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

\+ C.A.(COMM.IPD-TM) 38/2022

WHIRLPOOL PROPERTIES, INC. ..... Appellant

Through: Mr. Pranay Bali and Ms. Sucharitha Banda, Advocates.

versus

THE REGISTRAR OF TRADE MARKS ..... Respondent

Through: Mr. Harish Vaidyanathan Shankar, CGSC with Mr. Srish Kumar Mishra, Mr. Sagar Mehlawat and Mr. Alexander Mathai Paikaday, Advocates for R-2.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

O R D E R

% 05.01.2023

1. Present appeal under Section 91 of the Trade Marks Act, 1999 [hereinafter "***the Act***"], impugns order dated 19th September, 2018 read along with statement of grounds of decision dated 07th January, 2019, both issued by Senior Examiner, whereby Appellant's application No. 2557910 for device mark *viz.* "" [hereinafter "***subject mark***"] in Class 03 for goods in the nature of – combination cleaner with deodorizer for clothes, washing machines etc., has been refused. Relevant portion of statement of grounds of decision, is extracted hereunder:

> *"With reference to the above and request on Form TM-M dated 11/10/2018. It has been decided by the Registrar of Trade Marks to inform you that hearing in respect of above application was held on 06/09/2018*

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and the said application is refused on the following Grounds;

** Advocate Abhimanyu appeared. Application is devoid of any distinctive character. Objection under Section (9) sustained. Identical/Similar mark already on record. There is no affidavit and supporting document is on record claiming the use and distinctiveness of the mark. Likelihood of confusion. Objection under Section (11) sustained. Perused. Trademark refused on merit.*
** 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 or 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; or*
**11(1)(b)- Relative grounds for refusal of registration. The said trade Mark is refused for registration because of its similarity to an earlier trade mark and the identity or similarity of the goods or services covered by the trade mark there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.*

Application is devoid of any distinctive character. Objection under Section (9) sustained. Identical/Similar mark already on record. There is no affidavit and related supporting document is on record claiming the use and distinctiveness of the mark. Likelihood of confusion. Objection under Section (11) sustained. Perused.
Trademark refused on merit."

2. Mr. Pranay Bali, counsel for Appellant submits that aforesaid reasons for refusal are erroneous and without any sufficient cause. Appellant had filed: (i) details of worldwide registrations and evidence of use of subject mark; (ii) reply to Examination Report dated 17th July, 2014; and (iii) an affidavit of evidence in support of prior use, which have not been taken into consideration by Respondent. Further, subject mark is already registered in India under different classes which indicates that Respondent has accepted

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subject mark to be distinctive and thus, grounds of refusal are not sustainable.

3. *Per contra*, Mr. Harish Vaidyanathan Shankar, counsel for Respondent, opposes the application and states that reasons given in the Statement of Grounds are in accordance with the Act and the rules framed thereunder, and no interference is warranted.

4. The Court has considered the afore-noted submissions. The subject mark has been objected to under Section 9(1)(a) and (b) and Section 11(1)(a) and (b) of the Act. Although reference is made to afore-noted provisions, no reasoning has been supplied to support the conclusion drawn by Senior Examiner.

5. Be that as it may, subject mark comprises of the word "AFFRESH" a coined and invented word written in a stylized manner, which does not have a dictionary meaning. It is therefore, inherently distinctive and the objection under Section 9(1)(a) of the Act is not sustainable. As regards objection under Section 9(1)(b) of the Act, the Court finds that the subject mark does not readily conjure up the image of the goods it is sought to be applied to. Accordingly, adoption of said mark, in relation to said goods, is not descriptive, but can only be considered as suggestive.

6. As regards objection under Section 11 of the Act, the similar cited marks are as follows:

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APPL NO	CLASS	CONFLICTING MARK	JOURNAL No	PROPRIETOR NAME	PROPRIETOR ADDRESS	STATUS	TM IMAGE
GOODS SERVICES							
341389	3	FRESH COVER	945	COSCELEBRE, INC,	415, MADISON AVENUE, NEW YORK, NEW YORK 10017, UNITED STATES OF AMERICA.	Registered	
APPLICATION DATE 04/10/1978 GOODS/SERVICE FACIAL CREAMS, LOTIONS, CLEANSERS, MASKS, LIQUID AND CREAM MAKE-UP, ALL BEING NON-MEDICATED TOILET PREPARATIONS.							
400233	3	FRESH START	1093	COLGATE - PALMOLIVE COMPANY	300, PARK AVENUE, NEW YORK, 10022, NEW YORK, UNITED STATES OF AMERICA.	Registered	
APPLICATION DATE 19/01/1983 GOODS/SERVICE DETERGENTS AND LAUNDRY PREPARATIONS INCLUDED IN CLASS 3.							
446785	3	FRESHERS		RAMESH TAINWALA.	71, KALPTARU, NUTAN LAXMI SOCIETY, J.V.P.D.SCHEME, VILE PARLE (WEST), MUMBAI-400049.	Accepted	
APPLICATION DATE 12/12/1985 GOODS/SERVICE PERFUMMED SERVIETTES FOR TOILET AND COSMETIC PURPOSES INCLUDED IN CALSS-3.							
645661	3	FRESHNOL		BHARAT PURUSHOTTAM BAGADIYA	1117, SHUKRAWAR PETH, SATHE COLONY, 1ST FLOOR, PUNE -411 002, M.S. INDIA.	Registered	
APPLICATION DATE 15/11/1994 GOODS/SERVICE CLEANERS (CLEANING PREPARATIONS)							
866110	3	FRESH MAKE UP	9999	M/S.L'OREAL	14 rue Royale 75008 PARIS FRANCE.	Registered	
APPLICATION DATE 15/07/1999 15:39:48 GOODS/SERVICE PERFUME, TOILET WATER, GELS, SALTS, FOR THE BATH AND THE SHOWER, TOILET SOAPS, BODY DEODORANTS, COSMETICS NAMELY CREAMS, MILKS, LOTIONS, GELS AND PWDERS FOR THE FACE, THE BODY AND THE HANDS, SUN CARE PREPARATIONS, MAKE-UP PREPARATIONS, SHAMPOOS, GELS, SPRAYS, MOUSSES AND BALMS FOR THE HAIR STYLING AND HAIR CARE, HAIR LACQUERS, HAIR COLOURING AND HAIR DECOLORANT PREPARATIONS, PERMANENT WAVING AND CURLING PREPARAIONS, ESSENTIAL OILS FOR PERSONAL USE, DENTIFRICES.							
888852	3	FRESH HOME	9999	ANITA TUSHARBHAI CHAMPANERIA	14, GAYATRI NAGAR, NR. KAILASH NAGAR, SAGARAMPARA, SURAT - 395 002, GUJARAT.	Registered	FRESH HOME
APPLICATION DATE 29/11/1999 15:31:52 GOODS/SERVICE bleaching powder, liquid bleach, naphthalene balls, perfumedicleaner, toilet cleaner, liquidsoap, shampoo, hydrochoric acid.							
1030297	3	FRESHINA	1321	MEHULBHAI J. KANANI	C - 44, M. P. SHAH SARU SECTION, UDYOGNAGAR, JAMNAGAR, (GUJARAT).	Opposed	
APPLICATION DATE 24/07/2001 15:57:19 GOODS/SERVICE SOAP STRIPS INCLUDED IN CLASS 3							
1037017	3	FRESHEE	9999	VINAY SIL-COS PVT. LTD.	201, SHIVAM SATYAMA WING, M.G. ROAD, GHATKOPAR (EAST), MUMBAI - 077.	Registered	
APPLICATION DATE 14/08/2001 15:48:00 GOODS/SERVICE dish washer, included in class 3.							
1484903	3	FRESH @ (LOGO)	1400	HERITAGE FOODS (INDIA) LTD	6-3-541/C, PANJAGUTTA, HYDERABAD-500082, AP	Opposed	
APPLICATION DATE 06/09/2006 15:12:00 GOODS/SERVICE BLEACHING PREPARATIONS AND OTHER SUBSTANCES FOR LAUNDRY USE; CLEANING, POLISHING, SCOURING AND ABRASIVE PREPARATIONS; SOAPS; PERFUMERY, ESSENTIAL OILS, COSMETICS, HAIR LOTIONS; DENTIFRICES ALL INCLUDED IN CLASS 3							
1509624	3	FRESH (LABEL)		SRI ANAND	LL. COMPOUND, P.B. ROAD, GAGAD, KARNTAKA - 582 101	Objected	
APPLICATION DATE 01/12/2006 16:37:00 GOODS/SERVICE WASHING POWDER, SCOURING POWDER, LIQUID BLUE							
1606173	3	FRESH MIX	1604	M/S BIOTHERM	"LE NEPTUNE" 11 AVENUE ALBERT II MC-98000 MONACO PRINCIPAUTE DE MONACO	Registered	
APPLICATION DATE 27/09/2007 15:30:17 GOODS/SERVICE PERFUME, TOILET WATER; GELS, SALTS FOR THE BATH AND THE SHOWER NOT FOR MEDICAL PURPOSE; TOILET SOAPS, BODY DEODORANTS; COSMETICS NAMELY CREAMS, MILKS, LOTIONS, GELS AND POWDERS FOR THE FACE, THE BODY AND THE HANDS; SUN CARE PREPARATIONS (COSMETIC PRODUCTS), MAKE-UP PREPARATIONS; SHAMPOOS; GELS, SPRAYS, MOUSSES AND BALMS FOR THE HAIR STYLING AND HAIR CARE; HAIR LACQUERS; HAIR COLOURING AND HAIR DECOLORANT PREPARATIONS; PERMANENT WAVING AND CURLING PREPARATIONS; ESSENTIAL OILS FOR PERSONAL USE.							
1660032	3	FRESH		CHRYSALIS PLASSO	105, RAKESH DEEP, 11 COMMERCIAL COMPLEX, GULMOHAR ENCALVE, NEW DELHI	Objected	
APPLICATION DATE 29/02/2008 17:20:21 GOODS/SERVICE AIR FRESHENERS, BLEACHING PREPARATIONS AND OTHER SUBSTANCES FOR LAUNDRY USE; CLEANING, POLISHING, SCOURING AND ABRASIVE PREPARATIONS; ESSENTIAL OILS, COSMETICS, HAIR LOTIONS; COLOR REMOVING PREPARATIONS, COSMETICS, FAIRNESS CREAM, PERFUMERY, AFTER SHAVE LOTION, DEODORANTS FOR PERSONAL USE, SOAPS, DEODORANTS SOAP, DISINFECTANT SOAP, SOAP FOR DRIGHTENING TEXTILE; HAIR DYES, MASCARA, FLOOR CLEANERS, MULTI SURFACE CLEANER, TOILET SOAP & CLEANERS; TOILET CLEANING AND CLEANSING, POLISHING, SCOURING & ABRASIVE PREPARATIONS; WINDSCREEN OR GLASS CLEANING LIQUIDS AND OTHER ALLIED GOODS INCLUDED IN CLASS 3.							
1856951	3	FRESH		M.D. AMEEN	NO. 18/28, 1ST FLOOR, 9TH, A MAIN ROAD, 5TH CROSS, B.T.M. LAYOUT, 1ST STAGE, BANGALORE - 560 029.	Objected	
APPLICATION DATE 31/08/2009 16:56:59 GOODS/SERVICE AGARBATTI							

7. Amongst the afore-noted cited marks, Mr. Bali has pointed out that marks at serial no. 1, 5, 8 and 11 *viz*., "FRESH COVER", "FRESH MAKE UP", "FRESHEE" and "FRESH MIX", had lapsed as on the date of the

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impugned order. Further, mark at serial no. 4 *viz.* '' has since lapsed. Remaining marks, on a comparison are found to be *prima facie* dissimilar. It is a well settled principle that comparison has to be made between two trademarks as a whole.[1] Subject mark, when taken as a whole, is distinctive and not deceptively similar to said marks. That apart, Appellant already has registration in its favour of identical device mark in in several other jurisdictions such as U.S.A., Canada, Australia, Indonesia, Mexico, Hong Kong including within India (*vide* application No. (s) 2557911 and 2557912 under Classes 07 and 11, respectively).

8. For fore-going reasons, grounds for refusal cannot sustain and accordingly, present appeal is allowed with following directions:

(i) Impugned order dated 19th September, 2018 is set aside.

(ii) Trademark Registry is directed to process the registration application for the subject mark.

(iii) Subject mark be advertised within a period of three months from today.

(iv) If there is any opposition to the said application, the same shall be decided on its own merits uninfluenced by observations made hereinabove.

9. With the above directions, the appeal is disposed of.

10. Registry is directed to supply a copy of the present order to the

[1] Cadilla Healthcare Ltd. *v.* Cadilla Pharmaceuticals Ltd., 2001 SCC OnLine SC 578.

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Trademark Registry at llc-ipo@gov.in for compliance.

SANJEEV NARULA, J

JANUARY 5, 2023
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