e. the words Burger King written in Red and the two semi circles in yellow with a blue coating around it is distinct. On the other hand, the defendant's used a crown between the words Burger King to depict the word Burger King, whereas it appears that, plaintiffs have never used it. Thus, the visual deception is concerned, there is none. In fact, the words Burger King are descriptive rather than distinctive. The test is to see in relation of the goods to

which they had applied.

25] It is the specific stand of defendants that they have been operating this shop since 1989 and using the name Burger King since 1992. They are wife and husband respectively. They have been honestly using this name with no intentions of deceiving anyone and was in fact not even aware of plaintiff's existence. Defendants have various licenses issued in their name from the various public departments and which have been renewed every year as such registration trade license, certificate of registration in the name of Burger King under the Maharashtra State Tax on Profession, Trades, Calling and Employment Act. There is no likelihood of confusion pertaining to trade mark Burger King in the mind of customers as defendants have no where put a sign, display, placard, denoting that it is associated with plaintiff. The plaintiff has no reputation in India as it has not entered in India and commenced business as yet. Therefore, it cannot be said that the plaintiff is prior user of its trade mark in India. Since there is no existence of Burger King in India and, therefore, there is no question of infringement of said trade mark by these defendants.

26] Though the plaintiff may have registered trade mark in India, do not have single franchise in India. No

valid ground for non user are given since registration in 1979. The trade mark was registered for paper and paper products in 1979 and only as recently as May, 2000 for sandwiches, burgers etc. So, the classes in which the goods are registered are different.

27] Defendants have been using the trade name for their restaurant since about 1992 which is 14 years prior to the registration for Restaurant Trade Service. As such, the plaintiff has not used the trade mark in India for nearly 30 years since registration. The pleadings put forth by the plaintiff are totally silent about how customers have been confused due to use of trade mark Burger King by defendants to their restaurant. Whatever emails referred by the plaintiff to show the same are false, fabricated and bogus. The plea taken by the plaintiff about advertisement of its business through trade mark under reference with the help of entertainment media i.e. films is false. Even notice issued by the plaintiff to defendants is not signed by any authorized person or representative of plaintiff company. The plaintiff received notice reply given by defendants in or about July 2009, however the present suit has been filed on 3rd March, 2011 by causing unexplained delay of 20 months. So, such laches and delay on the part of plaintiff dis-entitles it from getting the relief of injunction.

28] In fact, defendants have been conducting their business without any interruption and thus they being honest and prior user, they can't be blamed.

29] In their further contentions, defendants have submitted that infact they never committed infringement of plaintiff's trade mark nor committed act of passing off, therefore, no prayers made by the plaintiff can be granted including damages, rendition of accounts and relief of delivery up.

30] According to defendants, the mischief of the plaintiff is also apparent from the injunctive relief sought in the plaint and suit as it is apparent that the plaintiff has made an application for registered trade mark in various classes. Each class further subdivided by the particular good. For example class 30 has an application bearing no.348562 made in the year 1979 for coffee, tea, cocoa etc., more particularly stated in para-5 of the suit and also has an application bearing no.927122 for Hamburger, chicken sandwiches etc. Thus, it is apparent for the subclass of Hamburger, Fish sandwiches, pies, pasta, Bread etc the application was made only on 24th May, 2000. Thus, defendants have been using the said trade mark in regards to their eatery selling burgers since 1992 and hence are bonafide prior user. Since defendants do not sell

raw meat, coffee, tea, beverages in the name and style of Burger King. As stated above soft drinks are sold in bottles of Limca, Fanta, Coke etc. Coffee is served in regular insulated cups. Defendants also sell limbu pani which the plaintiff or any of the MNC's like McDonald don't sell. As regards to restaurant services, the plaintiff has got the trade mark in the year 2006.

31] As such, after seeking dismissal of suit being meritless, defendants have put forth their counter claim as follows.

32] Defendants have been recently getting calls and asking questions merely to try and provoke a breach of the ad-interim order of injunction. On calls the caller would ask "is this Burger king?" Defendants have been put in a very embarrassing situation because of that. Defendants who have honestly done business for more than 2 decades are being put to immense hardship and monetary loss for which just and necessary compensation is being sought by them. Defendants perceive that it is being done at the behest of the plaintiff and their advisors. This entitles the defendants to claim compensatory damages for the mental pain and agony they had to go through. Defendants are thus praying for Rs.20 lacs as damages as a reasonable compensation for the wrong

done by the plaintiff.

33] The cause of action to present counter claim arose when the plaintiff at para 23 explored the idea of coming to India and by filing the present suit, the possibility of coming to Pune. Hence, the suit / counter claim is filed without any delay to seek order of permanent injunction to prevent the entry of the plaintiff in the District of Pune. As such, defendants have valued their counter claim of Rs.1,000/- for injunctive relief and Rs.20,00,000/- for compensatory damages. As such, defendants prayed that suit of the plaintiff be dismissed with costs. The counter-claim of defendants be allowed as follows that :-

- a. The plaintiff, their agent, representatives and all others acting on their behalf permanently restrained from using the name "Burger King" for their restaurant service in the District of Pune.
- b. Compensatory damages be awarded to the tune of Rs.20,00,000/- to the defendant from the plaintiff.
- c. Cost of such frivolous, misleading suit be imposed upon the plaintiff.

34] The plaintiff by filing written statement below Exh.40 resisted the counter-claim made by defendants. The plaintiff has denied all adverse allegations along with

plaint made in the counter-claim being false and vexatious. Since counter-claim is made with an ulterior motive to victimize the plaintiff and, therefore, same is not maintainable. The plaintiff ought to have filed written statement and counter-claim separately but same has been filed in composite manner which is not in accordance with law and procedure. The plaintiff trade mark "Burger King" has been registered in India entitles it to enforce its trade mark any where in India. Certificate of registration of trade mark is prima facie evidence of the ownership of said trade mark.

35] The contentions raised by defendants are untenable and it is well established that even though the plaintiff is physically not in India, in view of its Indian and International registrations and trans border reputation in India, in law the plaintiff is entitled for injunction. It is an admitted fact that the defendants are running their business of restaurants and/or eatery under the name and style of Burger King which is identical to the registered trademark and name used by the plaintiff from a long period of time, much prior to the defendants' claimed use, in numerous countries across the world hence the fictitious justification quoted by defendants in para under reply is not acceptable and strongly opposed by the plaintiff. Defendants with mischievous and malafide intentions are

trying to get unjust enrichment by using the registered trade mark of the plaintiff and, therefore, defendants approached the court with unclean hands.

36] Further, it is submitted by the plaintiff that it is running its business worldwide and using the trade mark since 1954 and hence it is the prior user, registered proprietor and undisputed owner of the said trade mark. Lastly, by denying rests of allegations made in counter-claim, it is submitted that the counter-claim is false, imaginary, without cause of action and, therefore, it is liable to be dismissed with costs.

37] Upon rival pleadings, learned predecessor of this court on 12.06.2013 framed issues below Exh.56 which are reproduced below.

Sr. No.	ISSUES	FINDINGS
1.	Whether plaintiff proves that plaintiff is validly holding the trade mark in the name of Burger King in the field of Hamburger, Sandwich, chicken etc food articles ?	.. In the affirmative.
2.	Whether plaintiff proves that defendant infringed trade mark of plaintiff Burger King while running their restaurant ?	.. In the negative.

3.	Whether plaintiff proves that the suit is tenable in present form ?	.. In the negative.
4.	Whether plaintiff proves that defendant is liable to pay damages of Rs.20,00,000/- and rendition of accounts ?	.. In the negative.
5.	Whether plaintiff is entitled to the relief of perpetual injunction as prayed in the suit ?	.. In the negative.
6.	Whether defendants prove that their right is damaged due to act of plaintiff ?	.. In the negative.
7.	Whether defendants prove that plaintiff is liable to pay Rs.20,00,000/- to them by way of damages ?	.. In the negative.
8.	What order ?	As per final order.

REASONS

38] In order to substantiate their respective claims, both parties have adduced oral as well as documentary evidence on record. So far as oral evidence led on behalf of plaintiff is concerned, Evidence affidavit of plaintiff's witness no.1 Vincent Jose is at Exh.174.

Oral evidence adduced on behalf of defendants.
DW-1 Mr. Shapoor Irani at Exh.227,

Evidence affidavit of DW-2 Mr. Praful Raghuv
Chandavarkar is at Exh.289.

39] Besides above referred evidence on behalf of both parties, the voluminous documents are filed on record and I shall discuss the same at appropriate place as per their relevancy.

Arguments on behalf of plaintiff :-

40] Learned advocate for the plaintiff during the course of arguments 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 second largest hamburger quick service restaurant company and operates well over 15000 Burger King restaurants in more than 100 countries and territories worldwide. So, plaintiff's trademark has worldwide reputation and goodwill. According to learned advocate for the plaintiff, the said fact can be gathered from Exh.195, 196, 198, 199, 200 to 204 and Exh.209. These are publicly available documents being internet extracts and duly supported by certificates under section 65-B of the Indian Evidence Act. So, the plaintiff has sufficiently proved that its trademark has worldwide reputation and goodwill.

41] In his further arguments, it is submitted that the plaintiff has also significant Indian presence and rights in the trademark Burger King in India which date 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. Therefore, even prior to launch of its Burger King restaurant in India, the Indian public have been 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. Internet extracts pertaining to the plaintiff's reputation and use of the Burger King mark in India are supported by Exh.206, 207 and 208.

42] It is 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 fastfood 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. Therefore, the plaintiff's Burger King trademark registrations stand proved as well

as admitted by the defendants. Said certificates are placed on record at Exh.197. 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 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.

43] Thus, 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 the 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. Hence, there is no requirement to show a likelihood of confusion because of statutory presumption provided under section 29 (3) of the Act. This particular aspect finds support of the observations of their Lordships of Apex Court in the case of **Renaissance Hotel Holdings Inc. Vs. B. Vijaya Sai** reported in **(2022) 5 SCC 1**.

44] It is further submitted on behalf of plaintiff that initially 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 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. This legal aspect has been clarified by their Lordships of Apex Court in the case of **United Bank of India Vs. Naresh Kumar** reported in **(1996) 6 SCC 660**. Therefore, in view of this, the objection raised on behalf of defendants regarding tenability of suit for want of proper

authorization to Cecilia Dempsey and Pankaj Pahuja are baseless.

45] So far as objection raised by defendants that PW-1 Vincent Jose was not given power of attorney or written authorization to give evidence in the court on behalf of plaintiff, therefore, he was not authorized to depose. In this regard, it is submitted on behalf of plaintiff that in view of pronouncement in the case of Central Bank of India Vs. Tarseema Compress Wood Manufacturing Company and others, it is well settled position that anybody can come and give 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. The said decision is also followed by Bombay High Court in the case of Bicholim Urban Co-operative Bank Ltd., Vs. Anil Madhusudan Sawant; 2014 SCC OnLine Bom 1681. As such, according to plaintiff, through the oral evidence of PW-1 Vincent Jose and with the help of documentary evidence placed on record, the plaintiff has proved its allegations made in the plaint.

46] So far as proof of documents tendered by plaintiff in evidence is concerned, the learned predecessor of this court by its order dated 13.01.2020 below Exh.151 by passing detailed order observed that the documents with list Exh.151 at serial nos.4 to 8, 14, 15, 17, 18, 19, 20, 21, 22, 24, 29 and 30 be exhibited and it be read in evidence. However, said order has not been challenged by defendants. Therefore, now defendants cannot dispute about proof of those documents.

47] 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 merely taking the defence that the plaintiff has started restaurant service under trademark Burger King in India at first time in 2014 and prior to that defendants were in use of trademark to provide restaurant services in India i.e. prior to plaintiff. In this regard, the Apex Court in the case of **Milmet Oftho Industries and others Vs. Allergan Inc.** reported in **(2004) 12 SCC 624** observed 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 that of plaintiff.

48] As such, defendants' use of plaintiff's registered trademark Burger King amounts to infringement of trademark under sections 28 and 29 of the Trade Marks Act, 1999 and also amounts to passing off of business of plaintiff under section 27 of the Trade Marks Act, 1999. Therefore, defendants are required to be restrained by passing decree of perpetual injunction by awarding damages to the plaintiff. Similarly, it is also submitted that defendants failed to prove their counter-claim and, therefore, it is also liable to be dismissed with costs.

Arguments on behalf of Defendants :-

49] On the other hand, on behalf of defendants, it is argued 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. The plaintiff is not well known trademark in India particularly in the year 1991-92 when defendants started using the name Burger King. Defendants being known trademark in the territories of Pune so 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. Infact, there is no similarity in both trademarks so there is no question of deception or

confusion in the mind of customers.

50] 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.

51] 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. In addition to it, 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. Thus, the ultimate result is that there is no oral evidence in support of plaintiff's claim put forth by way of averments made in the plaint.

52] 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. 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.

53] It is further submitted on behalf of defendants 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.

54] Lastly, 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, therefore by allowing counter-claim made by defendants, the plaintiff is necessary to restrain from using the trademark in question

and further is necessary to direct pay compensation as prayed in counter-claim.

55] Both parties have referred the following cases in support of their submissions :-

a] On behalf of plaintiff, reliance is placed on following cases;

i] Narmada Bachao Andolan Vs. State of M.P. reported in AIR 2011 SC 1989,

ii] Commissioner of Income-Tax Vs. M/s. Sun Engineering Works (P) Ltd., reported in 1992 AIR SCW 2600,

iii] Bharat Petroleum Corporation Ltd. Vs. N. R. Vairamani reported in 2004 AIR SCW 5457,

iv] Govt. of Karnataka and others Vs. Gowramma and others reported in AIR 2008 SC 863,

v] Vatech Global Co. Ltd. Vs. Unicorn Denmart Ltd., reported in 2022 SCC Online Del 2349,

vi] Radico Khaitan Ltd. Vs. J. D. Wines and others reported in 2019 SCC Online Del 10640,

vii] Burger King Corporation Vs. Techchand Shewakramani and others in CS (COMM) 919/2016 and CC (COMM) 122/2017,

viii] Bicholim Urban Cooperative Bank Ltd. Vs. Anil Madhusudhan Sawant reported in 2014 SCC Online Bom 1681,

- ix] Janki Vashdeo Bhojwani and another Vs. Indusind Bank Ltd., reported in AIR 2005 SC 439,
- x] Central Bank of India Vs. Tarseema Compress Wood Manufacturing Company, reported in 1996 SCC Online Bom 565,
- xi] State Bank of Travancore Vs. M/s. Kingston Computers (I) P. Ltd., reported in 2011 AIR SCW 1948,
- xii] Miraj Marketing Corporation Vs. Vishaka Engineering and another, reported in (2005) 79 DRJ 209,
- xiii] Bama Kathari Patil Vs. Rohidas Arjun Madhavi, reported in 2004 ALLMR (2) 290,
- xiv] L.I.C. of India Vs. Ram Pal Singh Bisen reported in AIR 2010 SC (Supp) 753,
- xv] Sait Tarajee Khimchand Vs. Yelamarti Satyam alias Satteyya reported in (1971) AIR (SC) 1865,
- xvi] Milmet Oftho Industries and others Vs. Allergan Inc. reported in (2004) 12 SCC 624,
- xvii] Manu Kagliwala Vs. Mayo Foundation for Medical Education and Research, USA reported in 2018 (2) MHLJ 720,
- xviii] Cluett Peabody and Company Inc. Vs. Arrow Apparels in 1998 PTC (18),
- xix] Burger King Company LLC Vs. Virendra Kumar Gupta and others in C.O. (COMM.IPD-TM) 686/2022 & I. A. 10228/2022,
- xx] Ram Parshotam Mittal Vs. Hotel Queen Road

Pvt. Ltd. in Civil Appeal No.3934/2017 with Civil Appeal No.3935/2017,

xxi] Taco Bell Corporation Vs. Taco Bell and others in 2000 (20) PTC 554 (Bom),

xxii] Renaissance Hotel Holdings Inc. Vs. B. Vijaya Sai and others in (2022) 5 SCC 1,

xxiii] Ultra Tech Cement Ltd Vs. Alaknanda Cement Pvt. Ltd. reported in 2011 (5) Bom R588,

xxiv] Bal Pharma Ltd. Vs. Centaur Laboratories Pvt. Ltd., reported in 2001 SCC Online Bom 1176,

xxv] Kaviraj Pandit Durga Dutta Sharma Vs. Navratna Pharmaceutical Laboratories reported in AIR 1965 SC 980,

xxvi] Mayo Foundation for Medical Education and Research Vs. Bodhisatva Charitable Trust and others in CS (COMM) 920/2022,

xxvii] Nishi Gupta Vs. Cattle Remedies reported in 2021 SCC Online Del 3032.

b] On behalf of defendants, reliance is placed on following cases;

i] Narmada Bachao Andolan Vs. State of M.P. reported in AIR 2011 SC 1989,

ii] Govt. of Karnataka and others Vs. Gowramma and others reported in AIR 2008 SC 863,

iii] Commissioner of Income-Tax Vs. M/s. Sun

Engineering Works (P) Ltd., reported in 1992 AIR SCW 2600,

iv] Ram Parshotam Mittal Vs. Hotel Queen Road Pvt. Ltd. in Civil Appeal No.3934/2017 with Civil Appeal No.3935/2017,

v] Life Insurance Corporation Vs. Ramakant Vaman Varde reported in 2019 (1) MDBHC 21,

vi] Kores (India) Ltd., Vs. Whale Stationary Products Ltd. reported in 2008 MhLJ (3) 523,

vii] Toyota Jidosha Kabushiki Vs. M/s. Prius Auto Industries Limited and others reported in LNIND 2017 SC 3011,

viii] State Bank of Travancore Vs. M/s. Kingston Computers (I) P. Ltd., reported in 2011 AIR SCW 1948,

ix] Miraj Marketing Corporation Vs. Vishaka Engineering and another, reported in (2004) 115 DLT 471 Delhi High Court Division Bench,

x] L.I.C. of India and another Vs. Ram Pal Singh Bisen reported in AIR 2010 SC (Supp) 753,

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

xii] Bama Kathari Patil Vs. Rohidas Arjun Madhavi, reported in 2004 MhLj (2) 572 High Court of Bombay,

xiii] Inder Pal Dua and another Vs. Yash Garg and company, reported in (2002) 3 CivCC 437 Punjab and

Haryana High Court, Single Bench,

xiv] Cluett Peabody and Company Inc. Vs. Arrow
Apparels reported in 1998 PTC (18).

56] I have gone through above cited cases in consonance with arguments submitted on behalf of both parties.

AS TO ISSUE NO.1 :-

57] So far as this issue is concerned, on behalf of defendants purshis below Exh.123 is came to be filed on 16.01.2017 and thereby they had conceded to issue no.1 and submitted to call upon the plaintiff to lead evidence on remaining issues. Therefore, under such situation, I have no hesitation to observe that issue no.1 stands proved.

AS TO ISSUE NO.2 :-

58] This issue pertains to whether plaintiff has proved that defendants had infringed trade mark of plaintiff Burger King while running their restaurant at Pune.

59] In this regard, according to plaintiff, defendants have started their restaurant in the year 1992 at Pune and by using its trade mark Burger King, they have infringed its registered trade mark. These particular allegations are specifically denied on behalf of defendants. In order to

prove this particular issue, plaintiff has adduced the oral evidence of PW-1 Vincent Jose whose evidence affidavit is at Exh.174.

60] Learned advocate for defendants has pointed out the verification made below the evidence affidavit of PW-1. According to defendants, merely mentioning in verification of deponent that the contents of evidence affidavit are true and correct to the best of my knowledge and on based information of plaintiff is not proper and legal verification of evidence affidavit, as it is not in accordance with Order 19 Rule 3 (1) of Civil Procedure Code. So, due to non verification of evidence affidavit in proper form, said evidence affidavit cannot be read in evidence nor it can be treated as a evidence of deponent concern.

61] On the other hand, it is argued on behalf of plaintiff that whatever the verification of evidence affidavit is made in proper way and since it being the procedural part, defendants cannot make much capital of the same. All the contents of evidence affidavit are based on factual aspects pleaded in the plaint and supported by the record and documents placed on record. So, according to plaintiff, the objections raised by defendants in that regard hold no water.

62] Then the verification of affidavit of PW-1 Vincent Jose at Exh.174 is as follows :-

Whatever above written is true and correct to the best of my knowledge, information and belief, therefore I signed therein below on this 20th day of September, 2019.

63] Under these circumstances, now it is to be seen as per Order 19 Rule 3 (1) of CPC how should be the verification of evidence affidavit. Order 19 Rule 3 (1) of CPC provides :-

Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted: Provided that the grounds thereof are stated.

64] It means the deponent is required to mention in verification that which part of his evidence affidavit is based on information and which part is based on belief. So also, he is required to divulge the source of his information of the ground of his belief. Whether the matter deposed to is not based on personal knowledge but on information the source of information ought to be clearly disclosed.

65] However, having considered the verification below the evidence affidavit of PW-1 in consonance with Order

19 Rule 3 (1) of CPC referred above, it goes without saying that the verification of evidence affidavit is not in accordance with Order 19 Rule 3 (1) of CPC. If position is being so then what would be its effect ?

66] Learned advocate for defendants has submitted that if the verification of evidence affidavit is not proper then said evidence affidavit could not be admitted in evidence. In support of his said arguments, he placed reliance on following cases.

Miraj Marketing Corporation Vs. Vishaka Engineering and another reported in **(2005) 2 AD (Delhi) 252 (Division Bench Delhi High Court)** wherein their Lordships by taking the resort of observations of their Lordships of Apex Court and Gujarat High Court in the case of **AKK Nambiar Vs. Union of India (UOI) and another** reported in **1970 SC 652** and **D. N. Gupta Vs. Jaswant Singh** reported in **AIR 1982 Delhi 1250**, it is observed that, as per Order 19 Rule 3 of CPC the affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statement of his belief may be admitted, provided that the grounds thereof are stated.

In case of such evidence affidavit what is required to be declared as a source of knowledge whether it is personal or knowledge of information based on record or

on the base of legal advise etc., but to say that deposition is true to the best of own knowledge is no affidavit and is not in accordance with the provisions of Order 19 Rule 3 of CPC and that such affidavit does not inspire any confidence so as to act upon the same. As such, their Lordships of Apex Court have held that in absence of proper verification, the affidavit could not be admitted in evidence.

Same ratio has been laid down in the case Indrapal Duwa and another Vs. Yash Garg and Company reported in (2002) AIHC 2591 (P&H High Court).

67] Hence, in consideration of above referred factual and legal aspects, I find considerable force in the submission made on behalf of defendants that whatever the evidence affidavit filed on behalf of plaintiff is not affidavit in accordance with Order 19 Rule 3 (1) of CPC and, therefore, they can't be accepted as evidence to prove the contentions made in plaint.

68] In addition to it, the vital admissions given by PW-1 during his cross-examination which are required to be seen.

(i) I have not given the information mentioned in my evidence affidavit to Advocate Aaditya Gupta. I got the hard copy of evidence affidavit, then it got it affirmed by

Notary at Delhi going along with Advocate Aaditya Gupta. I would not be sure that Advocate Aaditya Gupta had furnished the information about the present suit.

(ii) I am not aware of the fact that suit is primarily filed by Previous Company and not by the Subsidiary Company. I am not aware that whether previous company have a board of directors. It is true that as I am representative of the company since 2018.

(iii) I am not employee of Burger King Corporation, US company. I do not recollect the name of Subsidiary Company of plaintiff in India. I am not directly employee of the Subsidiary Company in India. I am not aware of the fact that the suit is directly filed by U.S. Company and not by the Subsidiary Company. I am not aware whether U.S. Company have a Board of Directors. I am not aware whether there are Board of Directors of U.S. Company or not. I am not aware whether Pankaj Pahuja is the employee of U.S. Company. I am not aware that Pankaj Pahuja is not the Board of Directors of U.S. Company as well as Subsidiary Company. I have not met Pankaj Pahuja personally. It is true to say that the document of attorney was brought before me and I was decided to act upon it.

(iv) There is no document to show that Board of

Directors of U.S. Company directly authorized me to depose on behalf of plaintiff. There is no document to show that Board of Directors of U.S. Company authorized Pankaj Pahuja to authorize third person to depose on behalf of Plaintiff Company.

(v) It is true to say that, at the time of filing of suit some other person was aware about circumstances leading to the filing of present suit. I am not personally aware about prevailing situations at the time of filing of the suit as I was not associate with plaintiff company at the relevant period. What stated in the evidence affidavit is merely by converting the plaint. It is true to say that I have not mentioned name of any person who had given me information in respect of contents of my evidence affidavit.

(vi) I cannot be sure as to whether logo of our company was filed by the name Burger King for the restaurants.

69] Therefore, on perusal of admissions given by PW no.1 Vincent Jose, plaintiff's witness mentioned above, it is apparent that the witness has no personal knowledge about any events, facts, cause of action or averments made in the evidence affidavit of examination-in-chief. His entire evidence is of hearsay nature and further as per legal

requirement, he ought to have disclosed the source of his information which he referred / deposed in affidavit. Therefore, whatever mentioned in the evidence affidavit of PW-1 could not be proved and, therefore, evidence affidavit of PW-1 is required to be treated as no evidence. Hence, the arguments advanced on behalf of plaintiff by taking the resort of ratio laid down in the case of Central Bank of India, anybody can come and give evidence in the suit who has knowledge about facts, circumstances of the suit cannot be considered.

70] In addition to it, it is important to note that the present suit was came to be filed in the year 2011 whereas according to PW-1 Vincent Jose he came in the association of plaintiff company since 2018. Therefore, by this angle also, there is no chance much less possibility of witness Vincent Jose to have the knowledge of facts, circumstances, rights and cause of action to file the present suit by the plaintiff company. Even his evidence no where unfolds that he had taken the information pertaining to facts and circumstances of the suit either from Cecilia Dempsey, Pankaj Pahuja or any other competent person connected to plaintiff's company, so what Vincent Jose has deposed in his evidence affidavit has no base of source of information.

71] After perusal of entire evidence affidavit of PW-1 Vincent Jose, it goes without saying that he did not vouch upon the various documents which are placed on record on behalf of plaintiff in order to support or prove the contents therein. So, all those documents could not be proved. Except Vincent Jose, no other witness is examined on behalf of plaintiff to prove the documents which it had placed on record in support of its claim.

72] It is a matter of record that, learned predecessor of this court by its order dated 13.01.2020 ordered to exhibit the documents at serial nos.4 to 8, 14, 15, 17 to 22, 24, 29 and 30 along with list Exh.151. However, it is well settled position under law that the mere exhibition of documents does not dispense with its proof. Therefore, the ratio laid down in the case of **L.I.C. of India and another Vs. Ram Pal Singh Bisen** reported in **AIR 2010 SC (SUPP) 753**, **Sait Tarajee Khimchand and others Vs. Yelamarti Satyam @ Satteyya and others** reported in **AIR 1971 SC 1865**, it is to be observed that the mere exhibition of documents does not dispense with its proof and if the documents along with list Exh.151 in present suit are exhibited as per order of learned predecessor of this court without proof in support of those documents; then the said act of exhibiting of documents can be taken to be an administrative act for the purpose of identification

of those documents. Thus, ultimately it goes without saying that whatever the documents placed on record by the plaintiff could not be proved in accordance with certain provisions under Indian Evidence Act. Therefore, it goes without saying that the plaintiff miserably failed to prove that defendants had infringed its trademark Burger King while running their restaurant at Pune. Hence, I endorse my findings against issue no.2 in the negative.

AS TO ISSUE NO.3 :-

73] This issue pertains to the tenability of suit in present form. Defendants have raised strong objection that the original plaint as well as amended plaint are verified and signed by Cecilia Dempsey and Pankaj Pahuja respectively. However, they were not given proper authorization to sign and verify the plaint in accordance with Order 29 Rule 1 of Civil Procedure Code. Admittedly, while deciding issue no.2, I have observed that whatever the oral as well as documentary evidence rendered by the plaintiff in support of its claim cannot be looked into or considered as the oral evidence of PW-1 Vincent Jose is not evidence in the eye of law, further assuming for the sake of arguments that, his evidence is to be considered then it is not helpful to prove the documents tendered in evidence on behalf of plaintiff. Moreover, merely exhibiting the documents along with list Exh.151 without proving the

same is not of consequence. So, due to this particular situation, there is sufficient scope to observe that there is no evidence to believe that Cecilia Dempsey and Pankaj Pahuja were duly authorized to sign and verify the plaint. Admittedly, there is no resolution passed by Board of Directors authorizing Cecilia Dempsey and Pankaj Pahuja to sign and verify the plaint. Even alleged power of attorney deeds executed in favour of Cecilia Dempsey and Pankaj Pahuja are not proved. In addition to it, there is nothing on record to believe that Cecilia Dempsey and Pankaj Pahuja are principal officers of plaintiff company. So, in absence of all above things, it is to be observed that since plaint is not signed and verified by duly authorized person, so the very institution of suit is not in accordance with Order 29 Rule 1 of Civil Procedure Code.

74] Learned advocate for the plaintiff has submitted that the plaint has been duly signed and executed by Miss. Cecilia Dempsey being principal officer of the plaintiff corporation at the time of institution of suit and, therefore, institution of suit is in accordance with Order 29 Rule 1 of CPC. In further argument, it is submitted that authorization may be express or implied and that even in absence of cogent documentary evidence, the court may conclude that the suit was authorized by the plaintiff by taking all facts into consideration. In support of

his said arguments, he placed reliance on the observations of their Lordships of Apex Court in the case of **United Bank of India Vs. Naresh Kumar** reported in **(1996) 6 SCC 660** wherein it is held that,

It cannot be disputed that a company like the appellant can sue and be sued in its own name. Under Order 6 Rule 14 of the Code of Civil Procedure a pleading is required to be signed by the party and its pleader, if any. As a company is a juristic entity it is obvious that some person has to sign the pleadings on behalf of the plaintiff. Order 29 Rule 1 of the Civil Procedure Code, therefore, provides that in a suit by or against a corporation the Secretary or any Director or other Principal Officer of the corporation who is able to depose to the facts of the case might sign and verify on behalf of the company. Reading Order 6 Rule 14 together with Order 29 Rule 1 of the Civil Procedure Code it would appear that even in the absence of any formal letter of authority or power of attorney having been executed a person referred to in Rule 1 of Order 29 can, by virtue of the office which he holds, sign and verify the pleadings on behalf of the corporation.

A person may be expressly authorised to sign the pleadings on behalf of the company, for example by the Board of Directors passing a resolution to that effect or by a power of attorney being executed in favour of any individual. In absence thereof and in cases where

pleadings have been signed by one of its officers a corporation can ratify the said action of its officer in signing the pleadings. Such ratification can be express or implied. The court can, on the basis of the evidence on record, and after taking all the circumstances of the case, specially with regard to the conduct of the trial, come to the conclusion that the corporation had ratified the act of signing of the pleading by its officer.

75] However, in this regard I would like to make it clear that, no where it is proved on behalf of plaintiff that Cecilia Dempsey and Pankaj Pahuja were authorized to sign and verify the plaint by the Board of Directors passing a resolution to that effect or by a power of attorney being executed in favour of any individual. Thereafter, again it is not proved that Cecilia Dempsey and Pankaj Pahuja are the Secretary or Director or other principal officers of plaintiff company and the act of their signing and verifying the plaint has been ratified by the plaintiff company. Apart from this, neither Cecilia Dempsey nor Pankaj Pahuja stepped into witness box to clarify under which capacity and authority they had signed and verified the plaint. Therefore, due to non-examination of both on behalf of plaintiff, the probable inference can be drawn that allegations made in the plaint could not be proved.

76] The legal provision about anybody can come and give evidence in court provided that his acquaintance with the facts of that case clarified by their Lordships of Bombay High Court in the case of **Central Bank of India Vs. Tarseema Compress Wood Manufacturing Company and others** can be made applicable for giving evidence by Vincent Jose in absence of power of attorney or authorization. However, it is clear that institution of suit by signing and verifying the same is quite different from giving evidence in capacity of witness before court of law. Even otherwise considering entire evidence of Vincent Jose, it can be gathered that he is not acquainted with the facts of the suit. So, with the help of his evidence also, the allegations in the plaint could not be proved.

77] Apart from this, in the case of **Central Bank of India** referred above, it is made clear that, 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. So, in view of above referred factual and legal position, I find that suit is not instituted by authorized person in accordance with Order 29 Rule 1 of Civil Procedure Code. In addition to it, the observations of their

Lordships in the case of State Bank of Travancore Vs. M/s. Kingston Computers (I) Pvt. Ltd., AIR 2011 SCW 786 are useful upon which reliance has been placed by defendants. Therefore, in view of above discussed aspects of the matter, I find that present suit is not maintainable in present form due to non filing of the same by authorized person. Thus, I record findings against issue no.3 in the negative.

AS TO ISSUE NOS.4 & 5 :-

78] These issues pertain to claim of damages of Rs.20,00,000/- and rendition of accounts from defendants and with respect to prayer of relief of perpetual injunction against defendants to restrain them from using the plaintiff's trademark. However, in view of above discussed aspects and the fact that absolutely there is no evidence on behalf of plaintiff regarding proof of infringement of its trade mark and actual damage caused to it. Therefore, it is needless to mention that the plaintiff is not entitled for damages of Rs.20,00,000/- and rendition of accounts.

Similarly, with respect to relief of perpetual injunction is concerned, admittedly the plaintiff has started to provide services through restaurant under its trademark Burger King in India particularly in the year 2014 whereas since 1991-92 defendants are using the

trademark Burger King to provide restaurant services. Even the plaintiff has not placed on record the registration certificate about registration of its trademark in India under class 42 prior to 1991-92. Admittedly plaintiff has registered its trade mark Burger King under class 42 pertaining to restaurant services is of 06.10.2006. So, considering the fact that defendants are prior user of trademark in question, I am of the opinion that the plaintiff has no cause of action to seek relief of perpetual injunction. Thus, in absence of cogent evidence, I find that the plaintiff is not entitled for damages, rendition of accounts and the relief of perpetual injunction. Hence, I answer issue nos.4 and 5 in the negative.

AS TO ISSUE NOS.6 & 7 :-

79] Defendants had put forth the counter claim with prayers that the plaintiff, their agent, representatives and all other acting on their behalf be permanently restrained from using the name Burger King for their restaurant services in the district of Pune and then, compensatory damages be awarded to them to the tune of Rs.20,00,000/- from the plaintiff. The counter claim made by defendants has been denied and resisted by the plaintiff through its written statement below Exh.40. Therefore, issue nos.6 and 7 were came to be framed.

80] So far as evidence adduced on behalf of

defendants is concerned, evidence affidavit of defendant no.2 Mr. Shapoor Irani is at Exh.227 and in his evidence he has supported in all 54 documents which includes original trade licenses issued by different authorities in favour of defendants, original challans, original notices, online receipts, photographs, screenshots and other documents. However, having gone through the entire evidence of this witness, it appears that he has categorically denied all the allegations made in the plaint and tried to make out the case that how plaintiff could not prove its allegations made in the plaint and how it is not entitled to get relief of perpetual injunction as well as damages. His entire evidence is totally silent on the point that how defendants are entitled to get injunction against the plaintiff. So also, his evidence no where discloses specific cause of action to claim the relief of injunction against the plaintiff. Even in the evidence affidavit no where it is mentioned that the relief of perpetual injunction be granted in favour of defendants.

81] So far as claim of compensation / damages of Rs.20,00,000/- is concerned, except bare interested words that due to exparte order sought by the plaintiff against them, they had caused loss to their goodwill. He had to answer the questions of some customers including the plaintiff. As such, according to him, due to all these

things, defendants had caused loss of Rs.20,00,000/-. However, there is no supporting evidence to prove the actual damages caused to defendants. Therefore, like plaintiff defendants are also not entitled to claim of damages.

82] Then on behalf of defendants evidence of DW no.-2 Mr. Praful Raghveer Chandawarkar is adduced. His evidence affidavit is at Exh.289. His entire evidence is with respect to since when defendants are doing the business of restaurant under Burger King trademark in camp area and how it has become famous. Similarly, he states that there was no publicity of plaintiff's trademark in India prior to 2014. According to him, he travelled various places at abroad where he found Burger King restaurants at some places however, according to him due to use of trademark in question by defendants, there is no possibility of confusion in the mind of customers. However, his evidence is not helpful to prove that how defendants are entitled for the relief of perpetual injunction and damages as prayed.

83] In addition to it, again the evidence affidavit of DW nos.1 and 2 bear the verification as follows :-

“Whatever stated above is true and correct to the best of my knowledge, belief and information and I have signed on _____ at Pune.”

84] The said verification is not as per Order 19 Rule 3 (1) of CPC, because as per said order the affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted: Provided that the grounds thereof are stated.

It means the deponent is required to mention in verification that which part of his evidence affidavit is based on information and which part is based on belief. So also, he is required to divulge the source of his information of his belief. Whether the matter deposed to is not based on personal knowledge but on information the source of information ought to be clearly disclosed.

85] If the above referred requirement of verification of evidence affidavit within the meaning of Order 19 Rule 3 (1) of CPC is compared with the verification contained in evidence affidavits of DW nos.1 and 2 then it has to be observed that those evidence affidavit are not proper and, therefore, they could not be admitted in evidence. This particular aspect has find support of observations of their Lordships in the cases of **Miraj Marketing Corporation Vs. Vishaka Engineering and another** reported in **(2005) 2 AD (Delhi) 252 (Division Bench Delhi High Court)**, **AKK Nambiar Vs. Union of India (UOI) and another** reported in **1970 SC 652, D. N. Gupta**

Vs. Jaswant Singh reported in AIR 1982 Delhi 1250, and Indrapal Duwa and another Vs. Yash Garg and Company reported in (2002) AIHC 2591 (P&H High Court).

86] Hence, ultimate result is that whatever oral evidence adduced on behalf of defendants cannot be considered as a evidence. Thus, ultimately it goes without saying that defendants also failed to prove their counter claim. Therefore, I answer issue nos.6 and 7 in the negative.

87] In consideration of factual and legal aspects discussed above, in the result I pass the following order.

ORDER

- 1] Suit is dismissed.
- 2] Defendant's counter-claim is also dismissed.
- 3] Both parties shall bear their costs own.
- 4] Decree be drawn accordingly.

Pune.
Date : 16.07.2024

(Sunil G. Vedpathak)
District Judge-2, Pune.

CERTIFICATE

I affirm that, the contents of this P. D. F file judgment are same word for word as per original order.

Court Name	Sunil G. Vedpathak District Judge-2, Pune.
Name of Steno	S. Y. Shaikh, Stenographer (Grade-I)
Date	16.07.2024
Judgment signed by Presiding Officer on	22.07.2024
Judgment PDF & uploaded on	23.07.2024