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

+ **CS(COMM) 48/2021**

BEIERSDORF AG

..... Plaintiff

Through: Mr. Pravin Anand, Mr. M.S. Bharath, Mr. Dhruv Anand, Mr. Premchandrar, Ms. Uditra Patro, Mr. N.C. Vishal, Ms. Kavya Mammen and Ms. Sampurnaa Sanyal, Advs.

Versus

RSH GLOBAL PRIVATE LIMITED & ANR. Defendants

Through:

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

ORDER

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28.01.2021

(Video-Conferencing)

IA 1367/2021 (Order XI Rule 1(4) of the CPC)

1. This is an application by the plaintiff, under Order XI Rule 1(4) of the CPC (as amended by Commercial Courts, Commercial Division and Commercial Appellate Divisions of High Courts Act, 2015), for permission to file additional documents. Additional documents, if any, be filed within a period of four weeks from today, subject to the right of the defendants to admit or deny the same.

2. The application stands disposed of in the aforesaid terms.

IA 1368/2021

1. Subject to the plaintiff placing on record clear and legible

copies of any documents on which it seeks to place reliance, within a period of four weeks from today, exemption is granted for the present.

2. The application stands disposed of.

CS(COMM) 48/2021

1. Issue summons.

2. Written statement to the plaint, if any, be filed by the defendants within a period of four weeks from today accompanied by affidavit of admission/denial of plaintiff's documents, with advance copy to learned Counsel for the plaintiff, who may file replication thereto, if any, within a period of two weeks thereof accompanied by affidavit of admission/denial of defendants' documents.

3. List before the Joint Registrar (Judicial) for completion of pleadings, admission/denial of documents and marking of exhibits on 24th March, 2021.

IA 1366/2021 (Order XXXIX Rules 1 and 2 of CPC)

1. Issue notice to the defendants, returnable on 26th April, 2021 before the Court.

2. The plaintiff, essentially, alleges infringement, by the defendants, of its trade dress qua the products referred to in paragraph 12 of the plaint, particularly the trademarks registered vide

Registration No. 2912562 and 3289787.

3. The specific products, with respect to which this suit has been filed, and the allegedly infringing products of the defendants, are reflected thus, in para 36 of the plaint:

Plaintiff's – label, trade-dress and packaging	Defendant's label and trade-dress and packaging
 A dark blue plastic bottle with a pump dispenser. The label features the NIVEA logo in white on a dark blue background. Below the logo, it says "Oil in Lotion Cocoa Nourish" in white and gold text. Further down, it says "long lasting nourishment" and "shea butter & coconut oil". At the bottom, it says "VERY DRY SKIN" and "400 ml".	 A dark blue plastic bottle with a pump dispenser. The label features the JOY logo in white on a green background. Below the logo, it says "Intense Moisture dryness repair body lotion" in white. Further down, it says "5 action moisturiser" and "24h hydration". At the bottom, it says "400 ml".

4. For the time being, it is not necessary to advert, in detail, to all the assertions in the plaint, which needless to say, revolve, essentially on the history of the plaintiff, and the reputation, which has been garnered over a period of time, with respect to its trademarks and trade dress. The distinguishing features of the trade dress of the plaintiff, as are apparent from the body of the products, of which infringement is alleged, are that (i) the brand name of the plaintiff is written in white font on a dark blue background, (ii) the container bears a distinctive

blue colour, which is stated to be inevitably identified with the plaintiff and its products and which, as per the assertions in the plaint, stands protected as a colour mark by German Trademark and Patent Office in Class 3, (iii) a milk swirl/splash device in white colour towards the lower half of the container and (iv) cocoa butter in the form of a droplet design in golden colour in the middle of the milk swirl/splash device.

5. The defendants, it is pointed out, have been manufacturing and dealing in sale of beauty care and cosmetic products under the name “Joy” but, till the commencement of manufacture of the allegedly infringing moisturizer, was adopting trade dresses which were distinct from those of the plaintiffs. Para 34 of the plaint reflects this position by the following photographs of the various other products of the defendants:



6. The plaint asserts, therefore, that, till the defendants started manufacturing the allegedly infringing products, the trade dress of the defendants’ products did not imitate or replicate any of the distinctive features which mark the trade dress of the plaintiff’s product.

7. The plaintiff further alleges that sometime in December, 2020, the plaintiff came to know that the defendants had commenced manufacture of “Joy Intense Moisture” moisturizing lotion, in a container, using a trade dress which was deceptively similar to that of the plaintiff.

8. A *prima facie* comparison of the products of the plaintiff and the allegedly infringing products of the defendants reveals this, indeed, to be the case. The defendants’ product is also contained in a container of similar, even if not identical, shape and size, with white letters on a blue background, the shades of blue also being similar to the naked eye and, perhaps, most significantly, a white semicircular splash towards the lower half of the container, which at any rate is, *prima facie*, a feature distinctive to plaintiff’s product. The test for comparison, it is settled, is not for identifying *dissimilarities* between the plaintiff’s product and the allegedly infringing product of the defendant, but of whether, seen as a whole, the product of the defendants is *deceptively similar* to that of the plaintiff.

9. Holistically seen, therefore, there is, *prima facie*, every likelihood of an unwary purchaser, of average intelligence and imperfect recollection, confusing the product of the defendants with that of the plaintiff.

10. Seen in juxtaposition with the fact that, till the allegedly infringing product came to be manufactured, the defendants were not

adopting any trade dress, for its other products, which was similar to that of the plaintiff's product, *prima facie*, a case of deliberate infringement by the defendants, of the trade dress of the plaintiff is, in my opinion, made out.

11. In view thereof, till the next date of hearing, the defendants, their directors, wholesalers, distributors, partners, or proprietor as the case may be, its officers, servants and agents are restrained from using, manufacturing, selling, exporting, importing, offering for sale, distributing, advertising, directly or indirectly dealing in cosmetic products, especially body cream, lotion or goods that are deceptively similar to the plaintiff's distinctive trade dress, amounting to an infringement of the plaintiff's registered trademarks as stated in paragraph 12 of the plaint, particularly Trademark Registration Nos. 2912562 and 3289787; infringement of the plaintiff's copyright in the artistic work of the plaintiff's "NIVEA" label, trade-dress as also passing off their products as emanating from the plaintiff.

12. As the aforesaid order has been passed in the absence of the defendants, the plaintiff shall comply with the provisions of Order XXXIX Rule 3 of the CPC within the time stipulated in that regard.

13. Needless to say, the defendants would be at liberty to apply for variation or modification of the order, if they so choose.

C.HARI SHANKAR, J

JANUARY 28, 2021

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