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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: **21.12.2023**

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THE HONOURABLE **MR.JUSTICE SENTHILKUMAR RAMAMOORTHY**

(T)CMA(TM)/161/2023
(OA/34/2020/TM/CHN)

FRESHTOHOME FOODS PRIVATE LIMITED,
No.15, Ground floor, Krishik Sarvodaya,
Golf Avenue Road, Off Old Airport,
Bengaluru (Bangalore) Urban-560 008. ... Appellant

-vs-

The Registrar of Trade Marks,
Trade Marks Registry,
Chennai. ... Respondent

PRAYER: Transfer Civil Miscellaneous Appeal (Trademarks) filed under Section 91 of the Trade Marks Act, 1999, to record and call for the proceedings; to allow the appeal; to set aside the order dated 13.03.2019 passed by the Registrar of Trade Marks, Chennai; to accept the Application No.3681035 and proceed further in accordance with law.

For Appellant : Ms.S.Harinyi

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for M/s.Krislaw

For Respondent : Mr.S.Diwakar, SPC

JUDGMENT

The appellant assails an order dated 13.03.2019 by which Application No.3681035 for registration of the following device mark was refused:



2. The above mentioned application was filed by the appellant on 17.11.2017 in Class 29 by asserting use from 22.03.2016. By examination report dated 24.11.2017, objections were raised both on absolute and relative grounds. The examination report was responded to by stating that the mark is a device mark and that it is

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not within the scope of Section 9 of the Trade Marks Act, 1999 (the Trade Marks Act). As regards the relative ground, it was stated that the cited marks are not similar and that, in any event, the status of the cited marks is objected. After a hearing on 13.03.2016, the impugned order was issued. This was followed by the statement of grounds of decision on 29.04.2019. The present appeal arises in the above facts and circumstances.

3. Learned counsel for the appellant invited my attention to the application and pointed out that the application was made by asserting use since 22.03.2016. By way of substantiating use, learned counsel turned to the affidavit dated 24.10.2017 and pointed out the sales turnover for the financial years 2015-2016, 2016-2017 and a part of the financial year 2017-2018. She also referred to the invoices at pages 27 to 41 of the appeal paper book and indicated that the earliest of such invoices is dated 31.03.2016. Thereafter, learned counsel pointed out that advertisements were issued in the print media in relation to the relevant mark. She concluded her

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submissions by referring to the registration of identical marks under multiple classes.

4. In response, Mr.S.Diwakar, learned SPC, submitted that the application was rejected primarily on the ground that the trade mark consists exclusively of words indicating the intended purpose. He also pointed out that two prior marks were found in course of search and that these prior marks are deceptively similar.

5. The application of the appellant asserts use since 22.03.2016. In order to corroborate such use, an affidavit dated 24.10.2017 is on record and this affidavit contains the sales turnover for financial years 2015-2016 and 2016-2017. Several invoices were placed on record and the first of these invoices is dated 31.03.2016. The examination report records objections both on absolute and relative grounds. I deal with the relative grounds first. The objection on relative grounds is made by referring to the two allegedly conflicting marks. The status of both the cited marks is "objected". Besides, the

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marks are required to be examined as a whole and, if so examined, the cited marks do not appear to be deceptively similar.

6. As regards the absolute grounds raised in the examination report, it should be recognised that the prohibition under Section 9 applies only if the trade mark consists exclusively of marks or indications which serve in trade to designate *inter alia* the intended purpose. The trade mark of the appellant is a device mark consisting of two elements: a pictorial depiction of three leaves; and the words "Fresh to Home" in stylised fonts. When the trade mark of the appellant is examined as a whole, it does not fall within the prohibition of Section 9(1)(b) of the Trade Marks Act.

7. By taking into account the evidence of use and the fact that multiple registrations were granted for an identical mark in several classes by the respondent, the impugned order, which is unreasoned, is unsustainable and is, hereby, set aside. Consequently, the

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application shall proceed to advertisement. It is made clear that this order will not be binding on opponents, if any. (T)CMA(TM)/161/2023 is disposed of on the above terms without any order as to costs.

21.12.2023

Index : Yes / No
Internet : Yes / No
Neutral Citation: Yes / No

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SENTHILKUMAR RAMAMOORTHY,J.

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