
Date of the judgement

1997.03.11

Case Number

1994(O)1102

Reporter

Minshu Vol.51, No.3

Title

Judgment concerning whether the name of a franchise chain can be regarded as "one's name" referred to in Article 26, paragraph (1), item (i) of the Trademark Act

Case name

Case for prohibition of infringement of a trademark right, etc.

Result

Judgment of the Third Petty Bench, dismissed

Court of the Second Instance

Takamatsu High Court, Judgment of March 28, 1994

Summary of the judgement

1. The name of an organized business group united as a whole by franchise agreements (franchise chain) can be regarded as "one's name" referred to in Article 26, paragraph (1), item (i) of the Trademark Act.

2. Where the term "小僧寿し" (Kozozushi) is widely recognized among general consumers as an

abbreviation of the name of a famous franchise chain, each of the marks consisting of characters used by the franchise chain, such as "小僧寿し" and "KOZO ZUSHI," produces a pronunciation or gives rise to a concept only in its entirety, and the part of "小僧" or "KOZO" in these marks does not produce any pronunciation or give rise to any concept that may serve as an identifier of the source of goods, and therefore these marks are not similar to a registered trademark "小僧."

3. Where marks consisting of figures (not attached hereto) have been continuously used by a famous franchise chain together with the chain's name or abbreviation, "小僧寿しチェーン" (Kozosushi Chain) or "小僧寿し" (Kozozushi), although there is the possibility that these marks may produce a pronunciation "ko-zo-u-zu-shi" or "ko-zo-u-su-shi," they are not likely to cause confusion with a registered trademark "小僧" as to the source of goods, and therefore these marks are not similar to the registered trademark.

4. Against a claim for damages made by the trademark right holder under Article 38, paragraph (2) of the Trademark Act, the alleged infringer is allowed to avoid liability for damages by alleging as a defense: and proving, the impossibility of the occurrence of damage on the part of the trademark right holder.

References

(Concerning 1) Article 26, paragraph (1), item (i) of the Trademark Act; (Concerning 2 and 3) Article 37 of the Trademark Act (prior to the amendment by Act No. 65 of 1991); (Concerning 4) Article 38, paragraph (2) of the Trademark Act

Trademark Act

Article 26

(1) A trademark right has no effect on any of the following trademarks (including those which constitute part of other trademarks):

(i) a trademark indicating, in a common manner, one's own portrait, name, famous pseudonym, professional name, pen name or famous abbreviation thereof.

Trademark Act (prior to the amendment by Act No. 65 of 1991)

Article 37

The following acts are deemed to constitute infringement of a trademark right or an exclusive license:

(i) the use of a trademark similar to the registered trademark in connection with the designated goods, or the use of the registered trademark or a trademark similar thereto in connection with goods similar to the designated goods;

(ii) the possession for the purpose of assignment or delivery of the designated goods or goods similar

thereto, with the registered trademark or a trademark similar thereto affixed to these goods or their packages;

(iii) the possession of articles indicating the registered trademark or a trademark similar thereto, for the purpose of using the registered trademark or a trademark similar thereto in connection with the designated goods or goods similar thereto;

(iv) the assignment or delivery, or possession for the purpose of assignment or delivery, of articles indicating the registered trademark or a trademark similar thereto, for the purpose of causing the registered trademark or a trademark similar thereto to be used in connection with the designated goods or goods similar thereto;

(v) the manufacture or importation of articles indicating the registered trademark or a trademark similar thereto, for the purpose of using the registered trademark or a trademark similar thereto or causing the same to be used in connection with the designated goods or goods similar thereto; and

(vi) the manufacture, assignment, delivery or importation, as a business, of articles to be used exclusively for the manufacturing of articles indicating the registered trademark or a trademark similar thereto.

Article 38

(2) The trademark right holder or exclusive licensee may claim against an infringer compensation for damage sustained as a result of the intentional or negligent infringement of the trademark right or the exclusive license, by regarding the amount the trademark right holder or exclusive licensee would have been ordinarily entitled to receive for the use of the registered trademark as the amount of damage sustained.

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Main text of the Judgment

The final appeal is dismissed.

The appellant of final appeal shall bear the cost of the final appeal.

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Reasons

Concerning Reason I for final appeal argued by the appeal counsel, ONO Shoen, and Reasons II to VIII for final appeal argued by the appeal counsel, SERITA Sachiko

I. The outline of the facts legally determined by the court of prior instance is as follows.

1. The appellant of final appeal holds a trademark right for the trademark having the constitution indicated in the attached list of trademarks (the attached list omitted; hereinafter referred to as the "Trademark"), for the designated goods in Former Class 45 (foodstuff and seasoning not assigned to any other classes), based on Registration No. 0505891 (application for trademark registration filed

on October 29, 1956; registration established on July 25, 1957) (this trademark right is hereinafter referred to as the "Trademark Right").

2. The appellee of final appeal is a stock company incorporated on May 1, 1972, for the purpose of producing and selling take-out sushi (hereinafter referred to as the "Goods"). The appellee entered into a franchise agreement with Kozosushi So-Honbu Co., LTD. ("株式会社小僧寿し本部") and became its franchisee, and as the franchisor in the Shikoku region, it also entered into franchise agreements with local franchisees. Thus, Kozosushi So-Honbu, the master franchisees including the appellee, and the subfranchisees under the appellee's auspices formed a single organized business group united as a whole by franchise agreements (franchise chain). By 1977 at the latest, "株式会社小僧寿し本部" (Kozosushi So-Honbu Co., LTD.) had been referred to with abbreviations, "小僧寿し本部" ("Kozosushi So-Honbu") or "小僧寿し" ("Kozosushi") and the term "小僧寿しチェーン" ("Kozosushi Chain") had been put into use as a name to indicate said business group.

3. In the Shikoku region, since 1972, the appellee has been using the marks indicated in the attached list of marks (the attached list omitted; hereinafter referred to as "Appellee's Mark 1(1)" and the like) by indicating them on the signboards and walls of its stores where it produces and sells the Goods as well as on its cars, etc., and has also authorized the franchise stores under its auspices to use these marks in the same manner. With regard to Appellee's Mark 3(1), Kozosushi So-Honbu filed an application for trademark registration, for the designated goods in Class 32, "meat, egg, seafood, vegetables, fruits, processed foodstuff," and had the establishment of a trademark right registered on December 16, 1976 (Registration No. 1242315).

4. Kozosushi So-Honbu and the Kozosushi Chain run by the former make up one of the largest business groups in the Japanese restaurant industry in terms of the number of stores and the amount of sales. By 1978 at the latest, the term "小僧寿し" (Kozosushi) had been widely recognized as indicating Kozosushi So-Honbu or the Kozosushi Chain, and in the trade of the Goods, it had become common among general consumers as an abbreviation of the name of Kozosushi So-Honbu or the Kozosushi Chain.

II. In this case, the appellant, based on the Trademark Right, seeks compensation from the appellee for the damage that the appellant sustained during the three years from 1980 to 1982 due to the appellee's use of the Appellee's Marks. Given the facts mentioned above, the court of prior instance determined that among the Appellee's Marks, the use of Mark 2(1) and (3) constitutes infringement of the Trademark Right, but the use of other marks does not constitute infringement of the Trademark Right. The summary of the grounds for this determination is as follows.

1. (i) The Trademark is a mark consisting of two characters "小僧" written vertically, which has the appearance as indicated in the attached list of trademark. It produces a pronunciation, "ko-zo-u," and concepts such as "a young boy employed at a shop," "a young monk," and "a young boy who is underestimated."

(ii) Appellee's Marks 1(1) to (9) are marks consisting of four characters "小僧寿し" written horizontally or vertically. The part of these marks which has the function of distinguishing one's goods from others (the essential part) is "小僧." This essential part is similar to the Trademark in terms of appearance and identical to it in terms of pronunciation and concept. Therefore, these marks are similar to the Trademark.

(iii) Appellee's Marks 2(1) and (3) are marks consisting of alphabetical characters "KOZO" written horizontally, and Appellee's Marks 2(2), (4), and (5) are marks consisting of alphabetical characters "KOZO" SUSHI," "KOZOSUSHI," and "KOZO ZUSHI" written horizontally, respectively. The part of these marks which has the function of distinguishing one's goods from others is "KOZO." This essential part is not similar to the Trademark in terms of appearance, but it is identical to it in terms of pronunciation and concept. Therefore, not only Appellee's Marks 2(1) and (3) but also Appellee's Marks 2(2), (4), and (5) in their entirety, are all similar to the Trademark.

(iv) Appellee's Marks 3(1) to (6) are, as indicated in section 3(1) to (6) of the attached list of marks, marks consisting of the figures that depict, from the front, a person with his hair in a topknot with a twisted towel worn around his head, wrapping cotton cloth around his breast, wearing a short coat over his kimono and also wearing an apron and clogs with high supports, who bows with his hands held together in front of his apron. These marks are not similar to the Trademark in terms of appearance. Even if these marks could remind people of a concept of "a person working at a shop," they do not immediately remind people of a concept of "a young boy employed at a shop," nor do they always produce a pronunciation "ko-zo-u." However, in light of the manner and history in which these marks have been used, and in particular, the fact that these marks have been used together with Appellee's Marks 1(1) to (9) or Appellee's Marks 2(1) to (5) on signboards, etc. for the appellee's store and the franchise stores under its auspices, it can be found that by around 1977, general consumers had come to recall "小僧寿し" (Kozozushi) just by seeing Appellee's Marks 3(1) to (6) and to pronounce them as "ko-zo-u-zu-shi". In that case, Appellee's Marks 3(1) to (6) are identical to the Trademark in terms of concept and pronunciation, and therefore they are similar to the Trademark.

2. However, by 1978 at the latest, the term "小僧寿し" (Kozozushi) had become famous as an abbreviation of the name of Kozosushi So-Honbu or the Kozosushi Chain. In this respect, it should be regarded as a famous abbreviation of one's name as referred to in Article 26, paragraph (1), item (i) of the Trademark Act, and the appellee's use of Appellee's Marks 1(1) to (9) and Appellee's Marks 2(2), (4), and (5) is an act of indicating such abbreviation in a common manner. Therefore, the Trademark Right has no prohibitive effect on these marks.

3. For Appellee's Mark 3(1), Kozosushi So-Honbu filed an application for trademark registration and had the establishment of a trademark right registered. Since Appellee's Marks 3(2) to (6) are similar to Appellee's Mark 3(1), Kozosushi So-Honbu has an exclusive right to use Appellee's marks 3(1) to

(6) in connection with the designated goods. And, since the appellee has been licensed to use these marks under the franchise agreement with Kozosushi So-Honbu, the Trademark Right has no prohibitive effect on these marks. In addition, the indication of the characters "小僧寿し" written horizontally on the part of Appellee's Mark 3(5) (the person's apron) is the use of an abbreviation of the name of Kozosushi So-Honbu or the Kozosushi Chain in a common manner, and therefore it does not constitute infringement of the Trademark Right.

III. We now examine whether or not the determination of the court of prior instance mentioned above is appropriate.

1. It is found to be justifiable for the court of prior instance to determine that in accordance with Article 26, paragraph (1), item (i) of the Trademark Act, the Trademark Right had no prohibitive effect on the appellee's use of Appellee's Marks 1(1) to (9) or Appellee's Marks 2(2), (4), and (5). Considering that a business group united by franchise agreements carries out business activities as a unit aiming at a common goal, an indication of an entity's affiliation to a business group should be held to have a function to make people recognize the entity's identity. Consequently, it is appropriate to construe that the name of a business group can also be regarded as "one's name" as referred to in Article 26, paragraph (1), item (i) of the Trademark Act. In this case, "小僧寿し" (Kozozushi) is a famous abbreviation of the name of the Kozosushi Chain, a business group united by franchise agreements, and the appellee's use of Appellee's Marks 1(1) to (9) and Appellee's Marks 2(2), (4), and (5) can be deemed, for the style of writing and method and place of indication applied thereto, to be an act of indicating said abbreviation in a common manner. Therefore, it should be concluded that the Trademark Right has no prohibitive effect on the use of these marks.

The court of prior instance also determined that the indication of the characters "小僧寿し" on the part of Appellee's Mark 3(5) (the person's apron) is an indication of an abbreviation of a name in a common manner. However, the indication of the characters "小僧寿し" contained in this mark is used as a part of a trademark in combination with a figurative mark, and therefore it cannot be deemed to be indicating an abbreviation of a name in a common manner.

Furthermore, on the grounds that Kozosushi So-Honbu holds a trademark right for Appellee's Mark 3(1), the court of prior instance determined that Kozosushi So-Honbu has an exclusive right, based on said trademark right, to use Appellee's Marks 3(2) to (6) that are similar to Appellee's Mark 3(1), and therefore the Trademark Right has no prohibitive effect on Appellee's Marks 3(2) to (6). However, a trademark right, the substance of which is an exclusive right to use a registered trademark in connection with the designated goods, does not include the exclusive authority to also use any marks similar to the registered trademark in connection with the designated goods. Rather, the trademark right holder is only allowed to demand, inter alia, that another person who uses such similar marks should be prohibited from using them, by alleging infringement of the trademark right (see Articles 25, 36, and 37 of the Trademark Act). Therefore, this determination by the court of

prior instance cannot be affirmed.

As mentioned above, the court of prior instance should be held to have erroneously interpreted and applied the Trademark Act when determining that the indication of the characters "小僧寿し" on the part of Appellee's Mark 3(5) (the person's apron) is the use of an abbreviation of a name in a common manner, and that the trademark right holder also has an exclusive right to use any trademarks similar to the registered trademark.

As explained below, the court of prior instance also determined that the Appellee's Marks, except for Appellee's Marks 2(1) and (3), are similar to the Trademark, but this determination cannot also be affirmed. However, since none of these marks can be deemed to be similar to the Trademark, it should be said that the illegality found in the abovementioned explanation given by the court of prior instance, after all, does not affect the conclusion of the judgment.

2. Similarity between trademarks should be examined from an overall perspective by comprehensively considering various factors, including specific impression, memory or association that the trademarks affixed to identical or similar goods will give to the traders and consumers by means of their appearances, concepts and pronunciations, and should also be determined based on the actual conditions of trade of the goods as far as such actual conditions can be clearly defined. Thus, similarity of trademarks in terms of appearance, concept, or pronunciation is nothing more than preliminary evidence which may lead to a presumption that the trademarks are likely to mislead people or cause confusion as to the source of the goods to which they are affixed. Therefore, even when trademarks are similar to each other in terms of any of these three factors, if they differ in terms of other factors or, in light of the actual conditions of trade, they cannot be deemed in any manner to be likely to mislead people or cause confusion as to the source of goods, they cannot be regarded as similar trademarks (see 1964 (Gyo-Tsu) No. 110, judgment of the Third Petty Bench of the Supreme Court of February 27, 1968, Minshu Vol. 22, No. 2, at 399).

3. This reasoning can be applied in this case as follows.

(i) As indicated in the attached list of trademark, the Trademark is a mark consisting of two characters "小僧" written vertically. It is pronounced as "ko-zo-u," and associated with such concepts as "a young boy employed at a shop," "a young monk," and "a young boy who is underestimated."

(ii) On the other hand, the court of prior instance found that, in light of the various circumstances concerning the Kozosushi Chain during the period from 1972 to 1985, namely the number of franchise stores forming the chain, the amount of sales, the size and contents of advertisements, the news reports in general newspapers, magazines and other media, and the results of the nationwide survey on name recognition, the Kozosushi Chain ranked high in sales in the food service industry and had high name recognition. By 1978 at the latest, the Kozosushi Chain had become famous as a producer/seller of the Goods, and the term "小僧寿し" (Kozosushi) had been widely recognized

among general consumers as an abbreviation of the name of Kozosushi So-Honbu or the Kozosushi Chain. Therefore, with regard to the Appellee's Marks, it should be said that when seeing the characters "小僧寿し" or hearing the pronunciations "ko-zo-u-zu-shi" or "ko-zo-u-su-shi," general consumers would immediately recall Kozosushi So-Honbu or the Kozosushi Chain as a producer/seller of the Goods. Considering that the term "小僧寿し" (Kozozushi) is usually pronounced by general consumers as a single term, it is appropriate to construe that by 1978 at the latest, each of the Appellee's Marks, "小僧寿し," "KOZOSUSHI," "KOZOSUSI," and "KOZO ZUSHI," had become an indivisible mark pronounced as "ko-zo-u-zu-shi" or "ko-zo-u-su-shi" and had come to remind people of the Kozosushi Chain as a business group or the Goods produced and sold thereby. It cannot be said that the part "小僧" or "KOZO" in each of these marks can independently produce a pronunciation "ko-zo-u," nor can it be said that said part would remind people of a concept of "a young boy employed at a shop." In short, in the case of Appellee's Marks 1(1) to (9) and Appellee's Marks 2(2), (4), and (5), they produce a pronunciation or give rise to a concept only in their entirety, and the part, "小僧" or "KOZO" alone cannot be deemed to produce any pronunciation or give rise to any concept that may serve as an identifier of the source of goods. Comparing the Trademark and the abovementioned Appellee's Marks, although they have some common parts in terms of appearance and pronunciation, each such common part in the Appellee's Marks cannot independently serve as an identifier of the source of goods. Considering that the Appellee's Marks are associated with the Kozosushi Chain, a famous business group, or the Goods produced and sold thereby and that these marks indicate nothing but the source of goods, it should be said that the Goods to which the Appellee's Marks are affixed are so distinctive that people who see the Goods can immediately recognize them as those produced and sold by the Kozosushi Chain, and therefore they cannot be deemed to be likely to mislead consumers or cause confusion as to the source of goods. In conclusion, Appellee's Marks 1(1) to (9) and Appellee's Marks 2(2), (4), and (5) cannot be deemed to be similar to the Trademark.

(iii) Appellee's Marks 3(1) to (6) are not similar to the Trademark in terms of appearance, and although these marks could remind people of a concept of "a person working at a shop," they do not remind people of a concept of "a young boy employed at a shop," nor do they produce a pronunciation "ko-zo-u." Where such a mark consisting of a figure or symbol that does not give rise to any specific concept or pronunciation has been used as a mark that represents a famous person or company for a long period of time and finally become widely recognized among general consumers, it may be possible that the mark might remind people of the famous person or company and produce the same pronunciation as that of the person's or company's name or abbreviation thereof. However, in such case, even where the mark has been used as a trademark with respect to the goods produced and sold by the famous person or company, the concept and pronunciation arising from the mark indicate nothing but the famous person or company that is the source of the goods, and therefore the

goods to which the mark is affixed can be deemed to be so distinctive that the people who see the goods can immediately recognize them as those produced and sold by the famous person or company. Even if there is any trademark that is identical or similar to the mark in terms of pronunciation, it should be said that such trademark is not likely to mislead consumers or cause confusion as to the source of goods.

In this case, since Appellee's Marks 3(1) to (6) have been continuously used by the franchise stores of the Kozosushi Chain together with the name "小僧寿しチェーン" (Kozosushi Chain) or "小僧寿し" (Kozozushi), there is the possibility that just by seeing these marks, people would think of the Kozosushi Chain, a famous business group, and these marks would produce a pronunciation "ko-zo-u-zu-shi" or "ko-zo-u-su-shi." Even so, they cannot be deemed to remind people of a concept of "a young boy employed at a shop" or produce a pronunciation "ko-zo-u." Furthermore, in light of the fact that the concept and pronunciation arising from these marks indicate nothing but the Kozosushi Chain, a famous business group, which is the source of goods, even where these marks have some parts in common with the Trademark in terms of pronunciation, they are not likely to mislead consumers or cause confusion as to the source of goods. Therefore, these marks cannot be deemed to be similar to the Trademark. With respect to the indication of the characters "小僧寿し" written horizontally on the part of Appellee's Mark 3(5) (the person's apron), since the mark "小僧寿し" cannot be deemed to be similar to the Trademark as mentioned above, Appellee's Mark 3(5) cannot be deemed to be similar to the Trademark only because it contains that indication of the characters.

IV. For the reasons stated above, we can affirm the determination of the court of prior instance that concluded that the appellee's use of the Appellee's Marks, except for Appellee's Marks 1(1) and (3), cannot be deemed to constitute infringement of the Trademark Right. The appeal counsel's arguments are groundless after all, and therefore cannot be accepted.

Concerning other reasons for final appeal argued by the appeal counsel, ONO Shoen, and Reason I for final appeal argued by the appeal counsel, SERITA Sachiko

I. The court of prior instance, while determining that the appellee's use of Appellee's Marks 2(1) and (3) constitutes infringement of the Trademark Right, dismissed the appellant's claim to seek compensation under Article 38, paragraph (2) of the Trademark Act for the damage that the appellant sustained during the three years from 1980 to 1982. The summary of the grounds for this determination is as follows.

1. Article 38, paragraph (2) of the Trademark Act can be construed to be based on the presupposition that a registered trademark has a certain proprietary nature. However, unlike a patent right and a utility model right each of which arises from a creative invention or device and therefore has a proprietary value by itself, a trademark right does not originally have a proprietary value arising from a trademark, which is no more than a combination of characters or figures, but it acquires such

value when the trademark gains a business reputation.

2. Since 1978, in the Shikoku region, the mark "小僧寿し" (Kozosushi) had been widely recognized among general consumers as indicating Kozosushi So-Honbu or the Kozosushi Chain, which is the source of the Goods, acquiring a significant capability to attract customers, whereas the Trademark had not been recognized in such a manner and had had little capability to attract customers, or in other words, the Trademark had little proprietary value.

3. Among the Appellee's Marks, the appellee mainly used Appellee's Marks 1(1) to (9) and Appellee's Marks 3(1) to (6), while using Appellee's Marks 2(1) and (3) only secondarily. In addition, in light of the fact that those primarily used were famous as an abbreviation of the name of Kozosushi So-Honbu or the Kozosushi Chain, whereas those used only secondarily were not so famous, Appellee's Marks 2(1) and (3) did not contribute to motivating consumers to buy the Goods, and in this respect, they had no proprietary value.

4. Consequently, Article 38, paragraph (2) of the Trademark Act cannot be applied in this case.

II. The abovementioned determination of the court of prior instance should be held to be justifiable, on the following grounds.

1. Article 38, paragraph (2) of the Trademark Act provides that the trademark right holder may claim against an infringer compensation for damage sustained as a result of the intentional or negligent infringement of the trademark right, by regarding the amount the trademark right holder would have been ordinarily entitled to receive for the use of the registered trademark as the amount of damage sustained. According to this provision, it is appropriate to construe that the trademark right holder is not required to go so far as to allege or prove the occurrence of damage but only required to allege and prove the fact that his/her right has been infringed and the amount that he/she would have been ordinarily entitled to receive, whereas the alleged infringer is allowed to avoid liability for damages by alleging as a defense: and proving, the impossibility of the occurrence of damage on the part of the trademark right holder. Article 38, paragraph (2) of the Trademark Act, in combination with paragraph (1) of said Article, is intended to reduce the infringed party's burden to allege and prove damage when claiming damages in tort. If the infringer is held to be liable for damages even in the case where it is obvious that no damage has occurred, it should be said that this would go beyond the basic framework of the law of tort and therefore it is an unacceptable interpretation of the provision of Article 38, paragraph (2).

The substance of a trademark right is to protect the business reputation of the trademark right holder by way of the trademark's function to identify the source of goods, and to protect general consumers by maintaining the marketing system of goods. Unlike a patent right and a utility model right, a trademark right itself does not have any proprietary value. Therefore, even where a third party other than the trademark right holder uses a mark similar to the registered trademark as a trademark for the goods produced and sold by such third party, if the registered trademark is found to have no

capability to attract customers and it is obvious that the use of the mark similar to the registered trademark makes no contribution to the third party's sales, it should be concluded that the trademark right holder has not sustained any damage equivalent to the amount of royalties as profit that he/she would have been entitled to receive.

2. In this case, the court of prior instance found the following facts. (i) In around November 1974, in the Kinki area, or, mainly in Osaka City, the appellant started to produce and sell take-out rice balls, sushi, etc. under the name of "おにぎり小僧" (Onigirikozo). The appellant has never sold rice balls, sushi or other items with the Trademark affixed thereto in the Shikoku region, where the appellee's store and the franchise stores under its auspices are located. (ii) By 1978 at the latest, the term "小僧寿し" (Kozosushi) had become famous not only as an abbreviation of the name of Kozosushi So-Honbu or the Kozosushi Chain but also as an indication of the goods produced and sold by the Kozosushi Chain. Appellee's Marks 3(1) to (6) had also become famous in the same meaning and acquired a business reputation and capability to attract customers. (iii) The Trademark was never used in the Shikoku region, and therefore it had no name recognition among general consumers, had no business reputation embodied therein, and had little capability to attract customers in this region. (iv) During the period from 1980 to 1982, Appellee's Marks 2(1) and (3) were used only for two stores among the appellee's store and 21 franchise stores under its auspices located in Kochi Prefecture, in the manner that Appellee's Mark 2(1) was indicated on the window beside the front entrance door at one store and Appellee's Mark 2(3) was indicated on the wall of the other store. The appellee primarily used Appellee's Marks 1(1) to (9) and Appellee's Marks 3(1) to (6), while using Appellee's Marks 2(1) and (3) only secondarily. According to these facts, it should be determined that the appellee's sales of the Goods were derived exclusively from such factors as the degree of fame of the Kozosushi Chain, its advertisement and quality of its goods, and the capability to attract customers that existed in Appellee's Marks 1(1) to (9) and Appellee's Marks 3(1) to (6), whereas the use of Appellee's Marks 2(1) and (3) made no contribution to its sales, and therefore the appellant cannot be found to have sustained any damage to its sales of goods due to the appellee's use of Appellee's Marks 2(1) and (3), and it should also be held that the appellant has sustained no damage from losing profit that it would have been entitled to receive based on the Trademark Right.

3. Consequently, we can affirm the determination of the court of prior instance that dismissed the appellant's claim for damages under Article 38, paragraph (2) of the Trademark Act in this case.

III. The determination of the court of prior instance with regard to the points argued by the appeal counsel, including those mentioned above, can be affirmed as justifiable, and the judgment of prior instance does not involve such illegality as argued. The appeal counsel's arguments are nothing more than a criticism of the judgment of prior instance based on their own dogmatic view, and therefore cannot be accepted.

Concerning other reasons for final appeal argued by the appeal counsel, SERITA Sachiko

The fact-finding and determination of the court of prior instance with regard to the points argued by the appeal counsel can be affirmed as justifiable based on the evidence cited in the judgment of prior instance, and the determination process does not involve such illegality as argued. The appeal counsel's arguments are nothing more than a criticism of the admission of evidence or fact-finding by the court, which come under the exclusive jurisdiction of the court of prior instance, or a criticism of the judgment of prior instance based on erroneous understanding thereof, and therefore cannot be accepted.

Therefore, according to Articles 401, 95 and 89 of the Code of Civil Procedure, the judgment has been rendered in the form of the main text by the unanimous consent of the Justices.

Presiding judge

Justice KABE Tsuneo

Justice SONOBE Itsuo

Justice ONO Masao

Justice CHIKUSA Hideo

Justice OZAKI Yukinobu

(This translation is provisional and subject to revision.)