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

\+ FAO(OS) (COMM) 8/2022 & CM APPLs. 2992-2993/20-22

M/S TOASHA AGENCIES AND ANR ..... Appellants
Through: Mr. Kapil Sankhla, Advocate with Ms. Meghna Sankhla, Advocate.

versus

SIDDHANT CHOUDHARY AND ANR ..... Respondents
Through: None.

% Date of Decision: 17th January, 2022

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

JUDGMENT

MANMOHAN, J. (Oral)

Matter has been heard by way of video conferencing.

1. Present appeal has been filed challenging the order dated 10th November, 2021 passed by this Court in IA. No. 9425/2021 in CS (COMM) No. 1441/2016.

2. Learned counsel for the appellants states that the learned Single Judge has erroneously and without properly appreciating the facts of the case dismissed the application filed under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure, 1908 restraining respondents no.1 and 2 from using the trade name TOASHA till the disposal of the suit or creating any third party right or interest to use the trade name TOAHSA. He states that

the learned Single Judge failed to appreciate that the appellants admittedly were prior user of the said Trademark and had been erroneously swayed by the order dated 25th November, 2019 which had set aside the injunction against respondent No.1.

3. Learned counsel for the appellants states that the learned Single Judge did not appreciate the fact that the order dated 25th November, 2019 setting aside the injunction in favour of the appellants and against respondent No.1, was pre-dominantly on the ground that the stock lying with respondent No.1 was perishable in nature. He states that the learned Single Judge erred in not considering the subsequent conduct of respondent No.1 of creating third party interest by opening a separate outlet with his wife during the pendency of the suit, thus enlarging the scope of the suit.

4. A perusal of the paper book reveals that the learned Predecessor Division Bench had held that the plaintiffs/appellants are yet to establish their right over the trade name TOASHA. The learned Predecessor Division Bench further held that the facts constituted prima facie case in favour of the original defendants/respondents. The relevant portion of the order dated 25th November, 2019 passed by the earlier Division Bench is reproduced hereinbelow:-

> *"2. Having heard the counsel for both the sides and looking to the facts and circumstances of the case, it appears that CS(COMM) 1441/2016 is pending before the learned Single Judge and hence, we are not going into the fine niceties of the facts. Too much dissection of the facts is not required at this stage otherwise the observations of this Court may affect the outcome of the suit. For disposal of the present appeal, suffice it is to say:-*

(a) The appellant (original defendant) has got registered trade mark 'TOASHA'.

(b) The said registration was given by the competent authorities in favour of the defendant on 29.06.2011.

(c) The respondent (original plaintiff) has already preferred an application for rectification under Section 47 to be read with Section 57 of the Trade Marks Act, 1999 further read with Rule 92 of the Trade Mark Rules, 2017 and the same is pending before the concerned authorities since June, 2016.

(d) <u>Thus, it appears that there is a registered trade mark namely 'TOASHA' in favour of this appellant (original defendant) and rectification preferred by the respondent (original plaintiff) is pending before the Registrar of Trade Marks, as stated hereinabove. These facts constitute a prima facie case in favour of this appellant (original defendant)</u>.

3. Looking at para 3 of CM No.45408/2019 preferred in this appeal, it appears that the present appellant (original defendant) has purchased vaccines worth ₹1,25,00,000/- from the manufacturer. Since this stock of vaccines is a perishable item, as submitted by the counsel for the appellant, they are bound to be sold out as early as possible, else an irreparable loss will be caused to this appellant if the stay as prayed for is not granted. Moreover, <u>balance of convenience</u> is also found to be in favour of this appellant. We, therefore, stay operation, implementation and execution of the order dated 24th July, 2019 passed by the learned Single Judge in IA No.13185/2016 in CS(COMM) 1441/2016 which is at Annexure A-1 to the memo of this FAO.

4. It is pertinent to mention that the aforesaid aspects of the matter have not been properly appreciated by the learned Single Judge while granting stay in favour of the plaintiff in IA No.13185/2016 vide judgment and order dated 24th July, 2019. <u>Since all the three ingredients for giving stay for grant of injunction are in favour of the defendant, we hereby quash and set aside the order passed in IA No.13185/2016 in CS(COMM) 1441/2016.</u> As the suit is already fixed for further hearing on

16th March, 2019, the parties are at liberty to mention before the learned Single Judge for preponing the date of hearing."

(emphasis supplied)

5. Consequently, the present appeal and applications, being bereft of merits, are dismissed.

MANMOHAN, J

NAVIN CHAWLA, J

JANUARY 17, 2022

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