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* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ CS(COMM) 566/2022 & I.As. 13009-12/2022

GEMINI EDIBLES AND FATS INDIA LIMITED Plaintiff

Through: Ms. Shikha Sachdeva, Ms. Mugdha
Palsule & Ms. Shreya Das, Advocates
(M-7073569007)

versus

LV BHAVANI SANKAR Defendant

Through: None.

CORAM:
JUSTICE PRATHIBA M. SINGH

ORDER

% 22.08.2022

1. This hearing has been done through hybrid mode.

I.A. 13010/2022 (for exemption)

2. This is an application seeking exemption from filing original, translated and fair typed copies of the document. Exemption is allowed, subject to all just exceptions.

3. **I.A. 13010/2022** is disposed of.

I.A. 13011/2022 (u/S 12A)

4. This is an application seeking exemption from instituting pre-litigation mediation.

5. In view of the orders passed in **CS (COMM) 132/2022** titled **Upgrad Education v. Intellipaas Software**, the application is allowed.

6. **I.A. 13011/2022** is disposed of.



I.A. 13012/2022 (exemption from advance service to the Defendants)

7. In view of the fact that the Plaintiff has sought an *ex parte ad-interim* injunction along with the appointment of a Local Commissioner, exemption from advance service to the Defendant is granted.

8. ***I.A. 13012/2022*** is disposed of.

CS(COMM) 566/2022

9. Let the Plaint be registered as a suit.

10. Issue summons to the Defendant through all modes upon filing of Process Fee.

11. The summons to the Defendant shall indicate that a written statement to the Plaint shall be positively filed within 30 days from date of receipt of summons. Along with the written statement, the Defendant shall also file an affidavit of admission/denial of the documents of the Plaintiff, without which the written statement shall not be taken on record.

12. Liberty is given to the Plaintiff to file a replication within 15 days of the receipt of the written statement(s). Along with the replication, if any, filed by the Plaintiff, an affidavit of admission/denial of documents of the Defendant, be filed by the Plaintiff, without which the replication shall not be taken on record. If any of the parties wish to seek inspection of any documents, the same shall be sought and given within the timelines.

13. List before the Joint Registrar for marking of exhibits on 11th October, 2022. It is made clear that any party unjustifiably denying documents would be liable to be burdened with costs.

14. List before Court on 4th November, 2022.



I.A. 13009/2022 (u/O XXXIX Rules 1 & 2 CPC)

15. The Plaintiff - Gemini Edibles and Fats India Limited, has filed the present suit, seeking protection of its mark 'FREEDOM', registered under no.4318371, in Class 29, as also the packaging used by the Plaintiff, in respect of refined sunflower oil, against the Defendant. The Defendant is using the mark 'FREEDAY' in respect of the same product. The mark 'FREEDAY' has been registered by the Defendant, under application no.3830617, in Class 29.

16. The Plaintiff 's case is that, since 2008, it is engaged in the manufacture and sale of various Fast Moving Consumer Goods, including edible oils and fats, such as sunflower oil, mustard oil, groundnut oil, etc. The Plaintiff avers that it is a step-down subsidiary company of Golden Agri Resources Ltd, one of the world's largest fully integrated, seed to shelf, palm oil-based agribusiness. One of the products manufactured by the Plaintiff is the 'FREEDOM REFINED SUNFLOWER OIL' which was launched by the Plaintiff in 2009. The Plaintiff also has various other products with different marks.

17. The present suit relates to the product 'FREEDOM REFINED SUNFLOWER OIL'. The Defendant has started using the FREEDAY in an identical packaging for the same product. The competing labels of the Plaintiff and the Defendant are set out herein below:



Plaintiff's Product	Defendant's Product
FREEDOM	FREEDAY
	
	



18. Ms. Sachdeva, Id. Counsel appearing for the Plaintiff, points out that when the Plaintiff came across the Defendant's product, 'FREEDAY REFINED SUNFLOWER OIL', in 2019, a cease and desist notice was issued to the Defendant on 16th October, 2019. In its reply dated 11th November, 2019, the Defendant informed the Plaintiff that it is a registered trademark owner for the mark 'FREEDAY', bearing no. 3830617 in class 29, dated 11th May, 2018.

19. It is submitted that the Plaintiff had even initiated criminal proceedings in terms of a raid against the Defendant, which failed due to the fact that the Defendant had a registered trademark. Further, the Plaintiff got a test report conducted in respect of the Defendant's product not being up to standard. The test report dated 11th April, 2019, provided by M/s Vimta Labs, states that '*the submitted sample does not conform to the relevant provisions in food and safety standards*'.

20. Upon acquiring knowledge of the Defendant's registration, a cancellation petition **ORA/34/2020/TM/CHN** titled ***Gemini Edibles and Fats India Pvt. Ltd v. L. V. Bhavani Sankar & Anr.***, was filed by the Plaintiff before the Intellectual Property Appellate Board (*hereinafter* "IPAB") in March, 2020. Vide order dated 31st December, 2020, the mark 'FREEDAY', was cancelled by the IPAB.

21. It is further submitted by the Id. Counsel for the Plaintiff, that the Defendant's product is being sold in a clandestine manner in New Delhi. She relies upon the Investigator's report dated 5th May, 2022, and photographs of a shop in West Delhi, from the said report, where the Defendant's products are available. It is claimed that the said shop does not issue invoices upon sale.



22. A perusal of the record shows that the two labels belonging to the Plaintiff and the Defendant are almost identical and on a first look, the differences are not at all visible. The Defendant uses an identical white background on the packaging of the product, with a confusingly similar script, for the mark 'FREEDAY'. The mark FREEDAY is similar to the Plaintiff's mark FREEDOM. The label has certain colour combinations, including orange and yellow, as also expressions in red, such as "Vitamins A, D & E", etc., which are all imitated from the Plaintiff's packaging. The overall get up and layout arrangement of the packaging is imitative and likely to cause confusion.

23. Moreover, vide order dated 31st December 2020, the IPAB gave the following findings:

"61. The Respondent No.1 further contention is that the marks packaging cannot be compared as if it is done for the passing off action and it needs to be compared as it is Registered for the purpose of the present Rectification Application as follows:

<i>Applicant's Registered Mark</i>	<i>Respondent No.1's Registered Mark</i>
	



And thus when compared as above the marks are dissimilar and the Applicant cannot claim any confusion arising out of the same. The language used in Section 11 of the Trademarks Act, 1999, is 'Earlier Trademark' and not "Earlier Registered Trademark" and thus the argument of the Respondent No.1 that only registered marks need to compare cannot be sustained. Section 9 of the Trademark Act, 1999 also states that if the mark is unable to distinguished with the earlier marks it cannot be proceed to Registration. Thus the earlier mark is used by the Applicant can be compared with the mark obtained Registration by the Respondent No.1 for the purpose of ascertaining confusion and distinctiveness. "

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64. The Respondent No.1 has offered to change the labels from the current one and offered four choices for it to adopt and distinguish the label of the Applicant. This Board welcomes the Respondent No.1 for such proposal to defeat the confusion in the market. This in itself also establishes that the Respondent No..1 is admitting the similarities though the said statement has been made without prejudice to its defence.

65. In the case of Tata Tea Ltd v. Suruchi Tea Company and Anr., the Court while ordering the set aside of granting of the Registration expressly clarified that the order of this Court shall not be regarded as precluding the respondent from applying for the registration of an appropriate mark with the use of the words "SURUCHI TEA". While doing so, the respondent shall, however, not utilise any visual representation deceptively similar to the ornamental pattern based on the concentric curves which is associated with the registered trademark of the appellant or adopt any design similar to that is likely to deceive all to cause confusion.



66. In view of the above discussion, this Board is of the considered view that to maintain purity of the Register, the Registrar (Respondent No.2) should not allow any mark that is confusingly similar to be registered and hence the mark



under Application number 3830617 in class 29 is ordered to be removed from the Registry which is deceptively similar to the Applicant mark. However the word 'FREEDAY' cannot be restricted and the Respondent No.1 is given liberty to file fresh application/s with prior user of the proposed label marks and obtain Registration/s which are not deceptively similar to the Applicant mark and upon such application/s by the Respondent No.1, the Respondent No.2 is directed to dispose of the said application in accordance with law. Copy of this order is sent to the parties as well as respondent number two.

24. Considering that the Defendant's mark 'FREEDAY' of the Defendant has been cancelled by the aforementioned order, there cannot be any justification for using a deceptively similar mark. The packaging is also identical. This Court is especially concerned, as these are goods for human consumption. The test report shows that the product of the Defendant does not match the quality standards required by the relevant food and safety standards. The report provided by M/s Vimta Labs reads as under:

"The submitted sample does not conforms to relevant provisions in food safety and standards (Food Product Standard and Food Additives) regulation, 2011 with respect to the tested parameters as Refractive Index at 40⁰ & Iodine Value (WijisMethod), Saponification Value."



25. In view of the above facts and circumstances, the Plaintiff has made a *prima facie* case for grant of an *ex-parte ad interim* injunction. The balance of convenience lies in favour of the Plaintiff and irreparable injury would be caused if the interim injunction is not granted. Accordingly, till the next date of hearing, the Defendant, and all others acting for or on its behalf, stand restrained from using the mark 'FREEDAY', as also any identical or deceptively/confusingly similar mark or packaging, to that of the Plaintiff's 'FREEDOM' mark, in respect of any oils, or cognate and allied products.
26. Compliance of Order XXXIX Rule 3 CPC be done within one week of this order.
27. Reply to the application be filed within 4 weeks. Let rejoinder thereto, if any, be filed within four weeks, thereafter.
28. Accordingly, list before the Court on 4th November, 2022.

PRATHIBA M. SINGH, J

AUGUST 22, 2022
Rahul/SS