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

Date of Decision: 28th March, 2022

+ **CS (COMM) 131/2021**

RADICO KHAITAN LIMITED Plaintiff
Through: Mr. Anirudh Bakhru, Ms. Ishani
Chandra, Ms. Srijan Uppal, Mr.
Abhishek Bhati, Mr. Yashasvi Gupta,
Advocate (M:9654041529)

versus

SARAO DISTILLERY (OPC) PVT. LTD. & ANR. Defendants
Through: None

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.

I.A. 4356/2021 (for stay)

2. The present injunction application has been filed seeking *ad interim* injunction in respect of the use of the mark 'EVENING MOMENT' by the Defendants, which is deceptively similar to the Plaintiff's mark 'MAGIC MOMENTS' registered in Class 33 for alcoholic beverages.

3. The case of the Plaintiff is that it is one of the largest manufacturers and sellers of Indian Made Foreign Liquor (IMFL) in India. One of its leading products branded as 'MAGIC MOMENTS' has annual sales of more than Rs.1,700/- crores in the year 2019-2020, and cumulative sales of 15 years from 2005 to 2020 of over Rs.11,000/- crores. The grievance in the present suit was that the Defendant No.1 was using the mark 'EVENING MOMENT' for whisky manufactured by it. The Defendant No.2 is the

proprietor of the impugned trademark 'EVENING MOMENT' in Class 33 for alcoholic beverages, vide Trademark Application No.3644751, though the same was filed on a 'proposed to be used' basis.

4. The suit was listed for the first time on 22nd March, 2021. On the said date, the Court had granted an *ex parte ad-interim* injunction in the following terms:

“12. Having regard to the facts noted above, at this stage, the Court considers it appropriate to grant limited relief to the Plaintiff. Till the next date of bearing, the Defendants, the directors, executive partners, proprietors as the case may be, are restrained from using the trade mark 'EVENING MOMENTS' in respect of any other product, except for whiskey that is already being manufactured by the Defendant.”

5. However, the Defendants have not entered appearance as is clear from the order dated 1st October, 2021 passed by the Joint Registrar. The Joint Registrar has perused the entire records and various other reports and has arrived at a conclusion that both the Defendants have been served through email on 23rd September, 2021.

6. Mr. Bakhru, Id. Counsel appearing for the Plaintiff, submits that the Defendants were initially not enjoined *qua* whisky as the Defendants had claimed that they had been using the mark for five years, in view of the registration which was in their favour. He submits that since inception, more than 7 to 8 hearings have passed, but the Defendants have not entered appearance. He relies on the fact that the word 'MOMENTS' is the essential and dominant feature of the Plaintiff's mark 'MAGIC MOMENTS'. Owing to the large amount of sales of the Plaintiff and the various registration for

the word 'MOMENTS' and 'MAGIC MOMENTS', etc., the mark deserves to be protected even *qua* whisky. Reliance is placed upon the judgments in *Shree Nath Heritage Liquor Pvt. Ltd. v. Allied Blenders & Distillers Pvt. Ltd.* [2015 SCC OnLine Del 10164] as also in *South India Beverages Pvt. Ltd. v. General Mills Marketing Inc.* [2014 SCC OnLine Del 1953].

7. A perusal of the record shows that the Plaintiff adopted the word mark 'MAGIC MOMENTS' in the year 1997 and has launched Gin and Vodka products under the trademark 'MAGIC MOMENTS' in the year 2005 and 2006, and has been using the said trade mark extensively, continuously and in an uninterrupted manner. It launched many variants under the umbrella brand 'MAGIC MOMENTS', namely Remix (2008), Verve (2012) and Electra (2015).

8. The Defendants have not appeared in this matter, despite service. The essential feature of the mark 'MAGIC MOMENTS' being 'MOMENTS' has also been protected, vide order dated 12th October, 2020 passed by the Id. Single Judge of this Court in *CS (COMM) 441/2020* titled *Radico Khaitan Limited v. Vintage Distillers Ltd.* The observation of the Id. Single Judge in respect of the adoption of the mark 'VINTAGE MOMENTS' by the Defendant therein, is set out below:

“8. Grievance of the plaintiff in the present suit is to the adoption of the mark 'VINTAGE MOMENTS' by the defendant who has adopted this mark for the identical goods. Defendant has applied for the impugned trademark 'VINTAGE MOMENTS' in Class-33 on 26th August, 2020 on proposed to be used basis vide application No.4625185 for alcoholic beverages including Wines, Spirits, Whisky, Rum, Vodka, Gin and Brandy. The said mark has already been objected to by the Trademark Registry. The plaintiff has also screen

shared the search on the Trademark Registry which shows that the pre-dominant marks registered with the word 'MOMENTS' belongs to the plaintiff and few marks registered otherwise have either been abandoned or are on proposed to be used basis for which, learned counsel for the plaintiff states, that as and when required action would be taken if necessary.

9. Considering the averments in the plaint as also the documents filed therewith the plaintiff has made out a prima facie case in its favour and in case no ad-interim injunction is granted, the plaintiff will suffer and irreparable loss. Balance of convenience also lies in favour of the plaintiff.”

9. The above order dated 12th October, 2020 has been upheld by the Id. Division Bench of this Court, vide order dated 4th January, 2021 in **FAO(OS) COMM-177/2020**.

10. In a similar fact situation, the Id. Division Bench of this Court in **Shree Nath Heritage Liquor (supra)**, has held as under:

“95. For trademark infringement, we will consider only label 1 of the respondent which is registered as a trademark in India. The respondent's word mark 'Officer's Choice' is an essential feature of this label as consumers are bound to refer to the respondent's product by this mark. We disagree with the appellant's argument that the only essential feature of the respondent's labels is the insignia on the label Since we have already held that prima-facie the word mark 'Officer's Special' is deceptively similar to the mark 'Officer's Choice', therefore, the appellant's mark 'Officer's Special' would prima-facie be deceptively similar to the respondent's label 'Officer's Choice' label, especially since consumers expect manufacturers of alcoholic beverages to churn out variants.

96. Furthermore, for the purpose of passing off, we consider labels 1, 2, 3 and 5 of the respondent. The

respondent has been using the said labels and/or their minor variants with the mark 'Officer's Choice' since 1988. While the labels may have been altered over the years, the word mark 'Officer's Choice' has remained consistent, thereby creating the same commercial impression. We do not consider label 4 for passing off since the respondent admittedly did not sell any products under this label. The appellant's label for 'Officer's Special' prima-facie gives the same visual impression as labels 1, 2, 3 and 5 of the respondent identified above. As discussed above, the presence of the prima-facie deceptively similar mark 'Officer's Special' on the appellant's label makes the label of the appellant deceptively similar to the respondent's label No. 1. Furthermore, similarities that give the same overall impression between the appellant's label and respondent's labels No. 2, 3 and 5, in addition to the deceptively similar mark 'Officer's Special' are a golden border on a white background, use of the deceptively similar mark 'Officer's Special' in red font and the style and font in which 'Officer's Special' is written on the label.

97. We therefore prima-facie conclude as follows:

a. The appellant's word mark 'Officer's Special' is prima-facie deceptively similar to the trademark 'Officer's Choice' of the respondent;

b. The appellant's label for 'Officer's Special' is deceptively similar to the trademark 'Officer's Choice' label No. 1 of the respondent for the purpose of infringement and labels 1, 2, 3 and 5 for the purpose of passing off.

Nature of goods/services in respect of which they are used as trademarks:

98. Both parties are using the marks in question for IMFL. The difference between the products cited by the appellant, i.e. its whisky is produced

from grains, is highly unlikely to rule out an otherwise probable likelihood of confusion. Therefore goods of the parties in this case are identical.

99. The respondent has also been using the mark 'Officer's Choice' for packaged drinking water as is evident from the respondent's sales promotion material filed in the suit, a copy of which is filed in the present appeal by the appellant. Since the product of the appellant, i.e. whisky/IMFL, is allied and cognate to packaged drinking water, it is likely that consumers will be confused into believing that the appellant's 'Officer's Special' whisky originates from the respondent.

Class of purchasers who are likely to buy the goods

100. The class of purchasers of the two products are highly likely to be overlapping since the two products are IMFL and they are sold through common vendors.

101. Further, it is highly likely that customers of both parties for the products in question are indiscriminating purchasers.

Mode of purchasing the goods or placing orders for the goods

102. As discussed while discussing FAO (OS) No. 368/2014, the likelihood of confusion between similar marks increases with increase in passage of time and sequential consumption of the products.

103. In the instant case, sequential consumption of the two products is of course highly probable. These products are also sold through common vendors where not only the consumer can be

susceptible to confusion but also the vendors who deal in these products.

104. It is likely that once a consumer is confused between the marks 'Officer's Choice' and 'Officer's Special', especially when it is likely that he consumes one subsequent to the other and after some time, he or she may even confuse the experience associated with them.

Intention of the Appellant

105. The stark similarities between the appellant's 'Officer's Special' label and that of the respondent as discussed above are unlikely to be mere coincidental, especially since the appellant's adoption of the impugned label is admittedly subsequent to that of the respondent.

106. The appellant had filed an opposition against a trademark application filed by the respondent for the mark 'Officer's Choice'. The appellant has stated as follows:

...The mark 'Officer's Choice' under the impugned application is visually, phonetically, structurally and confusingly, deceptively similar to our reputed and well known trademark 'Officer's Special' ...

107. Based on the above discussion, we prima-facie conclude that the appellant's mark and label for 'Officer's Special' are deceptively similar to the respondent's mark and labels 1, 2, 3 and 5 for 'Officer's Choice' and are likely to cause confusion among consumers. The appellant's impugned mark and label amount to infringement of the respondent's registered trademarks No. 538927 and 610451 and passing off of the mark 'Officer's Choice' and labels No. 1, 2, 3 and 5."

11. Similarly, in respect of composite marks, the observations of the 1d. Division Bench of this Court in *South India Beverages (supra)* are relevant. The said observations are extracted below:

“25. Therefore, the submission of the appellant-defendant predicated upon the principle of ‘anti-dissection’ that action for infringement would not lie since use of the word ‘D'DAAZS’ does not result in complete appropriation of the respondent-plaintiff’s mark ‘HAAGEN DAZS’, which is to be viewed as an indivisible whole, is liable to be rejected.

26. Dominant features are significant because they attract attention and consumers are more likely to remember and rely on them for purposes of identification of the product. Usually, the dominant portion of a mark is that which has the greater strength or carries more weight. Descriptive or generic components, having little or no source identifying significance, are generally less significant in the analysis. However, words that are arbitrary and distinct possess greater strength and are thus accorded greater protection.[174 F. Supp. 2d 718, 725 (M.D. Tenn. 2001) Autozone, Inc. v. Tandy Corporation]

27. It would be pertinent to recollect that in the present case, the mark of the respondent-plaintiff- ‘HAAGEN DAZS’, is a unique combination of Danish-sounding words, which have no recognised meaning whatsoever in any language or etymology. Evidently, the owner of the mark coined these arbitrary words in order to make its brand name sound original or unique.”

12. In the present case too, the words ‘MAGIC MOMENTS’ is an arbitrary word used for the products of the Plaintiff. Considering the overall facts and circumstances, this Court is of the opinion that the marks ‘MAGIC MOMENTS’ and ‘EVENING MOMENT’ are deceptively similar in view of

the fact that the essential feature 'MOMENT' is being used *in toto* by the Defendants. The use of the word 'MOMENT' in the Defendant's mark could lead consumers to connect the said product to the Plaintiff. It can be easily perceived that the Defendant's product is another addition to the Plaintiff's product-stable. Moreover, the use of the word 'EVENING' is not sufficient to distinguish the two products due to the very nature of the product which is usually consumed in evening times. The focus would be on the word 'MOMENT' which is the dominant part of the impugned mark.

13. Accordingly, the Defendants and all others acting for or on their behalf, are restrained from using the mark 'EVENING MOMENT' or any other mark consisting of the word 'MOMENT/MOMENTS' in respect of any alcoholic beverages manufactured, sold or offered by sale by them.

14. Interim order shall operate during the pendency of the present suit. Application seeking interim injunction being *I.A. 4356/2021* is disposed of in the above terms.

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15. List before the Court on 22nd July, 2022.

**PRATHIBA M. SINGH
JUDGE**

MARCH 28, 2022/aman/ad
(corrected & released on 31st March, 2022)