

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1510/2006

M/s. Alle'nora Beauty Saloon & Parlor...versus...Mrs. Qurat-ul-Ain Mansoor

Suit No.625/2007

M/s. Alle'nora Beauty Saloon & Parlor...versus...Mrs. Qurat-ul-Ain Mansoor

Suit No.1568/2008
(Old No.58/2006)

Mrs. Qurat-ul-Ain MansoorversusMrs. Aliya Tipu

Mr. Shaiq Usmani, Advocate for Plaintiff in Suit No.1568/2008 and for
Defendant in Suits Nos.1510/2006 and 625/2007

Ms. Fouzia Rasheed, Advocate for Defendant in Suit No.1568/2008 and for
Plaintiffs in Suits Nos.1510/2006 and 625/2007

Date of Hearing : 13.01.2015

Date of Announcement : 30.03.2015

J U D G M E N T

NAZAR AKBAR, J.--- This common judgment will disposed of three suits. First suit No.58/2006 was filed on **16.10.2006** by Mrs. Quratul Ain Mansoor against Mrs. Alia Tipu for declaration, injunctions and infringement of trademark/name **Alle'Nora** in the Court of District and Sessions Judge, South Karachi. This suit was subsequently transferred to High Court of Sindh and renumbered as **Suit No.1568/2008**. The other two suits bearing **Suit No.1510/2006** and **Suit No.625/2007** were filed on **24.11.2006** and **20.02.2007** by M/s. Alle'Nora Beauty Salon and Parlour through its partner Mrs. Alia Tipu before this Court against the plaintiff of Suit No.1568/2008 (Old Suit No.58/2006) (Quratul Ain Mansoor). Said Mrs. Quratul Ain Mansoor has also filed a counterclaim in Suit No.625/2007.

The dispute between the parties is limited to the declaration and entitlement of the use of trade name / trademark of Alle'Nora by them. Precisely both the plaintiff and the defendant claim their right to use

trademark Alle’Nora to the exclusion of other for the purposes of running their respective Beauty Salon. Since the pleadings are common, by consent of the parties all the suits were consolidated by order dated **14.04.2008** and the following common issues were framed:

Issue No.1: Which of the parties is a prior user of the Mark “Alle’Nora” in Pakistan?

Issue No.2: Has any of the parties a right to exclusive use of the Mark “Alle’Nora” anywhere in Pakistan?

Issue No.3: Is the prior user so determined entitled to the relief claimed in their respective Suits?

Issue No.4: What should the decree be?

The precise facts from the pleadings of the parties are that the plaintiff of Suit No.1568/2008 (old No.58/2006) claimed that she had been running a Beauty Salon and Parlour with the trade name of Alle’Nora at Lahore since 1990 and in the year 2002 she started a branch of her Beauty Salon at Karachi and Mrs. Alia Tipu was its Manager on profit sharing basis. On acquiring a considerable experience sometimes in 2006 the defendant (Mrs. Alia Tipu) begun to represent herself as owner of the Karachi branch of Plaintiff’s Beauty Salon and, therefore, Suit No.58/2006 (renumbered as HC Suit No.1568/2008) was filed for declaration and injunction against Mrs. Alia Tipu. In the meanwhile, the plaintiff (Mrs. Quratul Ain Mansoor) also filed an application for formal registration of trademark Alle’Nora before the Registrar, Trademarks by application dated **29.07.2006**, which was later on officially registered in her name in 2010, effective from the date of application in terms of **subsection (3) of Section 33** of the Trademarks Ordinance, 2001. The defendant of Suit No.58/2006 (Mrs. Alia Tipu) also filed a Suit No.1510/2006 on **24.11.2006** before High Court of Sindh at Karachi, as partner of a registered partnership firm by the name and style of M/s. Alle’Nora Beauty Salon and Parlour and sought identical relief against Mrs. Quratul Ain Mansoor. In **Suit No.1510/2006**, Mrs. Quratul Ain Mansoor filed her counterclaim and sought restraining orders against Mrs. Alia Tipu. Mrs. Alia

Tipu on **22.05.2007** filed yet another case through her Partnership Firm bearing **Suit No.625/2007** before the High Court of Sindh to protect her copy rights for the use of the name of Alle’Nora. After almost two years of hectic litigation and accumulation of three suits and a counterclaim, the parties settled the consolidated issues mentioned above.

Evidence was recorded through Commissioner in **Suit No.1510/2006** which is to be treated as common in all cases. The plaintiff’s partner Mrs. Alia Tipu examined three witnesses and the defendant also examined three witnesses. The plaintiff, Mrs. Alia Tipu, produced her affidavit in evidence as Ex-P-1, certified copy of registration of Firm M/s. Alle’Nora as Ex-P/1, certified copy of Deed of Partnership as Ex-P/2, undated Certificate issued by Studio Ex-P/3, Certificate issued by Hakim Sons Studio as Ex-P/4, Certificate issued by MCB Badar Commercial Branch dated 02.11.2006 as Ex-P/5 (the last three Exhibits P/3, P/4 and P/5 were under objection), Income tax return for the year 2006 as Ex-P/6. During her cross-examination, she also produced photocopy of demand draft of MCB Bank Limited and its certificate of cancellation Ex-P/6-A and Ex.P/7, advertisement as Ex-P/8, Website Ex-P/9, Advertisement in Libas International Vol. 16 of 2003 as Ex-P/10, advertisement Ex-P/10, advertisement in Magazine “Me and My Wedding” as Ex-P/11. Mrs. Ghazala Pirzada appeared as witness No.2 for the Plaintiff and produced her affidavit-in-evidence as Ex-P/12. Mr. Aijaz Akhtar Shaikh appeared as witness No.3 for the plaintiff and produced his affidavit in evidence as Ex-P/13.

Mrs. Quratul Ain Mansoor, the defendant in Suit No.1510/2006 examined herself at Ex.D-1 and she produced her affidavit in evidence as Ex-D/1 and original documents referred to in her affidavit in evidence as Ex-D/1 to D/36. Mrs. Mussarat Misbah appeared as witnesses No.2 for the defendant. She produced her affidavit-in-evidence as Ex-D/37 and Mrs. Ittrat

Gillani appeared as witness No.3 for the defendant, she produced her affidavit in evidence as Ex-D/38.

I have heard the learned counsel for the parties and perused the record. My issue-wise findings are as follows:

Issue No.1 : The burden of proof of this issue was equally on both the sides. The Plaintiff (Mrs. Alia Tipu), PW-1 claimed that she is running the partnership firm by the name and style of Alle’Nora Beauty Salon and Parlour since the year 2002. The plaintiff has placed several documents on record to claim that she has been using the trademark Alle’Nora for her business of beauty salon at Karachi. The maximum timeframe she could show dates back to **30.12.2003** when she got the Partnership Firm registered by the name Alle’Nora Beauty Salon and Parlour though the registration Ex-P/2 is dated **21.02.2004**. However, the date of commencement of business mentioned in the partnership deed was 30.12.2003. Her evidence shows that no income tax or sales tax was paid by the plaintiff until 2006. The defendant has produced more than 36 original documents, showing the use of trademark Alle’Nora since 1990. Besides the evidence of the defendant, in the cross-examination plaintiff (Mrs. Alia Tipu) has admitted that the defendant was using the trademark Alle’Nora for her business since 1990 and she had even negotiated to purchase the rights of use of trademark Alle’Nora from the defendant. In this context the counsel for the defendant has referred to the following piece of cross-examination:

“It is correct to suggest that the defendant is using the name Alle’Nora in Lahore since 1990.”

“It is correct that in 2003 when I sent the pay order to the defendant she was known to me as we were talking on the telephone with each other in respect of business. In 2003 I intended to buy the trade name from the defendant at Lahore business. Approximately the amount assessed by me with the defendant for the purchase of trade was about Rs.250,000/-. It is correct that my two sisters are residing at Lahore i.e. Ghazala and Aisha. The defendant was doing the business at Lahore in the name of Alle’Nora”.

In view of the above admissions and the other overwhelming evidence placed on record by the defendant I hold that the defendant (Mrs. Quratul Ain Mansoor) is the prior user of the trade name of Alle’Nora in Pakistan.

Issue No.2 : The logical consequences of my findings on issue No.1 is that the defendant has an exclusive right to use the trademark Alle’Nora since she is the prior user by at least 10 years than the use of the said trademark by the plaintiff of Suit No.1510/2006. It is settled law that the exclusive right to use a mark can either be acquired through long and continuous use or through registration. In the case in hand, the defendant admittedly had filed her application for registration of the trademark on **29.07.2006** and the said application had been allowed during the pendency of the litigation in 2010 and by application of the provisions of **Section 33** of the Trademark Ordinance, 2001, on the registration, trademark shall be deemed to have its effect from the date of making such an application. Therefore, in addition to the case of prior user which the defendant has already established, once the registration of the mark has been acquired by the defendant in accordance with the law, she has a better right to exclusively use the mark Alle’Nora in Pakistan. In this context learned counsel for the defendant has relied on **2001 SCMR 967** (Messrs MEHRAN GHEE MILLS. (PVT.) LIMITED and others versus Messrs CHILTAN GHEE MILL (PVT.) LIMITED and others). In this case the Hon’ble Supreme Court of Pakistan with approval relied on the following observation from the case reported as P.L. Anwar Basha v. M, Natarajan **AIR 1980 Mad. 56**:

“A suit for infringement of trademark when an application for registration is pending on the date of plaint is competent even if the trademark is registered pending the suit because under Section 23 of the Act the date of registration should be taken to be the date of application which the certificate of registration has to bear.”

The learned for the defendant has also relied on the judgment reported in **2010 CLD 311** [Karachi] (GHULAM MUJTABA PARACHA versus MUHAMMAD SALEEM). In this case, after referring to several case law on

the point of superior right of prior user, in para 14 this Court has held as under:

“14. A perusal of above referred decision/treaties would reveal that there is a consensus that a right in a trademark created by a prior user despite non-registration was a superior right and protection to such right is provided under the law.”

Mr. Shaiq Usmani, learned counsel for the defendant has also claimed protection of Section 39(2) of the Trademark Ordinance, 2001 whereby the trademark has been declared as a personal property and prohibited its use by any person other than the proprietor, thus the plaintiff's use of the mark Alle'Nora is infringement of the use of the trademark. The crux of discussion and the law referred by the learned counsel for the defendant leads us to inescapable conclusion that the defendant has exclusive right of use of the trademark Alle'Nora in Pakistan. Her exclusive right of use of trademark Alle'Nora is protected by law. The issue No.2 is also decided in favour of the defendant (Mrs. Quratul Ain Mansoor).

Issue No.3 : In view of findings as issue Nos.1 and 2, once it is declared that the defendant of suit No.1510/2006 has been a prior user of mark Alle'Nora and she has exclusive right to use the mark Alle'Nora all over Pakistan, the plaintiff in Suit No.1510/2006 is not entitled to the relief claimed by her. Similarly her suit No.625/2007 is also liable to be dismissed. However, since neither of the parties have led any evidence to justify the losses/damages claimed by them in their respective suits while seeking declaration and permanent injunction for the use of the trademark Alle'Nora, I am not in a position to determine any damages caused to/by either of the parties to each other on account of use of the trademark during all the period of litigation or prior to it.

Issue No.4 : In view of the discussion on the issue Nos.1, 2 and 3, Suit No.1568/2008 is decreed and Suit No.1510/2006 and Suit No.625/2007 along with the counter claim of the defendant to Suit No.1510/2006 stands

dismissed with no orders as to cost. The plaintiff of Suit No.1568/2008 is hereby declared as owner of the trademark Alle’Nora and she has the exclusive right to use the trademark Alle’Nora all over Pakistan and Defendant in Suit No.1568/2008 (Mrs. Alia Tipu) as well as the Partnership Firm, M/s.Allenora Beauty Saloon Parlor, Karachi are hereby restrained from using the trademark Alle’Nora as they have no right to use the trademark Alle’Nora.

J U D G E

Karachi

Dated:_____