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

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Date of Decision: 18th October, 2022

+ C.A.(COMM.IPD-TM) 105/2022

MIKKO VAULT LLC

..... Appellant

Through: Mr. Abhishek Saket and Ms. Sanna Harta, Advocates.

versus

REGISTRAR OF TRADE MARKS

..... Respondent

Through: Mr. Alexander Mathai Paikaday,
Advocate for Mr. Harish Vaidyanathan Shankar,
Central Government Standing Counsel.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J. (ORAL)

1. Present appeal has been filed by the Appellant under Section 91 of the Trade Marks Act, 1999 (hereinafter referred to as the 'Act') seeking setting aside of the impugned order dated 31.07.2018 passed by the learned Senior Examiner of Trade Marks in application No. 2628985, refusing to accept and advertise the trademark 'SENSE FLO' for goods in Class 10, as well as for a direction to accept and advertise the same.
2. Appellant had filed an application for registration of the trademark 'SENSE FLO' on 18.11.2013 and on 11.02.2015, the Examination Report was issued with the following objections:-

“The trade marks-which are devoid of any distinctive character, that is to say, not capable of distinguishing the goods or services of one person from those of another person; which consist exclusively of marks or indications which may serve in trade to designate the kind, quality, quantity, intended purpose, values, geographical origin or the time of production of the goods or rendering of the service or other characteristics of the goods or service;

The Trade Mark application is open to objection on relative grounds of refusal under Section 11 of the Act because the same/similar trade mark(s) is/are already on record of the register for the same or similar goods/services. The detail of same/similar trade marks is enclosed herewith Save as provided in Sec. 12, a trade mark shall not be registered if because of-its identity with an earlier trade mark and similarity of goods or services covered by; the trade mark; or its similarity to an earlier trade mark and the identity or similarity of the goods or services covered by the trade mark,”

3. On receiving the Examination Report, Appellant responded to the objections on 21.04.2015, stating that the mark ‘SENSE FLO’ was unique and had become distinctive on account of Appellant’s reputation, global presence and user of the mark and also sought to differentiate ‘SENSE FLO’ from other allegedly conflicting trademarks.

4. Show-cause notice dated 16.05.2018 was issued by the Trade Marks Office informing the Appellant of the hearing scheduled on 27.06.2018. It is the case of the Appellant that despite the notice period being short, the Authorized Agent of the Appellant appeared before the Respondent and made submissions regarding the distinctiveness, uniqueness, exclusivity, reputation and goodwill of Appellant’s trademark ‘SENSE FLO’. However, despite detailed submissions, learned Senior Examiner, *vide* the impugned order, wrongly recorded the absence of the Authorized Agent of

the Appellant and also rejected the application on merits on the following grounds:-

“NONE APPEARED, OPPORTUNITY GIVEN AND NO REQUEST FOR ADJOURNMENT FILED AND REPLY IS ALSO NOT SATISFACTORY TO EXAMINATION REPORT, MARK IS NOT DISTINCTIVE BUT DESCRIPTIVE IN NATURE OF OBJ. U/S 9 SUSTAIN, MOREOVER IT IS PROPOSED TO BE USED SO BENEFIT OF PROVISIO OF SEC.9 IS NOT PROVIDED, HENCE REFUSED.

**9 – Absolute grounds for refusal of registration.*

**9(1)(a) – The trade mark is devoid of any distinctive character, that is to say, not capable of Distinguishing the goods or services of one person from those of another person:*

**9(1)(b) – The Trade Mark consist exclusively of marks or indications which serve in trade to designate the kind, quality, quantity, intended purpose, values, geographical origin or the time of production of the goods or rendering of the service or other characteristics of the goods and services.*

**11(1)(a) – Relative grounds for refusal of registration.- The said trade Mark is refused for registration because of its identity with an earlier trade mark and similarity of goods or services covered by the trade mark;...”*

5. Learned counsel appearing on behalf of the Appellant submits that the application was rejected by the learned Senior Examiner of Trade Marks erroneously under Sections 9 and 11 of the Act. As far as objection under Section 9 of the Act is concerned, it is urged that Proviso to Section 9(1) of the Act clearly stipulates that a trademark shall not be refused registration, if before the date of application for registration it has acquired distinctiveness as a result of use. The order overlooks the fact that Appellant’s mark has acquired distinctiveness as a result of its use. The brand SENSE FLO has a team of professionals committed to designing, testing and evaluating the

products and maintaining high quality and standards. Appellant's Company under the brand 'SENSE FLO' began with an incredible goal in mind to produce the highest quality of baby and infant care products for ultimate satisfaction of the consumers, with a unique patented nipple technology enabling babies to breathe in a natural rhythm while feeding, akin to breast feeding. The trademark 'SENSE FLO', according to the Appellant, strives to exceed customer expectations by optimizing process, use of technology, infrastructure, etc. and Appellant has emerged as one of the most reliable suppliers, meeting the needs of the customers in a broad way.

6. The trademark 'SENSE FLO' has registrations across jurisdictions internationally, such as in USA, Jamaica, Mexico, Australia, etc. and has established global presence, loyal patronage and transborder reputation.

7. Appellant has internet presence through www.bebekbabyproducts.com as also social media presence with huge followers on various social media platforms, such as, Facebook, Twitter, etc. Appellant has incurred huge costs on advertisements and promotional campaigns and within a short span of time, the sales turnover of the Company has reached 2,600,000,00 USD. Appellant has also participated in various global events and as a result of its long extensive use, the trademark 'SENSE FLO' has come to be associated exclusively with the Appellant to the exclusion of others. Therefore, the incessant use of the mark SENSE FLO and its popularity makes the mark distinctive. Impugned order is also erroneous since Appellant is not claiming exclusivity over the words 'SENSE' or 'FLO', which when taken separately, may have dictionary meanings, but is claiming registration of the trademark SENSE FLO as a

whole and when applied to the goods in question, the mark is arbitrary and entitled to registration. Thus, the conclusion drawn by the Senior Examiner that the mark SENSE FLO is descriptive for goods falling under class 10 is also incorrect and cannot be sustained.

8. This Court does not subscribe to the argument of the Appellant that the impugned order wrongly records the absence of the authorized representative of the Appellant, though he had appeared and made submissions. In the absence of any material on record to substantiate the stand, there is no reason to disbelieve the official record. However, there is *prima facie* merit in the contention of the Appellant that the trademark SENSE FLO was required to be seen as a whole and not dissected into its components for the purpose of its registration as also the contention that the Senior Examiner ought to have considered the extensive, long and continuous user of the trademark which has acquired distinctiveness and transborder reputation. The impugned order reflects that despite all these points being raised by the Appellant in the reply to the Examination Report, none of them have been considered and no reason has been given for their non-consideration and/or if considered, the reason for their rejection.

9. Insofar as rejection on grounds under Section 11(1)(a) of the Act is concerned, learned counsel for the Appellant assails the order contending that the cited conflicting marks 'SENSE AND SIMPLICITY', 'SENSE4BABY' and 'Sense+' are neither identical nor deceptively similar to the mark 'SENSE FLO' and even the goods for which the cited marks are registered are dissimilar to the goods of the Appellant, in respect of which registration is sought.

10. Perusal of the reply to the Examination Report shows that the

Appellant had in response to the objection stated that SENSE FLO is a coined word and different from the cited marks visually, phonetically and structurally. Seen as a whole, 'SENSE FLO' is arbitrary to the goods in question. As a whole, SENSE FLO is distinctive and merely because the word 'Sense' is a generic term, the mark as a whole cannot be rejected. It was also brought out that the goods and services offered by the Appellant are completely different. The target audience comprising of discerning and niche consumers are well-aware of the goods which the Appellant is offering, which are '*FEEDING BOTTLE VALVES, BABY BOTTLE NIPPLES OR TEATS, BABY BOTTLE SPOUT, BABY BOTTLES, CUPS ADAPTED FOR FEEDING BABIES AND CHILDREN*'. Technical details of the difference in the specialized products under 'SENSE FLO' were also brought forth in the reply.

11. This Court finds merit in the submissions that none of the points urged by the Appellant in response to the Examination Report have been considered while passing the impugned order, especially the point that goods and services of the Appellant are allegedly different from the ones under the cited and registered marks.

12. For all the aforesaid reasons, the impugned order dated 31.07.2018 is set aside and the matter is remanded back to the Senior Examiner of Trade Marks for consideration, afresh. The examination shall be conducted in accordance with law within a period of 2 months from today, considering that the application dates back to the year 2013. Needless to state that if the Senior Examiner is satisfied with the reply and the grounds urged by the Appellant and finds no legal infirmity, the application shall proceed for advertisement.

13. It is made clear that this Court has not expressed any opinion on the merits and it is open to the Respondent to take a decision on acceptance and consequent advertisement of the trademark 'SENSE FLO' in the Trade Marks Journal, in accordance with law and the provisions of the Act, as well as taking into account the cited allegedly conflicting trademarks.

14. Appeal is allowed and disposed of, in the aforesaid terms.

JYOTI SINGH, J

OCTOBER 18, 2022/rk

