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

% Reserved on: 25th October, 2017
Decided on: 13th December, 2017

\+ **CS(COMM) 643/2017**

MAKEMYTRIP (INDIA) PRIVATE LIMITED .... Plaintiff

Represented by: Mr. J. Sai Deepak, Mr. Bharadwaj Jaishankar, Mr. Ashutosh Nagar, Mr. Abhishek Kotnala, Mr. Deepankar Mishra, Mr. Ayush, Ms. Sangeeta Goel, Mr. Mohit Goel, Mr. Sidhant, Advs.

versus

ORBIT CORPORATE LEISURE TRAVELS (I) PRIVATE LIMITED

..... Defendant

Represented by: Mr. A.S. Chandiok, Sr. Adv. with Mr. Sudeep Chatterjee, Ms. Jaya Mandelia, Ms. Sonal Chhablani, Advs.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

IA 11225/2017 (u/O XXXIX R 1&2 CPC) and IA 11871/2017 (u/O XXXIX R 4 CPC)

1. MakeMyTrip (India) Pvt. Ltd. (in short MakeMyTrip) has filed the present suit inter-alia praying for a decree of permanent injunction restraining the defendants, their franchisees, affiliates, subsidiaries, licencees and agents in any manner using the trademark GETMYTRIP infringing the plaintiff's trademark MakeMyTrip, its domain name, logo and/or device etc., amounting to passing off the defendant's goods, services and business

and/or business of the defendant as that of the plaintiff besides delivery up and damages.

2. Claim of the plaintiff is that it is a private limited company registered under the Companies Act, 1956 incorporated in the year 2000 having started its business initially with airline ticket booking, however is now one of the largest travel companies in India with its presence all across India and several other countries. Initially, the plaintiff was incorporated with the trade name "Travel by Web Private Limited" and later on 28th June, 2002 it changed its name to the current name i.e. MakeMyTrip India Pvt. Ltd. Over the years the plaintiff has expanded its business through its primary website www.makemytrip.com and other technology including application based mobile platforms etc. and offering extensive range of travel services and products both in India and abroad including booking of air-ticket, rail ticket, bus ticket, hotel reservation, car hire, domestic and international holiday packages and ancillary travel requirements such as travel insurance etc. The domain name makemytrip.com was registered on 8th May, 2000 in the name of the founder of the plaintiff company Shri Deep Kalra. Plaintiff has collaboration agreement with numerous travel companies and has been conferred number of awards for its unmatched performance with its business partners. Plaintiff has acquired and invested in well-known brands of the industry to provide full spectrum service to its clients all across the globe such as merger with Ibibo Group, investments in Bona Vita Technologies etc.

3. It is claimed that MakeMyTrip is a coined and invented word which is an essential feature of all the composite label or logo marks of the plaintiff and due to extensive use now spanning almost 17 years MakeMyTrip marks

are synonymous with high standards of quality in respect of services provided by the plaintiff. The composite use of "MY" device in a stylized manner with other artistic elements and colour combinations of the MakeMyTrip logo is highly distinctive. Plaintiff is the registered proprietor of a number of MakeMyTrip marks and several other applications are pending consideration. Further the plaintiff has got registered its trademark MakeMyTrip in numerous other countries besides India and in several countries, the applications are still pending. Plaintiff has also actively sponsored various national and international events. Plaintiff has earlier also filed suits before this Court wherein the plaintiff was granted ex-parte injunctions and finally on settlement the suits were decreed in favour of the plaintiff. Plaintiff has also placed on record its figures of the turn-over and expenditures on advertising and promotional activities worldwide.

4. Plaintiff further claims that the defendant is also engaged in the identical business of travel related services including but not limited to booking and selling tickets, hotel reservations, arranging trips in India and abroad. Sometime in April, 2017 plaintiff came to know through the trademarks journal that the defendant had filed application for registration of the trademark GETMYTRIP and infringing logo mark. The plaintiff filed objections to the same in April, 2017 itself, carried out further investigation on its own and came across the defendant's website namely www.getmytrip.com and agent.getmytrip.com. It is contended that the trademark and logo of the plaintiff "GETMYTRIP" is deceptively and phonetically similar to the plaintiff's word mark "MakeMyTrip", thus infringing the plaintiff's trademark and violating its rights under the Copyright Act as well.

5. When the suit came up before this Court for the first time on 25th September, 2017 this Court restrained the defendants, its partners, directors, shareholders, assignees and travel agents from selling, offering for sale, advertising, directly or indirectly dealing in any of the services under the mark GETMYTRIP or any other deceptively similar mark to that of the plaintiff's registered trade names/marks. The defendant, its partners, directors, shareholders, proprietors or assignees in business, franchisees, affiliates, subsidiaries in licencees and agents have been also restrained from using the domain name getmytrip.com.

6. On receipt of the notice defendant filed an application under Order XXXIX Rule 4 CPC being IA 11871/2017 wherein notice was accepted by the learned counsel for the plaintiff on 13th October, 2017 with directions to file reply affidavit within one week and rejoinder affidavit within three days thereafter and the matter was listed for 25th October, 2017. Since the plaintiff filed the reply affidavit only on 23rd October, 2017 defendant was granted an opportunity to place on record additional documents. With the consent of learned counsels for plaintiff and defendant arguments have been heard on both the applications.

7. Case of the defendant in IA 11871/2017 under Order XXXIX Rule 4 CPC is that the plaintiff has concealed material facts i.e. the plaintiff had prior knowledge of the predecessor-in-interest of the defendant using the trademark GETMYTRIP and plaintiff had been doing business with the predecessor-in-interest of the defendant being Hermes I Tickets Private Limited under the mark GETMYTRIP since 2011. The plaintiff has also used the services of the defendant under the mark GETMYTRIP. The plaintiff is in fact a subscriber of the defendant's service on its website

www.getmytrip.com. Further the plaintiff is fully aware that the plaintiff and defendant operate in entirely different spheres of activities i.e. plaintiff operates in business to consumer (B2C Model) whereas the defendant operates in business to business (B2B Model), thus there exists no scope of confusion. Further the new venture of the defendant's business into B2C model is under the trade name 'GOOMO" and not 'GETMYTRIP'. In fact the defendant is properly known as GMT and the plaintiff to copy the same has started calling itself as MMT. It is further contended that the plaintiff has played fraud on the Court by misrepresentation and suppression of material facts. Acquiescence, delay and latches also disentitle the plaintiff an injunction in its favour. Thus the interim injunction in favour of the plaintiff be vacated. Defendant also claims that it enjoys enormous good-will and reputation as a travel platform and has received several notable accolades/ awards. The sales figures of the defendant show its popularity and goodwill. The defendant's trademark GETMYTRIP is written in a distinctive and unique stylized manner. The trademark/ label GETMYTRIP qualifies as a well-known trademark since it has been used continuously by the defendant for its goods and services.

8. Defendant further claims that the trademark GETMYTRIP and internet platform www.getmytrip.com to the knowledge of the plaintiff exits since 2011 as the plaintiff is transacting huge volume of business since then on its e-commerce platform i.e. *www.getmygrip.com* with the defendant and also its predecessors-in-interest Hermes. Defendant has placed on record table-wise summary of plaintiff availing the defendant's services. Screen shot of e-mail dated 20th November, 2013 exchanged between the representative of the plaintiff and the predecessor-in-interest of the

defendant showing that the plaintiff was transacting with the predecessor of interest of the defendant on the same platform has also been placed on record. It is the case of the defendant that the trademark/logo GETMYTRIP and domain name www.getmytrip.com has been continuously used by the defendant and its predecessor-in-interest as a travel platform solution for organizing the airline services, train ticketing and largely unorganized regional bus services, tier 2/ tier 3 hotels, car rental services and providing the customer's/ travelers access to large markets and a more efficient ticket distribution and reservation systems. Plaintiff cannot claim any proprietary rights on the words "MyTrip". The defendant further forayed into the Business to Consumer B2C trade under its mark "Goomo" and the defendant's site for the said business has become an instant success and has in fact generated approximately over ₹16-17 crores of sales monthly. So as to stifle a healthy competition, the plaintiff's have filed the present suit to affect the defendant's later B2C venture under the mark 'Goomo' which is directly competing with the plaintiff's business under the mark 'MakeMyTrip'.

9. In support of the contentions based on pleadings in the suit as noted above, learned counsel has relied upon the decisions reported as *Midas Hygiene Industries (P) Ltd & Anr. Vs. Sudhir Bhatia & Ors. (2004) 3 SCC 90; Vardhman Properties Ltd. Vs. M/s Vardhman Realtech Pvt. Ltd. (2016) 231 DLT 535; M/s. Hindustan Pencils Pvt. Ltd. Vs. M/s Stationary Products Co. Suit No. 941/1988 dated 23.1.1999; Shri Pankaj Goel Vs. M/s Dabur India Ltd. (FAO(OS) 82/2008 dated 04.07.2008 and M/s. Power Control Appliances Vs. Sumeet Machines Pvt. Ltd. (1994) 2 SCC 448*.

10. Learned counsel for the defendant distinguishing the decisions referred above has relied upon *M/s Power Control Appliances & Ors. Vs. Sumeet Machines Pvt. Ltd. (1994) 2 SCC 448; Wheels India Vs. Nirmal Singh & Ors. 2010 SCC Online Del 2852; Lintech Electronics (P) Ltd. & Anr. Vs. Marvel Engineering Co. & Anr. 1995 (35) DRJ 11 and S.P.Chengalvaraya Naidu Vs. Jagannath & Ors. (1994) 1 SCC 1*.

11. Marks of the plaintiff and defendant are as under:

Plaintiff's Mark(s)	**Defendant's Mark(s)**
Word Mark: MAKEMYTRIP	Word Mark: GETMYTRIP
Composite Logos: make my trip make my trip Dil toh roaming hai make my trip .com HOTELS UNLIMITED make my trip .com MEMORIES UNLIMITED make my trip	Composite Logos: GETMYTRIP GETMYTRIP

12. Claim of the defendant is that defendant has acquired the mark/ name/ brand GETMYTRIP and its formatives and domain name www.getmytrip.com along with the goodwill associated therewith from its predecessor-in-interest i.e. Hermes I Tickets Private Limited in December 2015. Further Hermes I Tickets Private Limited has been in business for a long period of time and still continues to operate and manage the internet platform website www.getmytrip.com and agent relationship on behalf of the defendant company, Thus the defendant being the successor-in-interest of Hermes which was using the mark/ name/ brand GETMYTRIP and the domain name *www.getmytrip.com*, was in business with the plaintiff which the plaintiff cannot deny at least from 21st September, 2011 when Hermes and the plaintiff entered into an API agreement wherein Hermes was using the platform GETMYTRIP.

13. For the facts noted above though learned counsel for the plaintiff vehemently argued that merely because the plaintiff has not filed any suit against Hermes using GETMYTRIP since 2011, the same cannot be a ground for not entertaining a challenge to the user of the defendant, it would be material to note the cause of action pleaded in Para 50 of the plaint as under:

> *"50. The cause of action of this suit arose in the month of April 2017 when the plaintiff discovered the user of the infringing Trade Mark on cyber space. The cause of action of this suit first arose in the month of April 2017 when the plaintiff discovered the publication of the Defendant's trade mark applications in the trade marks journal, which claimed use since the year December 2016. It is submitted that the cause of*

action is a continuing one and continues to accrue each day till the Defendant continues using the infringing marks for its business activities. This more so, since the Defendant's main business model appears to be Internet based, like that of the plaintiff, and enables an internet user in Delhi, across India and worldwide, to book flight tickets (and tour bookings), hotel reservations, etc. Accordingly, each day of access to the Defendant's website constitutes a fresh cause of action."

14. At this stage, it would also be appropriate to note the reliefs sought in the suit as under:

"a) Decree for permanent injunction restraining the defendant, its partners, directors, shareholders or proprietor as the case may be, its assigns in business, franchisees, affiliates, subsidiaries, licencees and agents from using in manner whatsoever, selling, offering for sale, advertising, directly or indirectly dealing in any products or services under, the infringing Marks, namely GETMYTRIP (word per se) and the GETMYTRIP Logos, i.e., GETMYTRIP and GETMYTRIP or any other trade mark/ trade name/ trade dress or logo/device, which is identical to and/or deceptively similar to the plaintiffs' well known MakeMyTrip Logo Marks, amounting to infringement of the plaintiffs' registered trade marks as detailed hereinabove.

b) Decree for permanent injunction restraining the defendant, its partners, directors, shareholders or proprietor as the case may be, its assigns in business, franchisees, affiliates, subsidiaries, licencees and agents from using in manner whatsoever, selling, offering for sale, advertising, directly or indirectly dealing in any products or services under, the infringing Logo marks, i.e. GETMYTRIP Logos, i.e. GETMYTRIP or any other logo and/or device as may be a colourable imitation or substantial reproduction of the plaintiff's MakeMyTrip Logo Marks in respect of their trade dress, colour combination, get up, lay out or arrangement of features, amounting to infringement of copyright of the plaintiffs.

c) Decree for permanent injunction restraining the defendant, its partners, directors, shareholders or proprietor as the case may be, its assigns in business, franchisees, affiliates, subsidiaries, licencees and agents from using in manner whatsoever, selling, offering for sale, advertising, directly or indirectly dealing in any products or services under, the infringing marks, namely GETMYTRIP (word per se) and the GETMYTRIP Logos, i.e. GETMYTRIP or any other trade mark/ trade name/ trade dress or logo/ device, which is identical to and/or deceptively similar to the plaintiffs' well known MakeMyTrip Logo Marks, amounting to passing off of the goods/ services and/or business of the defendant for those of the plaintiff.

d) A decree of mandatory injunction directing the defendant to transfer the domain names (www.getmytrip.com) and (agent.getmytrip.com) in favour of the plaintiff and/ or any other domain name deceptively similar to the plaintiff's which the defendant have commonly or separately registered;

e) A decree for delivery up of all products and material including stationery, visiting cards, bill boards, brochures, promotional material, letter-heads, cash memos, sign boards, sign posts, leaflets, cartons or any other items of whatsoever, bearing the infringing Marks, namely GETMYTRIP (word per se) and the GETMYTRIP Logos, i.e. GETMYTRIP and/or any other name or mark which may be identical and/or deceptively similar to the plaintiff's well-known MakeMyTrip Marks;

f) A decree for damages amounting to ₹1,00,00,000/- (Rupees One Crore only) or any such amount as found due in favour of the plaintiff;

g) An order awarding costs of this suit to the plaintiff;

h) Any other and further relief(s) as this Hon'ble Court may deem fit and proper to meet the ends of justice."

15. Thus cause of action to the plaintiff is use of the trademark 'GETMYTRIP' and domain name www.getmytrip.com and the plaintiff

claims reliefs not only against the defendant but its franchisees, affiliates, subsidiaries, licencees and agents as well, Hermes being one of the agents of the defendant. Plaintiff in its reply to IA 11871/2017 has admitted its dealing with Hermes and thereby its knowledge of the use of the trademark GETMYTRIP and the internet platform www.getmytrip.com since September, 2011. Further the API agreement dated 21st September, 2011 copy whereof the defendant has placed on record is an agreement between the Hermes and MakeMyTrip.

16. No doubt, defendant claimed user in the application since 2016, however the fact remains that plaintiff with the same trademark and domain name i.e. GETMYTRIP and *www.getmytrip.com* respectively had been dealing with the Hermes which is the predecessor-in-interest of the defendant at least since 2011, thus had knowledge of this trademark and domain name being used.

17. Learned counsel for the plaintiff vehemently argued that even assuming plaintiff was aware of Hermes using the trademark GETMYTRIP and the domain name *www.getmytrip.com*, mere non-filing of the suit or challenging the use of trademark and the domain by Hermes would not entail the said protection qua the defendant as has been settled by this Court in *Vardhman Properties Limited (supra*). It is contended that acquiescence at best can be limited to use of infringing mark by Hermes in the B2B space and there is no material to suggest that the plaintiff's rights were prejudiced by the use of Hermes use of infringing mark in the B2C space.

18. In *Vardhman Properties (supra*) this Court relied upon the Supreme Court decision in *Midas Hygiene (supra*) and held that the Courts would be entirely wrong in refusing the relief of injunction merely on the basis of

delay and latches. In *Midas Hygiene (supra*) Supreme Court laid down that in case of infringement either of trademark or of copyright normally an injunction must follow and mere delay in bringing action is not sufficient to defeat grant of injunction and it becomes all the more necessary to grant injunction if it is prima facie shown that the adoption of the mark itself was dishonest.

19. In the present case the issue is not of delay and latches only but of acquiescence where the plaintiff to its knowledge permitted continued user by Hermes of the trademark GETMYTRIP and domain name www.getmytrip.com, however now to its transferee-in-interest i.e. the plaintiff has objection to it on the sole ground that Hermes never operated in B2C domain but in B2B domain. In this regard it would be appropriate to note the documents filed by the defendant placing on record copies of the screenshot of websites of Hermes dated 10th January, 2012 showing its B2C user falsifying the claim of the plaintiff that Hermes was not operating in the B2C space.

20. In *National Bell Co. Vs. Gupta Goods Manufacturing Co. (P) Ltd. & Anr. AIR 1971 SC 898* the Supreme Court held that if a registered proprietor of a mark ignores repeated infringements of its mark than it can even be considered as an abandonment of its mark. The decision in *Pankaj Goel (supra*) relied by learned counsel for the plaintiff has no application to the facts of the case for the reason in the said decision the Court came to the conclusion that the conduct of the defendant was fraudulent. However, in the case in hand plaintiff was aware of the use of the trademark GETMYTRIP since 2011 and admittedly since 2013. Thus despite the use

of the trademark GETMYTRIP plaintiff continued its business dealings with Hermes which is the predecessor-in-interest of the defendant.

21. The law on acquiescence is well settled by the Supreme Court in the decision reported as *(1994) 2 SCC 448 Power Control Appliances v. Sumeet Machines (P) Ltd.* wherein it observed:

> "*26. Acquiescence is sitting by, when another is invading the rights and spending money on it. It is a course of conduct inconsistent with the claim for exclusive rights in a trade mark, trade name etc. It implies positive acts; not merely silence or inaction such as is involved in laches. In Harcourt v. White [(1860) 28 Beav 303 : 54 ER 382] Sr. John Romilly said: "It is important to distinguish mere negligence and acquiescence." Therefore, acquiescence is one facet of delay. If the plaintiff stood by knowingly and let the defendants build up an important trade until it had become necessary to crush it, then the plaintiffs would be stopped by their acquiescence. If the acquiescence in the infringement amounts to consent, it will be a complete defence as was laid down in Mouson (J.G.) & Co. v. Boehm [(1884) 26 Ch D 406] . The acquiescence must be such as to lead to the inference of a licence sufficient to create a new right in the defendant as was laid down in Rodgers v. Nowill [(1847) 2 De GM&G 614 : 22 LJ KCH 404] .*
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> *27. The law of acquiescence is stated by Cotton, L.J. in Proctor v. Bannis [(1887) 36 Ch D 740] as under:*
>
> > *"It is necessary that the person who alleges this lying by should have been acting in ignorance of the title of the other man, and that the other man should have known that ignorance and not mentioned his own title."*
>
> *In the same case Bowen, L.J. said:*
>
> > *"In order to make out such acquiescence it is necessary to establish that the plaintiff stood by and knowingly allowed the defendants to proceed and to expend money in ignorance of the fact that he had rights and means to assert such rights."*

28. In Devidoss and Co. [AIR 1941 Mad 31 : (1940) 2 MLJ 793 : ILR 1941 Mad 300] at pages 33 and 34 the law is stated thus:

> *"To support a plea of acquiescence in a trade mark case it must be shown that the plaintiff has stood by for a substantial period and thus encouraged the defendant to expend money in building up a business associated with the mark. In Rowland v. Michell [(1896) 13 RPC 464] Romer J. observed:*
>
> > *'If the plaintiff really does stand by and allow a man to carry on business in the manner complained of to acquire a reputation and to expend money he cannot then after a long lapse of time, turn round and say that the business ought to be stopped.'"*

In the same case, but on appeal Lord Russel, C.J. said [Rowland v. Michell, (1897) 14 RPC 37, 43] at p. 43:

> *"Is the plaintiff disentitled to relief under that head by injunction because of acquiescence? Of course it is involved in the consideration of that that the plaintiff has a right against the defendant and that the defendant has done him a wrong and the question is whether the plaintiff has so acted as to disentitle him from asserting his right and from seeking redress from the wrong which has been done to him. Cases may occasionally lay down principles and so forth which are a guide to the court, but each case depends upon its own circumstances.*

Dealing with the question of standing by in Codes v. Addis and Son [(1923) 40 RPC 130, 142] at p. 142, Eve, J. said:

> *'For the purpose of determining this issue I must assume that the plaintiffs are traders who have started in this more or less small way in this country, and have been continuously carrying on this business. But I must assume also that they have not, during that period, been adopting a sort of Rip Van Winkle policy of going to sleep and not watching what their rivals and competitors in the same line of business were doing. I accept the evidence of any*

gentleman who comes into the box and gives his evidence in a way which satisfies me that he is speaking the truth when he says that he individually did not know of the existence of a particular element or a particular factor in the goods marketed by his opponents. But the question is a wider question than that : ought not he to have known : is he entitled to shut his eyes to everything that is going on around him, and then when his rivals have perhaps built a very important trade by the user of indicia which he might have prevented their using had he moved in time, come to the Court and say : "Now stop them from doing it further, because a moment of time has arrived when I have awakened to the fact that this is calculated to infringe my rights." Certainly not. He is bound, like everybody else who wishes to stop that which he says is an invasion of his rights, to adopt a position of aggression at once, and insist, as soon as the matter is brought to Court, it ought to have come to his attention, to take steps to prevent its continuance; it would be an insufferable injustice were the Court to allow a man to lie by while his competitors are building up an important industry and then to come forward, so soon as the importance of the industry has been brought home to his mind, and endeavour to take from them that of which they had legitimately made use; every day when they used it satisfying them more and more that there was no one who either could or would complain of their so doing. The position might be altogether altered had the user of the factor or the element in question been of a secretive or surreptitious nature; but when a man is openly using, as part of his business, names and phrases, or other elements, which persons in the same trade would be entitled, if they took steps, to stop him from using, he gets in time a right to sue them which prevents those who could have stopped him at one time from asserting at a later stage their right to an injunction.'

In Mc. Caw Stevenson & Orr Ltd. v. Lee Bros. [(1960) 23 RPC 1] acquiescence for four years was held to be sufficient to preclude the plaintiff from succeeding. In 1897 the plaintiffs in

that case registered the word 'glacier' as a trade mark in respect of transparent paper as a substitute for stained glass. As the result of user the word had become identified with the plaintiffs' goods. In 1900 the defendants commenced to sell similar goods under the name 'glazine.' In 1905 the plaintiffs commenced an action for infringement. The defendants denied that the use of the word 'glazine' was calculated to deceive and also pleaded acquiescence. A director of the plaintiff company admitted that he had known of the use of the word 'glazine' by the defendants for four years — he would not say it was not five years. It was held that the plaintiffs failed on the merits and by reason of their delay in bringing the action.

Delay simpliciter may be no defence to a suit for infringement of a trade mark, but the decisions to which I have referred to clearly indicate that where a trader allows a rival trader to expend money over a considerable period in the building up of a business with the aid of a mark similar to his own he will not be allowed to stop his rival's business. If he were permitted to do so great loss would be caused not only to the rival trader but to those who depend on his business for their livelihood. A village may develop into a large town as the result of the building up of a business and most of the inhabitants may be dependent on the business. No hard and fast rule can be laid down for deciding when a person has, as the result of inaction, lost the right of stopping another using his mark. As pointed out in Rowland v. Michell [Rowland v. Michell, (1897) 14 RPC 37, 43] each case must depend on its own circumstances, but obviously a person cannot be allowed to stand by indefinitely without suffering the consequence."

29. This is the legal position. Again in Halsbury's Laws of England, Fourth Edn., Vol. 24 at paragraph 943 it is stated thus:

> *"943. Acquiescence.— An injunction may be refused on the ground of the plaintiff's acquiescence in the defendant's infringement of his right. The principles on which the court will refuse interlocutory or final relief on this ground are the same, but a stronger case is required to support a*

> *refusal to grant final relief at the hearing. [Patching v. Dubbins [(1853) Kay 1 : 69 ER 1] ; Child v. Douglas [(1854) 5 De GM&G 739 : 43 ER 1057] ; Johnson v. Wyatt [(1863) 2 De GJ&Sm 18 : 46 ER 281] ; Turner v. Mirfield [(1865) 34 Beav 390 : 55 ER 685] ; Hogg v. Scott [(1874) LR 18 Eq 444] ; Price v. Bala and Festiniog Rly. Co. [(1884) 50 LT 787]] The reason is that at the hearing of the cause it is the court's duty to decide upon the rights of the parties, and the dismissal of the action on the ground of acquiescence amounts to a decision that a right which once existed is absolutely and for ever lost: Johnson v. Wyatt [(1863) 2 De GJ&Sm 18 : 46 ER 281] at 25; and see Gordon v. Cheltenham and Great Western Union Rly. Co. [(1842) 5 Beav 229, 233 : 49 ER 565] per Lord Langdale MR."*

22. It is thus settled that the registered proprietor of trademark is not expected to pursue each and every insignificant infringer who is of no consequence to his business, however in none of the judgments it has been held that inaction against an infringer who has lot of business competing with that of the plaintiff would not amount to acquiescence. In the present case, Hermes was holding a substantial share in the market place. It cannot be said that Hermes was an insignificant infringer. As noted above Hermes was also working in B2C space thus competing with plaintiff's business.

23. Contention of learned counsel for the plaintiff that since defendant is now operating in B2C space and affecting its business is liable to be rejected for the reason defendant has now entered into B2C space but under the trade mark "GOOMO". Thus, the plaintiff cannot on this pretext seek injunction against the defendant.

24. Learned counsel for the defendant has vehemently argued that the plaintiff deliberately suppressed the API agreement between the plaintiff and

Hermes which was using the trademark in order to obtain an ex-parte ad-interim injunction, whereas learned counsel for the plaintiff submits that the non-placing of the API agreement between plaintiff and Hermes before the Court was not relevant and had no material bearing on the grant of ad-interim injunction.

25. A perusal of the plaint would show that there is no mention whatsoever about other entities such as Hermes using the trademark GETMYTRIP. Plaintiff in the plaint has placed API agreement with third parties which have no relevance to the facts of the case but failed to place on record API agreement with Hermes and other material which would show that Hermes was using the impugned trademark. Even assuming that the plaintiff was not aware of the fact that defendant was the successor-in-interest of Hermes and it was not for the plaintiff to have found out the agreements between Hermes and defendant; the plaintiff having acquiesced user of the trademark GEYMYTRIP and domain name *www.getmytrip.com* cannot now claim injunction against the successor in interest in respect of the said trademark.

26. Plaintiff also claims the copyright in the stylized manner of writing 'MY' in plaintiff's trademark, however the defendant's trademark does not use 'MY' in the same or similar stylized manner and is also characterized by three upward arrows in yellow, dark blue and orange colours at the end of 'GETMYTRIP' which is not there in plaintiff's trade mark.

27. Defendant has also placed on record material to show that even after the defendant acquired business of Hermes, plaintiff continued dealing with the trademark GETMYTRIP and the domain name www.getmytrip.com. Whether the said continuance of business was for the reason that Hermes

was using the mark GETMYTRIP or not is an issue to be decided after the parties have lead their respective evidence. Sufficient at this stage would be to note that in view of the conduct of the plaintiff suppressing material facts, in the cause of action the grievance of the plaintiff being qua use of the infringing mark and not the party using it, the plaintiff's claim of injunction being not only against the defendant but also its franchisees, agents etc., and having permitted Hermes to use the trademark GETMYTRIP for a long time, this Court finds that no case for grant of interim injunction in favour of plaintiff pending the suit is made out. Consequently, the interim order dated 25th September, 2017 against the defendants is vacated. However, to protect the interests of the plaintiff, defendant will maintain its account statements and will submit the same in sealed cover after every six months.

28. IA No.11871/2017 is disposed of and IA No.11225/2017 is dismissed.

(MUKTA GUPTA)
JUDGE

DECEMBER 13, 2017
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