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* **IN THE HIGH COURT OF DELHI AT NEW DELHI***Date of Decision: 4th December, 2023*+ **CS(COMM) 54/2022, I.As. 1795/2022, 3651/2022 & 3652/2022****FRANKFINN AVIATION SERVICES
PRIVATE LIMITED**

..... Plaintiff

Through: Mr. Kapil Midha, Ms. Samiksha
Gupta, Advs. (M. 9318887589)

versus

TATA SIA AIRLINES LTD.

..... Defendant

Through: Ms. Kruttika Vijay, Mr. Aditya
Gupta, Mr. Mukul Kochhar, Advs.**CORAM:****JUSTICE PRATHIBA M. SINGH****Prathiba M. Singh, J. (Oral)**

1. This hearing has been done through hybrid mode.
2. The Plaintiff- Frankfinn Aviation Services Pvt. Ltd. is a company engaged in training airline staff and providing other services under the name FRANKFINN. The present suit under Section 134 of the Trade Marks Act, 1999 has been filed by the Plaintiff- seeking protection of rights in its trade mark 'FLY HIGH'.
3. The Plaintiff claims rights in the said mark 'FLY HIGH', both due to the trade mark registrations as extracted at paragraph 16 of the plaint and common law rights underlying the said marks. It adopted the mark 'FLY HIGH' in 2004, obtained registrations for the same in 2007.
4. It is averred that the Plaintiff is engaged in the business of training staff for airlines and uses the marks 'FRANKFINN' and 'FLY HIGH'. Its grievance in the present suit is that the Defendant- Tata SIA Airlines is using



the mark 'FLY HIGHER'.

5. An interim order was granted on 21st January, 2022, which was, however, vacated on 28th October, 2022. One of the findings in the said judgement is that the Defendant is not using the mark 'FLY HIGHER', as a trade mark but is only using it as a common usage of the said expression. The relevant paragraph of the order dated 28th October 2022 is set out below (para 30):

“30. Albeit, Defendant has taken a clear position that it is not using the expression/phrase 'FLY HIGHER' as a trademark, however, in order to show common usage of the said expression, Defendant has placed on record documents which are online articles showing use of the mark 'FLY HIGH' by several Airlines, in the context of their common as well as dictionary meaning. A chart enumerating the same is as follows:-

<i>Name</i>	<i>Date</i>
<i>Air India Brand Journey: Of Pride, Prudence, Panache</i>	<i>09.10.2021</i>
<i>Airline Stocks Fly High in Monday's Trading: Here's Why</i>	<i>08.12.2021</i>
<i>Airline Stocks Fly High in Thursday's Trading: Here's Why</i>	<i>14.01.2022</i>
<i>Airlines fly high as European markets end good week on a high note</i>	<i>15.10.2021</i>
<i>Airlines fly high as India-UAE flight bookings soar by 75%</i>	<i>04.10.2021</i>
<i>Domestic airlines fly high in September as demand soars but still far away from pre-Covid era</i>	<i>10.09.2020</i>



<i>For civilian aircraft, 'Viceroy's Territory' will stay</i>	29.07.2021
<i>Hi-tech facilities at upcoming terminal, taxi track to make Surat airport fly high</i>	29.11.2021
<i>Indigo shares fly high on vaccine optimism, ignoring risks from new wave</i>	14.04.2021
<i>In-Flight Catering Services Market is Set To Fly High in Years to Come LSG Group, Gategroup Holding, Dnata</i>	24.01.2022
<i>Now that Jet Airways' revival plan has been cleared, will it have a smooth ride?</i>	23.06.2021
<i>Star Air announces direct flights from Jamnagar to Bengaluru and Hyderabad</i>	25.08.2021
<i>Airlines 'fly high' after passenger traffic surge</i>	17.09.2021
<i>US airlines fly high while virus drag keeps Japan carriers low</i>	04.08.2021
<i>What the Tatas must do to make Air India fly high again</i>	10.10.2021
<i>Abu Dhabi's Etihad flying high as revenues rise 19 percent</i>	07.04.2013
<i>Air India could fly high with Tatas</i>	14.08.2020
<i>SpiceJet, IndiGo fly high riding Jet closure. Will this dream-run sustain?</i>	23.08.2019
<i>Chelsea fly high with Etihad</i>	11.05.2008
<i>Flying high: Jet, Etihad re-engineer tarmac</i>	28.07.2014
<i>Indian airlines fly high as August passenger traffic surges</i>	17.09.2021
<i>IndiGo, SpiceJet Shares Fly High As August Passenger</i>	17.09.2021



<i>Traffic Surges</i>	
<i>KLM Airlines enters digital territory on the back of TCS' high-flying tech</i>	10.09.2021
<i>What the Tatas must do to make Air India fly high again</i>	10.10.2021
<i>Will Tata Sons, Singapore Airlines fly high in Indian skies</i>	25.09.2013

6. In paragraph 24 of the said order, the Court has further observed as under:

*“.....From the plethora of documents placed on record, in my prima facie view, **this Court cannot agree with the Plaintiff that the Defendant uses the phrase FLY HIGHER as a trademark and thus the edifice built on foundation of the argument that by using a deceptively similar trademark. Defendant is guilty of infringement, falls to the ground.**”*

It bears repetition to state that in the wake of the Defendant not using FLY HIGHER as a trademark, none of the judgments would be applicable to the present case.”

7. Thus, the repeated and clear findings in the order are to the effect that the Defendant is not using FLY HIGHER as a trade mark but merely as a descriptive term. The said judgment dated 28th October 2022 has not been challenged by the Plaintiff, and thus, it has attained finality at the interim stage.

8. Considering that the short issue between the parties involves the use of the ‘FLY HIGH’ and ‘FLY HIGHER’ in a non-trademark sense, the Defendant made a proposal to the Plaintiff vide email dated 26th July 2023. The said proposal contains the following two conditions:



“1. TSAL (Defendant herein) will not file applications for registration of the mark, ‘Fly High’ or ‘Fly Higher’ as a trade mark.

2. Frankfinn agrees that TSAL's use of ‘Fly High’ or ‘Fly Higher’ as a part of keywords, advertising campaigns and hashtags does not constitute trademark use.”

9. The contest between the parties revolves around whether the suit ought to be decreed or not based on the terms suggested by the Defendant. It is the Defendant’s apprehension that such a decree may be used against it and its affiliated group companies, potentially binding them to the said undertaking.

10. On behalf of the Plaintiff, it is submitted that since the Defendant is not using the expression as a trade mark, there ought to be no apprehension about the suit being decreed.

11. Heard. There is no longer any dispute about the fact that the Plaintiff’s objection is about use of the mark FLY HIGHER as a trade mark. The Plaintiff has accepted the position that non-trade mark use of the said words would not be objected by it. The Defendant has accepted the position that it would not use the said expression FLY HIGHER in a trade mark sense.

12. Viewed in the context of the above and the suggested terms extracted above, it is clear that the same can be made binding on the parties. Accordingly, the following two terms are recorded as as assurances and undertakings given to the Court.

- a. Defendant shall not claim any trade mark rights in the expression FLY HIGH or FLY HIGHER. It shall also not file any applications for registration of the mark,



'Fly High' or 'Fly Higher' as a trade mark.

b. The Defendant also agrees not to oppose the Plaintiff's trade mark 'FLY HIGH'.

c. However, the Defendant is free use 'Fly High' or 'Fly Higher' in a non-trade mark sense as also as a part of keywords, advertising campaigns and hashtags. Plaintiff has no objection in this respect.

The said undertakings and assurances are accepted by the Court and it is held that the Defendant shall be bound by the same. Additionally, it is clarified that the above terms are binding only on the parties and shall not be read against any other entities including group companies.

13. Needless to add, the judgment dated 28th October, 2022 clarifies in paragraph 41 as under:

“41. It is made clear that the observations in the present judgment are only prima facie and shall not impact the final adjudication of the suit on merits. ”

14. Thus, the said order shall not be treated as a final adjudication of the disputes on merits. The suit is disposed of in the above terms. All pending applications are disposed of.

PRATHIBA M. SINGH
JUDGE

DECEMBER 04, 2023
dj/dn