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

\+ FAO (COMM) 138/2021

M/S GULAB OIL AND FOOD (AHMEDABAD) PVT. LTD.

..... Appellant

Through Mr. Amit Sibal, Sr. Adv. with Mr. YJ Jasani, Mr. Pratik Jasani, Mr. Nikhil Goel and Mr. Aniruddha Deshmukh, Advocates

Versus

SMT. MADHU GUPTA ..... Respondent

Through Mr. Sanjeev Singh, Advocate.

% Date of Decision: 16th September, 2021

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MR. JUSTICE NAVIN CHAWLA

MANMOHAN, J. (Oral)

The hearing has been done by way of video conferencing.

CM APPL. 31712/2021

Exemption allowed, subject to all just exceptions.

Accordingly, application stands disposed of.

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FAO (COMM) 138/2021

Admit.

Issue notice. Mr. Sanjeev Singh, Advocate accepts notice on behalf of respondent. He prays for and is permitted to file a reply affidavit within eight weeks. Rejoinder affidavit, if any, be filed before the next date of hearing.

List before the Joint Registrar for completion of pleadings on 16th December, 2021. Upon completion of pleadings, the Joint Registrar is directed to list the matter in the final hearing list according to its seniority.

CM APPL. 31852/2021

1. Present appeal has been filed by the appellant challenging the order dated 30th March, 2021 passed by the learned District Judge, Commercial Court-5, Central District, Tis Hazari Courts, Delhi in CS Comm. No. 1724/2020 to the limited extent that it prohibits the Appellant/Defendant No.1 from trading and selling Namkeen products under the mark 'Gulab' and certain findings regarding the predecessor of the Appellant/Defendant No.1.

2. Learned senior counsel for the Appellant states that the getup, colour combination, style or pattern of writing alphabet as well as the picture of rose printed upon the packaging of the goods of the Appellant/Defendant No.1 and the Respondent/plaintiff No.1 are totally different. He further states that the documents for sale filed on record by the plaintiff are related to sale of other items and not of Namkeen. He submits that the Respondent stopped selling Namkeen

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in 2014. Though the Plaintiffs claimed sales of Namkeen by Plaintiff No. 2, however, by the impugned order, Plaintiff No. 2 has been found to be having no locus standi to maintain the suit and has now been deleted from the array of the parties. He submits that therefore, the respondent/plaintiff no. 1 cannot maintain the suit and is not entitled to any injunction.

3. We have perused the two marks in question and are prima facie of the view that they are similar if not identical. In any event, the products of the plaintiff are sold across the counter to consumers who ask for 'Gulab' products. The Trial Court in the impugned order has held as under:-

> *"…it is hereby held that ordinary intelligent person will certainly be confused even at first impression/look of the namkeen products of the defendant and he will think at first glance that the same belongs to the plaintiffs and accordingly defendant is liable to be injuncted for misuse of trade name 'Gulab' registered in favour of the plaintiffs since year 1944.*
>
> *…After considering the facts and circumstances of the present case, I am of the view that goodwill and reputation of the firm M/s. Shivnath Rai Sumerchand has so closely associated with the trademark 'Gulab' that ordinary purchaser just identify the products of the plaintiff by simply asking about the trademark and nothing else. The products of the plaintiff are recognized and purchased only by name of trademark 'Gulab' and after seeing the picture of rose flower on the packaging.*
>
> *...It is also revealed from the documents of the parties that M/s. Shivnath Rai Sumerchand firm now owned by the plaintiff no. 1 has started selling namkeen items since year 2000 with the trademark 'Gulab' whereas predecessor of*

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defendant company namely M/s. Pankaj Industries started selling namkeen items with same trademark 'Gulab' since year 2008 and thus plaintiff no. 1 is entitled to seek injunction against defendant on the basis of passing off also despite existence of big dissimilarity in packaging.

Firm M/s. Shivnath Rai Sumerchand got registered trademark 'Gulab' for its sweets item mainly Gajak and Rewari in the year 1944 under class-30, though it started selling namkeen items much later and on the basis of registered trademark also due to allied and cognate good, it is entitled to the interim protection..."

4. Moreover, the predecessor of the plaintiff has been found by the Trial Court to be the prior user and registered owner of the mark with regard to 'Gajjak' and 'Rewari'. Since 'namkeen' is an allied and cognate product, this Court is of the view that Section 29 of the Trade Marks Act, 1999 would also be *prima facie* attracted to the present case.

5. As far as alleged non-user of the mark by the plaintiff no. 1 is concerned, the learned Trial Court has held that the plaintiff no. 1, by permitting the plaintiff no. 2 (of whom she is one of the Director) to use the mark, does not cease to be owner thereof.

6. The Supreme Court in ***Wander Ltd and Anr. v. Antox India P. Ltd., 1990 (supp) SCC 727,*** has held that in the appeals before the Division Bench against the exercise of discretion by the Trial Court, the appellate court will not interfere with the exercise of such discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court

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had ignored the settled principle of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle.

7. In view of the aforesaid parameters, this Court finds no ground to interfere with the impugned order at the interim stage. Accordingly, the present application is dismissed.

8. The order be uploaded on the website forthwith. Copy of the order be also forwarded to the learned counsel through e-mail.

MANMOHAN, J

NAVIN CHAWLA, J

SEPTEMBER 16, 2021
AS

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