

# GNOSIS

*Victoriam Legalis - Advocates & Solicitors | Newsletter*



## *In this Month's Issue:*

<b>Media &amp; Entertainment</b>	<b>1</b>
<b>Technology &amp; E-Commerce</b>	<b>3</b>
<b>Fashion &amp; Sports Law</b>	<b>4</b>
<b>Corporate &amp; Commercial Law</b>	<b>6</b>
<b>Hospitality &amp; Real Estate</b>	<b>7</b>
<b>Litigation &amp; Dispute Resolution</b>	<b>8</b>
<b>Start-Up Advisory &amp; Consultancy</b>	<b>10</b>
<b>Descriptive Use vis a vis Trademark Use of a Mark – Delhi HC vacates ex parte ad interim injunction against use of the words FLY HIGHER</b>	<b>11</b>
<b>Get in Touch</b>	<b>15</b>

We here, at Victoriam Legalis, believe in continuous learning and growth, and agree that one way to do the same is to keep up with the developments and changes taking place around us.

We live in an Information Age, and while there is no dearth of knowledge and information, we, through this newsletter, hope to give you a consolidated account of relevant updates and developments.

In light of the same, we present to you the first issue of our newsletter, which we hope, you find beneficial!

Happy Reading!



# Media and Entertainment

## **1. Google removed 5,50,000 content pieces in India due to Intellectual Property Rights complaint**

Google received multiple complaints regarding contents from Indian users. This complaint were basically based on IPR or violation of local laws. Google previously also removed various accounts on the ground of receiving complaints. It took this step in compliance with Information Technology Rules. Google while removing this account stated that they are objecting this content which is violating the laws of land and so they are removing the said account.

## **2. Delhi High Court restrains foreign company from using the TATA trademark in cryptocurrencies trading**

The appellant court has asked the United Kingdom (UK) based company to take down websites and also restrained them from using the trademark of the 'Tata' while selling or trading or advertising in digital currency or cryptocurrency. The court has asked them to take down there two websites i.e. [www.hakunamatata.finance](http://www.hakunamatata.finance) and [www.tatabonus.com](http://www.tatabonus.com). Although, this websites were not in function in India but can be accessed on a daily basis. Also, they changes the name of the currency to \$HKUN token.

## **3. Telegram is instructed to disclose the details about the channels violating the copyright law- Delhi High Court**

The case was filed by a teacher Neetu Singh who aggrieved that the videos of her lecture as well as books/ materials provided regarding competitive exams were uploaded on Telegram. Post her complaint, Telegram took down some channels but new channels were being created and the content was shared. On July 28,2020 the court passed the interim order curbing this activity and issuing directions to give declarations regarding operation of such channels. But this direction was ineffective and so Delhi High Court re-issued the direction to Telegram to disclose the "details of the channels/ devices used to upload the infringing content, mobile numbers, IP addresses, E-mail address etc."

## **4. Ministry Issues Advisory Against Advertisements Of Betting Still Visible On Television And Digital Media**

I&B Ministry has issued two Advisories, one for private television channels and the other for digital news publishers and OTT platforms strongly advising them to refrain from showing advertisements of online betting sites and surrogate advertisements of such sites.

It had come to the notice of the Government that several sports channels on television, as well as on OTT platforms, have recently been showing advertisements of offshore online betting platforms as well as their surrogate news websites. The Advisories were supplemented with evidences which contained direct and surrogate advertisements of offshore betting platforms such as Fairplay, PariMatch, Betway, Wolf 777, and 1xBet.



## **5. Broadcasters sued over copyright infringement by Global Music Rights collecting society**

Three radio broadcasting companies face a lawsuit initiated by the US collecting society, the Global Music Rights. The GMR has claimed that the radio broadcasters had not obtained proper licenses and permissions to play the songs covered by the organization, thereby infringing the rights of the songwriters associated with GMR. The three broadcasting stations being sued are from California, Florida, and Rhode Island, who have not yet obtained a GMR License, while playing the songs without obtaining the license and committing copyright infringement. The representatives of the three radio stations have yet to respond.





# Technology and E-Commerce Updates

## 1. Whatsapp to launch feature where it will block the users to take screenshot for the messages which are marked at 'view once'

Whatsapp is going to launch a new version where it will block the users to take the screenshot of the chats/messages, images and videos which are marked on view once option. Users will be further blocked to screenrecord these messages. If someone tries to take the screenshot then the image or chat will be appearing black. WeBetaInfo is the platform who is currently taking care of the new feature on whatsapp.

## 2. ONDC: Some hit and some flause

The government's e-commerce platform, Open Network for Digital Commerce (ONDC), which aims to empower mom-and-pop shops and kirana stores, was opened for public. Consumers in the particular area can now order groceries and food from restaurants. The app has collaborated with the delivery partners such as Dunzo and Loadshare to deliver the orders. On the first day of the app, Loadshare estimated delivery was 100 orders.

## 3. Amazon has launched its new e-reader 'Kindle scribe' which is different from its other materials

Amazon has recently launched its new Kindle ebook reader which is completely different from its previous models. Due to launch of such category, Amazon holds the dominant position in the e-reader category. So what makes it different from previous models? It has huge library of ebooks and the ecosystem that no-one can compete with. Also it supports Amazon's send to kindle feature, which means that you can directly import the PDF and Word Document from your computer and put it on the scribe. It has not been launched in India yet but looking at the growing market of Amazon in India this will soon gain its popularity and will be launched in India.

## 4. Microsoft will discontinue Swiftkey on IOS from October 5 this year

The tech giant, Microsoft will discontinue to use this key and drop this feature from IOS starting from October 5. But the people who have already installed this feature can continue to use this feature post October 5 till the time they don't shift to any other. Microsoft declined to comment on this question that why they are dropping this feature from IOS but stated that they are currently only focusing on Android.

## 5. Electric One's unique multi-brand outlets are helping push EV sales in India

Electric One operates in three store formats in a franchise model. The company's flagship stores, which are about 2,000 sq ft large, are given to traditional automobile dealers who have worked with brands including Maruti, TVS and Honda, among others. A flagship store is more suited for a city like Lucknow, where the company set up a store in November 2020.

These stores stock EV two-wheeler brands including Kinetic Green, Cosbike, Okinawa, Evtric, and Hayasa, among others. In the last few months, the firm also started stocking its in-house EV two-wheelers brand, Yaan. Electric One also stocks electric three-wheeler brands like Andaaz, Mayuri, and Ele, and e-cycles from Hero Electro, Motovolt, and EM.





## Fashion & Sports Law Updates

### 1. Brooks claim “bully” Puma lacks Trademark, Patent rights in Nitro Lawsuit

There was the case which was filed by Puma in July against Brooks in regards to trademark. On this, Brooks pushed by against the trademark and design patent infringement lawsuit against Puma. In this case Puma claimed that Brooks is infringing its Nitro Trademark by selling sneakers bearing that mark. For this, Brooks is arguing that Puma lacks the claims which they are making.

<https://www.thefashionlaw.com/brooks-claims-bully-puma-lacks-trademark-patent-rights-in-nitro-lawsuit/>.

### 2. District Court refuses Mason Rothschild’s Appeal bid in Hermes Metabirkins Lawsuit

A New York Federal judge has sided with Hermes in the latest round of a closely watched battle over trademarks and non-fungible tokens (NFT). In this order, Judge of the US District Court refused to clarify on the decision which was released in May in which court denied Rothschild’s motion to dismiss Hermes claims that he violated “the Birkin Bag- maker’s trademark rights by way of his headline making Metabirkins Project.”

### 3. Kim Kardashian to pay \$1.26 million to settle Security and Exchange Commission (SEC) charges over EMAX Instagram post

Kim Kardashian has settled the charges which were levied by the U.S. SEC on matter of “touting on social media a crypto asset security offered and sold by EthereumMax without disclosing the payment she received for the promotion.” The charges were levied because she failed to disclose the charges she received i.e. \$2,50,000 to post on her Instagram on EMAX tokens. She was charged because she violated anti- touting provision of the Federal Securities Laws which state to disclose the details she received for the promotion.

### 4. Dior Loses Bid to Register the Shape of its Saddle Bag as Trademark for Bags in EU

The Saddle bag by Christian Dior doesn't deviate from standard fashion industry designs enough to qualify for a handbag-specific trademark registration. That is what the Second Board of Appeal of the European Union Intellectual Property Office (“EUIPO”) opined in a decision issued at the beginning of this month, rejecting Dior's application to register the shape of its well-known handbag, which is owned by LVMH, as a three-dimensional trademark for use in connection with various types of leather goods, including bags.

### 5. Patagonia Names Walmart in Trademark, Copyright Lawsuit Over Trout Logo

Patagonia is suing Walmart for allegedly offering up t-shirts bearing one of its copyright and trademark-protected designs. According to the copyright and trademark infringement, and trademark dilution lawsuit that it filed with the U.S. District Court for the Central District of California on October 6, Patagonia claims that Robin Ruth produced and sold apparel “bearing nearly identical copies of Patagonia’s P-6 Trout logo and artwork” – replacing Patagonia’s PATAGONIA trademark with the word “Montana” – and fellow defendant Walmart “purchased and resold those copycat products in several [of its] retail stores ... in substantial quantities,” thereby, running afoul of its copyright and trademark rights. In the newly-filed suit, Patagonia claims that Walmart and its supplier Robin Ruth “have promoted, offered for sale, and sold shirts bearing designs and logos that are nearly



identical to the P-6 Trout logo and P-6 logo, only replacing Patagonia’s PATAGONIA word mark with the word ‘Montana,’” which Patagonia alleges “inevitably will imply to consumers that Patagonia has endorsed or authorized these products.” In addition to claiming trademark infringement, Patagonia argues that “the PATAGONIA brand and P-6 logo” – the latter of which consists of “a multi-colored label inspired by a silhouette of the jagged peaks of the Mt. Fitz Roy skyline”.



# Corporate & Commercial Law Updates

## 1. Supreme Court clarified that recovery certificate under Debt Recovery Act is not limited to winding up proceedings but only extend to IBC

The Supreme Court in case of Kotak Mahindra Bank Limited vs. A. Balakrishnan and another issued the clarification stating that any liability which is arising out of a recovery certificate needs to be treated as financial debt within Section 5 of the Insolvency and Bankruptcy Code, 2016. The holder of the recovery certificate would be a financial creditor within the meaning of Section 5 of the IBC. The holder of such certificate is liable to initiate the CIRP process if committed any default.

## 2. Meesho jumps ahead of Amazon securing its position after Flipkart

In this festive sale order, Meesho has secured its position on 2nd directly after Flipkart who is holding the first position. Meesho shares stood at 21% whereas Flipkart shares were standing at 49%. Although if we compare through Gross Merchandise Volume (GMV), Flipkart and Amazon occupied the top positions with 62% and 26%. Meesho shares in GMV were lower because of its low average ticket sizes. However, it is holding its ground in Tier 2 cities.

## 3. Amazon to invest \$972 million for electric vans, trucks in Europe

Amazon said it will invest 1 billion euros (\$972.1 million) to add thousands of more electric vans, long-haul trucks and cargo bikes to its delivery network in Europe. The investment would grow the number of electric delivery vans the company has in Europe from roughly 3,000 to 10,000 by 2025. With the investment, Amazon is also hoping to purchase more than 1,500 electric trucks, up from five in the United Kingdom. To accommodate those vehicles, the company said it will build hundreds of fast chargers across its European facilities that can charge the vehicles in roughly two hours. Amazon has launched 25 "micro-mobility hubs," or more centrally located delivery stations in dense European cities, that allow the company to try out different delivery methods, such as bike and foot deliveries.

## 4. Adani Enterprises secures ₹10,238 cr financing for Ganga expressway

The State Bank of India, India's largest public sector lender, has provided loan finance of ₹10,238 crore to Adani Enterprises Ltd, the Adani Group's flagship firm, for the construction of the Ganga expressway. The access-controlled six lane greenfield Ganga expressway project has reached financial closure, according to three wholly-owned subsidiaries of Adani Enterprises: Budaun Hardoi Road Private Ltd (BHRPL), Hardoi Unnao Road Private Ltd (HURPL), and Unnao Prayagraj Road Private Ltd (UPRPL), the Gautam Adani-led business reports in an exchange filing.





## Hospitality & Real Estate

### 1. GRAFF launches unique vintage collection to honor Chicago Fire Department

GRAFF launches its new collection taking inspiration from the Chicago Fire Department role in extinguishing Chicago's Big Fire in 1934. The collection reflects the red logo of Chicago fire department which is transferred into a silhouette evoking classic detailing excellence and product quality of GRAFF. It has been launched in 21 styles.

### 2. TIAMO and Vicky Ratnani brings Italian dining experience at Conrad Bengaluru

As the word simplifies "Ti Amo" which means "I Love You" in Italian. This place which is recently opened in Bengaluru is a fresh dining concept that combines an Italian as well Californian style of cuisine along with India's local agricultural produce. The motive behind this combination was to boost the agricultural market of India and support the farmers.

### 3. VR Experience centre launched by PropVR for Real Estate

In order to assist real estate developers in providing transparent, educational, and immersive customer experiences to purchasers, PropVR, the 3D visualization platform of Square Yards, has opened a first-of-its-kind Real Estate futuristic Experience Center in Mumbai. With the use of cutting-edge technologies, the center strives to improve the property visualization experience by providing in-depth exploration insights into a newly launched property.

### 4. Accor signs Fairmont Udaipur Palace

Accor, a global hospitality group with over 425 hotels across India, the Middle East, Africa, and Turkey, continues to expand its luxury footprint in India with the signing of Fairmont Udaipur, located in the Udaipur, which is set to open in 2024. The agreement was signed in partnership with Keystone Resorts, a real estate development company set on increasing their footprint in hospitality. The signing of the project further strengthens Accor's already dominant position in India, with its existing 56 properties across a selection of brands, including Raffles, Fairmont, Sofitel, Pullman, Grand Mercure, Novotel, Mercure, ibis and ibis Styles.







# Litigation & Dispute Resolution

## **1. Supreme Court held that man must earn by doing physical labour to provide maintenance to wife and kids**

A bench of Justice Dinesh Maheshwari and Bela M Trivedi in the petition where the husband submitted that he has no income to provide maintenance to wife and kids held that Section 125 of the CrPC is a measure of social justice enacted to protect the interest of wife and kids and giving such an excuse of not having any means to provide so cannot be an exception. So, the court held that the husband was obliged to provide the means to maintain the wife and minor son.

## **2. Supreme Court ruled that married woman cannot be said to be ‘dependent’ on her deceased mother for compassionate appointment**

Justice MR Shah and Krishna Murari issued a clarification on the appeal which was filled by the Maharashtra Government challenging the decision of the Bombay High Court which stated the appointment of the respondent on compassionate ground. In this case the father of the respondent was in the clerical cadre serving appellant. After his death, mother of the respondent was appointed on compassionate ground. However, she dies while in service. Thereafter, elder sister of respondent made application but it was rejected in 2011 on the ground that she was married. In 2013, State of Maharashtra issued a circular providing the employment to the legal heirs of the deceased on compassionate ground. Based on this the younger daughter who is also married applied but that was also rejected. The High Court and Tribunal directed to consider respondent for that position. Supreme Court on considering various grounds came down to the conclusion that appointment of the respondent now would be contrary to the motive and concept of ‘compassionate ground.

## **3. Non- Delivery of Signed Copy cannot save limitation- Chhattisgarh High Court**

The Chhattisgarh High Court in Union of India vs. Bhola Prasad Agarwal and Anr. while observed Section 31(5) of the Arbitration and Conciliation Act, 1996, highlighted that post the delivery of the arbitral award, delivery of the signed copy is to be handed over to each party. But the court also highlighted that if the award debtor already in his frame of mind acknowledges about the award, enabling the person to file an application to set aside the award, mere non- delivery of the signed copy cannot be said to cause any prejudice.

<https://www.livelaw.in/news-updates/chhattisgarh-high-court-section-37-of-the-arbitration-and-conciliation-act-arbitral-proceedings-limitation-210299>.

## **4. Women allowed to terminate the 21 weeks pregnancy without the consent of the husband- Kerala High Court**

The Kerala High Court in Aryamol vs. Union of India allowed the pregnant women to terminate the pregnancy which was already in its 21 weeks. In this case, the women married the husband besides the wish of her family. After the marriage, husband’s family demanded dowry and started ill-treating her. Later, when she thought to terminate the pregnancy, medically it was not allowed so she approached the court. The court while stating its judgment highlighted the rules which are framed under the MTP Act. The rules allow the women to terminate the pregnancy between 20 to 24 weeks if the “marital status of the women is changed during the term of pregnancy.” In the current scenario the women status was not changed legally but she was willing to grant divorce to husband and so the court granted her the right to terminate the pregnancy without the consent of the husband.

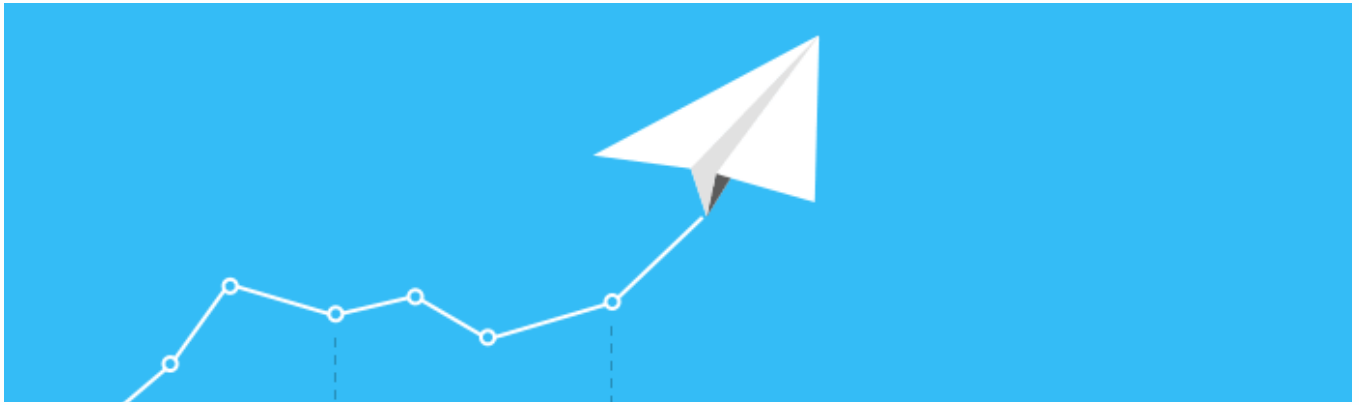
## **5. No Offence Under Section 138 NI Act If Cheque Is Presented For Full Amount Without Endorsing Part Payment Made By Borrower : Supreme Court**

In a significant judgment, the Supreme Court on Tuesday held that no offence for dishonour of cheque under Section 138 of the Negotiable Instruments Act is made out if the cheque is presented for the full amount without endorsing the part-payment made by the borrower after the issuance of the cheque. The Court held that the sum reflected on the cheque will not be the "legally enforceable debt" as per Section 138 NI Act, when it has been presented for encashment without endorsing the part-payment. Part-payments must be endorsed on the cheque as per Section 56 of the NI Act. If such endorsement is made, the cheque can be presented for the balance amount, and the offence under Section 138 NI Act will be attracted if such a cheque with endorsement of the part-payment gets dishonoured, explained the Court.

## **6. SC delivers the split verdict on Hijab, the case will be transferred to a larger bench**

A two judge bench of the Supreme Court on October 13, 2022 delivered a split judgment on the appeal which was filed to challenge the Karnataka High Court decision that wearing hijab is not an essential practice of Islam. Justice Gupta said that the prohibition on Hijab in classrooms does not violate free expression and choice of Muslim girl students. Whereas Justice Dhulia hold to the ground that Karnataka High Court was wrong in deciding whether or not wearing hijab was an essential part of Islam. Due to the split judgment, the matter was referred to the Chief Justice of India who will be further appointing the higher bench to hear and decide the matter.





# Start-Up Advisory & Consultancy

## 1. BillDesk, Byju's, Zetwork, Swiggy among startup hit by defaulting investors

A growing number of startups have seen investors which are binding on contracts or share purchase pacts in the last few quarters, a trend that is likely to exacerbate. Startup which have faced the investor default in the past six to eight months include leading startup of india i.e. BillDesk, Byju, Zetwork and Swiggy.

## 2. Miko which is a Robotics startup acquire 70% stake in Sqaure Off

Miko announced that it is acquired 70% stake in Square off which is AI driven automated board games startup. With this acquisition it will expand its product line beyond the AI robot companions. Miko claims that people using Miko3 which is there one of the bestselling robot, increase their speaking proficiency, engagement with academic activities and physical activity by more than 45% on average.

## 3. Software Development Program GitHub now is launched in India

Microsoft owned platform GitHub has million of developers in India whereas 83 million globally. GitHub having partnership with some of the leading venture capital launches this startup development platform. In order to boost startup, Software Development Platform GitHub made its software available in India. The startup companies will receive up to 20 seats of GitHub enterprise free for one year along with the guidance provided by the technical experts.

## 4. Mahindra will buy startup B2B Rivigo

Mahindra Logistics is going to buy the unicorn startup's B2B express delivery business along with all rights, title, beneficial ownership and interest at INR 225 Crore. The deal is expected to be closed by 1st November. Along with this takeover, Mahindra will takeover all the Rivigo's customers, team, assets etc. However, Rivigo will continue its business of the full truck load operations.

## 5. Delivery startup BookWater lets you track the quality of water in your cans

BookWater is an IoT-powered and quality-based water delivery platform. Its patent-pending technology lets you scan the QR code on a water can and discover its quality. BookWater, with its QR code lets consumers not only track the quality of water but also the number of times their water can has been recycled and when it will be upcycled. Sensors fitted in water stations help determine the quality of water that is being filled into the cans.

<https://yourstory.com/2022/10/delivery-startup-bookwater-can-water-quality-iot-technology-chennai/amp>

## 6. Dhoni has picked up equity in plant based protein startup ' Shaka Harry.'

The startup company which has created plant based mock meat, has received the funding of around USD 2 million. The company holds investors such as Chef Manu Chandra. Dhoni while investing reported that - He loves chicken but now he is after a balanced diet. The company has wide ranges of traditional meat dishes. The company has currency customer base of 30,000 with the spread in 10 cities.





## Descriptive Use vis a vis Trademark Use of a Mark – Delhi HC vacates ex parte ad interim injunction against use of the words FLY HIGHER

- Amay Jain

### INTRODUCTION

In the contemporary context of increasing significance being attributed to brand protection and trademark exclusivity, more and more *ex parte* ad interim injunctions are being sought for and granted by various courts. A trend of numerous interim injunctions, including a sizeable number of *ex parte* ad interim injunctions, being granted in trademark infringement and passing off matters by the Hon'ble Delhi High Court might be a welcome development for brands seeking urgent relief against entities/persons infringing their intellectual property rights from the plaintiffs' perspective. On the other hand, from the defendants' perspective, in cases where eventually, a finding in favour of the defendants is arrived at by the Hon'ble Courts, such interim injunctions, especially *ex parte ad interim* injunctions, are likely to be harshly difficult to abide by, given the amount of investment and expenditure is likely to be incurred in revising brand logos or taking down trademark featuring contents, and then having to restore the same.

It is no *res integra* that protection of marks actually being used to distinguish one's goods/services from those of another is in sync with the idea of enforcing a strong intellectual property regime by ensure brand protection and preventing consumers from confusion likely to be caused by deceptively similar/identical marks. However, in case of marks not capable of acting as source identifiers by virtue of being devoid of distinctiveness and/or by virtue of being used in manner not aimed at source identification or trademark usage, such protection shall not be applicable as it would only stifle *bona fide* contributors in trade and commerce without serving any of the objectives of having a strong intellectual property regime.

### **FLY HIGHV. FLY HIGHER CASE: BACKGROUND**

The Hon'ble Delhi High Court in its Judgement dated 28<sup>th</sup> October 2022 in the case of **Frankfinn Aviation Service Private Limited vs Tata SIA Airlines Limited** recently deliberated on the issue whether the exclusive rights available to a trademark proprietor under the Trade Marks Act,1999 would refrain a third party from using similar trademarks in a descriptive, laudatory or pictorial manner. A single judge bench of the Delhi High



Court decided the Defendant's plea seeking vacation of the *ex-parte ad interim* junction order passed on 21<sup>st</sup> January 2022 by the High Court restraining Vistara from using the words "FLY HIGHER." and/or any other mark deceptively similar to the Plaintiff's mark, FLY HIGH.

## **FACTUAL MATRIX AND PLAINTIFF'S CONTENTIONS**

Frankfinn Aviation Services Private Limited ("**Plaintiff**") filed this suit seeking to restrain Tata Sia Airlines Limited ("**Defendant**") from using the words "FLY HIGHER", claiming prior rights in the mark "FLY HIGH". The Plaintiff had been using the mark "FLY HIGH" since 2004 for managing and operating training institutes for people wishing to join aviation, hospitality, travel and customer care managing industries and had obtained trademark registrations in respect of the same in Classes 16 and 41.

The Defendant is a joint venture between Tata Sons Private Limited (Tata Sons) and Singapore Airlines Limited (SIA) with Tata Sons holding majority stake and operates its full-service Airlines under the trademark "VISTARA" and the tagline "Fly the new feeling" which has been engraved in the defendant's composite logo. The Defendant's campaign using the words "FLY HIGHER" went live in 2018.

The Plaintiff contended that they are the original adopters and users of the Trademark "FLY HIGH" adopted in 2004. The mark is broadly and unceasingly used for imparting training in aviation, travel management, hospitality and customer services. The plaintiff in reference to the order in their favour by the Delhi HC stated that the trademark FLY HIGH cannot be termed as generic or descriptive in nature and at best it may be possible to content that the expression FLY HIGH is suggestive of the services provided by the Plaintiff.

The Plaintiff argued that the Defendant was using the impugned mark for similar and related services due to their existence in the same sector, and therefore, it is highly likely that this would cause confusion amongst the public. The Plaintiff's also recorded their objection to the defendants' use of the mark "Fly High" as hashtags on popular social media websites to promote their services.

Based on the preliminary submissions of the Plaintiff, the Court deemed fit to grant *ex parte ad interim* injunction in the Plaintiffs favour and passed an order on 21<sup>st</sup> January 2022 restraining the defendant from using any mark similar to the trademark FLY HIGH.

## **DEFENDANT'S CONTENTIONS**

The Defendant argued that the words "FLY HIGHER" are used as a descriptor for its well-known trademark "VISTARA" and exclusively for advertising and promotion of its airline business. The term "FLY HIGHER" is not used to distinguish the Defendant's goods and services from those of third parties and hence the same cannot be termed as a trademark.

Challenging the *ex parte ad interim* injunction in the plaintiff's favour, the Defendant filed an application seeking vacation of the order. The Defendant submitted that it was a full-time operating service airline under the trademark "VISTARA". The Defendant contended that the services offered by the Plaintiff and the Defendant were not similar as the Defendant was granted services under Class 12 and Class 39 in relation to the airline industry. The Defendant stated that the Plaintiff's activities were limited to educational services through its training academy and the defendant's use of the phrase is the part of an advertising campaign to promote the services offered and thus this cannot infringe the plaintiff's rights.



The Defendant submitted arguments stating that the Plaintiff could not claim exclusivity for the use of such a mark, since the words used in the mark were commonly used generic/descriptive words in the aviation sector.

## **RULING AND ANALYSIS**

The court observed that the primary question essential to the determination of the instant suit was whether the defendant was using the mark “FLY HIGHER” as a trademark. Hon’ble Ms. Jyoti Singh, J. explained that the Trade Marks Act, 1999, the terms, “mark” and “trademark” have two different connotations and for a mark to qualify as a trademark, it must be capable of distinguishing the goods and services of one from those of another and it must be used or planned to be used in order to designate a connection in the course of trade, *i.e.*, as a source identifier.

Placing reliance on the landmark precedent of *Cadila Health Care Ltd. Vs Gujarat Co-operative Milk Marketing Federation Ltd.*<sup>1</sup> the court held that if the Defendant can validate that its use of the alleged infringed trademark is not as a trademark but as a description of its goods and services, the Defendant would not be deemed to be infringement as per Section 29 of the Trade Marks Act, 1999.<sup>2</sup>

It was also noted that the Plaintiff and Defendant operated in two different fields and industry. The Hon’ble Court also upheld Defendant’s contention stating that the phrase FLY HIGHER is only used in combination with its well-known mark VISTARA and with a solitary purpose of advertising and promoting its scheduled Airline functioning under rather than being used as a trademark.

Further, with the documents on record evidencing that the phrase “FLY HIGH” and its variants such as “FLY HIGHER”, “HIGH FLY” and many more are commonly used to describe the success of brands in the airplane industry, it was reinforced that the Defendant should not be restrained from using terms common to the concerned business in a descriptive or laudatory manner. Further, it was taken into consideration that the target audience/potential consumers for the Plaintiff are people seeking soft skills training in the travel, tourism, hotel management and aviation sector whereas the Defendant’s customers are travellers who choose to fly with Vistara Airlines. Therefore, it could not be established that a potential consumer/customer intending to travel with the airline would do so keeping in mind the alleged popularity of the FLY HIGH mark of the Plaintiff.

In view of the above, the *ex parte* ad interim injunction granted in favour of the Plaintiff was set aside by the Hon’ble Delhi High Court upholding the Defendant’s contentions based primarily on the argument that the said mark was not being used a trademark by the Defendant.

## **CONCLUSION**

Hon’ble Ms. Jyoti Singh, J. reiterated the settled position of law that when a party adopts an descriptive/generic/laudatory phrase, it must be prepared to tolerate some degree of similarity in marks used by subsequent proprietors/adopters due to the extensive use of such marks/words/phrases by competitors which is inevitable in the ordinary course of business. For instance, in the present case, the Defendant is using the phrase “FLY HIGHER” in relation to its mark for promoting and advertising its airline services which is a phrase likely to be common to the aviation industry as a descriptive/laudatory phrase and not as a source

---

<sup>1</sup> *Cadila Health Care Ltd. v. Gujarat Co-operative Milk Marketing Federation Ltd.*, 2009 SCC OnLine Del 2786

<sup>2</sup> Section 29, The Trade Marks Act, 1999.



identifier constituting trademark use. Such use, as held by the Hon'ble Delhi High Court, should not be held to be in infringement of the Plaintiff's statutory or common law rights in its trademark.



## Get in Touch

We hope you enjoyed reading the newsletter, and we would love to hear your thoughts on what you want to be covered in our next edition!

You can get in touch here:

**Mumbai Office:**

1085, Hotel Sahara Star,  
Opposite Domestic Airport,  
Vile Parle East,  
Mumbai - 400099,  
Maharashtra, India

**Delhi (NCR) Office:**

713, Tower 1,  
Assotech Business Cresterra  
(ABC Towers), Sector 135,  
Noida - 201304,  
Uttar Pradesh, India

Phone: 022-39807480

Email: [info@victoriamlegalis.com](mailto:info@victoriamlegalis.com)