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

% *Date of Decision: 28th October, 2022*

+ CS(COMM) 54/2022 & I.A. 1795/2022, 3651-52/2022

FRANKFINN AVIATION SERVICES
PRIVATE LIMITED

..... Plaintiff

Through: Mr. Chander M. Lall, Senior Advocate with Mr. Kapil Midha, Ms. Versha Singh and Ms. Ananya Chug, Advocates.

versus

TATA SIA AIRLINES LTD.

..... Defendant

Through: Mr. Akhil Sibal, Senior Advocate with Ms. Kruttika Vijay, Mr. Aditya Gupta, Mr. Mukul Kochhar and Ms. Asavari Jain, Advocates.

**CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH**

JUDGEMENT

I.A. 1188/2022 (under Order 39 Rules 1 and 2 CPC, by Plaintiff) & 1670/2022 (under Order 39 Rule 4 CPC, by Defendant)



1. This judgment shall dispose of the aforementioned two applications, one filed by the Plaintiff under Order 39 Rules 1 and 2 CPC and the other filed by the Defendant for vacation of *ex-parte ad interim* injunction granted *vide* order dated 21.01.2022.


2. Plaintiff has filed the present suit for permanent and mandatory injunction restraining the Defendant *inter alia* from infringement of trademark 'FLY HIGH', passing off, unfair competition, dilution and for rendition of accounts.

3. Narrative of facts, as set out in the plaint, is that Plaintiff is the original adopter, user as well as registered proprietor of the trademark ‘FLY HIGH’, which was coined and adopted in the year 2004 and has been continuously, extensively and uninterruptedly used for imparting training in hospitality, aviation, travel management and customer services, with largest network of state-of-the-art centres across India as well as in Dubai.

4. Plaintiff claims to be a leader in its field of business, recognized as an Institution of repute and eminence for its professionalism and services and finds mention in the Limca Book of Records. Plaintiff has been a recipient of the several awards, honours and accolades, including the award of ‘Best Training Institute’ for the last ten consecutive years from 2011 to 2020.

5. Plaintiff is a registered proprietor of the trademark ‘FLY HIGH’ in India in its different forms and variants in multiple classes as under and the registrations are stated to be valid and subsisting:

Application No.	Trademark	Class	Status	User Since	Description
1535614	FLY HIGH	41	Registered	01/01/2007	PROVIDING OF TRAINING.
3857360		41	Registered	01/01/2007	PROVIDING EDUCATION AND TRAINING SERVICES IN AVIATION, HOSPITALITY, TRAVEL AND CUSTOMER CARE MANAGEMENT.
2233277		16	Registered	01/01/2007	PAPER, CARDBOARD AND GOODS MADE FROM THESE MATERIALS, NOT INCLUDED IN


					OTHER CLASSES; PRINTED MATTER; BOOKBINDING MATERIAL; PHOTOGRAPHS; STATIONERY; ADHESIVES FOR STATIONERY OR HOUSEHOLD PURPOSES; ARTISTS” MATERIALS; PAINT BRUSHES; TYPEWRITERS AND OFFICE REQUISITES (EXCEPT FURNITURE); INSTRUCTIONAL AND TEACHING MATERIAL (EXCEPT APPARATUS); PLASTIC MATERIALS FOR PACKAGING (NOT INCLUDED IN OTHER CLASSES); PRINTERS” TYPE; PRINTING BLOCKS.
2233278		41	Registered	01/01/2007	EDUCATION; PROVIDING OF TRAINING; ENTERTAINMENT; SPORTING AND CULTURAL ACTIVITIES.

6. Plaintiff further avers that it is the proprietor of an active website under the domain name www.frankinn.com and the trademark ‘FLY HIGH’ forms an essential part of each web page as an indicator of being an essential

part of the identity of the Plaintiff. Plaintiff also has registrations in various other domain names, as mentioned in the plaint.

7. Plaintiff approached this Court upon coming across an advertisement/promotion campaign launched by the Defendant, who

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operates its full-service airline under the trademark , for promoting its services under the mark 'FLY HIGHER' on various online platforms and social media websites. Grievance of the Plaintiff, pithily placed, is that the Defendant has in a brazen and blatant manner copied the registered trademark of the Plaintiff 'FLY HIGH' and is using the same for allied and cognate services. Defendant also uses the trademark 'FLY HIGHER' as a hashtag on its website and since the services of the parties to the *lis* pertain to the same sector, i.e., aviation, confusion amongst the public and members of the trade is inevitable.

8. On 21.01.2022, this Court granted an *ex parte* ad interim injunction in favour of the Plaintiff, relevant part of which is as follows:

“27. Accordingly, till further orders, defendant, its directors, servants, agents, franchisees or anyone acting for and on its behalf in any manner, are restrained from using the mark/name “FLY HIGHER” or any other mark either as a trade mark, trading style, trade name, logo, key word, meta tag, hashtag, domain name, or in any other manner, identical or deceptively similar to the plaintiff company’s mark “FLY HIGH” in relation to any goods or services in printed and/or in any other media, electronic online version or digital form or in any other form whatsoever, resulting infringement, passing off, unfair competition and dilution of plaintiffs rights.”


9. Upon service of the summons, Defendant filed an application seeking vacation of interim injunction, on which notice was issued on 02.02.2022


and time to file reply was granted to the Plaintiff. On the same day, notice was issued in I.A. No. 1795/2022 filed by the Plaintiff under Order 39 Rule 2A CPC and time to file reply was given to the Defendant. The order was assailed before the Division Bench and *vide* order dated 09.02.2022 in FAO(OS)(COMM) 33/2022 and FAO(OS)(COMM) 34/2022, the Division Bench, with the consent of the parties, disposed of the Appeals sequencing the hearing of I.A. No. 1670/2022 and I.A. No. 1188/2022 prior to the contempt application being I.A. 1795/2022 under Order 39 Rule 2A CPC.

10. Arguing the application for vacation of the interim injunction, contentions raised on behalf of the Defendant can be aptly encapsulated as follows:

A. Defendant is a joint venture between Tata Sons Private Limited (TATA SONS) and Singapore Airlines Limited (SIA) with Tata sons holding majority stake and operates its full-

service Airlines under the trademark  and the

logo , the registered aubergine and gold colour

combination  and the tagline 'Fly the new feeling'.

Defendant's advertisements usually carry a composite logo



, which contains each of the elements

of its trademarks. Plaintiff and Defendant operate in completely different fields i.e. educational training and Airline industry, respectively. Defendant operates a full-service

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Airline under its trademarks and the phrase 'FLY HIGHER' is descriptive of the services provided and is used as a part of advertising and promotional campaign.

B. Defendant does not use the phrase 'FLY HIGHER' as a trademark, contrary to the claim of the Plaintiff. 'FLY HIGHER' is used by the Defendant in conjunction with its

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well-known trademark as a descriptor and solely for marketing and promotion of its scheduled airline business. No goods or services are sold or provided under the said phrase. The manner of use of the phrase in the advertisements etc. would clearly show that it is not acting as a source-identifier and is not capable of distinguishing Defendant's services from those of the competitors, which is the function of a 'trademark' as defined under Section 2(1)(zb) of the Trade Marks Act, 1999 (hereinafter referred to as the 'Act'). Pertinently, Plaintiff has failed to cite any provision of law or a judicial precedent where use of a mark as a non-trademark by a Defendant has been held to be infringement or passing off. Furthermore, even the use of the phrase 'FLY HIGHER' as a hashtag does not tantamount to use as a

trademark as Defendant has several other campaigns and hashtags, which it does not use in the trademark sense, such as 'Feel the flavours', 'Feel exclusive', #VistaraLove etc.

C. Plaintiff cannot allege that Defendant has infringed its proprietary rights in the trademark FLY HIGH since it does not use the said mark in classes 16 and 41 in which the Plaintiff claims to hold registrations. The core services of the Defendant are in classes 12 and 39 which relate to Airline Industry (goods and services). At the very highest, assuming without admitting that Plaintiff has any rights and assuming that Defendant's use is use as a trademark, to maintain a claim for infringement against the Defendant, Plaintiff would require to have registrations in class 12 (relating to vehicles), class 39 (transport services) and class 35 (advertising). Plaintiff never filed applications in classes 12 and 39 and abandoned its application in class 35, in face of the examination report, citing similar third-party trademarks. Plaintiff's activities are restricted to educational services through its training academy and Defendant's use of the phrase FLY HIGHER as part of an advertising campaign, to describe and promote the services offered and highlight its advantages, high quality etc., cannot infringe Plaintiff's rights.

D. Plaintiff has failed to demonstrate any distinctiveness in the mark 'FLY HIGH' either in its field of operation or across classes. FLY HIGH is not a well-known mark and is generally not used as a standalone mark but is usually used in

conjunction with 'FRANKFINN', represented as



, where FRANKFINN is the dominant part of the label. In any event, 'FLY HIGH' is a dictionary term, laudatory in nature and connotes 'the level up' or 'ambition' or 'the pursuit of higher success. The phrase 'FLY HIGH' and its variations 'FLY HIGHER'/HIGH FLY' etc. are commonly used to describe success of players in the Airlines sector and various Airlines such as Air India, Emirates, Philippine Airlines, Indigo, Lufthansa etc. have used and are till date using phrase 'FLY HIGH' or a version thereof as a part of their own social media post, advertisement campaigns or even as part of their Frequent Flyer Programmes. 'FLY HIGHER' being a laudatory phrase, used in conjunction

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with its trademark , cannot be stated to infringe Plaintiff's 'FLY HIGH' trademark, which the Plaintiff cannot even otherwise monopolise. In *Skyline Education Institute (India) Private Limited v. S.L. Vaswani and Another*, (2010) 2 SCC 142, *ITC Limited, Rep. by its Constituted Attorney S. Satyanathan v. Nestle India Limited*, 2020 SCC OnLine Mad 1158 and *Marico Limited v. Agro Tech Foods Limited*, 2010 SCC OnLine Del 3806, Courts have consistently held that

parties cannot monopolize marks which are common to trade or laudatory. In *Intex Technologies (India) Ltd. & Anr. v. M/s. AZ Tech (India) & Another*, 2017 SCC OnLine Del 7392, the Court held that the use of added matter such as source identifiers prevents the confusion and defeats any claim of passing off or misrepresentation. As on date, over 30 trademarks, incorporating the marks FLY HIGH or variants thereof are on the Register of Trade Marks, either registered or pending registrations, across various classes of goods and services, including in classes 35 and 41. Defendant has not and does not use the phrase as a trademark and since the nature of services offered by the respective parties are dissimilar, there is no likelihood of confusion or association and claim for infringement cannot be sustained under Section 29 of the Act.

E. Without prejudice to the aforementioned contentions, it was urged that Plaintiff has suppressed its prosecution history for the mark 'FLY HIGH' and obtained *ex parte* injunction order by misrepresentation. 'FLY HIGH', registered in class 41 was allowed to proceed to registration, with a condition that it shall give no right to exclusive use of the word 'HIGH'. Reliance was placed on the judgments in *Ritesh Properties & Industries Ltd. v. Youtube LLC and Others*, 2019 SCC OnLine Del 10454; *FAO(OS) 28/2010 Aero Club v. Timberland; Columbia Sportswear Company v. Harish Footwear & Anr*, 2017 SCC OnLine Del 8122 and *Om Prakash Gupta v. Praveenumar & Anr.*, 2000 SCC OnLine Del 397, to urge that

non-disclosure of a material fact in the plaint disentitles a party to an equitable relief of injunction.

F. Additionally, Plaintiff has approached the Court belatedly despite having knowledge of Defendant's promotion campaign in 2018 and the relief sought is barred by delay, laches and acquiescence. Launched on 14.12.2018, the campaign was widely advertised in print media, cinemas, television advertisements, on popular shows, billboards and hoardings on digital screens and other impact properties across Delhi, Mumbai, Calcutta, Chennai, Bengaluru and Hyderabad. Approximately 2480 social media posts including on Twitter, Facebook, YouTube and Instagram were posted even as late as in January 2022. Plaintiff has direct knowledge of the advertising campaign since it follows the Defendant on social media platforms such as Instagram and Directors of the Plaintiff company have enrolled in Defendant's Frequent Flyer Programme Club Vistara since 2019. Importantly, neither of these facts have been denied by the Plaintiff in its pleadings or arguments. This Court in *Procter & Gamble Company v. Satish Patel & Ors., 1996 SCC OnLine Del 579* refused injunction on finding that the Plaintiff pretended ignorance, despite knowledge of the widespread and long use by the Defendants. The stand of the Plaintiff is contrary to the documents filed along with the plaint, which clearly demonstrate that Defendant began the campaign at least 3

years ago and on this ground alone, the injunction ought to be vacated.

G. Defendant's advertising campaign was independently conceived by a third-party agency way-back in 2018. There has never been any commercial arrangement between the parties herein and no evidence even *prima facie* has been placed on record by the Plaintiff to suggest that signages with Plaintiff's 'FLY HIGH' mark were visible at any of the Defendant's recruitment drives.

H. Plaintiff has been unsuccessful in establishing even *prima facie*, the essential ingredients of the tort of passing off. Defendant does not offer services in the education or training sector under the phrase 'FLY HIGHER' and its campaign was aimed at enhancing customer experience and highlighting its own profile as India's best Airline. Defendant never offered services in a manner that would deceive or is likely to deceive the public into believing that Defendant's services have an association with those of the Plaintiff. Furthermore, in the entire campaign, there is a prominent use of Defendant's well-

known and registered trademark  or its logo



, which itself defies any intent to misrepresent. Any chance of confusion is obviated by the fact that both operate in entirely different fields and on a completely different scale.

The channels of trade and class of customers are separate and distinct. Moreover, to substantiate a claim for passing off, Plaintiff must demonstrate acts of misrepresentation by the Defendant and the necessity of misrepresenting arises only where the Defendant needs to encash on the formidable and immense reputation garnered by the Plaintiff. In the present case, Defendant is a joint venture between Tata Sons Pvt. Ltd. and Singapore Airlines Limited holding majority stake of 51 percent and operates a full-service airline. Vistara aims at creating memorable and personalised flying experiences for its customers flying to 36 destinations, both domestic and international, with over 200 flights a day with a growing fleet of 30 Airbus, 6 Boeings and other aircrafts, under its registered

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and well-known trademark . Vistara has flown 20 million passengers and its website as well as mobile app which allow booking tickets are visited by millions of internet users each year for which data is provided in the written statement. Defendant is a widely recognised and trusted brand in travel sector and recipient of several awards from 2016 for best airlines. Substantial amount is spent on promotion and advertisements each year because of which the trademark VISTARA is synonymous with and exclusively associated with the Defendant and with the stellar reputation that it has garnered, Defendant does not need to encash on the reputation

and/or goodwill of any other entity, least of all of the Plaintiff. Defendant has also placed on record the data which shows the roaring success of its campaign under 'FLY HIGHER'. Plaintiff has failed to demonstrate that the trademark 'FLY HIGH' is exclusively associated with it and given the evidence of its use by various companies/entities including in the aviation industry, even the third element of passing off, i.e., loss or likelihood of loss of reputation is missing.

- I. Reliance by the Plaintiff on the earlier interim injunction orders in other cases cannot aid the Plaintiff, as therein the use of the mark by the Defendants was in relation to education Institutions falling in class 41, in which Plaintiff currently holds registration, save and except CS(COMM) 287/2019 relating to the airline GO AIR. However, therein parties settled the matter and a consent decree was passed by the Court, which cannot be used against the Defendant herein.
- J. Balance of convenience lies in favour of the Defendant. Without disclosing true and correct facts to the Court, an *ex parte* order of injunction was obtained by the Plaintiff, which is severely impacting the reputation of the Defendant as well as its business and customer outreach. Defendant has spent significant monies on its marketing and promotion campaign with 2480 social media posts apart from use of 'FLY HIGHER' on web pages. Campaign was a huge success with tremendous social media reach and engagement. The injunction order restraining the Defendant from using 'FLY

HIGHER’ as trademark/logo/keyword/meta type/ hashtag etc. has resulted in undue restrictions and caused irreparable harm and injury. Removal of the posts would result in erasure of lakhs of social media posts and signages, including at Defendant’s airport offices etc. and this would not only be a herculean task but would also result in loss of revenue and reputation.

11. Responding to the contentions of the Defendant, Learned Senior Counsel appearing on behalf of the Plaintiff contended as follows:

A. Plaintiff is the original adopter, prior user and registered proprietor of the trademark ‘FLY HIGH’ and its formative in various classes, having coined the said trademark in 2004. The mark has been continuously and extensively used for imparting training in fields of aviation, hospitality, travel management and customer services. Plaintiff is a reputed organisation and has earned enormous goodwill and played a vital role in helping students in being successful in the selection process for various reputed airlines and hospitality and other industries. It is an approved training partner of National Skill Development Corporation since August, 2015 and is the pioneer in first impression training in India which aims to transform lives and lifestyles. Plaintiff has closely worked with various airlines across the globe and has a dedicated Placement Assistance Cell for placement in leading international and domestic airlines, five-star hotels etc. On account of extensive and continuous user of the trademark, coupled with superior quality and


services provided, Plaintiff's trademark 'FLY HIGH' has become distinctive and is exclusively associated with the Plaintiff amongst the public and trade and any attempt by a third party to use an identical and/or deceptively similar trademark ought to be enjoined. The name, fame and repute of Plaintiff's trademark are not limited to geographical boundaries. Plaintiff's total revenue for the year 2019-2020 alone, was Rs.19,451.09 lakhs. Huge expenditure has been incurred in advertisement and promotion of its services under the trademark 'FLY HIGH' and various celebrities have endorsed Plaintiff's brand.

- B. Plaintiff has been vigilant in taking action against third parties against infringement and passing off its trademark 'FLY HIGH' and in several matters such as CS(COMM) 305/2021, CS(COMM) 496/2021, CS(COMM) 866/2018 and CS(COMM) 287/2019, Courts have granted interim injunctions in favour of the Plaintiff. In fact in CS(COMM) 305/2021, this Court has observed that the trademark FLY HIGH cannot be termed as generic or descriptive in nature and at the highest it may be possible to contend that the expression 'FLY HIGH' is suggestive of the services provided by the Plaintiff therein and in this view, the Defendant cannot raise an argument that the mark is descriptive or generic or common to trade.
- C. Defendant through its advertising campaign is promoting its services under an identical/deceptively similar trademark 'FLY

HIGHER’. Defendant is a subsequent adopter of the mark ‘FLY HIGHER’ and is using the same in respect of allied and cognate services in gross violation of Plaintiff’s statutory as well as common law rights. Defendant is well aware of Plaintiff’s trademark as it has been in contact with Plaintiff for recruiting its students since 2014. Defendant is also using the trademark ‘FLY HIGHER’ as a hashtag on its website as also on its page and various social media platforms. Since both provide services in the same sector, i.e. aviation, confusion amongst the public is inevitable.

D. Being a registered proprietor of the trademark ‘FLY HIGH’, Plaintiff has a valuable right under Section 28(1) to use the same exclusively and seek relief of infringement against Defendant who is in bad faith and unauthorizedly using the mark ‘FLY HIGHER’ and causing confusion amongst the public. The intent is to mislead innocent and unwary persons availing Plaintiff’s services and acts of the Defendant amount to passing off and unfair competition.

E. Defendant wrongly urges that it does not use the mark ‘FLY HIGHER’ as a trademark. A bare perusal of the documents filed by the Defendant which include screenshots/pictures of the hoardings, YouTube and online portals clearly evidence the use of the mark as a trademark and pertinently the mark ‘FLY HIGHER’ is prominently displayed in a larger font as

compared to the accompanying mark . Defendant

is not correct in its submission that services provided by the Plaintiff and Defendant are dissimilar. Defendant operates and provides services in the aviation sector which are, to state the least, allied and cognate to the services offered by Plaintiff, i.e., training in field of aviation, hospitality, travel management and customer service and this is fortified by the admission of the Defendant in para 37 of the written statement.

F. Reliance by the Defendant on the trademarks of the Plaintiff which have been abandoned, is completely misconceived and has no bearing on the present suit, which has been preferred relying upon registration for the trademark 'FLY HIGH' in classes 16 and 41, which are valid and subsisting. It is denied that the suit has been filed belatedly. As soon as Plaintiff learnt of the advertising campaign, it approached this Court seeking injunction. Admittedly, the advertisement campaign was for a period of 75 days and the documents filed by the Defendant show that there are no hoardings/newspaper advertisements post June/August, 2019 and the social media posts which the Plaintiff has filed with the plaint merely show that the same were remnants of the campaign, which allegedly began in the year 2018 and of which the Plaintiff became aware only in January, 2022. Plaintiff has always vigilantly protected its trademark 'FLY HIGH' and besides the suits referred to in the present pleadings, it has filed 21 oppositions against various parties, who have filed applications for registration of identical/deceptively similar marks.

G. Reliance was placed by Learned Senior Counsel appearing on behalf of the Plaintiff on the following judgments:-

I. *Moonshine Technology Private Limited v. Tictok Skill Games Private Limited and Others, 2022 SCC OnLine Del 296;*

II. *Ansul Industries v. Shiva Tobacco Company, 2007 SCC OnLine Del 74;*

III. *Midas Hygiene Industries (P) Ltd. and Another v. Sudhir Bhatia and Others, (2004) 3 SCC 90;*

IV. *Sabmiller India Ltd. v. Jagpin Breweries Ltd., 2014 SCC OnLine Bom 4842;*

V. *Astra-IDL Limited v. TTK Pharma Limited, 1991 SCC OnLine Bom 204;*



VI. *Corn Products Refining Co. v. Shangrila Food Products Ltd., (1960) 1 SCR 968;*

VII. *M/s DRS Logistics (P) Ltd & Anr. v. Google India Pvt Ltd & Ors. [CS(COMM) 1/2017].*

12. This Court has heard the learned Senior Counsels for the parties and given careful consideration to their rival contentions.

13. From the expose of facts mentioned above, it is an admitted position obtaining between the parties that Plaintiff is a registered proprietor of the trademark 'FLY HIGH'. As per the Plaintiff the trademark was coined and adopted in the year 2004 and has been continuously and extensively used for imparting training in the field of aviation, hospitality, travel, management and customer services. Plaintiff has an exclusive right by virtue of registration of the said trademark under Section 28(1) of the Act. Pithily put, the grievance voiced by Plaintiff is that Defendant is a subsequent adopter of the trademark 'FLY HIGHER' and its use in respect of similar/allied and

cognate services, is a gross violation of Plaintiff's statutory as well as common law rights. Prime defence of the Defendant *per contra* is that Defendant's use of the phrase/expression 'FLY HIGHER' is not as a trademark, which is a fundamental requirement for any action of trademark infringement or passing off. Defendant is using 'FLY HIGHER' solely as a descriptive phrase/expression for its advertising and promotion campaign in respect of its airlines operating under a well-known trademark

. The phrase is always used in conjunction with its  trademark and no services are offered under the phrase/expression 'FLY HIGHER'. The expression 'FLY HIGHER' does not act as a source identifier of Defendant's services and it is fallacious to argue that it is a trademark of Defendant. Much was also argued to bring home the point that Plaintiff cannot claim exclusive right in the trademark 'FLY HIGH' as the same is *prima facie* invalid being a term of common parlance, descriptive in character and common to trade. It cannot be claimed by Plaintiff that the trademark is capable of being exclusively associated with the Plaintiff as the trademark 'FLY HIGH' has a dictionary meaning, which connotes ambition/pursuit of higher success/a level up and is merely laudatory in nature.

14. Indubitably, Plaintiff is a registered proprietor of the trademark 'FLY HIGH' and thus by virtue of provisions of Section 28(1) of the Act, it has a statutory right to use the mark exclusively as also seek protection against infringement by third parties. The first question that arises for consideration

is whether the registration of the trademark FLY HIGH by the Plaintiff can prevent the Defendant from using FLY HIGHER in light of the defence set up by the Defendant that it is not using the allegedly similar mark as a trademark and assuming for the sake of arguments that the use is as a trademark, the respective services are not identical/similar and there is no likelihood of confusion, besides the fact that usage is in respect of services falling under those classes in which Plaintiff has no registration. Thus the claim of infringement cannot be sustained under Section 29 of the Act.

15. Before proceeding to examine the question whether Defendant is using FLY HIGHER as a trademark, I may illustratively refer to one of the many screenshots of the campaign filed on record by the Defendant to demonstrate the use of 'FLY HIGHER' in conjunction with its trademark

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, as follows:-



16. Looking at the screenshot, this Court finds that Defendant is using the phrase FLY HIGHER in conjunction with its well-known trademark

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and the logo



. Under the Act, there is a clear

distinction between a ‘mark’ and a ‘trademark’ and the intent of the Legislature is to keep the two distinct as they have different connotations.

‘Trade Mark’ is defined under Section 2(1)(zb) as follows:

“2. (1)....

(zb) trade mark means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours; and--

(i) in relation to Chapter XII (other than section 107), a registered trade mark or a mark used in relation to goods or services for the purpose of indicating or so as to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right as proprietor to use the mark; and

(ii) in relation to other provisions of this Act, a mark used or proposed to be used in relation to goods or services for the purpose of indicating or so as to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right, either as proprietor or by way of permitted user, to use the mark whether with or without any indication of the identity of that person, and includes a certification trade mark or collective mark.”

17. ‘Mark’ is defined under Section 2(1)(m) as follows:

“2. (1)....

(m) mark includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof.”

18. Reading of the aforesaid definitions shows that in order to qualify as a trademark it must be capable of distinguishing the goods and services of one person from the others and it must be used or proposed to be used in relation

to goods or services for indicating a connection, in the course of trade, between the goods or services and the person having the right to use the mark either as a proprietor or as a permitted user. Trademarks, therefore, are intangible assets of the proprietors, which serve as ‘source identifiers’, instantly connecting the goods/services with the proprietor thereof.

19. In *Cadila Health Care Ltd. v. Gujarat Co-operative Milk Marketing Federation Ltd. & Ors.*, 2009 SCC OnLine Del 2786, the Division Bench of this Court while dealing with use of the term ‘SUGAR FREE’, upheld the findings of the learned Single Judge which were as follows:

“54. It is important to be borne in mind that use of a descriptive expression as a trade mark by a trader, irrespective of the said trade mark having acquired a secondary meaning and distinctiveness in relation to the trader's products, does not entitle such trader from precluding other traders from using the said expression for the purposes of describing the characteristic features of their products. I have no hesitation in stating, albeit without prejudice to the rights and interests of the plaintiff in the present suit, that by adopting such a purely descriptive and laudatory expression ‘Sugar Free’ as its trade mark, the plaintiff must be prepared to tolerate some degree of confusion which is inevitable owing to the wide spread use of such trade mark by fellow competitors. Simply because the plaintiff claims to be using the expression ‘Sugar Free’ as a trade mark much prior to the launch of the defendant's product Pro Biotic Frozen Dessert in the market does not give this Court a good ground for imposing a blanket injunction on the defendant from using the expression ‘Sugar Free’, especially when the defendant intends to use this expression only in its descriptive sense and not as a trade mark, and even otherwise, when the use of this expression is widespread in relation to foods and beverages.” (emphasis supplied)

20. In the aforementioned case, Court had *prima facie* held that the mark of the Plaintiff was descriptive and by adopting a purely descriptive and laudatory expression, Plaintiff must be prepared to tolerate some degree of confusion which is inevitable owing to widespread use of such trademark by fellow competitors. However, what is of relevance to the present case is the observation that even if the mark of the Plaintiff acquires a secondary meaning and is distinctive in relation to its products, it does not entitle such a person to preclude others from using the expression for purpose of describing the characteristic features of their products and more importantly where the Defendant uses the expression only in a descriptive sense and not as a trademark. In ***Bata India Limited v. Chawla Boot House and Another, 2019 SCC OnLine Del 8147***, the Court while holding that the mark ‘POWER’ could be termed as a ‘suggestive’ mark for footwear, which would make it an inherently distinctive mark and therefore, its use in combination with other words or in an isolated manner in respect of footwear, clothing etc. violates the statutory and common law rights of the Plaintiff, permitted Defendant No. 2 therein to use the tagline ‘THE POWER OF REAL LEATHER’ with a rider that no undue prominence shall be given to the word ‘POWER’. In ***Red Bull AG v. Pepsico India Holdings Pvt. Ltd. & Anr., 2022 SCC OnLine Del 969***, the Court held that the use of the impugned tag line ‘STIMULATES MIND. ENERGIZES BODY’ by the Defendants was in a descriptive/laudatory manner and not as a trademark. Being an expression comprising of four English words that aims to describe the features and quality of its drink in comparison to its brand name ‘STING’ its use cannot be termed as infringement of Plaintiff’s registered trademark/tag line ‘VITALIZES BODY AND MIND’ under Section 29 of

the Act. What emerges from the observations in the aforesaid judgments is that if the Defendant is able to demonstrate that its use of the allegedly infringing trademark is not as a trademark but merely descriptive of its goods, it can escape the rigours of Section 29 of the Act. In fact, this defence is available to the Defendant under Section 30(2)(a) of the Act which provides that a registered trademark is not infringed where the use in relation to goods or services indicates the kind, quality, quantity, intended purpose etc. or characteristics of goods or services.

21. Defendant has taken a categorical stand that its registered trademark is

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and its formatives. It is undisputed that the trademark

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has been declared as a well-known trademark by a judgment of this Court in CS(COMM) 156/2019, decided on 05.08.2019. In my *prima facie* view, the Defendant is right in stating that the phrase FLY HIGHER is

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only used in conjunction with its well-known mark and with a sole purpose of advertising and promoting its scheduled Airline operating

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under and is not used as a trademark. FLY HIGHER does not serve as a source identifier so as to distinguish Defendant's goods and services from its competitors, and cannot be termed as a 'Trade Mark', as defined under the Act. In order to demonstrate the inspiration behind the FLY HIGHER campaign, its aim and objective, Defendant has placed on record screenshots of social media posts as well as the advertisements on the

internet and print media etc. As an illustration, I may refer to one such document as under, which would reflect the purpose behind the campaign as well as the contents of the advertisements put in the public domain:



22. A perusal of the various documents in this regard, *prima facie* evidences that the FLY HIGHER campaign was launched in the year 2018 as an extension of Defendant's tagline 'FLY THE NEW FEELING'. The campaign was aimed at inspiring people to invest in flying with Vistara airline, promising high levels of class, quality, lifestyle etc. and not to settle for the second best. Defendant has, in the written statement, explained that the phrase FLY HIGHER seeks to build on inspiration from the trademark

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which means 'limitless expanse' and is interpreted to mean that sky is the limit in terms of its dream to remain India's favourite and most trusted Airline and Defendant never intended to use the same in a trademark sense. Defendant has also pointed out that in its other campaigns and hashtags, it uses various other descriptive and laudatory phrases such as

‘feel the flavours’, ‘feel exclusive’, ‘arrive fresh’, etc. and hashtags such as #VistaraLove and #AirlineIndiaTrusts.

23. Defendant has placed on record documents to show that the phrase FLY HIGH and its variants, such as FLY HIGHER/HIGH FLY etc. are commonly used in articles to describe success of players in the Airlines industry. Furthermore, it is brought out that various Airlines, such as Air India, Emirates, Spice Jet, Lufthansa etc. have been using and continue to use the phrase FLY HIGH or a variation thereof as part of their social media posts, advertising campaigns or even as a part of their Frequent Flyer Programmes and on account of this usage, common to trade, Defendant has never sought registration of the phrase FLY HIGHER.

24. On a perusal of the documents, this Court finds *prima facie* merit in the submission of the Defendant that the term FLY HIGH is demonstrably common to Aviation sector and this is fortified by the Master Data of over 20 registered companies, incorporating the phrase FLY HIGH/HIGH FLYER/HIGH FLYERS, which continue to be active and have not been struck off from the Register of Companies. Defendant has also placed on record copies of extracts of online records of the Trade Marks Registry showing registrations/pending applications for the mark FLY HIGH/HIGH FLYER. Another significant factor that needs to be noted is that the mark of the Plaintiff proceeded to registration under application no. 1535614 in class 41 with a condition that the Plaintiff shall have no exclusive right to use the word ‘HIGH’ which, as brought out by the Defendant, is a fact concealed by the Plaintiff in the plaint. 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.

25. Defendant is also right in its submission that even assuming for the sake of argument that it uses FLY HIGHER as a trademark, no right of the Plaintiff in its mark FLY HIGH is infringed since Defendant does not use the mark in classes 16 and 41 in which Plaintiff claims to hold registrations and Defendant's core services are in classes 12 and 39 relating to Airline industry. Plaintiff has not filed applications in classes 12 and 39 and its registration for the mark FLY HIGH in different classes cannot be the basis to restrain the Defendant in classes for which the Plaintiff has no registration, unless it is able to make out a case that the services are similar or allied and cognate.

26. Insofar as the services offered by the respective parties are concerned, this Court finds *prima facie* merit in the argument of the Defendant that Plaintiff and Defendant operate in an entirely different field and industry. Defendant is operating a full-service Airline under its well-known

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trademark, while the Plaintiff is engaged in running a training Institute under the FRANKFINN mark. The channels of trade and class of customers are separate inasmuch as Plaintiff's target audience comprise young impressionable students seeking soft skills training for future career. Plaintiff does not guarantee any student a career in an Airline and only trains them. No doubt, there is an element of training that the Defendant imparts, however, the same is only limited to a technical training imparted to the cabin crew personnel which is approved and regulated by DGCA and BCAS, coupled with technical examinations to obtain a pass

issued by BCAS. Therefore, Plaintiff cannot succeed even in arguing that the services offered by the Defendant are allied and cognate on all the parameters laid down by this Court in *FDC Limited v. Docsuggest Healthcare Services Pvt. Ltd. & Anr.*, 2017 SCC OnLine Del 6381, i.e. use, user, nature of services, trade channels etc.

27. The underlying ethos of an infringement action, in my view, under Section 29 of the Act is: (a) proprietary rights of a registered owner; and (b) public interest. Therefore, a very important ingredient of an action of infringement is likelihood of confusion and/or association amongst the intending purchasers. Hence, the pivotal question that next arises is whether there is a likelihood of confusion as to the origin of the services offered by the Defendant or any association between the services of the respective parties. In order to test the likelihood of confusion one would need to holistically examine not only the degree of visual, aural or conceptual similarity between the marks but also the impression of an average consumer with imperfect recollection with respect to the degree of similarity between the goods or services purveyed under the rival marks [*SABEL BV v. Puma AG, Rudolf Dassler Sport*, [1998] R.P.C. 199 & *Kerly's Law of Trade Marks & Trade Names*, 4th edition at page 247-248]. Looking at the nature of services, channels of trade and class of customers in the present case, at this stage, it is difficult to reach a *prima facie* conclusion that the services offered by the respective parties are not separate and distinct. Plaintiff's target audience are people seeking soft skills training in the travel, tourism, hotel management and Aviation sector with the hope of possible employment opportunities while Defendant's customers comprise travellers who choose to fly with Vistara Airlines. It is difficult to fathom that an

informed decision to travel by Vistara Airlines would be taken by a person intending to travel, keeping in mind the alleged popularity of the FLY HIGH mark of the Plaintiff or the services pertaining to training in varied fields of travel, hospitality and hotel industry, including Aviation Sector. Plaintiff has not placed on record any material to establish that it has the necessary goodwill or reputation in the services offered by the Defendant. To this Court, *prima facie*, the argument of the Plaintiff seems too far-fetched for this Court to hold that any prudent person desirous of purchasing an Airline ticket, would be influenced by the stellar reputation of a training Institute, even if it was solely training people for recruitment in Aviation sector, instead of exercising an option from amongst the competing airlines, based on the competitive fares and services offered. Defendant's customers, as rightly pointed out, comprise well-informed discerning people, who would not choose to travel in Vistara airlines, based on Plaintiff's repute in the training Institute. *Prima facie* the element of likelihood of confusion or members of the public or trade associating the services offered by the Defendant as emanating from the Plaintiff, is lacking in the present case. Thus, even assuming that Defendant is using FLY HIGHER as a trademark or even as a mark, ingredients of Section 29(1) and (2) are not satisfied.

28. In support of the plea of delay and acquiescence, Defendant has placed on record material in the form of advertisements, magazines on the print media, cinemas, television as well as billboards and hoardings on digital screens and on prominent properties in various metropolitan cities including 2480 social media posts on Twitter, Facebook, Instagram, YouTube etc. to demonstrate that it launched its national advertising campaign FLY HIGHER on 14.12.2018, which was widely advertised.

Plaintiff has denied that there is any delay and claims to have acquired knowledge only in January, 2022 through the advertisement campaign on various online platforms. In wake of documents placed on record by both sides and considering that there are remnants of the campaign even today on various platforms, this is really a mixed question of facts and law and cannot be decided without evidence. Suffice would it be to state that at this stage Plaintiff cannot be ousted on ground of delay and acquiescence.

29. Defendant has laboured hard to show that the words 'FLY HIGH' are common to trade and has placed on record several documents in support thereof, in an endeavour to demonstrate that the trademark 'FLY HIGH' is widely used by third party websites, in context of its dictionary meaning, particularly with respect to aviation sector. The documents filed by the Defendant can be categorised into three distinct categories. First is the category of documents which show use of the trademark 'FLY HIGH' with respect to aviation academies by third parties offering identical services as those of the Plaintiff, as follows:-

- i. 'FLYHIGH AVIATION ACADEMY' (Device Mark), registered on 21.03.2007, with user details 01.01.2002;
- ii. 'LET'S HAVE WINGS, LET'S FLY HIGH' (Word), registered on 06.12.2013, with user details 01.01.2012;
- iii. 'aerokids Empowering to fly high' (Device Mark), registered on 09.06.2012, with user details 12.01.2012, *albeit* renewal request is pending;
- iv. 'FLYHIGH HOTEL MANAGEMENT ACADEMY' (Device Mark), registered on 06.01.2017, with user details 'proposed to be used';

- v. 'FLY HIGH INSTITUTE OF AVIATION & HOSPITALITY',
accepted and advertised.

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:-

Name	Date
Air India Brand Journey: Of Pride, Prudence, Panache	09.10.2021
Airline Stocks Fly High in Monday's Trading: Here's Why	08.12.2021
Airline Stocks Fly High in Thursday's Trading: Here's Why	14.01.2022
Airlines fly high as European markets end good week on a high note	15.10.2021
Airlines fly high as India-UAE flight bookings soar by 75%	04.10.2021
Domestic airlines fly high in September as demand soars but still far away from pre-Covid era	10.09.2020
For civilian aircraft,	29.07.2021

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

Chelsea fly high with Etihad	11.05.2008
Flying high: Jet, Etihad re-engineer tarmac	28.07.2014
Indian airlines fly high as August passenger traffic surges	17.09.2021
IndiGo, SpiceJet Shares Fly High As August Passenger Traffic Surges	17.09.2021
KLM Airlines enters digital territory on the back of TCS' high-flying tech	10.09.2021
What the Tatas must do to make Air India fly high again	10.10.2021
Will Tata Sons, Singapore Airlines fly high in Indian skies	25.09.2013

31. The third set of documents are print-outs showing use of 'FLY HIGH' by various airlines, i.e. as common to aviation sector. A chart enumerating the same is as follows:-



Airline	Date	Extracted reference
Air India	12.01.2022	" AIRINDIA ✈️Fly High #shorts"
Air Asia	26.01.2022	"Here's to exercising our rights to fly high and fly free, bringing people, cultures, and communities closer to each other. #RepublicDay!"
Singapore Airlines	N.A.	" FLY HIGH as an airline professional"
Air India	09.05.2019	"Dream BIG! Fly HIGH! #AirIndia #FlyTheChange #FlyAI"



Ethiopian Airlines	13.02.2021	“Let us fly high together with a pleasant on-board experience. #FlyEthiopian”
Oman Air	08.12.2014	“ Flying high in our Embraer! How high exactly can we fly? Answer: 41,000 ft”
Air India	22.02.2019	“Dream BIG! Fly HIGH! #AirIndia #FlyTheCchange #FlyAI”
Oman Air	24.07.2018	Facebook profile “ Flyhigh MNL”
Indigo	07.09.2021	“Free to fly higher ”
Singapore Airlines	N.A.	“ HighFlyer business travel programme”
Oman Air	20.11.2020	“Always dream big, fly high and reach the top” – wishing a joyful #WorldChildrenDay to every child in the world! 📧: @buhudhaifa”
Oman Air	17.10.2019	“Spread Wings, Fly High. Happy #OmaniWomensDay!”
Spicejet Airlines	14.01.2022	“ Flying high with festive spirit”
Thai Airways	11.05.2018	“🎵 Fly high in the skies...”
Emirates Airline	13.01.2022	“ Flying high above it all. Can it get better than this?”
Lufthansa	21.01.2022	“May the tricolour fly high ”
Philippine Airlines	07.02.2021	“Buy Low, Fly High with Philippine Airlines!...”



32. From a perusal of the aforementioned documents, this Court finds as a matter of fact that ‘FLY HIGH’ is widely used, both in airline sector as well as with respect to coaching Institutes pertaining to aviation sector including travel and tourism and Defendant is neither the only one nor the first user of the phrase FLY HIGHER and this only supports the stand of the Defendant

that its intended user is descriptive of its services and for purpose of promotion and advertisement.

33. It is a settled law that in order establish a claim of passing off, Plaintiff must show that it has garnered goodwill and reputation, which is sought to be encashed by the Defendant by misrepresentation that its goods emanate from or have some connection with the Plaintiff and the confusion/misrepresentation results in injury to the reputation of the Plaintiff. In the present case, Defendant has brought out the stellar reputation and goodwill that it enjoys and the expanse of operations of its full-service


Airline under the well-known trademark . The growing fleet of its aircrafts, number of flights undertaken, both domestic and international, number of internet users visiting its website, the awards received as Best Airline consistently from 2016 and substantial amounts invested on promotion campaigns, revenue generated etc., are evidence of the reputation garnered by the Defendant. In fact, in the context of promotion campaigns, Defendant has stated in the written statement that from the year 2014-15, it has been spending nearly Rs. 15-20 crores on


promotions of its services under the trademark  and the expenses have increased to near/over Rs. 30 crores from the Financial Year


2015-16. Defendant's trademark  has been declared a well-known mark as defined under Section 2(1)(zg) of the Act by this Court in CS(COMM) 156/2019. Over the years, the campaign FLY HIGHER has

been deployed across multiple platforms including advertisements during popular prime time television shows. It is also averred in the written statement that the campaign launched in 2018 was a roaring success and from the 'VISTARA UPGRADE', Defendant has earned a revenue of Rs. 14,67,19,952/- since August, 2020 till mid-January, 2022. There is only a general and evasive denial to these averments by the Plaintiff, in the Replication.

34. It cannot be underscored that in a claim of passing off, Plaintiff must show the reputation/goodwill it has acquired, however, it is equally important to discharge the onus, even though *prima facie* at this stage, that Defendant is misrepresenting amongst the public by encashing on Plaintiff's reputation. Looking at the reputation of the Defendant, as aforementioned, Defendant does not need to encash on Plaintiff's reputation to operate its airlines, as rightly contended by learned Senior Counsel for the Defendant. The manner in which the phrase FLY HIGHER is being used by the Defendant does not appear to be with an intent to deceive, misrepresent or confuse members of the public. Prominent use of the well-known

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trademark in conjunction with the phrase FLY HIGHER further defies any intent of the Defendant to misrepresent, contrary to the stand of the Plaintiff. Hence, Plaintiff has failed to establish a *prima facie* case of passing off against the Defendant.

35. Learned Senior Counsel for the Plaintiff relied on orders of interim injunctions secured in CS(COMM) 496/2021, CS(COMM) 305/2021, CS(COMM) 866/2018 and CS(COMM) 287/2019. Insofar as, the first three

suits are concerned, the subject matter relates to educational institutions which fall within the purview of class 41, in which the Plaintiff holds registration. Additionally, in CS(COMM) 88/2016, the suit is against an ex-employee of the Plaintiff where a claim for misappropriation of confidential information has also been made. Insofar as CS(COMM) 287/2019 is concerned, the same was filed against Go Air, however, Defendant has stated in the written statement that a consent decree was passed in the said suit and as rightly contended, the same cannot bind the Defendant in the present suit. Insofar as reliance on the observation of the judgment dated 16.02.2022 passed in CS(COMM) 305/2021, is concerned, the same is inapplicable to the present case, in view of the finding given by this Court in the earlier part of the judgment that Defendant is not using the expression 'FLY HIGHER' as a trademark. Additionally, in the said case the Defendant was using the mark in respect of services similar to that of the Plaintiff and as evident from para 22 of the judgement it is in this backdrop that the Court held that any person using 'FLY HIGH' in respect of identical or similar services would be infringing Plaintiff's mark. In the present case, as noted above the services offered by the Defendant are not similar to those of the Plaintiff.

36. Learned Senior Counsel for the Plaintiff has relied on the judgment in ***Moonshine Technology Private Limited (supra)***. In the said case, the Court came to a finding that the word 'Baazi' was being used by the Defendants as a trademark and not as a description of their services with an intent to gain unfair advantage of the repute of the Plaintiff's trademark. In the present case, as noted above, Defendant is not using the phrase FLY HIGHER as a

trademark and has no intent to take unfair advantage of Plaintiff's reputation, having an impeccable and immense reputation of its own.

37. The facts of the case in the judgment relied upon by the Plaintiff in the case of *Sabmiller India Ltd (supra)*, are wholly different. The Court therein came to a finding that the rival trademarks were visually alike giving rise to likelihood of confusion as the words 'FIVE THOUSAND' and '5001' are phonetically similar. The question before the Court was primarily what constitutes 'use' and it was held that only because a registered trademark is not used exactly in the manner in which it is registered, it cannot be said that the registered proprietor has abandoned the trademark. In the context of an argument raised by the Defendant that there were multiple marks seemingly similar to that of the Plaintiff, the Court held that the mere presence of the mark on the Register does not prove its user and having regard to the enormity of Plaintiff's reputation in the suit mark, some solitary instances of such nature are of no consequence. Quite contrary, in the present case, the Defendant is not using the phrase FLY HIGHER as a trademark and Plaintiff has been unable to controvert the common usage of the said phrase and its variations, not only by Airlines but also training institutes.

38. Insofar as the judgment in *Midas Hygiene Industries (P) Ltd. and Another (supra)*, is concerned, this Court has not given any finding against the Plaintiff and therefore it is unnecessary to delve on the principles laid down therein. As far as the remaining judgments are concerned, suffice would it be to state that each of them deals with comparison of the rival trademarks in terms of visual, structural and phonetic similarity. 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.

39. For all the aforesaid reasons, the *ex parte* ad interim injunction order granted by this Court *vide* order dated 21.01.2022 is hereby vacated.

40. Accordingly, I.A. 1188/2022 filed under Order 39 Rules 1 and 2 CPC by the Plaintiff is dismissed and I.A. 1670/2022 filed under Order 39 Rule 4 CPC by the Defendant is allowed.

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.

CS(COMM) 54/2022 & I.A. 1795/2022, 3651-52/2022

42. List for further proceedings on 13.01.2023, before the learned Joint Registrar.

OCTOBER 28th, 2022/shivam/rk

JYOTI SINGH, J

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