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

+ **CS(COMM) 706/2022**

DIVAY HYGIENE PRIVATE LIMITED

..... Plaintiff

Through: Mr. Junaid Alam, Mr. Nishant
Mahtta, Mr. S. Nithin, Ms. Ipshita
Katak and Ms. Twinkle Rai,
Advocates.

versus

KAMAL GARG & ANR.

..... Defendants

Through: None.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

ORDER

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14.05.2024

I.A. 6531/2024 (for summary judgment)

1. Despite being granted ample opportunities, the Defendants have failed to file a reply to the above-captioned application. Further, they have not appeared to contest the proceedings. As a result, their right to file a reply is hereby deemed forfeited. The application is heard *ex-parte*.

2. The Plaintiff, Divay Hygiene Private Ltd., is into the business of feminine hygiene care products. They are engaged in manufacturing, marketing and selling of sanitary napkins, paper napkins, babies' diapers and adult diapers, as included under Class 5 of the Trade Marks Act, 1999¹.

¹ "the Act"



Plaintiff adopted the word mark “AMMY” and logo “”² in the year 2016 and have been using the same continuously since then. Over the years, the Plaintiff expanded their brand portfolio and introduced many variants relating to the brand/ trade name “AMMY” such as, *inter alia*, “AMMY KOOL KIDS”, “AMMY ADULT DIAPERS”, “AMMY NATURAL BABY WIPES” and “AMMY ULTRA THIN”.

3. The Plaintiff has secured registrations in respect of their AMMY Trademarks, with some of their applications still being under process. The details of Plaintiff’s relevant trademark registrations are delineated at Paragraph No. 9 of the plaint. The Plaintiff has also secured registrations in other countries, i.e. UAE and Nepal, for their AMMY Trademarks. Plaintiff also has a registration³ for the copyright relating to the artistic work in the labels/ trade dress. Furthermore, the Plaintiff also claims protection of its trade dress as follows:



² “AMMY Trademarks”



4. Plaintiff's extensive, continuous and uninterrupted use of the AMMY Trademarks has resulted in accrual of substantial goodwill and reputation. They have invested significantly in advertising and promoting their goods under the AMMY Trademarks, which are solely associated with the Plaintiff. Plaintiff promotes the "AMMY" brand through their website www.ammycare.com and other social media platforms. Plaintiff's products are also listed on various third-party e-commerce platforms such as Amazon, Flipkart, Indiamart, etc. Consequently, the Plaintiff has generated significant sales and revenue from their goods under the AMMY Trademarks, details whereof are stated in Paragraph No. 24 of the plaint.

5. Plaintiff's grievance arises on account of the Defendants' adoption of



deceptively similar marks "ANNY MAXI"/ "Anny"⁴. Defendant No. 2 is the proprietor of 'GARG INDUSTRIES', which is the firm name mentioned on the infringing products bearing the Impugned Marks. Defendant No. 1 is the son of Defendant No. 2, and is also associated

³ Copyright Registration No. A-132298/2019

⁴ "Impugned Marks"



with the abovementioned firm. The Plaintiff alleges that the Impugned Mark “ANNY”, which is visually, phonetically and structurally similar to the Plaintiff’s earlier AMMY Trademarks, is being used for identical goods, thus amounting to infringement. Further, the Plaintiff also alleges that the



Defendants’ trade dress – “ ” – is identical/ deceptively similar to the Plaintiff’s trade dress. The possibility of confusion is further compounded by the Defendants’ use of their website ‘www.annymaxi.com’.

6. On discovering that Defendant No. 2 had filed a trademark application, bearing No. 5520255, for registration of the mark



“ ”, the Plaintiff filed an opposition petition. No counter statement was filed in response thereto, and accordingly, the status of the application is now deemed to be abandoned, as held by the Registrar of Trade Marks through order dated 26th October, 2023, under Section 21(2) of the Act.

7. The Plaintiff issued a Cease-and-Desist notice to the Defendants on 27th August, 2022, however, to no avail. Accordingly, the Plaintiff filed the present suit seeking protection of their intellectual property rights. On 13th October, 2022, while issuing summons, an *ex-parte ad-interim* injunction was granted in favour of the Plaintiff, restraining the Defendants from using the Impugned Marks and packaging, as well as any other similar mark amounting to infringement or passing off of the Plaintiff’s registered



trademarks and copyright. A Local Commissioner was also appointed to visit the Defendants' premises to ascertain the nature of infringing activities. The Local Commissioner has filed his report and in terms thereof, he has stated as under:

- “6. That the following items containing the infringing trademark were found at the premises:-
- (i) 480 cardboard boxes
 - (ii) Carrybags – 1000
 - (iii) Bags containing sanitary pads – 4
 - (iv) Total sanitary pads – 790
 - (v) Pouches of sanitary pads – 300
 - (vi) Cartons containing sanitary Pads – 4
7. That the above items were sealed under the signatures of undersigned.
8. That from the premises we were told about another premises which was approx. 2 kms from the main premises. The undersigned searched the second premises at around 4.30 PM and found a few carry bags and packets of sanitary pads containing the infringing mark. The said items were sealed under the signatures of the undersigned and kept in the custody of Defendant No. 1.”

8. The parties were referred to the Delhi High Court Mediation and Conciliation Centre to attempt to resolve their disputes amicably, however, such efforts were unsuccessful. Accordingly, the Defendants filed their respective written statements, wherein they have stated as under:

- “2. That as soon as the Defendants became aware of the order dated 13.10.2022 passed in the present matter, the Defendants have stopped the use of the subject trade mark. It is submitted that as of fourth week of October, 2022 Defendants have stopped manufacturing, marketing, offering for sale, advertising or promoting sanitary napkins/pads



under the subject trade mark and the packaging



. The Defendants have no intention of using or



continuing with use of the trade mark in future or the



packaging

3. That during the pendency of suit, the Defendants have adopted a new trade mark ASHA CHOICE and a new label/packaging



for its goods being sanitary napkins/pads(hereinafter referred to as 'ASHA trade mark/labels/packaging). The ASHA trade mark/label/packaging of the Defendants are totally different and distinct from the Plaintiff's trade mark AMMY/



and label/packaging and do not violate any of the trade mark or copyrights of the Plaintiff herein."



9. Upon a statement made by the counsel for Defendants on 11th January, 2024, confirming that they have ceased use of the Impugned Marks and have no intention of using the same henceforth, the *ad-interim* injunction granted *vide* order dated 13th October, 2022 was confirmed and made absolute. There is no reply to the instant application or appearance on behalf of the Defendants. In the aforementioned circumstances, the Court has proceeded to adjudicate the present matter summarily against the Defendants under Order VIII Rule 10 and Order XIII-A Rule 3 of the Code of Civil



Procedure, 1908 (CPC), as applicable to commercial disputes, read with Rule 27 of the Delhi High Court Intellectual Property Division Rules, 2022. The Local Commissioner's report is also read in evidence in terms of Order XXVI Rule 10(2) of CPC⁵ and no *ex-parte* oral evidence is required to be led⁶.

10. In their separate written statements, the Defendants have contended



that their Impugned Marks “ANNY MAXI” and “” are not similar to Plaintiff's registered mark. However, the Court is unable to agree to such a defence. For the sake of ready reference, a side-by-side comparison of the competing marks is set out hereunder:

Plaintiff's Trademarks/Earlier trademarks	Impugned mark
<u>Trademark</u> AMMY	<u>Impugned Mark</u> ANNY
<u>Stylization & Font</u> 	<u>Stylization & Font</u> 

⁵ *ML Brother LLP v. Maheshkumar Bhuralal Tanna*, 2022 SCC OnLine Del 1452

⁶ *Disney Enterprises Inc. and Anr. v. Balraj Muttneja and Ors.*, 2014 SCC OnLine Del 781 and *Cross Fit LLC v. RTB Gym and Fitness Centre*, 2022 SCC OnLine Del 2788.



11. The Plaintiff has adopted the mark “AMMY” in connection with sanitary napkins. The term “AMMY”, while not found in standard dictionaries, can be recognized as a common personal name. However, within the context of sanitary products, “AMMY” bears no inherent or direct connection, rendering it an arbitrary mark in this category. This disassociation between the term and the product enhances the strength of the mark, affording it a higher level of protection under trademark law. Further, the above comparative tabulation reveals that the Defendants’ Impugned Marks are deceptively similar to the Plaintiff’s AMMY Trademarks. It is unequivocally clear that the terms “AMMY” and “ANNY,” both in their essence and their stylized presentation, are strikingly similar. The minimal alteration from ‘MM’ to ‘NN’ fails to establish a distinct identity between the Impugned Mark and the Plaintiff’s registered mark. Such a subtle change, merely swapping two adjacent letters, is far from sufficient to meet the legal standards for trademark distinctiveness. Although the Defendants’ mark adds the word “MAXI” as well, such use is merely descriptive of the size of the product being sold, and also finds reference in the Plaintiff’s packaging. Thus, such an addition would also not distinguish the Impugned



Mark from that of the Plaintiff. It is also evident that the Defendants employ a similar colour combination and writing style to the Plaintiff's AMMY Trademarks, resulting in the overall packaging of the Defendants' goods closely resembling the Plaintiff's trade dress. Thus, there is no real prospect of the Defendants succeeding in their defence of dissimilarity.

12. The Plaintiff has, through the documents placed on record, established their rights over the AMMY Trademarks, with user claim since the year 2016. On the other hand, the Defendants applied for registration of their Impugned Mark on a proposed to be used basis in July, 2022. Thus, the Defendants' adoption is evidently subsequent to the Plaintiff. It is further noticed that the Defendants have not furnished any reasons for their adoption of the Impugned Mark "ANNY". In absence of any justification, their adoption is clearly in bad faith and dishonest. Moreover, the Defendants' mark is being used for identical goods as that of the Plaintiff. In such circumstances, the Defendants' use of the Impugned Marks has a high potential for creating confusion and deception in the market, as consumers are likely to purchase the Defendants' goods under the false impression that the same are originating from/ associated with the Plaintiff. Thus, the Plaintiff has successfully proved their case for a permanent injunction. Besides, the Defendants have unequivocally confirmed that they have stopped using the Impugned Marks and adopted a new one, which indicates that the Defendants have no any material defence to contest the present suit.

13. The Local Commissioner's visit to the Defendants' premises has revealed significant findings. The inspection report details the discovery of 480 cardboard boxes, 1000 carry bags, 4 bags and 300 pouches containing sanitary pads, and a total of 790 sanitary pads across 4 cartons—all marked



with the infringing trademark “ANNY”. This evidence proves Defendants’ engagement in infringing activities, utilizing a mark confusingly similar to the Plaintiff’s registered trademark. The Defendants’ defence not only lacks plausibility but their absence from the present proceedings also undermines the integrity of the judicial process and manifests a clear evasion of accountability. It is thus both necessary and appropriate for the Court to impose damages. While the actual damages resulting from the infringement might be difficult to quantify precisely, the imposition of nominal damages is justified to acknowledge the infringement and deter future violations. Accordingly, the Court awards nominal damages of INR 3 lakhs against the Defendants.

14. In light of the above, the following directions are issued:

14.1. The suit is decreed in favour of the Plaintiff and against the Defendants in terms of prayers sought at Paragraphs No. 57(a) and (b) of the plaint.

14.2. The Defendants are directed to handover the goods seized by the Local Commissioner, which are lying on *superdari* with the Defendants, to the Plaintiff, who are then permitted to destroy the same, at their own risk and cost, in accordance with law.

14.3. As regards the relief of damages, considering the report of Local Commissioner, an amount of INR 3 lakhs is awarded towards nominal damages to the Plaintiff, recoverable jointly and severally from the Defendants. Further, the Plaintiff shall be entitled to the legal cost of INR 5,06,000/-, inclusive of:

(a) Court fees: INR 2,06,000/-

(b) Local Commissioner Fees: INR 1,50,000/-



- (c) Legal Fees: INR 1,50,000/-
15. Decree sheet be drawn up.
16. With the above directions, the suit, along with pending applications, is disposed of.

SANJEEV NARULA, J

MAY 14, 2024

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