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## DELHI HC ON TRADEMARK OF COMMON TERMS

### A. Introduction:

Delhi High Court (“**HC**”), in the *Hamdard* case<sup>1</sup> held on 6<sup>th</sup> January 2022 that the standard to determine similarity between two trademarks must be from the minds of a common consumer purchasing the relevant products and that there can be no proprietary claim made over common words or terms.

### B. Brief Facts:

1. Hamdard National Foundation (India) (“**Hamdard**”) is engaged in the business of manufacturing and selling of Unani and Ayurvedic medicines, syrups, and others for over 100 years. Sadar Laboratories Pvt. Ltd. (“**Sadar**”) is in the business of manufacturing Unani medicines, syrups, and others.
2. Hamdard petitioned alleging Sadar is infringing its well-known trademarks ‘*Hamdard*’ and ‘*Rooh Afza*’ and passing off their products as Plaintiff’s under the brand name of ‘*Dil Afza*’. It claimed that it acquired massive reputation and goodwill for its ‘*Rooh Afza*’ brand by using it in several products and have generously spent on promoting the same. Consequently, Hamdard registered the trademark ‘*Rooh Afza*’ and ‘*Hamdard*’ under the Trade Marks Act, 1999 (“**TM Act**”) and its registration is valid. ‘*Rooh Afza*’ *sharbat* (or *sherbet*) product sold in bottles has a unique combination of colour layout, get-up and arrangement of features, particularly, a unique and distinct floral arrangement.
3. Through a recent advertisement, Hamdard noticed that Sadar was launching syrup/*sharbat* with the mark ‘*Dil Afza*’ in deceptively ringlet bottles similar to its ‘*Rooh Afza*’ bottle, and having a deceptively similar mark, unique get-up, and design. However, Sadar had filed for registering the trademark ‘*Dil Afza*’ and have been granted the same. Hamdard claimed that due to oversight, they could not oppose the registering of the mark ‘*Dil Afza*’.
4. Images of both products are depicted below:<sup>2</sup>



**Rooh Afza**



**Dil Afza**

<sup>1</sup> *Hamdard National Foundation (India) & Anr vs. Sadar Laboratories Pvt. Limited* ([LiveLaw link to the judgment](#)).

<sup>2</sup> Rival parties’ product images are depicted solely for visual comparison purposes.

5. Hamdard approached the HC seeking permanent injunction restraining Sadar from infringing its registered mark and protection against disparagement, dilution and tarnishing of its trademarks, damage to its reputation and brand equity and claimed damages. Hamdard filed rectification application on grounds that Sadar had not provided entire details to the Trade Mark Registry for registering its mark (“**Rectification Application**”).<sup>3</sup>

### C. Parties’ Contentions:

1. Hamdard contended that its trademark ‘Rooh Afza’ has prior, continuous and long usage and is recognised as a well-known trademark by Lahore High Court according to the TM Act.<sup>4</sup>
2. Sadar contended that since its mark ‘Dil Afza’ is also a registered mark, there can be no case of infringement from using the same.<sup>5</sup> Further, the term ‘Afza’ has become a common term for *sharbat*, used by many other traders in the market. Further, Hamdard has obtained a registration for the entire mark ‘Rooh Afza’ and not for independent usage of the combined words. Therefore, Hamdard refers to its ‘Rooh Afza’ along with ‘Hamdard’ as it is ‘Hamdard’ that has acquired high repute and recognition of well-known mark and not ‘Rooh Afza’ alone.

### D. Conclusion:

Summary of HC’s judgment (emphasis added):

1. *“As has been repeatedly held by the courts,<sup>6</sup> the standard to be adopted while determining confusion arising in the mind is of a consumer of imperfect memory or recollection and of ordinary sensibilities. It would be taking an extreme position, even if the consumers were connoisseurs, to believe that the use of the word ‘Rooh’ and ‘Dil’ would cause confusion because they connote deep emotion...In any case, those who appreciate this deep emotion would be the first to be able to distinguish between ‘Rooh’ and ‘Dil’. However, we are concerned with the common consumer, to whom, in ordinary use of the words, ‘Dil’ and ‘Rooh’ do not denote the same thing. There cannot be a confusion being created on account of the meaning of the two words.”<sup>7</sup>*
2. *“(I)n order to claim exclusivity to the word ‘Afza’, Hamdard would have to also show that they had built a reputation leading to the acquisition of a secondary meaning whereby ‘Afza’ would denote only ‘Rooh Afza’, being the product of Hamdard. Thus, while ‘Rooh Afza’, that is the complete word, may have acquired a secondary meaning, indicative of *sharbat* produced by Hamdard, ‘Afza’ by itself does not appear to be of that category.”<sup>8</sup>*
3. HC rejected the plea for injunction and directed Sadar to maintain accounts of sale of ‘Dil Afza’ until the Rectification Application<sup>9</sup> is heard and disposed.<sup>10</sup>

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<sup>3</sup> Section 57 of the TM Act.

<sup>4</sup> Section 2(1)(zg) of the TM Act.

<sup>5</sup> Section 28 of the TM Act.

<sup>6</sup> *Unani Dawakhana v. Hamdard Dawakhana* MANU/LA/0094/1930; *Cadila Laboratories Ltd. v. Dabur India Limited* MANU/DE/0820/1997; *Schering Corporation v. Alkem Laboratories Ltd* MANU/DE/3179/2009.

<sup>7</sup> Para 22 of the judgment.

<sup>8</sup> Para 25 of the judgment.

<sup>9</sup> Section 124 of the TM Act.

<sup>10</sup> Para 28 of the judgment.