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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 18th May, 2022
+ **CS(COMM) 702/2021 & I.A. 17434/2021**
M/S BLUE HEAVEN COSMETICS PVT LTD Plaintiff
Through: Mr. Rishabh Srivastava & Ms.
Radhika Arora, Advocates (M-
9737708356)

versus

SHIVANI COSMETICS THROUGH ITS PARTNERS VINOD
MONGA NISHANT MONGA Defendant
Through: None.

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J.(Oral)

1. This hearing has been done through hybrid mode.
2. The present suit has been filed by the Plaintiff seeking permanent injunction restraining infringement of registered trademark, trade dress, copyright, writing style, colour combination, label, packaging, passing off goods, delivery up, rendition of accounts of profits along with further damages.
3. The Plaintiff – M/s. Blue Heaven Cosmetics Pvt. Ltd. is engaged in the business of manufacturing and sale of cosmetics and other allied goods. It is the case of the Plaintiff that the Defendant has infringed the rights of the Plaintiff in the registered marks “BLUE HEAVEN”/



and “BLUE HEAVEN GET BOLD” (word as well as formative marks). The Plaintiff adopted the mark “BLUE HEAVEN” in the year 1972 and has been continuously carrying out trade under the said mark. The Plaintiff further adopted the distinctive mark “BLUE HEAVEN GET BOLD” (word/formative marks) in the year 2020.

4. An *ex parte ad interim* injunction was granted, restraining the Defendant, vide order dated 23rd December, 2021 in the following terms:

“20. In the opinion of the court, upon an evaluation of the Plaintiff’s trademark / label / product with the Defendant’s product is it prima facie evident that the Defendant copied not only the trademark but also the trade dress / copyright / writing style / colour combination / label / packaging / overall get up of the Plaintiff’s mark. The balance of convenience also lies in its favour, and irreparable loss is likely be caused in case an injunction is not granted.

21. Accordingly, till the next date of hearing, Defendants, their directors, successors, franchisees, licensees, distributors, representatives, assignees, agents and all others in active concert / participation with them or on their behalf are restrained from using the trade dress / copyright / writing style/ colour

combination/label/packaging/ overall getup “

” &



or in any other manner whereby directly or indirectly infringing the Plaintiff's/Applicant's registered trade dress/ colour combination/ writing style/ packaging/ label/copyright



Blue
Heaven

and



(word as well as formative marks) or passing off its goods as that of the Plaintiff/Applicant for the goods Eyeliner and other allied and cognate goods and services related thereto in Classes 03 & 35.

22. Let the provisions under Order XXXIX Rule 3 be complied with within a period of one week from today.

23. Counsel for the Plaintiff very fairly states that it has no objection with the Defendant/Respondent's use of its own mark. Accordingly, it is clarified that the Defendants are free to use the mark "CANDY/



24. List before the Joint Registrar for completion of pleadings on 11th April, 2022.

25. List before the Roster Bench on 18th May, 2022.

5. None appears for the Defendant, despite repeated service being effected. A perusal of the affidavits of service dated 15th February, 2022 and placed on record by the Id. Counsel for the Plaintiff shows that the notice and summons have been served upon the Defendant repeatedly through speed post. Service has also been effected upon the Defendant through email.



6. Ld. Counsel for the Plaintiff further submits that, in fact, the Plaintiff has received a letter from the Defendant - M/s. Shivani Cosmetics, wherein the Defendant has stated as under:

*“I/we must confess we were unaware of your copyright, and we appreciate you brought the matter to our attention. **In this respect, we are willing to inform you that we are making an offer to stop this box immediately. We will make sure to remove all the boxes and material of this respective product.***

It was sheer case of ignorance. In future if you find any product in this design by our firm. We should be liable for such guilty.”

The letter which has been received by the Plaintiff from the Defendant appears to have the signatures of one Mr. Vinod Monga who is the partner of the Defendant – M/s. Shivani Cosmetics.

7. Ld. Counsel for the Plaintiff also submits that the address of the Defendant which has been mentioned in the memo of parties is the same as the address where the Defendant is presently residing and the said address appears on the Defendant’s products as well.

8. Considering the above facts, this Court is convinced that service has been effected upon the Defendant.

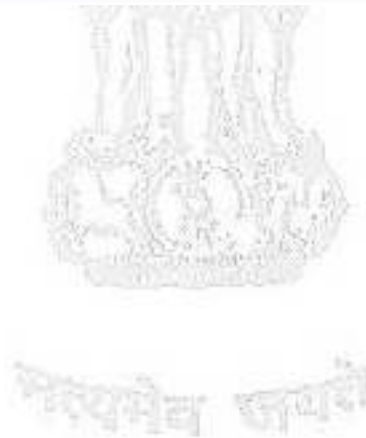
9. This Court has also perused the competing products of the Plaintiff and the Defendant which have been handed over to the Court. A perusal of the same shows that the Defendant’s products have a packaging that is virtually identical to that of the Plaintiff. The Plaintiff is the manufacturer and seller of ‘Blue Heaven Cosmetics’, including ‘Blue Heaven Get Bold Eyeliner Waterproof 7 ml’. The Defendant has copied the various elements



including the letter styling, colour scheme, the placement of the various features, the colour combination of the packaging, etc. The Defendant also used various devices and descriptive material on its product which is identical to that of the Plaintiff.

10. A representation of the packaging and trade dress of the products of the Plaintiff and the Defendant is set out below:

<u>PLAINTIFF's</u> <u>TRADEMARK/PRODUCT/</u> <u>PACKAGING/LABEL</u>	<u>DEFENDANT's</u> <u>TRADEMARK/PRODUCT</u> <u>/PACKAGING/LABEL</u>
	





11. Upon a perusal of the physical products, this Court is convinced that the Defendant's product is nothing but a counterfeit of the Plaintiff's product, though the mark 'CANDY' is being used in place of the Plaintiff's mark 'BLUE HEAVEN'. However, in the opinion of this Court, the same is not sufficient to distinguish the Defendant's product from the Plaintiff's product. Considering that these are eyeliners and are used by the consumers on their eyes, the standard of quality that is expected in this regard is quite high, and counterfeits/ knock-offs cannot be encouraged.



12. At this stage, Id. Counsel for the Plaintiff further submits that the Defendant's products do not appear to be approved by the Drugs Controller General of India, as no manufacturing dates have been mentioned on the packaging of the Defendant's products. In view of the foregoing facts, this Court agrees with the Id. Counsel for the Plaintiff that the Defendant's product is liable to be permanently enjoined from being manufactured and sold.

13. Accordingly, since the Defendant has chosen not to enter appearance despite repeated service, as also, no written statement has been filed on behalf of the Defendant, following the rationale of the judgment of the Id. Single Judge of this Court in ***Disney Enterprises Inc. & Anr. v. Balraj Muttneja & Ors.*** [CS (OS) 3466/2012 decided on 20th February, 2014], this Court is of the opinion that no *ex parte* evidence needs to be adduced in this matter. The same has been reiterated by the Court in ***S. Oliver Bernd Freier GMBH & CO. KG v. Jaikara Apparels and Ors.*** [210 (2014) DLT 381], as also, in ***United Coffee House v. Raghav Kalra and Ors.*** [2013 (55) PTC 414 (Del)]. The relevant observations from the judgment in ***Disney Enterprises Inc. (supra)***, are as under:

“3. Though the defendants entered appearance through their counsel on 01.02.2013 but remained unrepresented thereafter and failed to file a written statement as well. The defendants were thus directed to be proceeded ex-parte vide order dated 04.10.2013 and the plaintiffs permitted to file affidavits by way of ex parte evidence.

*4. The plaintiffs, despite having been granted sufficient time and several opportunities, have failed to get their affidavits for leading ex-parte evidence on record. **However, it is not deemed***



expedient to further await the same and allow this matter to languish, for the reason that I have in Indian Performing Rights Society Ltd. Vs. Gauhati Town Club MANU/DE/0582/2013 held that where the defendant is ex parte and the material before the Court is sufficient to allow the claim of the plaintiff, the time of the Court should not be wasted in directing ex parte evidence to be recorded and which mostly is nothing but a repetition of the contents of the plaint.”

14. Thus, the present suit is decreed in terms of the relief of permanent injunction as sought in paragraph 37(i) of the Plaint.

15. Insofar as the relief of damages and costs as sought in paragraph 37(iv) of the Plaint is concerned, the Defendant has manufactured and sold products which are counterfeits of the product of the Plaintiff. The copying and imitation of the Plaintiff's mark, trade dress, get up, and colour scheme is absolutely deliberate on behalf of the Defendant. Moreover, the Defendant has also chosen to stay away from the proceedings, despite repeated service. A perusal of the letter which has been produced by Id. Counsel for the Plaintiff and extracted hereinabove also shows that the Defendant has agreed to stop manufacturing of the infringing products immediately.

16. In light of the foregoing facts and circumstances of the present case, this Court is convinced that this is not a case of innocent adoption, and the Court cannot encourage such dishonest conduct on behalf of the Defendant. Thus, taking a reasonable assessment of the products which may have been sold by the Defendant, the present suit is decreed for Rs.10 lakhs as damages. In addition, Rs.2 lakhs is awarded as costs.

17. The Defendant shall pay the said amount to the Plaintiff within eight



weeks, failing which, the Plaintiff is permitted to commence execution proceedings against the Defendant. The copy of the letter extracted above is taken on record. The same be scanned and put in the pleadings file of the physical/electronic record.

18. All pending applications are also disposed of. Decree sheet be drawn accordingly.

MAY 18, 2022
Rahul/AD

PRATHIBA M. SINGH
JUDGE