

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

% **Date of decision: 29th July, 2019**

+ **CS(COMM) No.364/2019**

DR. VIJAY ABBOT

.... Plaintiff

Through: Mr. Harish Malhotra, Sr. Adv.
with Ms. Kanishka Prasad, Mr.
Harsimran Singh, Ms. Samridh
Ahuja, Mr. Kartikeya & Ms.
Khushboo Tomar, Advs.

Versus

SUPER CASSETTES INDUSTRIES

PRIVATE LIMITED & ORS.

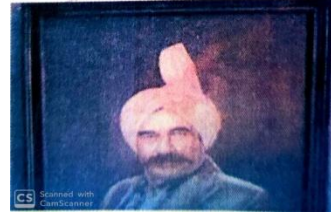
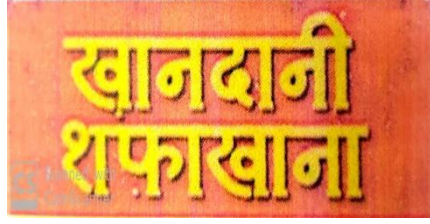
.....Defendants

Through: Mr. Harsh Kaushik, Mr. Varun
Tandon & Mr. Harshvardhan
Jha, Advs. for D-1.
Dr. Harsh Surana, Ms. Deepali
S. Surana & Mr. Sandeep
Malik, Advs. for D-3,4,7&8.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff has instituted this suit for (a) permanent injunction to restrain the ten defendants, being the producers, director and others, connected with the film "KhandaniShafakhana" slated for release on 2nd August, 2019, from releasing the film "KhandaniShafakhana" and / or from using the plaintiff's proprietary material amounting to dilution thereof and / or passing off; (b) mandatory injunction directing the defendants to change and remove the title of the film from that of "KhandaniShafakhana" to any other title not similar or deceptively similar to the plaintiff's proprietary material and to remove



or any other similar marks; and, (c) for recovery of Rs.2 crores.

2. The suit along with the applications for interim relief and under Order II Rule 2(3) of the Code of Civil Procedure, 1908 (CPC) came up before this Court first on 23rd July, 2019 when though I was not *prima facie* satisfied with the rights claimed by the plaintiff but being concerned whether the title of the film causes any damage to the reputation of the plaintiff, suggested to the counsel for the defendant / caveator, to before the scheduled release of the film, allow viewing thereof by the plaintiff and his counsel as well as the senior counsel briefed.

3. The counsel for the defendant / caveator, after taking instructions, agreed thereto expressing apprehension that the plaintiff and his counsels after watching the film and / or before the release thereof, may make statements to the public, media or otherwise about the film.

4. The senior counsel appearing for the plaintiff, under instructions assured that no such statement shall be made and no information qua the film will be divulged to anyone whatsoever.

5. It was also suggested that for the sake of expediency, the undersigned may also view the film as suggested.

6. Though vide order dated 23rd July, 2019 viewing of the film was tentatively scheduled for 26th July, 2019 but with mutual agreement, the viewing took place in the evening of 27th July, 2019.

7. The senior counsel for the plaintiff and the counsel for the defendant / caveator have been heard.

8. The plaintiff has instituted this suit, pleading, that (i) the plaintiff is a eminent Ayurvedic Sexologist with a career spanning over four decades; (ii) the plaintiff currently practices from Hakim Hari Kishan Lal Shafakhana Clinic, East Patel Nagar, New Delhi; (iii) the plaintiff is the son of Late Hakim Hari Kishan Lal Abbot who was a world renowned sexologist and had contributed significantly to the health sector by providing for over three generations Ayurveda medical care / treatment for all kinds of sexual dysfunctions; (iv) the plaintiff's father had originally coined and invented the logo / trade marks / brands / business names / portraits

“KHANDANI
SHAFAKHANA”

“खानदानी शफाखाना”



; (v) the said logo / trade marks / brands / business names / portraits constitute proprietary material and have been in existence and use by the plaintiff's late father since the year 1925 and after his death on 27th January, 1987 by the plaintiff and his other family members; (vi) the Registry of Trade Marks, vide order dated 8th December, 2000

declared Smt. Raj Devi, Dr. Rajender Kumar Abbot and the plaintiff as subsequent proprietors of the registered trade marks No.164662 and 213916 and allowed Dr. Rajender Kumar Abbot and the plaintiff to trade in the name of 'KhandaniShafakhana'; (vii) the plaintiff and his brothers still use the portrait of their father as corporate identity in their profession; (viii) the said proprietary material has been extensively used and advertised in promotion or otherwise by the plaintiff and his family and gained immense reputation and goodwill amongst the masses; (ix) the upward curved greased moustache and the Peshawari looks of the plaintiff's father in his famous portrait became a symbol of male sexuality / masculinity and are till date identified with the professional services rendered by the plaintiff's father; (x) the family members of the plaintiff agreed amongst themselves that all the members will be entitled to use the photograph of late Hakim Hari Kishan Lal Abbot on their respective sign boards and in order to settle the dispute amicably, none of them will use the word 'KhandaniShafakhana' in any of their sign boards or other materials / stationary; (xi) the said family arrangement does not give right to the third parties as the defendants to use 'KhandaniShafakhana' and the goodwill and reputation attached thereto; (xii) in June, 2009, the plaintiff was astonished to know about the forthcoming Hindi feature film "KhandaniShafakhana" that uses proprietary materials which belong to the plaintiff and his family; (xiii) the first look poster of the film was released on 19th June, 2019 and the official trailer of the film released on 21st June, 2019; (xiii) as per the official trailer, the movie is based on a story of a renowned

sexologist who provides Ayurveda medicines for all kinds of sexual dysfunctions at his popular sex clinic titled “KhandaniShafakhana”; (xiv) the movie repetitively uses the portrait of the character in the film and which is similar and can be confused with the portrait of the plaintiff’s father; (xv) the two portraits are as under:



; (xvi) from the trailer of the movie, it is evident that the movie is based on the real life and contributions of the plaintiff’s father; (xvii) the plaintiff’s father’s looks, features, goodwill and reputation have been exploited by the defendants for making financial gains without obtaining any permission therefor from the plaintiff and his family; (xviii) the similarity with respect to the style and colour of the turban, the handlebar moustache and the facial posture clearly indicate a thoughtful attempt to imitate the resemblance of the plaintiff’s father; (xix) the portrait of the plaintiff’s father associated with the plaintiff’s corporate identity have attained distinctiveness and have acquired secondary meaning for the treatment, of all kinds of sexual dysfunctions in both genders, rendered by the plaintiff’s father and now by the plaintiff; (xx) the defendants are indulging in passing off and misappropriation of business reputation of the plaintiff; (xxi) the

misrepresentations are likely to deceive the public; (xxii) the defendants are taking unfair advantage of the reputation and goodwill enjoyed by the plaintiff and his family in relation to proprietary material; and, (xxiii) the adoption and use of the plaintiff's proprietary material by the defendants shall cause illegal and wrongful loss, damage, hardship and injury to the plaintiff and his goodwill and reputation.

9. Though the plaintiff in the plaint represented as if its trade mark registrations were alive but a perusal of the documents filed by the plaintiff showed the registration vide trade mark application No.164663 in Class-5 [Medicinal Preparation] being of the device



mark and vide trade mark application No.213916 being of the



device mark also in Class 5. The documents also revealed that the validity of registration vide trade mark application No.164663 was till 22nd June, 2010 and of registration vide trade mark application No.213916 to be valid till 19th February, 2005 and the status of both registrations as on 15th July, 2019 being shown as "removed".

10. The aforesaid were essential facts to be disclosed by the plaintiff in the plaint itself. Not only did the plaintiff indulge in concealment but while claiming user of the two since 1925 and 1958

respectively did not disclose that the registrations already stood removed.

11. Such concealment and sharp practices followed in suits seeking discretionary relief of injunction, not only disentitle the plaintiff to the interim relief but also entail dismissal of the suit. A plaintiff, filing a suit with urgent relief, cannot adopt such practices and contend that the documents filed make the position clear. The Court, before which a large number of matters are listed everyday, is not able to before admission of the suit and considering the grant of *ex parter* relief, go through each and every page of the voluminous documents filed and it is for a plaintiff assisted by Advocates to make a clean breast of affairs, so that on the basis thereof the grant/non-grant of *ex parter* relief can be considered. The documents filed by the plaintiff do not show any registration even of the word mark “KhandaniShafakhana”. Only in the document at page 6 of Part-III A file pertaining to trade mark application No.164663 aforesaid, describes Hakim Hari Kishan Lal, the applicant therein, trading as “KhandaniShafakhana”. However, I repeat that registration is not of word “KhandaniShafakhana” but of device mark aforesaid.

12. The plaintiff, in my view is liable to be non-suited for this reason alone.

13. The plaintiff along with its documents has also filed a certified copy of the order dated 13th September, 2013 of the Court of Additional District Judge-02 (West), Tis Hazari Courts, Delhi in CS No.146/06/01 titled **Rajinder Kumar Vs. Ankur Abbot &Ors.** of

dismissal as withdrawn of that suit in terms of an application filed under Order XXIII Rule 3 of the CPC filed in the said suit. A perusal of the said application shows Rajinder Abbot, Ankur Abbot, Manju Abbot and the plaintiff to have agreed that all parties shall be entitled to use the photograph of their father / grandfather Late Hakim Hari Kishan Lal Abbot on their respective sign boards but neither party shall use or display the words “KhandaniShafakhana” in any of their sign boards or other materials / stationary.

14. It was for the reasons aforesaid that it was observed in the order dated 23rd July, 2019, that the plaintiff was not entitled to the reliefs claimed.

15. The senior counsel for the plaintiff today, after watching the film, has argued, that (i) the film shows the artist whose photograph is shown in the posters of the film, having been murdered because of having dispensed wrong medicine to a patient; though towards the end of the film, it is also shown that the same was not true but the fact remains that he was charged with dispensing a wrong medicine to a patient; (ii) the film shows the clinic in the name of “KhandaniShafakhana” in a shabby condition; (iii) the film shows the artist whose photograph is depicted in the posters, as having been disqualified by the Ayurvedic Body and also shows the clinic to have been subsequently sealed by the authorities; (iv) the film shows the niece of the artist whose photograph is depicted on the posters, attempting to run the clinic without being qualified therefor and studying for a decree only thereafter; (v) the plaintiff cannot be said to

have abandoned the mark “KhandaniShafakhana” because the said abandonment is not voluntary; (vi) the plaintiff and his other family members are till date continuing to use the photograph of the father of the plaintiff; (vii) nothing prevents the plaintiff and his other family members from joining together and collectively again start using the mark “KhandaniShafakhana” ; (viii) even the removal of the marks from the Registry is of no avail as the marks can be restored even belatedly; in *N.R. Dongre Vs. Whirlpool Corporation* (1996) 5 SCC 714, the restoration application was filed after much longer period; (ix) in any case the father of the plaintiff and the plaintiff and his family members have used the portrait since the year 1925 and the trade mark “Khandani Shafakhana” since 1958 till the Court order; (x) that though in the poster of the film the photograph of the artist therein is with the turban but else in the film the artist is never shown wearing a turban except in the beginning; (xi) though in the photograph of the artist in the posters of the film, he is shown sporting a handlebar moustache but in the film his moustache is not shown as handlebar; (xii) the film, for the aforesaid reasons is defamatory of the plaintiff and tarnishes the reputation of the plaintiff; (xiii) reliance is placed on *N.R. Dongre* supra, *Satyam Infoway Ltd. Vs. Siffynet Solutions (P) Ltd.* (2004) 6 SCC 145, *Laxmikant V. Patel Vs. Chetanbhai Shah* (2002) 3 SCC 65, *The Timken Company Vs. Timken Services Pvt. Ltd.* (2013) 200 DLT 453, *Rubiks Brand Ltd. Vs. Mahesh Vaman Manjrekar* MANU/MH/0703/2017, *The Scotch Whisky Association Vs. Pravara Sahakar Shakar Karkhana Ltd.* AIR 1992 Bom 294, *Erven Warnink BV Vs. J. Townend & Sons*

(Hull) Ltd. (1979) 2 All ER 927, *CIPLA Ltd. Vs. Registrar of Trade Marks* 2013 SCC OnLine Bom 1270 (DB), *Union of India Vs. Malhotra Book Depot* 2013 SCC OnLine Del 828, *Edmund Irvine Tidswell Ltd. Vs. Talksport Ltd.* (2002) 2 All ER 414, *Reckitt and Colman Products Ltd. Vs. Borden Inc.* (1990) 1 ALL ER 873 and *The Crash Dummy Movie, LLC Vs. Mattel, Inc.* 601 F. 3d 1387.

16. The counsel for the defendants has argued, that (a) the compromise recorded on 13th September, 2013 is in pursuance to the order in operation since the year 2001 restraining use of “Khandani Shafakhana”; thus the plaintiff has not been connected to the mark “Khandani Shafakhana” for 18 years prior to the institution of this suit, since the year 2001; (b) no case of any reputation of the plaintiff being attached to “Khandani Shafakhana”, inspite of admitted non use thereof for 18 years, has been pleaded; (c) in fact the document filed by the plaintiff himself at page 5 of Part-III A file pertaining to trade mark application No.164663 shows the name of the proprietor as K.H. Abdul Qadir trading as K.H. Soap Works and does not even disclose Hakim Hari Kishan Lal or the plaintiff or any of his other family members as proprietor thereof and there is no explanation whatsoever in the plaint thereof; (d) there has been no sale or business in the name of “Khandani Shafakhana” since 2001; (e) the plaintiff has not pleaded any sales or given figures thereof; (f) the documents filed by the plaintiff himself at pages 28,42 and 43 of Part-III A file show the plaintiff to be carrying on his business in the names of ‘Hakim Hari Kisan Lal Shafakhana’ or ‘Khandani Takat Shafakhana/Ankur Medico Pvt. Ltd./Abbot Business Centre’ or as ‘Hakim Saheb Shafakhana’

and not as “Khandani Shafakhana”; (g) the suit was based on a thirty second clip of the film released as trailer but which was not even attached to the plaint; (h) the protagonist of the film is not any man but a woman and all apprehensions of the plaintiff, of the film being based on the father, are misplaced; (i) the film is socially relevant and raises the issues of need, for sex education and treatment of sexual disorders like any other disorder/disease; (j) the reference in the film to the man whose photograph appears on the posters, is only to show how the lady protagonist of the film got the clinic and not of more than five or six minutes out of a film of over two hours; (k) the film is nowhere about the plaintiff or the plaintiff’s father and rather deals with the subject of sex education for youth through the eyes of the lady who is the main protagonist of the film; (l) the film is not at all about the life of the father of the plaintiff or the plaintiff; the plaintiff in paragraphs 12 and 19 of the plaint has pleaded similarity, only by citing the upward curved greased moustache, peshawari looks, colour of the turban, handlebar moustache and facial posture and in which there can be no proprietary rights and which are generic; (m) that look also is confined only to one scene in the film; (n) that this is not a case of sale of goods; (o) though the senior counsel for the plaintiff has today argued on the aspect of defamation and citing which preview of the film was also suggested and agreed to, but the plaint does not disclose any cause of action for defamation and is silent in this regard and the plaintiff cannot be granted any relief on the cause of action for defamation; (p) the present suit was filed on the ground of passing off and has to be decided on the said anvil only; (q) the plaintiff has not

filed any invoices; (r) no injunction for protection of a marks which lapsed in the years 2005 and 2010 and which have admittedly not been in use since 2001, can be granted; (s) for injuncting release of a film, the plaintiff cannot afford any delay; (t) the first poster of the film was released on 11th June, 2019 and the film then was scheduled for release on 26th July, 2019; the second poster was released on 19th June, 2019; the trailer of the film was released on 21st June, 2019; (u) however the present suit was filed only on 17th July, 2019 and re-filed on 20th July, 2019; (v) the plaintiff has not made out any case of irreparable loss or injury; rather by filing the application under Order II Rule 2 of the CPC, the plaintiff has admitted that the damage even if any can be quantified in terms of money; (w) on the contrary, the defendants have produced the film scheduled for release on 2nd August, 2019 at huge costs and which will be wasted if any interference is made; (x) the balance of convenience is also in favour of the defendants; (y) the film, rather than causing any damage to the plaintiff, takes the reputation if any of the plaintiff forward; (z) reliance is placed on *Mattel, Inc. Vs. Aman Bijal Mehta* 2017 SCC OnLine Del 11857, *Godrej Sara lee Ltd. Vs. AVM Production Pvt. Ltd.* 2017 SCC OnLine MAD 12599 and *A. Balakrishnan Vs. R. Kanagavel Kamaraj* 1999 SCC OnLine Mad 563.

17. The senior counsel for the plaintiff, in rejoinder has contended that the mention of K.H. Abdul Qadir as proprietor in trade mark application No.164663 at page 5 of Part-III A file is obviously a mistake, as evident from pages 6 and 9 to 12 of Part-III A file.

18. I have considered the rival contentions.

19. Having been privy to the film along with counsels for the parties, I expected the plaintiff to today withdraw the suit. The film is a work of fiction and deals with the subject of sex education and the stigma attached to sexual dysfunctions and disorders and treatment thereof. Of course, to attract the viewers to the film and sell it, the said socially relevant subject is embedded in a drama / storyline, and without which the film would be a documentary, with very limited audience and reach.

20. The drama / storyline created around the subject aforesaid spills to a large extent to the Court room. The Court scenes are again a dramatized version rather than what unfolds in the mundane course in the Courts every day. Again, to keep the interest of the viewers alive, a comical twist is given to the arguments in the Court and the conduct of the Judge. In fact, a thought did cross my mind while viewing the film, that if the film indeed ridicules anyone or if anyone can take offence to their depiction in the film, it is the lawyers and Judges.

21. I had risen after viewing the film thinking that it presents a golden opportunity to the plaintiff and other practitioners in the field, to, though till now found publishing their advertisements in local newspapers, approach the larger cross section of the society on the subject of need to impart sex education and for lifting the stigma and taboo attached to sexual diseases/disorder/dysfunction and treatment thereof and to commence a countrywide dialogue from the platform offered by the film.

22. There is no gainsaying that till date sexual disorders/dysfunctions are viewed in the society as an abnormality and not as a curable disease, with those in need of treatment therefor, shying therefrom for the fear of same becoming public knowledge, resulting in their becoming object of ridicule. This often results in the disorder/dysfunction, though being curable, going untreated, obviously at a huge emotional cost. Not only so, the same also results in the sufferers seeking treatment from quacks and unqualified people, offering cure shrouded in secrecy. The same is obviously to the prejudice of general practitioners thereof, who are because of the stigma attached to their profession, also deprived of the stature and respect in the society as accorded to other medical practitioners. The film, in two hours duration thereof, shows the societal transformation brought about on the subject. I also wondered, whether on the plaintiff and others so using the platform of the film, to propogate openness in the matter, it would be the turn of the defendants to sue the plaintiff for deriving undue benefit/mileage from the film. Alas! the plaintiff,inspite of viewing the film, has not seen the potential the film offers to him, to go out in the open and benefit not only himself but the public at large therefrom.

23. I have had occasion to deal with attempts at seeking such ban on films, besides in *Mattel, Inc.* supra cited by the counsel for the defendant, also in *Nandini Tewari Vs. Union of India* 2014 SCC OnLine Del 4662, *Dharmaprachar Sabha Vs. Union of India* 2014 SCC OnLine Del 6559, *Yahoo Inc Vs. Firoz Nadiawala* MANU/DE/0784/2014, *Prem Mardi Vs. Union of India* 2015 SCC CS(COMM) No.364/2019

OnLine Del 12039, *Kanungo Media (P) Ltd. Vs. RGV Film Factory* MANU/DE/1592/2017 and in *Ajay Gautam Vs. Union of India* 2015 SCC OnLine Del 6479 (DB) and the following principles can be culled out therefrom: (i) that the effect of the allegedly offending words / visuals is to be judged from the standards of a reasonable / strong minded, firm and courageous man and not those of weak and vacillating minds nor of those who scent danger in every hostile point of view; (ii) that any restrictions imposed on expression of artistic thought, affects the constitutional right of the film makers; (iii) our society is a very mature society and there is no need for anyone to be sensitive; (iv) that the standards that we set for our censorship must make a substantial allowance in favour of freedom, thus leaving a vast area for creative art to interpret life and society, with some of its follies along with what is good; (v) we must not look upon certain aspects, as banned in toto and forever from human thought and must give scope for talent to put them before the society; (vi) the requirements of art and literature include within themselves, a comprehensive view of social life, not only in its ideal form; (vii) a film that illustrates consequences of social evil, necessarily must show that social evil; (viii) a film is to be judged in its entirety, from the point of view of its overall impact; (ix) a feature film is a work of fiction and is exhibited for commercial purposes; (x) the Constitution protects the rights of the artist to portray social reality in all its forms; some of that portrayal may take the form of questioning values and mores that are prevalent in the society; (xi) films are a legitimate and important medium for the treatment of issues of general concern and it

is open to a producer to project his own message, even if it is not approved by others; (xii) freedom of expression is of inestimable value in a democratic society based on the rule of law; (xiii) right to communicate and receive ideas, facts, knowledge, information, beliefs, theories, creative and emotive impulses by speech or by written word, drama, theatre, dance, music, film etc. is an essential component of the protected right of freedom of speech and expression; (xiv) humour cannot be divorced from reality; we can laugh only in the context of what is known to us and not in abstract; if it were to be held that there can be no contextual humour as the same is bound to be considered to be offensive by someone or the other in the know of the context, there indeed would be no humour and it will indeed be a sad day; (xv) our commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing that freedom are pressing and the community interest is in danger; anticipated danger should not be remote, conjectural or far-fetched – it should have proximate and direct nexus with the expression and the expression to which objection is taken should be equivalent of a spark in a powder keg; (xvi) freedom of speech and expression is sacrosanct and the said right should not be interfered with; when the Central Board of Film Certification (CBFC) has granted the certificate and only something with regard to the petitioner which was shown in the media is being reflected in the film, the Court should restrain itself and not grant injunction; (xvii) a film is a creation of art; an artist has his own freedom to express himself in a manner which is not prohibited in law and such prohibitions are not read by implication, to crucify the

rights of expressive mind; (xviii) like human beings, literary work produced by the author or the work of entertainment produced by a producer needs a title to be identified; (xix) title alone of a literary work cannot be protected by Copyright Law; (xx) protection of literary titles lies in the field of trade mark and unfair competition; (xxi) titles may relate to two types of works i.e. titles of single literary works and titles of series of literary works; (xxii) titles of series of books, periodicals or newspapers do function as a trade mark, to indicate that each edition comes from the same source as the others and constitute a trade mark; (xxiii) titles of single literary work do not enjoy trade mark protection and in order to become entitled to this protection, it is necessary to prove that such a title has acquired Secondary meaning i.e. title is capable of associating itself with particular work or source; (xxiv) only if it is so, would the likelihood of confusion of source, affiliation, sponsorship or connection in the minds of potential patrons arise; (xxv) else, each literary work is a specific, separate and unique commercial item and not as one product among many competing products; and, (xxvi) the evidence necessary to establish secondary meaning of literary work is evidence of an audience educated to understand that the title means the work of a particular artist; such evidence includes the length and continuity of use, the extent of advertising and promotion and the amount of money spent and the closeness of the geographical and product markets of the plaintiff and defendants.

24. Applying the aforesaid law to the pleadings of the plaintiff, the plaint indeed does not show any right or cause of action for the plaintiff to sue.

25. While the pleadings of the plaintiff are of his father having practiced Ayurvedic treatment of sexual disorders in Delhi alone, under the name “Khandani Shafakhana” and which name also is not in use for the last 18 years, the film of the defendants is slated for an all India, if not worldwide, release. Moreover, while the use of 18 years prior to the institution of the suit, by the father of the plaintiff, of the words “Khandani Shafakhana” is in relation to his professional clinic, the use by the defendants is of the said words as a title to a film. The words “Khandani Shafakhana” singly as well as used in conjunction with each other are generic words. Both are words of Hindi / Urdu language. While the word “Khandani” connotes familial or clannish, the word “Shafakhana” means a hospital or a clinic. Used together, the words convey a family hospital or a family clinic. A bare search of the internet, discloses the word “Khandani” being used, with ‘Pakode Wala’ for vending street food, with ‘Rajdhani’ for a restaurant, with ‘Sherwani’ for a clothing store. Certainly, one person even if running his medical clinic in the name and style of “Khandani Shafakhana”, cannot prevent another, from using the generic word “Khandani” or “Shafakhana” for a hospital or a medical clinic.

26. It is perhaps for this reason only that even when the father of the plaintiff, and after him the plaintiff and his family members had registration, the same was not of the word mark “Khandani

Shafakhana” but of a stylized device mark, though with the word “Khandani Shafakhana” and a logo therein and of the portrait of the father of the plaintiff. The portrait of the father of the plaintiff, which the plaintiff claims is in use even now, can by no stretch of imagination be confused by anyone as portrait on the posters of the film of a well known actor whose face will perhaps be recognized by more people than the face of the father of the plaintiff.

27. The counsel for the defendant is right in his contention that the plaintiff cannot also have any proprietary rights asserting which this suit has been filed, to the Peshawari look or to the handlebar moustache or to the turban, depicted in the portrait of the father of the plaintiff and the portrait used in the posters of the film. In fact during the hearing, I have reminded the senior counsel for the plaintiff of other film characters sporting a similar turban or handlebar moustache. Else, the face in the portrait of the father of the plaintiff and the face of the well known film actor in the posters of the film can by no stretch of imagination be confused for each other. ‘

28. No merit is found in the contention of senior counsel for the plaintiff of the abandonment of the device mark with the word “Khandani Shafakhana” and the logo, being not voluntary. Such abandonment is under an application under Order XXIII Rule 3 of CPC, of the own volition of plaintiff. It is not pleaded that there was any force or compulsion on the plaintiff to sign the application.

29. The counsel for the defendant is also correct in his contention that the plaint as drafted does not even contain a cause of action for

defamation as has been argued by the senior counsel for the plaintiff today. The plaint is drafted, with title and with prayers, as on the ground of passing off and which ground of passing off is clearly negated from admitted non use, for the last 18 years prior to the institution of the suit, by the plaintiff and his family members of the stylized device with the words “Khandani Shafakhana” and logo contained therein. The plaintiff cannot be entitled to relief on the grounds as urged, of there existing a possibility of the plaintiff and his family members coming together and reviving the said registration even, in the device mark which was earlier registered, or may agree to commence using the words “Khandani Shafakhana” which was not even registered. Else, 18 years is a long time for the memory to fade. 18 years, in the context of those in need of the professional services as sexologist offered by the plaintiff, constitutes a generation and none of the present patrons of the services offered by the plaintiff in other names for the last 18 years, will connect the plaintiff with the words “Khandani Shafakhana”.

30. As far as the arguments of the senior counsel for the plaintiff after watching the film are concerned, besides the suit being not to prevent or to claim damages for defamation, I may also mention that seeing the film holistically rather than as dissected in the manner argued by the senior counsel for the plaintiff, shows the good to the society done by the predecessor of the female protagonist of the film and how in spite thereof he was not given social recognition / acceptability. The same, on the anvils of the case law discussed above, is a social evil and qua which it has been held that an artist cannot be

prevented from depicting. The clinic shown in the film is seen in a shabby condition only for the duration of non use and not otherwise. No merit is also found in the argument, of the film showing the female protagonist thereof to be practicing as a sexologist without the requisite qualification. The film, as part of its plot /storyline, shows the female protagonist thereof to have been entrusted the task, by her predecessor of, after his death, dispensing medicines prepared by him, to his patients, so as to not leave the patients in a lurch, depicting the concern of the medical practitioner for his patients; otherwise the film shows the society and the and the Ayurvedic Body earlier charging the female protagonist thereof with misconduct, subsequently withdrawing the said charges and the female protagonist, having broken the social taboos to practice as a sexologist, taking steps for being qualified therefor. The viewer of the film is more likely to walk away, being more open than earlier to the acceptability of the profession as a sexologist.

31. Rather, the pleadings of the plaintiff, instead of any damage from the film, are of the film exploiting the goodwill and reputation of the father of the plaintiff, for making financial gains to the producers thereof, without obtaining permission of the plaintiff and the producers of the film profiteering from the business reputation of the plaintiff.

32. Owing to the urgency shown by the counsel for the defendant, of the present suit interfering with the release of the film, the paucity of time does not permit the undersigned to deal with each and every

judgment cited by the senior counsel for the plaintiff and suffice it is to state that having scanned through the same, I do not find any to be laying down anything otherwise than what is expressed by him hereinabove.

33. For the reasons above, no merit is found to proceed further with the suit filed by the plaintiff.

34. The plaintiff, on the facts pleaded is not found entitled to the reliefs of permanent or mandatory injunction or for recovery of any damages from the defendant.

35. The suit is dismissed. However the senior counsel / counsel plaintiff having fully cooperated in expeditious hearing, no costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

JULY 29, 2019

‘gsr’