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

Date of Decision: November 02, 2016

+ **FAO 61/2015 & C.M.No.3555/2015**

NIKITASHA HOME APPLIANCES PVT LTD. Appellant

Through: Mr. M.K. Miglani and
Mr. Jithi M. George, Advocates

Versus

PRADEEP KAPAHI Respondent

Through: Mr. Mohan Vidhan, Mr. Rahul
Vidhani and Ms. Gita, Advocates

CORAM:

HON'BLE MR. JUSTICE SUNIL GAUR

JUDGMENT
(ORAL)

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Impugned order of 13th November, 2014 decides three applications pertaining to the trademark 'Niki Tasha'. The first two applications related to modification of the order of 13th October, 2011 whereby appellant was permitted to use the said trademark for goods falling under Class 11 of the Trade Marks Act, 1999 whereas respondent was permitted to sell the goods under Class 7 under the same trademark. It is common case of the parties that the need to seek revocation of the order of 13th October, 2011 arose because the trademark for the above said two classes

held by the parties was cancelled by the *Intellectual Property Appellate Board* vide order of 28th May, 2014. It is not in dispute that the afore-referred two applications were rightly decided by trial court vide impugned order. However, the third application for interim injunction filed by respondent herein stands allowed vide impugned order by observing as under: -

“Hence, conclusions are drawn that plaintiff has documentary record of cash memos/ bills showing mark NIKI TASHA for home appliances sold from the period 2007 onwards and plaintiff has been in trading of home appliances, even in the year 2005 appearing from bills etc. filed on judicial file. Whereas, the defendant M/s. Niki Tasha Home Appliances Pvt. Ltd. has not placed on record any bills or other documentary record showing that it has been using the mark from 1998 or prior to 2007 through its predecessor in interest or associated firms.”

The challenge to the impugned order qua the grant of interim injunction pertains to mark ‘Niki Tasha’ in favour of respondent-plaintiff is on the ground that the application for interim injunction filed in September, 2014 was not maintainable as in the first round of litigation, respondent herein was permitted vide order of 30th November, 2011 to seek variation/modification of trial court’s order of 13th October, 2014 in the event of respondent obtaining necessary certificate under the Trademark Act qua the trademark ‘Niki Tasha’ for class 11 from Registrar, Trademark. It is matter of record that respondent had obtained the registration for the trademark ‘Niki Tasha’ in January, 2012, but the

said registration was withdrawn on 28th May, 2014 on the appeal filed by appellant herein.

Impugned order notes that appellant herein had sought vacation of order of the 13th October, 2011 due to changed circumstances and so, fresh application for vacation of interim injunction has been heard afresh.

The challenge to the impugned order by learned counsel for appellant is primarily on the ground that respondent's fresh application for interim injunction was not maintainable as in the first round of litigation, the relief was confined to infringement action alone. Learned counsel for appellant submits that appellant is the prior user of the trademark '*Niki Tasha*' as predecessor of appellant was importing home and kitchen appliances under the aforesaid trademark much prior to the year 2007. Attention of this Court is drawn to a show-cause notice of 20th April, 2009 issued by the *Directorate of Revenue Intelligence (hereinafter referred to as DRI)* to point out that the goods as referred to in paragraph No.8 of the said show-cause notice were the home appliances imported way back in September, 2006 and as per paragraph No.13.1 of the aforesaid show-cause notice, the home appliances imported were of the different brands including '*Niki Tasa*'. Lastly, it is submitted by learned counsel for appellant that respondent used to purchase home appliances from appellant since the year 2006 and so, grant of injunction to restrain appellant from using the trademark '*Niki Tasha*' is wholly unjustified.

Learned counsel for respondent supports the impugned order and submits that though respondent has been purchasing home appliances from appellant, but the same were non-branded and the said purchases

were from December, 2006 and not earlier whereas respondent-plaintiff was using the mark '*Niki Tasha*' from the year 2002. It is pointed out that the reference to the show-cause notice does not advance the case of appellant because the reference in paragraph No.8.1 pertains to M/s. Equity Appliances and not to respondent and even paragraph No.13.1 of the show-cause notice does not relate to respondent. Respondent's counsel also submits that respondent had applied to the Registrar, Trademark for the registration of the trademark '*Niki Tasha*' in classes 7 and 11 way back in January, 2006 and so, there is no substance in this appeal.

Upon hearing and on perusal of impugned order and the material on record, I find that in the first round of litigation, a Coordinate Bench of this Court in its order of 30th November, 2011 had nowhere confined the parties to the infringement action alone. The said order was not on merits, as it had given liberty to respondent herein to seek variation/modification of the order of 13th October, 2011 upon restoration of the trade mark in question. Pertinently, it is the case of appellant also that there was change of circumstances and that is how the two applications filed by both the sides were allowed by the trial court vide impugned order, to which there is no challenge by either side. When fresh application for interim injunction was filed by respondent, neither side had registration of the trade mark '*Niki Tasha*'. In such a situation, trial court has rightly confined the application for interim injunction to the passing of action. The basis of granting interim injunction in favour of respondent-plaintiff is that respondent-plaintiff was found to be using the

mark '*Niki Tasha*' for home appliances since the year 2007 whereas appellant-defendant had failed to show that it was prior user of the aforesaid trade mark in question.

Although attention of this Court was drawn by appellant's counsel to Show Cause Notice of 20th April, 2009 issued by DRI but it is of no assistance for the reason that neither in paragraph No.8 nor in paragraph No.13.1 there was any reference to the respondent-plaintiff qua the brand '*Niki Tasha*'.

During the course of hearing, it was pointedly put to appellant's counsel to show any document evidencing use of the mark in question by appellant prior to the year 2007 but nothing substantial could be shown by appellant's counsel to indicate prior use of the trademark in question by appellant. In such a situation, this Court finds no hesitation in observing that impugned order suffers from no illegality or infirmity.

Consequently, this appeal and the application for stay are dismissed being without merits. However, it is made clear that any observation made in this judgment or trial court's order shall have no bearing on merits at trial.

(SUNIL GAUR)
JUDGE

NOVEMBER 02, 2016
s/r