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

\+ C.A.(COMM.IPD-TM) 91/2021

AMRIT SINGH MEHTA ..... Appellant

Through: Mr. Manoj Kumar Sahu, Advocate.

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.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

O R D E R

% 09.01.2023

1. Appellant seeks registration of the wordmark "NONIE" in respect of cosmetics falling under class 3 [*hereinafter*, "***subject mark***"] *vide* application No. 2094239. Said application was refused on 07th March, 2018 for reasons mentioned in the Statement of Grounds dated 23rd May, 2018. Aggrieved thereby, Appellant filed a review application against refusal order dated 07th March, 2018,[1] which was dismissed on 18th January, 2019 in following terms [*hereinafter*, "***review order***"]:

> " ***ORDER***
>
> *An application for registration of trade mark consisting of word " NONIE" was filed by the aforesaid Applicant under application No 2094239 in respect of all goods included in Class- 3. The application was examined and examination report containing the objections to the acceptance of*

[1] Erroneously noted as 29th October, 2018 in the review order.

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application for registration of trade mark was communicated to the Applicant. On the request of the Applicant, a hearing was fixed in this matter. Eventually on 29th October 2018, the application came up before me for hearing. Neither anybody appeared for hearing, nor was any application for adjournment filed on behalf of the applicant. Accordingly, the application was treated as abandoned and the order was passed accordingly.

The present petition on form TM-M has been filed for review of the order dated 29 October 2018

ADV. GAURAV APPEARED, ARGUED, HEARD CHECKED, IT APPEARED THAT REGISTERED CITED MARK WITH PRIOR USE AND GOODS IS ON RECORD, USER CLAIMED SINCE 1994 BUT NOT PRODUCED AND PROVED ALONG WITH AFFIDAVIT, MANY OPPORTUNITIES OF HEARING ALSO GIVEN SINCE NOV.2017 FOR PRODUCTION OF DOCUMENTS, SO THERE IS NO NEW FINDING OF FACTS, HENCE REFUSED.

The request on form TM-M is accordingly Refused."

2. The Senior Examiner of Trademarks has refused the application stating that Appellant failed to demonstrate user since 1994, as claimed. Objection in respect of proof of user claim since 1994 was raised for the first time at the time of review. The stipulation *qua* filing of user affidavit has been introduced by Trade Marks Rules, 2017, published in the Official Gazette on 06th March, 2017 and were not in force as on the date of the application (*i.e.*, 03rd February, 2011). There was thus no requirement for Appellant to substantiate its user claim by way of an affidavit, and this ground of refusal cannot sustain.

3. Coming to the Statement of Grounds dated 23rd May, 2018, which discloses following reasons:

"

With reference to the above and request on Form TM-M dated 05/04/2018. It has been decided by the Registrar of Trade Marks to inform you that hearing in respect of above application was held on 21/02/2018 and the said application is refused on the following Grounds;

** NON APPEARED, OPPORTUNITIES ARE GIVEN AND NO REQUEST FOR ADJOURNMENT FILED AND REPLY IS ALSO NOT SATISFACTORY AS TO*

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EXAMINATION REPORT, NO EVIDENCE IN SUPPORT ON RECORD, AND REGISTERED IDENTICAL CITED MARK IS ON RECORD HENCE REFUSED.

** 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.*
** 11(2)(a) - The trade mark with- it is identical with or similar to an earlier trade mark*"

4. The similar cited mark, as per examination report dated 29th March, 2012, is as follows:

APPL NO	CLASS	CONFLICTING MARK	JOURNAL No	PROPRIETOR NAME	PROPRIETOR ADDRESS	STATUS	TM IMAGE
GOODS SERVICES							
1657563	3	NONIE VANISHING CREAM WITH DEVICE	1433	MOHD. NASEEM	CK-68/25A, Kachchi Saray, Dalmandi, Varanasi U.P. (India	Registered	
APPLICATION DATE 25/02/2008 14:39:48							
GOODS/SERVICE COSMETICS, HAIR OIL; COCONUT OIL, AGARBATTI, STTICKS, NEEL, LIQUIED, BLUE, SOAP, WASHING POWDER, INCLUDED IN CLASS -3							

5. Mr. Manoj Kumar Sahu, counsel for Appellant, has informed that during pendency of present appeal, proprietor of the cited mark ["NONIE VANISHING CREAM WITH DEVICE" under application No. 1657563] *viz.* Mohd. Naseem has assigned the same to the Appellant by way of a 'Deed for Assignment of Trademark' dated 22nd August, 2022. Appellant has also filed an application for updating of records with the Trademark Registry.

6. In light of the foregoing, since the ground for refusal was only under Section 11 of the Trademarks Act, and the sole cited mark stands assigned in favour of Appellant, the present appeal deserves to be allowed.

7. Accordingly, following directions are issued:

(i) Review order dated 18th January, 2019 is set aside. Respondent is directed to proceed for registration of Appellant's mark *viz.* "NONIE" under

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application No. 2094239 for trademark.

(ii) Let advertisement of subject mark be carried out within a period of three months from today.

(iii) In case there is any opposition to the said application, the same shall be decided on its own merits uninfluenced with the above observations.

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

9. Registry is directed to supply a copy of the present order to the Trademark Registry at llc-ipo@gov.in for compliance.

SANJEEV NARULA, J

JANUARY 9, 2023
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