

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

Reserved on: 29th July, 2019

Pronounced on: 18th October, 2019

+ CS(COMM) 889/2018, I.As. 6896/2018 & 8837/2018

MAKE MY TRIP (INDIA) PRIVATE LIMITED Plaintiff

Through: Mr. J. Sai Deepak, Mr. Mohit Goel,
Mr. P.D.U. Srikar and Mr. Abhishek,
Advocates.

versus

MAKE MY TRAVEL (INDIA) PRIVATE LIMITED Defendant

Through: Mr. Abhishek Singh, Advocate.

CORAM: JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J

I.A No. 6896/2018 (under Order XXXIX Rules 1 And 2, CPC) & IA No. 8837/2018 (under Order XXXIX Rule 4, CPC)

1. Plaintiff by way of the present suit *inter alia* seeks permanent injunction restraining the Defendant from adopting and using (A) the trade mark/trade name 'Make My Travel' (word per se), MMT (letter mark) and the tag line 'Dreams Unlimited' (hereinafter, the "Impugned WordMarks"); (B) the



MakeMyTravel Logo, i.e., which includes the Infringing Word Marks, namely, MMT and Dreams Unlimited (hereinafter, the

"Impugned Logo") and (C) their domain name <makemytravelindia.com> (hereinafter, the "Impugned Domain Name") [hereinafter, these marks are collectively referred to as the "Impugned Marks"]; as the same are violative of the Plaintiff's statutory and common law rights in its own trade marks (A) MAKEMYTRIP (hereinafter, the "MakeMyTrip Word Mark"); (B) MMT (hereinafter, the "MMT Letter Mark") and (C) the tag lines MEMORIES UNLIMITED and HOTELS UNLIMITED (hereinafter, the "Plaintiff's Tag Lines"). For the sake of convenience, the terms MakeMyTrip Word Mark, MMT Letter Mark and Plaintiff's Tag Lines are collectively referred to as "MakeMyTrip Marks".

Submission of the Plaintiff

2. The case of the Plaintiff [MakeMyTrip (India) Private Limited] is that it was incorporated in the year 2000 and started its business initially with airline ticket bookings and is today one of the largest travel companies in the country. It has presence all across India and several other countries around the world including in the United States of America, the United Arab Emirates and Mauritius. Plaintiff was originally incorporated on 13th April 2000, with the trade name 'Travel by Web Private Limited' and subsequently, vide a fresh Certificate of Incorporation, dated 02 August 2000, its trade name changed to 'Makemytrip.com Pvt. Ltd'. Thereafter, on 28 June 2002, another change was effected and that remains its current and present name, i.e., 'MakeMyTrip (India) Pvt. Ltd.' Over the years, the Plaintiff has expanded its range of products and services beyond online travel bookings. Presently, the Plaintiff, through its primary website, www.makemytrip.com and other technology-enhanced platforms including

application based mobile platforms, etc., offers an extensive range of travel services and products, both in India and abroad. The said services of the Plaintiff include, booking of air tickets, rail tickets, bus tickets, hotel reservations, car hire, domestic and international holiday packages and ancillary travel requirements such as facilitating access to travel insurance.

3. After changing its trade name to include the words "MakeMyTrip" on 2nd August 2000, the Plaintiff has continuously and uninterruptedly used the trade marks MakeMyTrip and MMT, the MakeMyTrip Word Mark as well as the MMT Letter Mark. The tag line "Memories Unlimited" and "Hotels Unlimited", have also been continuously and uninterruptedly used by the Plaintiff for its business activities since the day they were conceived. The MakeMyTrip Marks, including the MakeMyTrip Word Mark, MMT Letter Mark and Plaintiff's Tag Lines are invented terms, and have earned immense reputation and goodwill on account of extensive and continuous use by the Plaintiff. The domain <makemytrip.com> was registered way back on 8th May 2000 and stands in the name of the founder of the Plaintiff Company, namely, Mr. Deep Kalra. Plaintiff has been hosting an interactive website on the said domain name, since as early as 2001. Due to extensive use, now spanning almost seventeen (17) years, the MakeMyTrip Word Mark is synonymous with high standards of quality in respect of services provided by the Plaintiff. In order to add further distinctiveness and brand recall to its MakeMyTrip Word Mark, the Plaintiff, over the years, has conceived, adopted and used various catchy and stylized logos, all of which contain the MakeMyTrip Word Mark, as their essential feature. Some such logos conceived, adopted and used by the Plaintiff, in different unique and

stylized forms, include



(the “MakeMyTrip logo marks”). Owing to the Plaintiff’s widespread goodwill and reputation in its MakeMyTrip Marks, the public and trade has come to associate and recognize the MakeMyTrip Word Mark and MakeMyTrip Logo Marks as originating from the Plaintiff and none else. Thus, any unauthorized use of the MakeMyTrip Marks and/or any other deceptively similar mark would violate the Plaintiff’s statutory and common law rights and an effort to ride upon the immense reputation and goodwill garnered by the Plaintiff in its MakeMyTrip Marks.

4. Plaintiff is also the registered proprietor of the MakeMyTrip Word Mark and MakeMyTrip Logo Marks. The sales turnover attributable to the Plaintiff’s MakeMyTrip Marks in India alone runs into several crores of Rupees. With a view to promote its MakeMyTrip Marks, the Plaintiff has made and continues to make substantial investment in advertising and promotional activities on a worldwide basis, including India. The promotional activities are done not only through conventional print media, but also digital media on the Internet. There is a strong social media presence and has been conferred with several awards and accolades. It has also been enforcing its rights in the MMT Marks through litigation as well as domain name complaints.

5. Sometime in the month of December 2017, while browsing through the Internet, the Plaintiff came to know about the Defendant and its Infringing Marks. Plaintiff carried out further investigation and came across the website of the Defendant, <https://www.makemytravelindia.com/> being hosted on the Impugned Domain Name, wherein the Defendant was offering information pertaining to travel tours and packages, which services are identical to that of the Plaintiff. Being aggrieved by the adoption and use of the Infringing Mark and Infringing Domain Name, the Plaintiff, through its Counsel, issued a cease and desist notice requisitioning the Defendant to, inter alia, cease all use of the Infringing Marks and Infringing Domain Name.

6. For the sake of full disclosure, the Plaintiff submits that in the past it had exchanged a few correspondences with two individuals- Mr. Desh Raj Yadav and one Mr. Kishan Panara, whose email addresses were makemytravel8@gmail.com and makemytravel28@gmail.com respectively. Plaintiff is not aware of whether these two individuals and email addresses are in any way connected with the Defendant.

7. The infringement and passing off of Plaintiff's marks is proved by following factors:

- a) Phonetically, visually, structurally and conceptually the competing marks are identical and/or deceptively similar.
- b) Identity of idea: The mark MakeMyTravel and MakeMyTrip are combination of three words, where first two words are identical and last word 'travel' and 'trip' convey the same meaning, idea and concept

c) Nature of goods and services in respect of which the trademarks are being used are identical.

d) Class of purchasers likely to use services of the Plaintiffs and the Defendants is the same.

Submissions of the Defendant

8. It is the case of the Defendant that the suit is barred by Section 33 of the Trade Marks Act 1999. Plaintiff and its officials were aware that Defendant had incorporated a company by name of Make My Travel (India) Private Limited and is doing business under the name of Make My Travel (India) Private Limited, since the year 2010-2011. There have been several email exchanges between the officials of Plaintiff and officials of Defendant during the period 2011 to 2017. Plaintiff and Defendant are members of various associations where in the list of members, their name appears alongside each other. In the years 2011 to 2017, Plaintiff and Defendant had entered into business transactions and on occasions, money was transferred from the account of Defendant to that of the Plaintiff. Plaintiff despite being aware of use of the name 'Make My Travel (India) Private Limited' by the Defendant, has not objected to the same. Plaintiff has also acquiesced to the use of trade mark/trade name Make My Travel, MMT and tag line DREAMS UNLIMITED and make my travel logo for a continuous period of five years and more and it cannot object to the use thereof. Since the very beginning, Defendant company was using the letter marks MMT in all its email accounts and other communication, this fact was known to the Plaintiff and its officials since the year 2011. Plaintiff company has adopted the letter mark MMT much later i.e. in and around the year 2015 and 2016.

9. With respect to the emails exchanged with Mr Desh Raj Yadav and Mr Kishan Panara, it was clarified that the said persons and their IDs have never been not associated with the Defendant company in any manner whatsoever.

Proceedings in the suit

10. The case first came up for hearing before this Court on 17th May 2018. On the said date, temporary ad-interim injunction was granted in favour of the Plaintiff, restraining the Defendant from using in any manner whatsoever, selling, offering for sale, advertising directly or indirectly dealing in any products or services under the infringing marks, namely Make My Travel (word per se), MMT (letter mark). Dreams unlimited (tag line), www.makemytravelindia.com and Make My Travel logos,



or any other trade mark/trade name/trade dress or logo/device, which is identical to and/or deceptively similar to and/or plaintiffs MakeMyTrip logo marks, namely, MakeMyTrip (word mark), MMT (letter mark) and Memories Unlimited and Hotels Unlimited (tag line). The said injunction is continuing. On 20th September 2018 certain compromise proposals were stated to have been discussed between the parties. However, on 10th October 2018, it was submitted that an amicable resolution could not be arrived at and the proceedings have continued since then.

Analysis and Conclusion

11. The Court heard the learned counsels for the parties at length. The main relief sought in the suit is for permanent injunction restraining infringement of trademarks and passing off. As noted above, the interim injunction is continuing and the court has been called upon to deliberate upon the question whether the same should be confirmed or vacated.

12. The main thrust of the argument of the Defendant is premised on the ground that Plaintiff's suit is not bonafide. Plaintiff has suppressed material facts, and not disclosed that the Defendant and its impugned marks were known to the Plaintiff since the year 2011, contrary to what has been pleaded in the suit. Defendant has also strongly emphasized that the Plaintiff has deliberately withheld from the court vital documents viz the communications exchanged between the booking executives and the franchisees of the Plaintiff, pertaining to the year 2011. In support of this submission, the Defendant has placed on record and relied upon email conversations exchanged between the Defendant and the booking customer care executives of the Plaintiff which exhibit the use of the impugned marks by the Defendant. To further buttress this argument, learned counsel for the Defendant has sought to highlight the conduct of the Plaintiff by relying upon the decision of this Court concerning the Plaintiff: *MakeMyTrip (India) Pvt. Ltd. v. Orbit Corporate Leisure Travels (I) Private Limited* 2017 SCC OnLine Del 12172.

13. In addition to the foregoing ground of defence, the Defendant has also set up the plea of acquiescence, alleging that since the Plaintiff has

previously not objected to the use of the name MakeMyTravel (India) Pvt. Ltd by the Defendant, it cannot now be permitted to object to the use of the said name. It had been further contended that Plaintiff and its officials were aware of the use of the letter mark MMT and the tagline 'Dreams Unlimited' and MakeMyTravel Logo by the Defendants since the year 2011 and thus the Plaintiff has acquiesced to the use of trademark/trade name MakeMyTravel, MMT and tagline 'Dreams Unlimited' and MakeMyTravel Logo for a continuous period of five years and cannot object to the use of the said marks.

14. At the preliminary stage of the suit, while deciding the application of the Plaintiff under Order 39 Rule 1 & 2 as also the application of the Defendant under Order 39 Rule 4, the court has to keep in mind the well settled principles governing the grant of injunction viz. prima facie case; balance of convenience and the harm or injury likely to be caused on account of the impugned acts of the Defendant. As per plaint, Plaintiff adopted and commenced the use of the trademark MakeMyTrip in the year 2000 for providing travel related services and Plaintiff has been using the primary website <www.makemytrip.com> since the year 2001. Learned counsel for the Plaintiff has further submitted that subsequent to filing of the present suit, Plaintiff has also secured registration of the word marks 'MakeMy' and 'Go-MMT'. Plaintiff claims that they had been using the MMT letter mark which has been thoughtfully conceived by taking first three alphabets of its trade name MakeMyTrip. Plaintiff is now commonly referred to by the abbreviation MMT within the trade and by consumers. It adopted and commenced the tag lines 'MEMORIES UNLIMITED' in April and

‘HOTELS UNLIMITED’ in May 2013. Defendant has adopted (A) the trade mark ‘Make My Travel’; (B) letter mark MMT (C) tag line ‘Dreams



Unlimited’; (D) MakeMyTravel Logo i.e. . On comparison of the Defendant’s marks with those of the Plaintiff, one can easily notice that the same are phonetically, visually, structurally and conceptually identical/deceptively similar to the Plaintiffs MakeMyTrip Marks. Defendants has not offered any plausible explanation for adoption of the infringing marks. The mark ‘MakeMyTrip’ and ‘MakeMyTravel’ are combination of three words where the two words are identical and the last word ‘travel’ and ‘trip’ convey the same meaning, idea and concept.

15. Concededly, the nature of goods/services in respect of which the two trademarks have been used is also common, inasmuch as both the Plaintiff and Defendant are in the business of online travel booking services. The target audience likely to use the services of the parties is also the same.

16. The Supreme Court in several decisions has laid down the test which is to be applied while evaluating the question regarding the infringement. In the case of *F. Hoffman La Roche v. Geofferey Mannors* reported in (1969) 2 SCC 716, the Apex Court held that *true test is whether the totality of the proposed trade mark is such that it is likely to cause deception or confusion or mistake in the minds of persons accustomed to the existing trade mark*. In the said case, while deciding the question of infringement relating to trademark “PROTOVIT” and “DROPOVIT”, it was held that *marks have to*


*be compared from the point of view of a person of imperfect recollection and meticulous comparison of both the words side by side is not to be made, but the marks are to be compared as a whole looking at the first impression created in the minds of the consumer. The Court has to lay stress on the common features rather than on the differences in essential features. In the case of **Cadilla Healthcare Ltd. v. Cadilla Pharmaceuticals Ltd.** 2001 PTC 541 (SC), the Supreme Court was deliberating on the question of infringement in relation to two brand names “FALCITAB” and “FALCIGO”. Referring to its earlier judgment in **Amritdhara Pharmacy v. Satyadev Gupta** AIR 1963 SC 449, the Court held that for deceptive resemblance, two important questions that need to be kept in mind are i) who are the persons that the resemblance must be likely to deceive or confuse and ii) what rules of comparison are to be adopted in judging whether such resemblance exists. It was further held that *confusion is perhaps an appropriate description of the state of mind of a consumer who on seeing a mark thinks that it differs from the mark on goods which he has previously bought, but is doubtful whether the impression is not due to imperfect recollection.**

17. Further, in **Shree Nath Heritage Liquor Pvt. Ltd. v Allied Blender & Distillers Pvt. Ltd.** (2015) 221 DLT 359, this Court while dealing with the marks OFFICER’S CHOICE and COLLECTOR’S CHOICE elucidated the concept of similarity in idea of a trademark and use of synonyms as trademarks. The Court elaborately discussed the different types of synonymy observed in adoption of trademarks or trade names classifying the same into absolute synonymy and relative synonymy. It was held that in case of

relative synonymy, words or phrases may be similar in certain contexts while not in others and in such cases, where certain words which may not be similar in every context but convey the same idea in a particular context, similar brand name recollection impairment may be observed. Thus, it was held that marks containing words with the same sense relation (or falling in the same semantic field, or conveying the same or similar idea in the mind) as that of previously existing marks are likely to be considered so similar as to be refused registration or deemed to constitute infringement of the previously existing trademark. The said judgment was recently followed in the case of ***The Gillette Company v Tigaksha Metallics Private Limited***

251(2018)DLT530, wherein the Court held that the device mark



is deceptively similar to the Plaintiff's mark , as the words SWORD and TALVAR convey the same meaning. In ***Corn Products Refining v Shangrila Food Products*** AIR 1960 SC 142 also, the Apex Court noted the concept of similarity of idea. In the said case, the Court was dealing with the marks GLUCOVITA and GLUVITA and it was observed that the idea of the two marks is the same as both convey the ideas of glucose and life giving properties of vitamins and to a person of average intelligence and imperfect recollection, the overall structural and phonetic similarity and the similarity of the idea in the two marks is reasonably likely to cause confusion. Reference may also be made to the case of ***Prathiba M. Singh v. Singh and Associates, 2014 (60) PTC 257 (Del)***, wherein this Court discussed the concepts of “priming” and “word association” and it

was observed as under:

“(A)(iv) To make sure that the aforesaid phenomenon and experience is not confined to the undersigned, I looked up and found the experts to have defined the same as "Priming" and which is defined as an implicit memory effect in which exposure to one stimulus influences a response to another stimulus. The seminal experiments on the said subjects appear to be of Meyer and Schvaneveldt who found that people were faster in deciding that a string of letters is a word when the word followed an associatively or semantically related word and subsequent research has led to priming, now being understood to be of many sorts. The said works report that priming can occur following perceptual, semantic or conceptual stimulus repetition and that its effect can be very salient and long lasting and unconscious, affecting word choice on a word-stem completion test, long after the words have been consciously forgotten. Keith E. Stanovich and Richard F. West in their Paper "On Priming by a Sentence Context" published in the Journal of Experimental Psychology have reported associative priming as a word that has a high probability of appearing with the prime and is associated with it and frequently appear together and context priming as where the context speeds up processing for stimuli that are likely to occur in that context and reported that these latter words are processed more quickly than if they had been read alone. Similarly John A. Bargh, Mark Chen and Laura Burrows in their Paper "Automaticity of Social Behaviour: Direct Effects of Trait Construct and Stereotype Activation on Action" published in the Journal of Personality and Social Psychology have reported that attention to a response increases the frequency of that response, even if the attended response is undesired.

(A)(v) The phenomenon is also described by some as 'Word Association' meaning "stimulation of an associative pattern by a word" or "the connection and production of other words in response to a given word done spontaneously". Derren Brown, a psychologist has predicted people's word associations and has opined that humans find it very difficult to disassociate words. Another author on the basis of psycholinguistic studies has

reported that words are not stored in our mental lexicon as single items, but forming clusters with related concepts. Yet others have reported that our brains use some kind of connections between lexical items and that it associates words with others.”

In the present case also, while the first two words of the marks MakeMyTrip and MakeMyTravel are identical, the last words, TRIP and TRAVEL are similar and convey the same idea. Similarly, the Defendant’s tag line DREAMS UNLIMITED is deceptively similar to the Plaintiff’s taglines HOTELS UNLIMITED and MEMORIES UNLIMITED. While the second word in the tag lines is identical, the first words DREAMS, MEMORIES and HOTELS, when considered in the context of travel and holiday related services, may be used in the same context or idea.

18. In view of the law laid down by the Supreme Court in the foregoing judgments and having regard to the facts of the case, there cannot be any doubt that the Plaintiff has a strong prima facie case and the balance of convenience also lies in its favour. In case the Defendant is permitted to continue to use infringing marks, grave and serious prejudice is likely to be caused to the Plaintiff.

19. Now, coming to the Defendant’s plea regarding suppression of facts and acquiescence. Plaintiff has strongly refuted the Defendant’s allegation qua suppression of facts in respect of the communications which have been placed on record. Plaintiff has explained that it is a large organization having over 3000 employees across India and in addition to these

employees, it has a large franchise network which works independently of the Plaintiff company. It has further been clarified that the communications relied upon by the Defendants were allegedly exchanged between the booking executives of the Plaintiff and the franchisees of the Plaintiff in the year 2011. Prima facie, it appears that such email communications were not exchanged with the management of the Plaintiff Company or any of its key managerial personnel who could be regarded as persons who ought to be aware of Defendant's existence. Although, for the sake of complete discovery, the Plaintiff should have placed on record all the communications exchanged between the parties including the franchisees, but failure to do so, cannot lead to assumption that there has been willful concealment on its part. This aspect would require trial, having regard to the nature of the Plaintiff's business which is based on a large network of booking executives, who are stated to be lowest rung employees. It is quite possible that such communications and correspondences were not known to any of the key managerial personnel of the Plaintiff Company. Further, as pointed out by the Plaintiff's counsel, some of the communications were exchanged with the email addresses obt1.delhicp@makemytrip.in and dom1.delhicp@makemytrip.in, which ids pertain to the franchisees and not the Plaintiff Company. Correspondences sent by the franchisees could possibly be not known to the key managerial personnel of the Plaintiff Company. It is also significant, as pointed out by Plaintiff's counsel, that the email communications exchanged between the automated response system and the officials of the Defendant Company are unnamed. Plaintiff's explanation regarding the bank statement of HDFC bank that the transactions reflected therein were completed by the franchisee and its

knowledge cannot be attributed to the Plaintiff, appears to be plausible, keeping in mind its business model. Besides, Defendant has not placed on record any email communication exchanged with the management of the Plaintiff Company, or any of its key managerial personnel who ought to have been aware of Defendant's existence. Therefore, it is not a case where the Plaintiff can be held to be guilty of suppression of facts.

20. Significantly, it cannot go unnoticed that the adoption of the mark by the Defendants is without any cogent explanation, and it prima facie appears to be dishonest. It cannot be accepted that the Plaintiff has acquiesced the use of the infringing mark by the Defendant. The correspondence with the booking customer care executive of the Plaintiff who apparently did not have knowledge of the intellectual property rights of the Plaintiff, cannot be considered as positive acts of encouragement towards the Defendant to do business under Infringing/Impugned Marks.

21. I have also perused the orders passed by this Court in the case of *MakeMyTrip (India) Pvt. Ltd. v. Orbit Corporate Leisure Travels (I) Private Limited*(supra), where this Court on the plea of suppression, vacated the interim injunction granted against the Defendants and dismissed the application of the Plaintiff under Order 39 Rule 1 and 2, CPC, 1908. In the said case, the two competing marks were 'MakeMyTrip' and 'GetMyTrip'. Plaintiff contends that in the said case, the Defendant therein has made a false statement which resulted in vacation of interim injunction and the Plaintiff had instituted an application under Section 340 Cr.P.C for perjury against the Defendants and has also filed the second interim application for

interim relief which led the parties to settle the matter amicably. Reliance is also placed on the other orders passed by the Court that records the filing of the aforementioned application.

22. The facts of the said case as recorded in the aforementioned order reveal that Defendant therein approached the Court by way of an application under Order 39 Rule 4 contending that the Plaintiff had prior knowledge of the Defendant's predecessor-in-interest using the trademark 'GetMyTrip' and the Plaintiff had been doing business with the said predecessor-in-interest of the Defendant under the mark 'GetMyTrip' since 2011. This contention was duly taken note of in paras 7 and 8 of the said decision which read as under:-

"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 exists 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'."

23. Taking note of the above, the Court *inter alia* observed as under:-

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.

24. From the above, it can be easily discerned that there was an agreement between Defendant's predecessor-in-interest and the Plaintiff, and this crucial factor prevailed upon the Court to accept the plea of acquiescence and to hold that the use of the mark 'GetMyTrip' was within the knowledge of the Plaintiff. In the present case, there is no such agreement on record and the plea of acquiescence is premised merely on the basis of email communications exchanged with booking customer care executives. Thus, I cannot, at this stage, hold that the Plaintiff has acquiesced to the use of the infringing marks by the Defendant. Similarly, the decision in ***Triumphant Institute of Management Education Pvt. Ltd. v Aspiring Mind Assessment Pvt. Ltd.*** (2014) 210 DLT 618, relied on by the Defendant, is distinguishable

on the facts and circumstances prevailing therein. In the said case, the factum of concealment of material fact and acquiescence had been proved, by the Defendants therein.

25. The law relating to acquiescence is well established. In ***Hindustan Pencils Private Limited v. India Stationary Products Co.*** AIR 1990 Del 19, this Court dealt elaborately with the question of delay and acquiescence. It has been held that in order to claim the defence of acquiescence, there should be a tacit or an express assent by the plaintiff to the defendant's using the mark and in a way encouraging the defendants to continue with the business. It is as if the plaintiff wants the defendant to be under the belief that the plaintiff does not regard the action of the defendant as being violative of the plaintiff's rights. In ***Dr. Reddy Laboratories Pvt. Ltd. v. Reddy Pharmaceuticals*** 2013 SCC OnLine Del 3626, the Court took note of the fact that the owners of trademarks or copyrights cannot be expected to run after every infringer and thereby remain involved in litigation at the cost of their business time, but can wait till the time the user of their name starts harming their business interests and starts misleading and confusing their customers. In ***Emcure Pharmaceuticals Ltd. v. Corona Remedies Pvt. Ltd.*** 2014 SCC OnLine Bom 1064, the Bombay High Court extensively discussed the defence of acquiescence as available to an alleged infringer of trademark. It was held that a mere failure to sue without a positive act of encouragement is no defence and is not acquiescence. Further, examining the concept of “acquiescence”, it was observed that acquiescence is a species of estoppel, a rule in equity and a rule of evidence and it is essential to the acquiescence doctrine that it is accompanied by an encouragement or an

inducement: he who possesses a legal right must have encouraged the alleged violator of that right in acting to the latter's detriment, confident in the knowledge that the former is not asserting his rights against the violator. Acquiescence is sitting by when another invades your rights and spends money in the doing of it. It is conduct incompatible with claims of exclusivity, but it requires positive acts, not mere silence or inaction (of the stripe involved in the concept of laches). Acquiescence is not mere negligence or oversight. There must be the abandonment of the right to exclusivity. In **Midas Hygiene Industries v. Sudhir Bhatia** 2004 (28) PTC 121 (SC) the Apex Court held that mere delay in bringing action is not sufficient to defeat grant of injunction in infringement cases.

26. Significantly, Defendant has no justification or defense for the use of the infringing marks, except for the plea of suppression and acquiescence, both of which would require a further and deeper scrutiny and examination during the course of trial. Thus, having regard to the aforesaid facts, the Court is of the considered opinion that Plaintiff has a prima facie case and the balance of convenience also lies in favour of the Plaintiff. Irreparable loss would be caused to the Plaintiff if the Defendant is not restrained from using the impugned marks.

27. Accordingly, I.A. No. 6869/2018 is allowed and the injunction order dated 17th May 2018 is made absolute and shall continue to operate during the pendency of the present suit. Consequently, I.A. No. 8837/2018 is dismissed. No order as to costs. The opinion expressed by the Court is only a *prima facie* view on the merits of the case and needless to say the same

shall not have any binding effect at stage of final adjudication.

SANJEEV NARULA, J.

OCTOBER 18, 2019

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