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

% **Judgment reserved on: 22 January 2024**
Judgment pronounced on: 16 April 2024

\+ FAO(OS) (COMM) 146/2023 & CM APPL. Nos. 36508/2023 (Stay), 36509/2023 (summoning entire court record).

GLENMARK PHARMACEUTICALS LTD. ..... Petitioner

Through: Dr. Abhishek Manu Singhvi & Mr. Amit Sibal, Sr. Advs. with Mr. Sidharth Chopra, Mr. Nitin Sharma, Mr. Kanishk Kumar, Ms Deepika Pokharia, Mr. Naman Tandon, Mr. Diwakar Chaturvedi, Mr. Nidhi Ram, Mr. Rishabh Sharma, Mr. Shaksham Dhingra & Mr. Mahesh Mahadgut, Advs.

versus

SUN PHARMA LABORATORIES LTD. ..... Respondent

Through: Mr. Mukul Rohatgi & Mr. Jayant Mehta, Sr. Advs. with Mr. Sachin Gupta, Mr. Sameer Rohatgi, Ms. Ayushi Kumar, Ms. Gaurangi Sharma, Mr. Rohit Pradhan, Mr. Kartikey Singh, Mr. Raghav Dutt & Mr. Ajay Kumar, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE DHARMESH SHARMA

J U D G M E N T

YASHWANT VARMA, J.

1. This appeal is directed against the judgment dated 03 July 2023 passed by a learned Single Judge in terms of which an interim injunction came to be granted in favour of the plaintiff/respondent restraining the defendant/appellant from using the word **"INDAMET"** or any other mark which may be said to be identical or deceptively similar to the plaintiff's registered mark **"ISTAMET XR CP"**.

2. When the appeal was originally entertained, we had by an order of 26 July 2023, placed the temporary injunction so granted in abeyance. We had the privilege of hearing detailed and erudite submissions addressed by Dr. Singhvi and Mr. Amit Sibal, learned senior counsels appearing for the appellant and Mr. Mukul Rohatgi and Mr. Jayant Mehta, learned senior counsels appearing for the respondents.

3. For the purpose of final disposal of the instant appeal we propose to take note of the following salient facts. The plaintiff/respondent **Sun Pharma Laboratories Ltd.**[1] is asserted to be one of the leading pharmaceuticals companies in the world and is a wholly-owned subsidiary of **Sun Pharmaceutical Industries Ltd.**[2]**.** SPIL has operated in the pharmaceutical sector since 1978 and markets drugs and formulations across 150 countries under various brand and trade names. It is also stated to have 45 manufacturing sites spread over 6 continents, 10 world class Research Centres and employs over 37,000 individuals.

[1] Sun Pharma
[2] SPIL

4. In 2010 Sun Pharma's predecessor **Merck Sharp & Dohme Corp.**[3] is stated to have coined and adopted the trademark "ISTAMET" and applied for registration of the said mark. The mark "ISTAMET" is stated to have been assigned by Merck to **MSD International GmBH**[4] on 01 July 2022, and which in turn and thereafter, assigned the same to Sun Pharma with respect to India vide an Assignment Deed dated 6 July 2022. Merck is stated to have used the trademark "ISTAMET" in India since 2011.

5. Merck's first application for registration of "ISTAMET" as a word mark was filed on 02 December 2010. The aforesaid application is stated to have been opposed by a third party and which challenge is still pending consideration. On 22 April 2014, Merck filed another application for registration of "istamet" as a device mark. In the course of examination, the **Registrar of Trade Marks**[5] is stated to have cited "ASTAMET", "INSTAMET" and "ESTIMET" as conflicting marks. The said application ultimately came to be refused by an order dated 28 September 2018. The refusal came to be assailed by the predecessor of Sun Pharma by way of C.A.(COMM.IPD-TM) 22/2022. The aforesaid appeal was ultimately allowed by our Court in terms of a judgment rendered on 20 April 2023. An event of some significance connected with the aforesaid appeal, and which merits notice, is the following.

[3] Merck
[4] MSD
[5] Registrar

6. In the course of prosecution of the aforenoted application, Merck is stated to have taken the position that ASTAMET, INSTAMET and ESTIMET were not deceptively similar. Aggrieved by the refusal of that application, Merck had preferred the appeal details of which have been set out hereinabove. In that appeal, Sun Pharma moved an application for amendment of the grounds of appeal and sought to reverse the stand that had been taken by Merck with respect to deceptive similarity concerned with the cited marks. Sun Pharma asserted that it could not be held bound by the stand taken by its predecessor. This, Sun Pharma contended, more so when the issue of deceptive similarity is essentially one of law. It appears to have been additionally urged that cyclostyled replies submitted in the course of proceedings taken before the Registrar cannot be viewed as being determinative of the question. It was further asserted by Sun Pharma that no products bearing the marks INSTAMET, ASTAMET or ESTIMET were found existing in the market. It had also alluded to the registration of those marks itself having lapsed. The said application for amendment came to be allowed by the Court on 13 April 2023.

7. The appeal thereafter came to be allowed on 20 April 2023 with the Court holding as follows: -

> "**3.** The present status of conflicting cited marks, in accordance with the status reflected on the online portal of the Trade Marks Registry, is given in a tabular representation below:

SL. No.	CITED MARKS	CURRENT STATUS
1. and 2.	Word mark – 'ASTAMET' under Trade Mark Application No. 1366667	Likely to be removed due to

	(Valid up/ renewed up to 27th June, 2015)	non-filing of renewal request in prescribed timelines.
	Word mark – 'INSTAMET' under Trade Mark Application No. 1755265 (Valid up/ renewed up to 19th November, 2018)	
4.	Word mark – 'ASTAMET' under Trade Mark Application No. 2273369	Refused.

This brings us to conflicting mark at Sl. No. 3 – 'ESTIMET' registered under Trade Mark Application No. 1894414. The said mark has been recently renewed and is valid up to December 2029. However, Mr. Sachin Gupta, counsel for Appellant, has pointed out that, as per his information, the said mark is not in use. To buttress his submissions, he places reliance on the screenshots of e-commerce portals where the products under the name 'ESTIMET' has been advertised/ marketed, but are shown as unavailable. As regards similarity with the conflicting marks, Mr. Gupta argues that resemblance is immaterial as the marks are not in use. He requests that Appellant's application should be allowed to be advertised and objection, if any, can be considered at the stage of opposition.

4. Appellant has a registration of word mark 'ISTAMET XR CP' under Trade Mark Application No. 2753891. This mark, although not identical to subject mark, certainly includes the word 'ISTAMET' and has been in use since the year-2011. Considering the facts noted above, in the opinion of the Court, the mark can be allowed to be advertised before acceptance.

5. In view of the above, the present appeal is allowed with following directions:
(a) Impugned Orders are set-aside.
(b) Trade Marks Registry is directed to process the registration application for the subject mark.
(c) Subject mark be advertised before acceptance as per proviso of Section 20 of the Act, within a period of three months from today. On advertisement in the Trade Marks Journal, an intimation shall also be sent by Trade Marks Registry to the registered proprietors of the cited marks, as per the Examination Report.
(d) If there is any opposition, the same shall be decided on its own merits, uninfluenced by observations made hereinabove.

(e) Appellant shall also send a copy of the order passed today to the proprietors of competing/ cited marks."

8. Merck obtained registration of the trademark **"ISTAMET XR CP"** pursuant to an application dated 11 June 2014 which was made on a "proposed to be used basis". The same came to be ultimately accepted on 07 February 2021 subject to the condition that "*the mark to be read as whole*". It is pertinent to note that **"XR"** is stated to be an acronym for *"Extended Release"* while **"CP"** is stated to be an abbreviation for *"Combi-Pack"*.

9. According to Sun Pharma, "ISTAMET" contains the salt 'Metformin Hydrochloride' and 'Sitagliptin Phosphate Monohyrdrate' and is used to treat diabetes. The aforesaid formulation is sold in the form of tablets under the extensions "ISTAMET", "ISTAMET XR" and "ISTAMET XR CP" and is a Schedule 'G' drug. Sun Pharma had alleged that in May 2022 it came across the appellant's/ Glenmark's application for "INDAMET" which had been submitted on a "proposed to be used" basis. The mark "INDAMET" is stated to have been granted registration on 26 May 2021. Taking recourse of the order dated 21 March 2022 in **Dr. Reddys Laboratories Ltd. vs. Controller of Patents Designs & Trade Marks**[6]**,** and which had extended the limitation for filing of opposition till 30 May 2022, both SPIL and Merck filed their opposition on 27 and 30 May 2022. It was the case of Sun Pharma that it was in the first week of September 2022, and after

[6] 2022 SCC OnLine Del 813

filing of the opposition, that it came across Glenmark's listing of the medicine and consequently instituted the suit in question.

10. Sun Pharma appears to have asserted before the learned Single Judge that the impugned mark, namely, "INDAMET" is confusingly similar to "ISTAMET" when tested on the principles of visual, structural and phonetic similarity. It was further asserted that the adoption of the impugned mark by Glenmark amounts to infringement under Sections 29 (1) and (2) of the **Trade Marks Act, 1999**[7] and would result in erosion of the distinctiveness of Sun Pharma's mark. It was further alleged that a human error in reading or construing Glenmark's mark could mislead a user into purchasing an incorrect medicine and thus have an adverse impact. Considering the likelihood of confusion on account of similarity between the two marks, Sun Pharma asserted that public interest must be accorded precedence bearing in mind the principles enunciated by the Supreme Court in **Cadila Healthcare vs. Cadila Pharmaceuticals**[8].

11. Insofar as the **appellant**[9] is concerned, it appears to have contended that "INDAMET" constituted a novel fixed dose combination drug for treatment of uncontrolled asthma. It was their case that "INDAMET" is distinguishable from "ISTAMET"/ "ISTAMET XR CP" since both are meant to treat different ailments and are also packaged distinctively. It was contended that while

[7] Act
[8] (2001) 5 SCC 73
[9] Glenmark

"INDAMET" is sold as a capsule to be inhaled with the aid of a **Dry Powder Inhaler**[10], "ISTAMET" is consumed as a tablet and thus there is no likelihood of confusion. It also appears to have been averred that Sun Pharma had failed to obtain registration for the mark "ISTAMET" and the registration held by it in respect of "ISTAMENT XR CP" is liable to be read as a composite whole in terms of the specific restrictions imposed by the Registrar while granting the mark. In view of the above, Glenmark argued that Sun Pharma can claim no monopoly or exclusive right over the mark "ISTAMET".

12. Without prejudice to the above, Glenmark averred that it had coined the term "INDAMET" from the constituent chemical compounds with "INDA" representing "Indacaterol acetate" and "MET" standing for "Mometasone furorate". Similarly, it was contended that Sun Pharma's drug "ISTAMET" also appears to have adopted the word "MET" from the usage of a constituent compound, namely, "Metformin" contained therein. In view of the above, Glenmark contended that Sun Pharma's allegations are wholly unfounded.

13. It was further asserted that Sun Pharma could claim no monopoly over the term "MET" given that it is common to the trade. It was contended that various drugs using the suffix "MET" are available in the market and thus the allegations as levelled by Sun Pharma are wholly untenable. The appellant also appears to have sought to draw distinction between the two competing marks by virtue of Sun

[10] DPI

Pharma's drug falling under Schedule 'G' whereas that of Glenmark's having been placed in Schedule 'H'. It also appears to have been argued before the learned Single Judge that Sun Pharma had taken an inconsistent and contradictory stand in the course of examination proceedings evidenced from it having sought to distinguish its mark from a cited conflicting mark, namely, "INTAMET". It was pointed out that Sun Pharma took an identical stand when the Registrar had cited "ASTAMET", "INSTAMET" and "ESTIMET". The aforesaid admission, according to Glenmark, was sufficient to warrant the refusal of injunction.

14. The learned Single Judge had upon considering the aforesaid submissions firstly held against Glenmark on grounds of deceptive similarity by holding that although Sun Pharma's registration was for the composite mark "ISTAMET XR CP", the dominant feature thereof is liable to be recognized as "ISTAMET". In view of the aforesaid, the learned Single Judge held that the distinguishing feature of Sun Pharma's mark is the term "ISTAMET" and which when compared to "INDAMET" exhibits striking similarity. The learned Single Judge held against the appellant also on the grounds of structural and phonetic similarity. This is evident from paragraph 7 of the impugned judgment, which is reproduced hereinbelow:

> "**7.** The restriction that Sun Pharma's mark has to be read as a whole, is a reiteration of Section 17 of the Act, which provides that when a trademark consists of several matters, its registration shall confer exclusive right to use of the trademark taken as a whole. It must be noted that protection afforded to a trademark is based on mark's overall impression on the consumers and not just one particular feature. The distinctive element or combination of

> elements is typically the most essential feature of the mark and the same is entitled to protection, as it sets the mark apart from others in the market and makes it identifiable to consumers. Although Sun Pharma's registration is for the composite mark "ISTAMET XR CP", the dominant feature indisputably remains the word "ISTAMET". Furthermore, the terms "XR" (denoting 'extended release') and "CP" (indicating 'combipack'), the added matter is standard nomenclature used by pharmaceutical companies to describe products. Therefore, the distinguishing feature of Sun Pharma's mark is the term "ISTAMET", which, when compared to Glenmark's "INDAMET", exhibits striking similarity. As for Mr. Lall's argument that no monopoly can be claimed on the suffix "MET", the Court is not dissecting the mark for comparing the suffix selectively. The competing marks "ISTAMET" and "INDAMET" are evidently structurally and phonetically similar, when compared as a whole with different prefix. The only difference lies in two letters of the prefix, with Sun Pharma employing 'ST' in 'ISTA' and Glenmark using 'ND' in 'INDA'. Therefore, "INDAMET" is deceptively similar to "ISTAMET" both structurally and phonetically. The next question to be addressed is whether such similarity between the two marks is substantial enough to warrant an injunction, given Glenmark's various defenses concerning the description of goods under Sun Pharma's registration and the perceived differences between the products associated with the competing marks."

15. The learned Judge then took note of the salient principles as enunciated in *Cadila Healthcare* and where the Supreme Court had propounded the rule of added caution which would apply in the case of drugs and pharmaceutical products. Bearing the aforesaid principles in mind, the learned Judge held as follows:

> "**8.** In Cadilla Healthcare (supra), the Court has held that trademarks in relation to pharmaceuticals must be assessed with utmost care and attention, keeping in the mind the potential risk to public health. Thus, scrutiny of deceptive similarity between trademarks for pharmaceutical products is higher as compared to other goods. The Court should not engage in technical gymnastics in an attempt to find some minor differences between conflicting marks. Such matters must be constructed from the point of view of public or consumers and must not ordinarily be construed from

> the perspective of chemists and pharmacists. Even so, chemists and pharmacists cannot be said to be infallible even though they are trained/ qualified, and thus, confusion and mistakes as to similar marks may arise. Thus, Glenmark's contention that both drugs are provided to users only on producing appropriate prescriptions of different kinds as opposed to an over-the-counter drug, does not hold weight. The Court is unimpressed with the argument that no confusion is possible as the source is mentioned on packaging. In the opinion of the Court, considering the overall similarity between the two marks, the likelihood of confusion for a buyer cannot be ruled out solely because the packaging is different. The Court is also unimpressed with Mr. Lall's submission that added matter is sufficient to distinguish the two products. Such a proposition firstly, should not be applied to pharmaceutical products where the Courts apply a stricter approach to gauge the possibility of confusion and do not engage in speculation as to minor differences since 'drugs are poisons not sweets. Further, considering the potentially dangerous consequences such a proposition cannot be accepted."

16. The Court ultimately proceeded to hold that the competing marks "ISTAMET" and "INDAMET" were clearly structurally and phonetically similar and merely because Glenmark's product was to be consumed with the aid of a DPI device, the same would not constitute a justifiable ground to refuse injunction. This, the learned Judge held, since DPI was not found to be an intrinsic part of the drug but merely an accessory and the purchase of which was discretionary. The learned Single Judge also alluded to the likelihood of confusion at the point of purchase irrespective of the mode of administration. The Court in this regard observed as follows:

> "**13.** In evaluating this case, the Court holds that the specificity outlined in Sun Pharma's registration, which confines their pharmaceutical product to be utilized for diabetes, should not be interpreted narrowly, as Mr. Lall proposes. When it comes to pharmaceutical products, it is crucial to consider the perspective of the end consumer. This viewpoint, often of a person with

> average intelligence, has consistently been deemed to be the guiding factor by this Court. Therefore, given the similarities between the products, we cannot discount the potential for confusion or misunderstanding when ordinary consumers are faced with similar-looking prescription drugs, even if their therapeutic applications differ significantly. This is particularly relevant in the context of public health, where any ambiguity could potentially lead to harmful consequences.
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> **14.** Bearing in mind the established legal principles mentioned earlier, we will now address the various points of differentiation emphasized by Mr. Lall. The suffix "MET" in Sun Pharma's product "ISTAMET" is an abbreviation derived from the first three letters of "Metformin Hydrochloride", the active ingredient in the drug. Likewise, the "MET" in Glenmark's "INDAMET" is based on a different active compound, "Mometasone Furoate". Although Glenmark has emphasized that the difference in these compounds as a significant point of distinction, however, in the Court's view, the marked similarity between Glenmark's and Sun Pharma's brand names overshadow these differences in composition, due to the shared suffix "MET." This could cause substantial confusion among consumers suffering from either asthma or diabetes, potentially leading to serious consequences. It is important to note that, in pharmaceuticals, minor differences in composition or formulation can yield significantly varied effects on the body, including potential side effects. It is thus critical that the public is not misled into purchasing a product under the belief that it has a specific composition or formulation, only to discover it contains different active ingredients. A more stringent test must be applied to pharmaceutical products, given their significant impact on public health and safety. Consumers trust these brand names for their respective health conditions and consequently, any ambiguity concerning a drug's composition or formulation could result in grave health repercussions."

17. The learned Judge also held against Glenmark based on the adverse effect likely to ensue upon a mistaken consumption of "INDAMET" in place of "ISTAMET" and observed as follows:

> **"16.** Glenmark's product labeling clearly advises users against ingesting the "INDAMET" capsule in the same manner as an oral tablet, presumably due to associated health risks. As such, Mr.

> Lall's assertion that accidental ingestion would result in no harm seems unfounded, and moreover, this assertion is unsupported by any scientific evidence or research. No authoritative report, study, or peer-reviewed publication has been submitted to indicate the potential repercussions of accidental consumption of either party's medication. In fact, Mr. Lall's assertion is controverted by Mr. Gupta, who states that in a situation where a person suffering from diabetes accidentally consumes Glenmark's "INDAMET" drug meant for asthma, blood sugar levels of the patient will increase on account of the molecules of "Indameterol" and "Mometason" present in the drug and also on account of the patient missing out on their actual prescribed dosage of "ISTAMET". If untreated, damage could occur to the blood vessels and could aggravate the potentiality of heart disease, stroke, kidney disease, vision problem and even nerve problems.
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> **17.** As illustrated by Mr. Gupta there is also a second scenario where a person suffering from asthma accidentally takes Sun Pharma's "ISTAMET" drug which is used to treat diabetes. That, as highlighted by him, can lead to Hypoglycaemia and continuing such dosage would lead to dramatic fall in a person's blood sugar levels leading to Hypoglycaemic coma which can have varied outcomes including death. Further, considering that the person taking "INSTAMET" is suffering from asthma, he would be miss out on his prescribed dosage of "INDAMET" which may worsen his asthma over time.
>
> **18.** Thus, the clinical consequence of the accidental consumption of an incorrect drug is a 'grey area' and cannot be a point of differentiation for this Court to rule out any possibility of confusion between the two drugs. On the contrary, the scenarios illustrated by counsel underscore the need for a rigorous assessment."

18. Insofar as the question of estoppel during the process of examination is concerned, the learned Judge held that the question of deceptive similarity is essentially one which is legal in character, and consequently, principles of estoppel would have no application. Proceeding then to evaluate the aspect of balance of convenience, the Court held that undisputedly Sun Pharma had been using the mark

"ISTAMET" since 2011, and thus evidently over a considerable period of time and which would necessarily result in market recognition. The Court took into account the fact that Glenmark had launched "INDAMET" only on 16 June 2022, and in the face of an opposition which had already been filed by Sun Pharma on 27 May 2022 against the use of the mark. The Court consequently took the view that Glenmark appeared to have consciously chosen to use the impugned mark despite the existing opposition and the said action being liable to be construed as either "*negligence*" or a "*strategic gamble*". It then bore in consideration the well-established "*first in the marketplace*" principle to hold in favour of Sun Pharma. On an overall conspectus of the aforesaid, an order of injunction came to be framed in the following terms:

> "**31.** In light of the aforementioned reasons, Sun Pharma has successfully met the criteria required for the issuance of an interim injunction against Glenmark. Therefore, it is hereby ordered that, during the pendency of this suit, Glenmark, including any parties acting on their behalf, are restrained from manufacturing, offering for sale, selling, displaying, advertising, marketing, directly or indirectly, any medicinal/pharmaceutical preparations bearing the Impugned Mark, "INDAMET" or any other mark which is identical/ deceptively similar to Sun Pharma's registered mark "ISTAMET XR CP" (as enumerated in Table-A above)."

19. Addressing submissions on the appeal, Dr. Singhvi and Mr. Sibal, learned senior counsels, submitted that Sun Pharma was clearly not entitled to interim protection bearing in mind the fact that the suffix **"MET"** is not liable to be viewed as a source identifier or one over which it could claim a monopoly. Emphasis was laid on the suffix

"MET" being common in the pharmaceutical trade and thus liable to be ignored while comparing the two marks. According to learned senior counsels, if the aforesaid aspects were kept in mind, it would be evident that the conclusions arrived at by the learned Single Judge with respect to deceptive similarity are rendered wholly unsustainable.

20. It was further submitted that in light of the judgment rendered by the Court in **South India Beverages vs. General Mills**[11] if "XR CP" were to be excluded in the course of comparison of the two marks, then following identical principles, the common to the trade suffix "MET" was also liable be excluded. This, according to learned senior counsels, would lead one to identifying the essential feature of Sun Pharma's mark being *"ISTA"* while that of Glenmark being *"INDA"* which are ex facie dissimilar.

21. Dr. Singhvi sought to draw sustenance for the aforenoted submissions from the following observations appearing in **F. Hoffmann-La Roche & Co. Ltd. v. Geoffrey Manner & Co. (P) Ltd.**[12] and where while considering competing marks "DROPOVIT" and "PROTOVIT", injunction was refused in the following terms:

> **"8.** In order to decide whether the word "Dropovit" is deceptively similar to the word "Protovit" each of the two words must, therefore, be taken as a whole word. Each of the two words consists of eight letters, the last three letters are common, and in the uncommon part the first two are consonants, the next is the same vowel 'O', the next is a consonant and the fifth is again a common vowel 'O'. The combined effect is to produce an

[11] 2014 SCC OnLine Del 1953
[12] [(1969) 2 SCC 716]

> alliteration. The affidavits of the appellant indicate that last three letters "Vit" is a well known common abbreviation used in the pharmaceutical trade to denote vitamin preparations. In his affidavit, dated January 11, 1961 Frank Murdoch, has referred to the existence on the register of about 57 trade marks which have the common suffix "Vit" indicating that the goods are vitamin preparations. It is apparent that the terminal syllable "Vit" in the two marks is both descriptive and common to the trade. If greater regard is paid to the uncommon element in these two words, it is difficult to hold that one will be mistaken for or confused with the other. The letters 'D' and 'P' in "Dropovit" and the corresponding letters 'P' and 'T' in "Protovit" cannot possibly be slurred over in pronunciation and the words are so dissimilar that there is no reasonable probability of confusion between the words either from the visual or phonetic point of view."

22. Dr. Singhvi also relied upon the observations in **Schering Corpn. v. Alkem Laboratories Ltd.** [13] to contend that common to trade suffixes should be excluded in the course of comparison of competing marks:

> **61.** TEMO has been used for TEMOZOLOMIDE by several parties apart from the respondents, namely, Cipla Limited, who use the brand name 'TEMOSIDE', Netco Pharma Limited, who use the brand name 'TEMONET' and Dabur Pharma Limited, who use the brand name 'TEMOZEM'. There are a number of other similar marks with the prefix TEM/TEMO for drugs, which are present in the market. The appellants have themselves pointed out that TEM/TEMO is contained as a part of the trademark of a variety of different pharmacological groups, such as (i) TEMSIROLIMUS (an anti-kidney cancer agent); (ii) TEMOPORFIN (a photosensitizing anti-cancer agent like TEMOZOLOMIDE); (iii) TEMOCILLIN (antibiotic); (iv) TEMOCAPRIL (anti-hypertensive). We may also notice that from the documents filed by the appellants it appears that there are various other drugs having the prefix TEM/TEMO such as TEMARIL—trademark for preparations of trimeprazine tartrate; TEMAZEPAM—a benzodiazepine used as a sedative and hypnotic in the treatment of insomnia, administered orally;

[13] 2009 SCC OnLine Del 3886

TEMEFOS-USAN for temephos; TEMEPHOS—an organophosphorous insecticide used as a larvicide for control of mosquitoes and blackflies and as a veterinary ectoparasiticide; TEMODOX—a veterinary growth stimulant; TEMOVATE—trademark for preparations of clobetasol propionate.

62. It has been repeatedly recognized that in the trade of drugs it is a common practice to name a drug on the basis of the name of its active chemical compound or salt, or the disease it seeks to remedy, or the particular organ it is intended to treat. The name of such an ingredient or compound, ailment or organ being in the public domain and of generic nature, which has been used descriptively, cannot be claimed by anyone for use exclusively as only his/her trademark.

63. From the materials produced by the respondent, it is evident that TEM/TEMO have been employed in place of TEMOZOLOMIDE or as abbreviations for certain other medicines. No doubt TEM/TEMO have also been used in place of 'TEMODAL' and TEMODAR'. However, there is nothing to suggest that TEM/TEMO mean, and only mean, TEMODAL/TEMODAR and nothing else. Even when TEM/TEMO is used in relation to 'TEMODAL' and 'TEMODAR', the reference is actually to the chemical compound TEMOZOLOMIDE, which is the active ingredient in 'TEMODAL' and 'TEMODAR'.

64. Consequently, in our view, *prima facie* the word fragment TEM/TEMO is *publici juris* and also generic for and descriptive of the chemical compound, TEMOZOLOMIDE, and, therefore, the appellants cannot claim the exclusive right to use thereof. The decision in *Astrazeneca* (supra) has rightly been held to apply on all fours to the cases in hand.

65. As the appellants have chosen to brand their product with a generic and descriptive prefix 'TEMO', any other person entering the market would be entitled to use the said term to identify the product in question. If the appellants were desirous of avoiding such a situation, they should have branded their drug with a unique name instead of a descriptive name [see *Rhizome Distilleries P. Ltd.* (supra)].

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112. The drugs of the respondents can be bought only against prescriptions from cancer hospitals, institutions and cancer specialists and not otherwise. The appellants have not produced any credible material to show actual confusion or that their product is, in any way, superior to that of the respondents which could be relied upon at this stage of the proceedings.

113. The aforesaid trademarks cannot be deciphered or considered separately *i.e.* by fragmenting them, but must be taken as a whole. But even if they are taken as a whole, the prefix TEMO used with suffix KEM and GET in the two competing names distinguish and differentiate the products of the appellants from those of the two respondents. When they are taken as a whole, the aforesaid two trademarks of the two respondents cannot be said to be either phonetically or visually or in any manner deceptively similar to the trademarks of the appellants *i.e.* TEMODAL and TEMODAR."

23. Reliance was also placed on the judgment of this Court in **Astrazeneca UK Ltd. v. Orchid Chemicals & Pharmaceuticals Ltd.**[14] wherein the following was observed:

"19. Admittedly, 'Mero', which is common to both the competing marks, is taken by both the appellants/plaintiffs and the respondent/defendant from the drug 'Meropenem', taking the prefix 'Mero' which is used as a prefix in both the competing marks. Both the appellants/plaintiffs and the respondent/defendant are marketing the same molecule 'Meropenem'. Neither the appellants/plaintiffs nor the respondent/defendant can raise any claim for exclusive user of the aforesaid word 'Meropenem'. Along with the aforesaid generic/common prefix, 'Mero', the appellants/plaintiffs have used the syllables 'nem', whereas, the respondent/defendant has used the syllable 'mer'. It is true that the aforesaid words/trade names cannot be deciphered or considered separately, but must be taken as a whole. But even if they are taken as a whole, the prefix 'Mero' used with suffix in the two competing names, distinguishes and differentiates the two products. When they are taken as a whole, the aforesaid two trademarks cannot be said to

[14] 2007 SCC OnLine Del 237

be either phonetically or visually or in any manner deceptively similar to each other.

20. We are informed that there are a number of such other similar names with the prefix 'hero' which are in the market. They were also taken notice of by the learned Single Judge while dealing with the injunction application. In the decisions of the Supreme Court and this Court also, it has been clearly held that nobody can claim exclusive right to use any word, abbreviation, or acronym which has become publici juris. In the trade of drugs, it is common practice to name a drug by the name of the organ or ailment which it treats or the main ingredient of the drug. Such an organ ailment or ingredient being publici juris or generic cannot be owned by anyone exclusively for use as a trade mark. In the Division Bench decision of this Court in *SBL Limited* (supra) it was also held that possibility of deception or confusion is reduced practically to nil in view of the fact that the medicine will be sold on medical prescription and by licensed dealers well versed in the field and having knowledge of medicines. It was further held that the two rival marks, 'Liv.52' and 'LIV-T', contain a common feature, 'Liv' which is not only descriptive, but also publici juris and that a customer will tend to ignore the common feature and will pay more attention to uncommon features i.e. '52' and 'T' and that the two do not have such phonetic similarity so as to make it objectionable.

21. In our considered opinion the facts of the said case are almost similar and squarely applicable to the facts of the present case. 'Meropenem' is the molecule which is used for treatment of bacterial infections. In that view of the matter, the abbreviation 'hero' became a generic term, is publici juris and it is distinctive in nature. Consequently, the appellants/plaintiffs cannot claim exclusive right to the use of 'hero' as constituent of any trademark. The possibility of deception or confusion is also reduced practically to nil in view of the fact that the medicine is sold only on prescription by dealers. The common feature in both the competing marks i.e. 'hero' is only descriptive and publici juris and, therefore, the customers would tend to ignore the common feature and would pay more attention to the uncommon feature. Even if they are expressed as a whole, the two did not have any phonetic similarity to make it objectionable. There are at least four other registered users of the prefix 'Mero' in India whereas the names of 35 companies using 'Mero' trademarks, which have been registered or applied for registration, have been

> furnished in the pleadings. The respondent/defendant advertised its trademark 'Meromer' after submitting its application for registration and at that stage, there was no opposition even from the appellants/plaintiffs. The trademark of the respondent/defendant was registered there being no opposition from any quarter, including the appellants/plaintiffs."

24. Apart from the decisions noticed above, the appellants also relied upon various other judgments which had held that words which are *publici juris* cannot form the basis for injunctive relief and of those two having been rendered upon actions instituted by Sun Pharma itself. The two decisions which were cited for our consideration were **Sun Pharmaceutical Laboratories Vs. Hetero Healthcare Limited**[15] and **Sun Pharmaceutical Laboratories Vs. Intas Pharmaceuticals Ltd.**[16] Dr. Singhvi also sought to draw sustenance from a list of third-party trademarks employing the words "MET" and which were set out in the shape of a table, which is extracted hereinbelow:

List of 3rd Party 'MET' Trademarks

S. No.	Trademark	Purpose & composition	TM Application (if any)	Availability/ Product Listing
MET marks cited in the Plaintiff's Examination Report				
1	INTAMET	-	Registered - **Applied on 30.11.1984 Valid upto 30.11.1994** Pg. 1225/ pdf pg.1234	-
2	VISTAMET	Anti-Hypertensive - Metoprolol	Abandoned- **Applied on 05.09.2007 Used since 11.05.2007**	1228-1229 pdf pg. 1237-1238

[15] 2022 SCC OnLine Del 2580

[16] 2020 SCC OnLine Del 59

			Pg. 1227/ pdf pg.1236	
3	ASTAMET (TMA 136667)	-	Registered (likely to be removed) - **Applied on 27.06.2005 Valid upto 27.06.2015** Pg. 1231/ pdf pg.1240	-
4	INSTAMET	Anti-diabetic - GLIMEPIRIDE + METFORMIN	Registered (likely to be removed)- **Applied on 19.11.2008 Used since 07.07.2007 Valid upto 19.11.2018** Pg. 1232/ pdf pg.1241	1233-1235/ pdf pg. 1242-1245
5	ESTIMET	Anti-diabetic - METFORMIN	Registered – **Applied on 10.12.2009 Used since 26.11.2006 Valid upto 10.12.2029** Pg. 1237/ pdf pg.1246	1238-1240/ pdf pg. 1247-1249
6	ASTAMET (TMA 2273369)		Refused - **Applied on 28.01.2012 Used since 25.12.2010** Pg. 1241/ pdf pg.1250	
Substitute of the Plaintiff's Drug				
7	ZITAMET – by Glenmark	Type 2 Diabetes - SITAGLIPTIN + METFORMIN HYDROCHLORIDE	Not filed on record	1275/ pdf pg. 1284
8	JANUMET	Type 2 Diabetes - SITAGLIPTIN + METFORMIN	Not filed on record	1282/ pdf pg. 1291
9	SEPAMET-XR	Type 2 Diabetes - SITAGLIPTIN + METFORMIN	Not filed on record	1294/ pdf pg. 1303
Other 3rd party MET Trademarks				
10	DIAMET	Anti-diabetic - METFORMIN	Registered (pending renewal)- **Used since 01.06.1995 Valid upto**	1308/ pdf pg. 1317

			25/02/2023 Pg. 1306/ pdf pg.1315	
11	BENCLAMET	Anti-diabetic - Glibenclamide + Metformin	Registered- **Applied on 27.11.1997 Valid upto 27/11/2027** Pg. 1320/ pdf pg.1329	1322/ pdf pg. 1331
12	GLUTAMET	Type 2 Diabetes - METFORMIN	Registered - **Applied on 10.05.2002 Valid upto 10/05/2032** Pg. 1333/ pdf pg.1342	1335/ pdf pg. 1344
13	METAMET	Type 2 Diabetes - METFORMIN	Registered- **Applied on 15.10.2007 Valid upto 15/10/2027** Pg. 1346/ pdf pg.1355	1348/ pdf. pg.1357
14	SITAMET	Type 2 Diabetes – SITAGLIPTIN + METFORMIN	Registered- **Applied on 17.03.2008 Valid upto 17.03.2028** Pg. 1359/ pdf pg.1368	1361/ pdf pg. 1370
15	YAMET	Diabetes – METFORMIN HYDROCHLORIDE + GLIMEPIRIDE	Registered- **Applied on 05.10.2004 Valid upto 05.10.2024** Pg. 1366/ pdf pg.1375	1368/ pdf pg. 1377
16	ALNAMET	Type 2 diabetes - GLIMEPIRIDE +	Registered- **Used since 15.02.2010**	1376/ pdf pg. 1385

		METFORMIN	**Valid upto 26.08.2032** Pg. 1374/ pdf pg. 1383	
17	YOGAMET	Type 2 diabetes - GLIMEPIRIDE + METFORMIN	Registered - **Applied on 19.01.2015 Valid upto19.01.2025** Pg. 1387/ pdf pg.1396	1389/ pdf pg. 1398
18	ZAVAMET	Type 2 diabetes - METFORMIN + VILDAGLIPTIN	Registered- **Used since 10.09.2019 Valid upto 10.09.2029** Pg. 1398/ pdf pg. 131407	1400/ pf pg. 1409
19	VIVAMET	Type 2 diabetes - GLIMEPIRIDE + METFORMIN	Registered (pending renewal)- **Applied on 12.02.2013 Valid upto 12.02.2023** Pg. 1405/ pdf pg.1414	1407/ pdf pg. 1416
20	VOKANAMET	Type 2 diabetes - CANAGLIFLOZIN + METFORMIN	Registered- **Applied on 15.01.2013 Valid upto 15.01.2033** Pg. 1412/ pdf pg.1421	1414/ pdf pg. 1423

In view of the aforesaid, it was Dr. Singhvi's submission that the impugned judgment is wholly perverse when it holds that there is a striking similarity between the two marks.

25. It was then submitted that in the course of examination of the application made by the appellant for registration of "INDAMET" by the Registrar, no conflicting marks were cited. According to learned senior counsel, this is liable to be read as the Registrar not finding the appellant's mark "INDAMET" to be similar to those of Sun Pharma, namely, "ISTAMET"/ "ISTAMET XR CP".

26. Insofar as infringement analysis is concerned, it was the submission of Dr. Singhvi that Sun Pharma's mark "ISTAMET XR CP" is registered only with respect to a limited specification of goods being "*Pharmaceutical Preparations for treatment and prevention of Diabetes*", and is further disclaimed by the following restriction- "*the mark to be read as a whole*". According to Dr. Singhvi, where marks are not identical, the test of deceptive similarity in case of infringement would be the same as those employed while testing a passing-off action. Reliance in this respect was placed upon the decision in **M/s Gufic Ltd. & Anr. vs Clinique Laboratories LLC & Anr.**[17] and to the following passage as appearing therein:

> "**22.** The following principles can be culled out from the aforesaid decisions:-
>
> 1. The test of deceptive similarity in the case of infringement is the same as in a passing off action, where the marks are not identical;
> 2. The question has to be approached from the point of view of a man with average intelligence and imperfect recollection;
> 3. In comparing the marks, it is the overall structural and phonetic similarity of the two marks that is to be seen

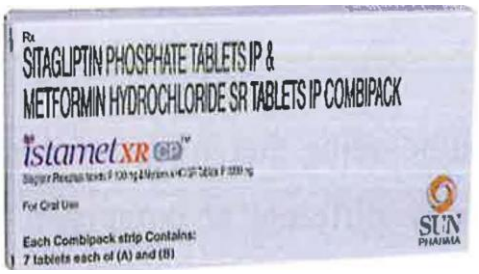
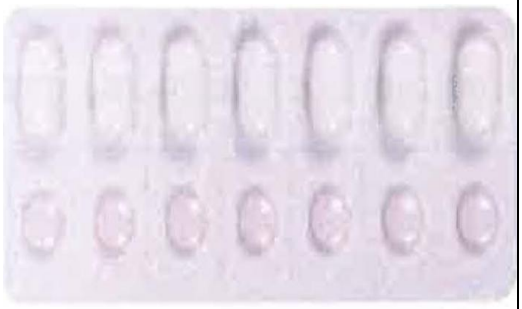
[17] 2010 SCC OnLine Del 2322

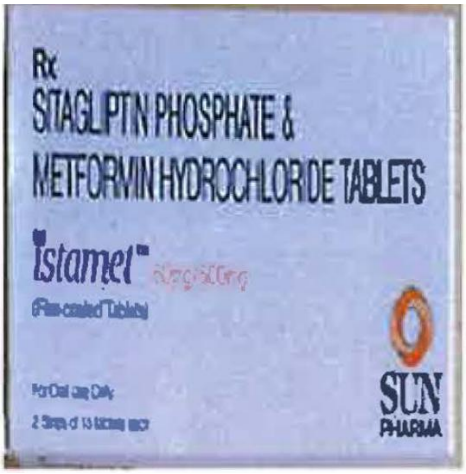
> and not by splitting them into their component parts and to consider the etymological meaning thereof;
> 4. The trademark is the whole thing - the whole word has to be considered; and
> 5. In comparing the two marks, it is also to be seen whether they both convey the same idea - (test of commonness of the idea between the two marks)."

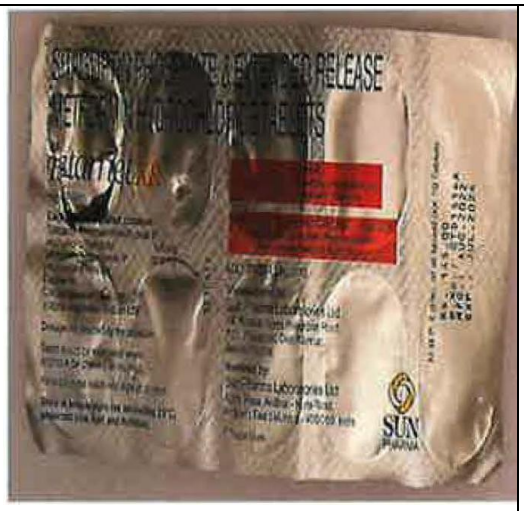
27. Proceeding then to the question of likelihood of confusion, Mr. Sibal contended that the test to be deployed is that of a person of average intelligence and imperfect recollection. When tested on that anvil, Mr. Sibal contended, it would be evident that no individual would be misled into purchasing drugs meant for chronic diseases such as regulation of diabetes and treatment of asthma. According to learned senior counsel, in cases where the end consumer is habitually used to taking a daily dose of specific strength as prescribed by a medical practitioner and is familiar with the manner and mode of administration of the drug, there would be no likelihood of confusion and that in any case the possibility of confusion would clearly stand diminished.

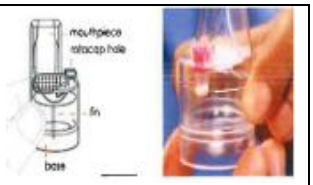
28. Mr. Sibal also sought to draw strength from the fact that while Sun Pharma's drug was placed in Schedule 'G', Glenmark's drug "INDAMET" stands placed in Schedule "H", and thus cannot be procured over-the-counter except when the drug is sought to be purchased on the basis of a prescription. It was contended in this respect that even in the event of an over-the-counter sale, a chemist would not be able to dispense Sun Pharma's drug "ISTAMET" or for that matter that of the appellant's "INDAMET" without reference to the specified strength.

29. Mr. Sibal further submitted that one would also have to bear in consideration the striking differences in trade dress. These were sought to be explained by reference to the following comparative chart:

Particulars	Respondent/ Plaintiff's mark – "ISTAMET XR CP"/ "ISTAMET"	Appellant/ Defendant's mark – 'INDAMET"
Packaging	  	 

	  	  Represented both in English and Devnagri script for ease of reference

	 Represented through a stylised logo Only in English	
Composition	Sitagliptin Phosphate (50mg) + METformin Hydrochloride (500/1000 mg) TABLET	INDAcaterol acetate (150 meg) + MoMETasone furoate (80/160/320 meg) CAPSULE
Ailment	Type 2 Diabetes	Asthma Actively advertised as an Asthma Treating Drug administered via an Inhaler
Administration	Ingested Orally	Capsule containing Dry Powder for Inhalation - To be inhaled through a Dry Powder Inhaler like a Rotahaler –

		
MRP	100 mg Variant Rs.145/-	160 mcg Variant Rs.399/-
Prescription	Prescribed by a General Practitioner/ Endocrinologist Always prescribed as T. ISTAMET 50/500mg or TAB. ISTAMET T. stands for tablets	Prescribed by Pulmonologist Always prescribed as DPI *R/C* INDAMET 320mcg DPI INDAMET 160 mcg R/c INDAMET 80mcg for first time user along with inhaler device. Prescribed always for first time users with *Instahaler/ Rotahaler or other similar device*
Method of intake	Oral solid dosage Tablet to be swallowed up with water	Through Inhaler Device to use a Dry Powder Inhaler, remove the inhaler cap, if there is one. Add or load a capsule of medicine as directed by your health care provider. Tilt your head back a little, and breathe out slowly and completely.

		Place the inhaler's mouthpiece in your mouth. Inhale quickly and deeply through your mouth for 2 or 3 seconds.

30. In support of the aforenoted submissions, Mr. Sibal also relied upon the decision of our Court in *Sun Pharmaceutical Laboratories Ltd. vs. Hetero Healthcare Ltd & Another* wherein the following was observed:

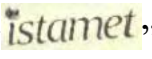
> **"35.** In our opinion, the judgment and the ratio laid down in *Schering Corporation* v. *Alkem Laboratories Ltd.* (supra), squarely applies to the facts of the present case. The appellant, in the present case, cannot be allowed to monopolize the INN 'LETROZOLE'. The mark, 'LETROZ', is not similar to the trademark 'LETERO' merely because both the parties have adopted the initial letters (SUN adopted the first six and HETERO adopted the first three) of the INN 'LETROZOLE'. It is apparent that both SUN and HETERO are using their marks, which are derived from the INN 'LETROZOLE', which is descriptive of the active ingredient of the drug, that is, 'LETROZOLE'.
>
> **36.** In the present case, there is also a marked difference in the price of both the products being sold by SUN and HETERO. SUN is selling its product at Rs. 187.80/- and HETERO is selling it for Rs. 60/-.
>
> **37.** The learned Commercial Court found that the trademarks in question were not similar. We concur with the *prima facie* view of the learned Commercial Court. *Prima facie,* there is little possibility of confusion or deception in the mind of the purchaser of the drug.
>
> **38.** In the case of *Panacea Biotec Ltd.* v. *Recon Ltd.*, 1996 SCC OnLine Del 508, the plaintiff was using the trademark 'NIMULID' and had filed a suit for injunction against the defendant for using the mark 'REMULIDE' in relation to the same medicine with the API being 'NIMESULIDE. This Court held that when the name is derived or coined from the name of the

principal ingredient being used in the manufacture of the drug, no distinctiveness or exclusiveness can be claimed by the manufacturer. The said decision is applicable to the facts of this case as well; the mark 'LETROZ' is nothing but a short name of the active ingredient 'LETROZOLE'.

39. Much reliance has been placed by the appellant on the judgment passed by Supreme Court in the case of *Cadila Health Care Ltd.* v. *Cadila Pharmaceuticals Ltd.* (supra). In our opinion, the ratio laid down does not apply to facts of the present case. In the case of *Cadila Health Care Ltd.* v. *Cadila Pharmaceuticals Ltd.* (supra), not only the names of the manufacturers were same being two companies which were formed after restructuring of the erstwhile parent company Cadila Laboratories, but their drugs administered for malaria also had similar marks, that are, 'FALCITAB' and 'FALCIGO'. Both parties in the said case were using the name 'CADILA', as a corporate name and were selling the drug for the treatment of falciparum malaria under the respective trademarks.

40. It is settled law that in case of an action for passing off, the similarity between the competing marks is to be seen along with the fact whether there is a likelihood of deception or causing confusion. The Supreme Court, in the facts of the case, held that the products being sold by the parties will be purchased by both villagers and townsfolk, literate as well as illiterate, and the question has to be approached from the point of view of 'a man of average intelligence and imperfect recollection'. The Court held that the purchaser of goods in India cannot be equated with the purchaser of goods in England. The Court found that the drugs have a marked difference in their observations with completely different side effects and therefore, the test should be applied strictly as the possibility of harm resulting from any kind of confusion by the consumer can have disastrous results. The Court further held that the confusion is more likely in such cases and an incorrect intake of the medicine may even result in loss of life or other serious health problems. In our opinion, the judgment relied upon, is not applicable to the facts of the present case."

31. Learned senior counsel then sought to highlight the aspect of prosecution estoppel and referred to Sun Pharma's reply as submitted in the course of examination of the application relating to "ISTAMET XR CP". It was sought to be underlined that as would be evident from a

reading of the response submitted by Sun Pharma, and which appears at page 545 of our record, the prior cited mark "INTAMET" was sought to be explained away with it being asserted that it was visually, structurally or phonetically dissimilar to the mark applied for. According to learned senior counsel, it is not permissible for Sun Pharma to disavow the stand that was taken by its predecessor when it came to the mark "INTAMET". According to the appellant, the respondent also appears to have taken a contradictory stand with respect to the device mark registration in respect of "  ". This was sought to be highlighted in the backdrop of the response of Sun Pharma when it sought to distinguish prior cited marks, namely, "ASTAMET", "INSTAMET" and "ESTIMET".

32. Turning then to the question of balance of convenience, Mr. Sibal submitted that from the time of its launch on 16 June 2022, "INDAMET" had achieved a sales turnover of more than INR 3.89 crores and, therefore, the said factor clearly operated in favour of the appellant.

33. Appearing for Sun Pharma, Mr. Rohatgi and Mr. Mehta, learned senior counsels, addressed the following submissions. Learned senior counsels firstly and at the outset submitted that the appeal being directed against an order granting interim injunction and thus representing a decision of the learned Single Judge to grant discretionary relief based upon a prima facie evaluation of the facts as placed is not liable to be interfered with merely because the appellate

court be of the opinion that another view was possible. It was their submission that as is well-settled, an appellate court would desist from interfering with the exercise of discretion granting or refusing to grant injunctive reliefs unless it be shown that the view as expressed suffers from manifest perversity or illegality. Reliance in this regard was placed on the celebrated decision of the Supreme Court in **Wander Ltd. vs. Antox India**[18] and where the following observations were made:

> **"14.** The appeal before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in Printers (Mysore) Private Ltd. v. Pothan Joseph [(1960) 3 SCR 713 : AIR 1960 SC 1156] : (SCR 721)
>
> > "... These principles are well established, but as has been observed by Viscount Simon in Charles Osenton & Co. v. Jhanaton [1942 AC 130] '...the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established,

[18] 1990 Supp SCC 727

> and any difficulty that arises is due only to the application of well settled principles in an individual case'."
>
> The appellate judgment does not seem to defer to this principle."

34. Learned senior counsels also contended that in case of infringement, injunction must follow. It was in this respect submitted that undisputedly the appellant had no existing trademark registration. It was thus contended that the use and adoption of the impugned mark by the appellant clearly amounts to infringement under Sections 29(1) & (2) of the Act and thus the learned Single Judge was justified in granting injunctive relief. Reliance in this respect was placed on the following passages as appearing in the decision of the Court in **Midas Hygiene vs Sudhir Bhatia**[19].

> **"5.** The law on the subject is well settled. In cases of infringement either of trade mark or of copyright, normally an injunction must follow. Mere delay in bringing action is not sufficient to defeat grant of injunction in such cases. The grant of injunction also becomes necessary if it prima facie appears that the adoption of the mark was itself dishonest."

35. It was then submitted that Glenmark had clearly failed to establish an honest adoption bearing in mind the admitted position which emerges from the record and which would evidence the mark having been adopted after the opposition had been filed by Sun Pharma on 27 May 2022. Despite the above, learned senior counsels submitted, the appellant chose to launch the product with the impugned mark on 16 June 2022 and thus at its own peril and in furtherance of it apparently having decided to take a calculated gamble and risk.

[19](2004) 3 SCC 90

According to Mr. Rohatgi and Mr. Mehta, the adoption of such a course would fortify the view as taken by the learned Single Judge. Learned senior counsels in this respect drew our attention to the following observations as made by the Bombay High Court in **Bal Pharma vs. Centaur Lab**[20]:

> **"8.** Then we turn to the question of delay and acquiescence. Mr. Tulzapurkar, learned Counsel appearing for the Respondent cites the judgment of the Supreme Court in Power Control Appliances v. Sumeet Machines Pvt Ltd., (1994) 2 SCC 448 wherein the Supreme Court approvingly referred to the judgment of the Appeal Court in England in Electrolux LD v. Electrix and quoted a passage therefrom in paragraph 34 of its judgment. Our attention was also drawn to the judgment in Electrolux itself. Reference to the judgment in Electrolux shows that there is no hard and fast rule that delay per se would defeat an application for interlocutory injunction. The judgment indicates that in a situation where the defendant to an action has been using the mark, even if concurrently, without making himself aware of the fact as to whether the same mark is the subject-matter of the registration and belongs to another person, the first person cannot be heard to complain for he has been using it negligently inasmuch as he has not taken the elementary precaution of making himself aware by looking at the public record of Registrar as to whether the mark in question is the property of another. If, however, he had taken search and, knowing full well that the mark was the property of another person, continues to use the mark, then he runs the risk of a registered proprietor challenging his action for infringement and merely because it is done at a subsequent stage, he cannot be heard to complain on the ground of delay. Further discussion in the judgment shows that in order to deny an interlocutory injunction, the delay must be such as to have induced the defendant or at least to have lulled him into a false sense of security to continue to use the trade mark in the belief that he was the monarch of all he surveyed. In our judgment, such are not the circumstances here. We are not satisfied from the record that a search was taken of the registry by the Appellant to assure itself that there was no other person who owned the mark "MICRODINE". Assuming that the search was taken, and the

[20] 2001 SCC OnLine Bom 1176

> Appellant has done it consciously, then the Appellant has to thank itself for having gambled by investing large amounts in a risky venture. Either way, we do not think that the defence can succeed, at this stage, at least."

36. Learned senior counsels argued that Sun Pharma had been able to establish the existence of a prima facie case as well as balance of convenience and consequently if the learned Single Judge had refused to grant injunction it would have suffered irreparable loss and damage. They drew our attention to the following passages from the judgment impugned before us:

> "**25.** The balance of convenience unequivocally lies in favour of Sun Pharma in this case. Sun Pharma has been utilizing the mark "ISTAMET" since 2011, establishing a considerable period of usage and market recognition. In contrast, Glenmark launched their product under the "INDAMET" mark quite recently, on 16th June, 2022. Significantly, this initiation occurred in the face of an opposition already filed against the use of the mark on 27th May, 2022. This scenario strongly suggests that Glenmark consciously chose to use the Impugned Mark despite the existing opposition, thus accepting the associated risks. This action can be construed as either negligence or a strategic gamble on Glenmark's part. In either case, it does not situate the balance of convenience in their favour.
>
> **26.** Additionally, the well-established principle that 'first in the marketplace' holds the right, applies here, favoring Sun Pharma. They have been in the market with their mark for over a decade, building consumer recognition and goodwill that Glenmark surely cannot claim to have achieved in such a short span of time. Glenmark's decision to proceed with the Impugned Mark despite the pending opposition demonstrates their willingness to risk potential legal consequences. Such disregard for established opposition cannot serve as a basis to claim the balance of convenience in their favour.
>
> **27.** Glenmark also avers that the correspondences in respect of the Merck's cease-and-desist notice prior to the institution of the suit, were concealed. Sun Pharma states that the cause of action

pleaded in the present suit arose on 27th May, 2022, when the opposition was filed against the Impugned Mark, which is prior to the date of issue of cease and desist notice. In the opinion of the Court, there has been no concealment or non-disclosure of any material and essential facts to deny the discretionary and equitable remedy on injunction. To the extent necessary, Sun Pharma's pleadings make a complete disclosure of the facts relating to the use of the competing marks by the parties, which is the subject matter of the suit.

28. Given these considerations, the balance of convenience distinctly favours the Plaintiff, Sun Pharma, thus warranting the issuance of an injunction. Furthermore, if an injunction is not granted, Sun Pharma may suffer an irreparable loss and damage. The deceptive similarity of the marks, coupled with Glenmark's recent market entry with a strikingly similar mark, could potentially lead to significant loss of business for Sun Pharma. More critically, it may damage Sun Pharma's long-built reputation and goodwill among consumers, who may inadvertently associate the quality and effects of Glenmark's product with Sun Pharma's product, due to the deceptive similarity in their marks. This reputational damage is intangible and often impossible to fully quantify or rectify, thereby characterizing it as irreparable harm. Furthermore, the potential health risks for consumers due to confusion between the two products adds a heightened element of public interest to this case. Therefore, in the interest of protecting Sun Pharma from such irreparable harm, and to safeguard public health, it is crucial that an injunction is granted in this case."

37. Assailing the stand which was taken in the appeal, Mr. Rohatgi submitted that courts must proceed with added circumspection when it comes to medicinal products. It was submitted that merely because the competing medical products are scheduled drugs and aimed at treating different ailments or contemplating different forms of administration, would not constitute a sufficient or safe basis for answering the question of confusion. Learned senior counsels laid stress on precedents having consistently held that in the case of drugs the threshold of confusion is comparatively lower and the test of deceptive similarity

more stringent. Mr. Rohatgi and Mr. Mehta commended the following passages from *Cadila Healthcare* for our consideration:

> **"28**. On applying the principles as above, the finding was recorded as follows:
>
> > "The respondent applied for registration of the mark 'Gluvita' used with reference to biscuits manufactured by him. The appellant who had been using the registered mark, 'Glucovita' with reference to his glucose with vitamins opposed the application under Section 8(a). It was established that the appellants trade mark had acquired a reputation among the buying public.
> >
> > Held applying the above tests that the commodities concerned were no connected as to make confusion or deception likely in view of the similarity of the two trade marks. Apart from the syllable 'co' in the appellant's mark, the two marks were identical. That syllable was not such as would enable the buyers in our country to distinguish the one mark from the other. Hence the respondents' mark could not be registered."
>
> **29.** In a case of Ruston & Honby Ltd. v. Z. Engineering Co., (1969) 2 SCC 727 : AIR 1970 SC 1649 the dispute was between 'Rustam India' and 'Ruston'. The plaintiff had its registered trade mark in the name of 'Ruston' whereas the defendant started its product in the name of 'Rustam India'.
>
> **30**. The High Court had held in the said matter that there was an infringement of the trade mark of the plaintiff committed by the defendant. However, it was also observed by the High Court that the word 'India' as a suffix to Rustom was a sufficient warning to the purchaser and, therefore, the defendant could be allowed to use the combination. The plaintiff had preferred appeal by Special Leave to the Hon'ble Supreme Court. No appeal was filed by the defendant against the finding that use of word 'Rustam' constituted infringement.
>
> **31**. The Hon'ble Supreme Court found that in view of the aforesaid fact, when there, was no appeal preferred by the defendant against the judgement of the High Court, that finding could not be challenged in the Supreme Court. The Hon'ble Supreme Court also found that if the defendant's trade mark was deceptively similar to that of the plaintiff, the fact that the word 'INDIA' was added to the defendant's trade mark, was of no

consequence and the plaintiff was entitled to succeed in its action for infringement of its trade mark.

32. It has also been observed that the test as to likelihood of confusion or deception arising from similarity of marks is the same both in infringement and passing-off action.

33. Therefore, the Hon'ble Supreme Court allowed the appeal of the appellant and the respondent was prevented by a permanent injunction from infringing the plaintiffs trade mark 'RUSTON' and from using it in connection with the engines, machinery and accessories manufactured and sold by it under the trade mark of 'Rustam' or 'Rustam India'.

34. It is to be considered here that the Hon'ble Supreme Court has observed in the said decision that in the given set of facts the test of infringement is the same as for passing off action. It is also required to be considered that in the said matter the defendant had not filed any appeal challenging the finding of the High Court to the effect that there was a deceptive resemblance between the word 'Ruston' and the word 'Rustam' and, therefore, the use of the have word 'Rustam' constituted infringement of plaintiffs trade mark 'Ruston'. The Hon'ble Supreme Court has clearly observed that the said finding has not been challenged and therefore the Supreme Court should decide the matter further on the strength of the finding of the High Court.

35. Then there is a decision of Reports of Patent Design and Trade Mark Cases. It was a decision in the matter of application by John Taylor Peddie. There the application was made by the registered proprietor of trade mark 'Supervita' for further registrations of that word. There was opposition by the registered proprietors of trade mark consisting of or including the word 'Supavita'. There it has been observed that 'Supavita' so nearly resembles 'Supervita' as to be likely to deceive or cause confusion if they are used as marks for goods respectively of the same description.

36. Ultimately the Registration No. 607.174 was ordered to be removed from the register and the Registration No. 618.418 was allowed to remain on the register.

37. In a case of Erven Warnink B.V. v. J. Townend & Sons (Hull) Ltd., (1980) R.P.C. 31, the plaintiffs were selling a drink in the name of 'Advocate' in the U.K. since 1911. Then in, 1976 their sales accounted for 75% of the total market. In 1974 the

defendant's began to manufacture and sell a drink which they called 'Old English Advocate'.

38. It has been observed that characteristics for a valid cause of action in passing off are as follows:

> "(I) a misrepresentation (2) made by a trader in the course of his trade (3) to prospective customers of his or ultimate consumers of goods or services supplied by him (4) which is calculated to injure the business or goodwill of another trader (in the sense that it is a reasonably foreseeable consequence) and (5) which causes actual damage to a business or goodwill of the trader by whom the action is brought or (in a quia time action) will probably do so.
>
> (II) that a plaintiff must show (1) that his business consists of, or includes, selling in England a class of goods to which the particular trade name applies; (2) that the class of goods is clearly defined, and that in the mind of the public, or a Section of the public, in England, the trade name distinguishes that class from other similar goods; (3) that because of the reputation of the goods, there is goodwill attached to the name; (4) that he the plaintiff, as a member of the class of those who sell the goods, is the owner of goodwill in England which is of substantial value; (5) that he has suffered, or is really likely to suffer, substantial damage to his property in the goodwill by reason of the defendant selling goods which are falsely described by the trade name to which the goodwill is attached.
>
> (III) that the principle established in the Champagne case was correct, viz. that a person competing in trade may not attach to his product a name or description with which it has no natural association, so as to make use of the reputation and goodwill which has been gained by a product genuinely indicated by the name or description and that it does not matter whether the persons truly entitled to describe their goods by the name and description are a class producing the goods and not merely one individual.
>
> (IV) that it cannot make any difference in principle whether the recognisable and distinctive qualities by which the reputation of the type of product has been gained are the result of its having been made in, or from the ingredients produced in, a particular locality or are the

result of Saving been made from particular ingredients regardless of their provenance.

(V) that the class of traders who have the right to describe their products as Advocate and for whom the right forms a valuable part of their goodwill are those who have supplied and are supplying the English market with an egg and spint drink in broad conformity with an identifiable recipe and, as in the champagne case, that class was definite and ascertainable.

(VI) that the essential characteristics for a valid cause of action in passing off were present and that there was no exceptional feature present which might justify, on grounds of public policy, withholding from a person who has suffered injury in consequence of the deception practised on prospective customers or consumers of his product a remedy in law against the deceiver."

39. In Duncans Agro Industries Ltd. v. Somabhai Tea Processors (P.) Ltd., XXXVI (1) G.L.R. 380. The respondent-plaintiff started manufacturing of Sargam Tea and marketed the same w.e.f. 28th June, 1991. In fact, the process had commenced on 25th July, 1990 but the marketing started on 28th June, 1991. It seems that the defendant also started manufacturing tea in the name of 'SARGAM' from 31st August, 1991. While deciding this matter, this Court had considered many decisions of various authorities and Courts. In this matter the plaintiff-Company was carrying on the business of blending, processing and marketing tea under different trade marks. 'SARGAM' was one of the trade names of? the plaintiff. The defendant started sale of tea in the said name 'SARGAM'. This Court found that the use of the same trade name 'Sargam' by the defendant could not be upheld.

40. This Court found that the plaintiff had prima facie case and balance of convenience was in his favour and that irreparable injury would be caused to the plaintiff, if the interim relief was not granted. Therefore, the injunction granted earlier was confirmed by this Court in the above decision."

38. It was further submitted that the accidental consumption of medicine designed to treat different ailments can itself lead to dangerous consequences. For the purposes of the aforesaid proposition,

Mr. Rohatgi firstly relied upon the judgment rendered by this Court in **Novartis AG vs Crest Pharma Pvt. Ltd and Anr.**[21] and where it was held:

> **"20.** The second contention of the defendant is that the plaintiffs drug is prescribed for urinary respiratory track infection and acute otitis media whereas the defendant's product being an antibiotic is prescribed mostly for post operative cases and the ingredients of the two products are also different and used for different purposes of disease. The defendant has also contended that the plaintiff's product is used in tablet and oral suspension form whereas the defendant's product is only available in injection form, therefore, there is no confusion and deception between the two products in question.
>
> **21.** I do not accept the submission of the learned counsel for the defendant as I feel that it is more dangerous if the pharmaceuticals products bearing the same mark is used for different purposes for the same ailment or even otherwise. I also do not accept the contention of the defendant's counsel that there would be no confusion if the product contain different ingredients/different salt. In my opinion, it is more dangerous and harmful in the trade if the same trade mark is used for different ailments. The Apex court has already dealt with this proposition of law in the case of Cadila Healthcare Ltd. v. Cadila Pharmaceuticals, (2001) 5 SCC 73 : (2001) 21 PTC 300 (SC) and held as under:
>
> > "25. The drugs have a marked difference in the compositions with completely different side effects, the test should be applied strictly as the possibility of harm resulting from any kind of confusion by the consumer can have unpleasant if not disastrous results. The courts need to be particularly vigilant where the defendant's drug, of which passing off is alleged, is meant for curing the same ailment as the plaintiffs medicine but the compositions are different. The confusion is more likely in such cases and the incorrect intake of medicine may even result in loss of life or other serious health problems. In this regard, reference may usefully be made to the case of Glenwood Laboratories, Inc. v. American Home Products Corp, 173 USPQ 19(1972) 455 F. Reports 2d, 1384 (1972), where it was held as under:

[21] (2009) SCC OnLine Del 4390 (Del)

> "The products of the parties are medicinal and applicant's product is contraindicated for the disease for which opposer's product is indicated. It is apparent that confusion or mistake in filling a prescription for either product could produce harmful effects. Under such circumstances, it is necessary for obvious reasons, to avoid confusion or mistake in the dispensing of the pharmaceuticals."

22. The other argument of the counsel for the defendant that the plaintiffs product is available in tablets and oral suspension form and the defendant's product is available in injection form has also no force as it has been seen from experience of the pharmaceuticals products available in all over the world that most of the companies are making pharmaceuticals products in both the forms i.e. tablets as well as in injection form under the same trade mark. As per well settled law, the actual confusion and deception is not required in order to prove the case of passing, off even if the defendant has adopted the mark innocently and the court comes to the conclusion that the two trade marks are deceptively similar, injunction under the said circumstances has to be granted. Actual deception is not required in an action of passing off. Century Traders v. Roshan Lal Duggar & Co., AIR 1978 Del 250 : 1 Supp PTC 720 (Del) (DB). Therefore there is no chance of confusion and deception.

23. In the case of Laxmikant V. Patel v. Chetanbhat Shah, (2002) 3 SCC 65 : (2002) 24 PTC 1 (SC) the Apex court has dealt with this question at great length in paras 8 and 9 which reads as under:

> "13. In an action for passing off it is usual, rather essential, to seek an injunction temporary or ad-interim. The principles for the grant of such injunction are the same as in the case of any other action against injury complained of the plaintiff must prove a prima facie case, availability of balance of convenience in his favour and his suffering an irreparable injury in the absence of grant of injunction. According to Kerly (ibid, para 16.16) passing off cases are often cases of deliberate and intentional misrepresentation, But it is well-settled that fraud is not a necessary element of the right of action, and the absence of an intention to deceive is not a defence though proof of fraudulent intention may materially assist a plaintiff in establishing probability of deception. Christopher Wad low in Law of

Passing Off (1995 Edition, at p. 3.06) states that the plaintiff does not have to prove actual damage in order to succeed in an action for passing off. Likelihood of damage is sufficient. The same learned author states that the defendant's state of mind is wholly irrelevant to the existence of the cause of action for passing off (ibid, paras 4.20 and 7.15). As to how the injunction granted by the Court would shape depends on the facts and circumstances of each case. Where a defendant has imitated or adopted the plaintiff's distinctive trade mark or business name, the order may be an absolute injunction that he would not use or carry on business under that name, (Kerly, ibid, para 16.97)"

24. The third contention of the learned counsel for the defendant is that the product of the parties in question is Schedule "H" drug and the same has to be purchased by the customers only on the prescription of medical practitioner. The argument of the defence of Schedule "H" drug has already been dealt with in various cases decided by the High Courts as well as the Apex court wherein the court has rejected the said submission many times. In the case of Cadila Pharmaceuticals (supra) in para 22 and 28 it was held as under:

"22. It may here be noticed that Schedule "H" drugs are those which can be sold by the chemist only on the prescription of the Doctor but Schedule "L" drugs are not sold across the counter but are sold only to the hospitals and clinics. Nevertheless, it is not un-common that because of lack of competence or otherwise, mistakes can arise specially where the trade marks are deceptively similar. In Blansett Pharmaceuticals Co. v. Carmick Laboratories Inc., 25 USPQ 2nd 1473 (TTAB 1993), it was held as under:

"Confusion and mistake is likely, even for prescription drugs prescribed by doctors and dispensed by pharmacists, where these similar goods are marketed under marks which look alike and sound alike".

"28. Here, it will be useful to refer to the decision of Morgenstern Chemical Company's case (supra) where it has been held as under:

"[5] In the field of medical products, it is particularly important that great care be taken to prevent any possibility of confusion in the use of trade marks. The

test as to whether or not there is confusing similarity in these products even if prescribed and dispensed only by professionally trained individuals does not hinge on whether or not the medicines are designed for similar ailments. The rule enunciated by Judge Helen in Cole Chemical Co. v. Cole Laboratories D.C. Mo. 1954, 118F. Supp. 612, 616, 617, 101, USPQ 44, 47, 48, is applicable here:

> "Plaintiff and defendant are engaged in the sale of medical preparations. They are for ultimate human consumption or use.***They are particularly all for ailments of the human body. Confusion in such products can have serious consequences for the patient. Confusion in medicines must be avoided.
>
> "Prevention of confusion and mistakes in medicines is too vital to be trifled with"

The observations made by Assistant Commissioner Leeds of the Patent Office in R.J. Strasenburgh Co. v. Kenwood Laboratories INC, (1955) 106 USPQ 379, 380 are particularly apt, that

> "Physicians are not immune from confusion or mistake. Further more it is common knowledge that many prescriptions are telephoned to the pharmacists and others are handwritten, and frequently handwriting is not unmistakably legible. These facts enhance the chances of confusion or mistake by the pharmacists in filling the prescription if the marks appear too much alike when handwritten or sound too much alike when pronounced."

The defendant concedes that physicians and pharmacists are not infallible but urges that the members of these professions are carefully trained to detect differences in the characteristics of pharmaceutical products. While this is doubtless true to dos not open the door to the adoption by manufacturers of medicines of trade marks or names which would be confusingly similar to anyone not exercising such great care. For physicians and pharmacists are human and in common with the rest of mankind are subject to human frailties. In the field of medicinal remedies the courts may not speculate as to whether there is a probability of confusion

between similar names. If there is any possibility of such confusion in the case of medicines public policy requires that the use of the confusingly similar name be enjoined (See Lambert Pharmacol Ltd. v. Bolton Chemical Corporation DCNY, 1915, 219 F. 325. 326."

25. Also in the case of Ranbaxy Laboratories Ltd. v. Dua Pharmaceuticals Pvt. Ltd., AIR 1989 Del 44 : (1988) 8 PTC 273 (Del) in para 6 it was held as under:

"(6) It was then contended by the learned counsel for the defendant that the said medicines can only be sold on the doctor's prescription and, thereforee, there can be little likelihood of confusion. It is true that the said drugs are supposed to be sold on doctor's prescription, but it is not unknown that the same are also available across the counters in the shops of various chemists. It is also not unknown that the chemists who may not have "CALMPOSE" may pass off the medicine "CALMPROSE" to an unwary purchaser as the medicine prepared by the plaintiff. The test to be adopted is not the knowledge of the doctor, who is giving the prescription. The test to be adopted is whether the unwary customer, who goes to purchase the medicine can make a mistake."

39. Another decision which was cited in respect of the aforesaid proposition was that of the Bombay High Court in **Macleods Pharmaceuticals vs Union of India**[22], and where the precept of a higher degree of scrutiny was reiterated as would be evident from the following passages:

24. The Delhi High Court in Novartis AG v. Crest Pharma Pvt. Ltd.[26], considered the submissions that two products are different and used for different purposes of disease and that one product is available only in tablet and oral suspension form whereas another product is available only in injection form and therefore there is no confusion or deception between the two products. The Delhi High Court held that:—

"20. The second contention of the defendant is that the plaintiff's drug is prescribed for urinary respiratory track

[22] 2023 SCC OnLine Bom 408 (DB)

infection and acute otitis media whereas the defendant's product being an antibiotic is prescribed mostly for post operative cases and the ingredients of the two products are also different and used for different purposes of disease. The defendant has also contended that the plaintiff's product is used in tablet and oral suspension form whereas the defendant's product is only available in injection form, therefore, there is no confusion and deception between the two products in question.

21. I do not accept the submission of the learned counsel for the defendant as I feel that it is more dangerous if the pharmaceuticals products bearing the same mark is used for different purposes for the same ailment or even otherwise. I also do not accept the contention of the defendant's counsel that there would be no confusion if the product contain different ingredients/different salt. In my opinion, it is more dangerous and harmful in the trade if the same trade mark is used for different ailments. The Apex court has already dealt with this proposition of law in the case of Cadila Healthcare Ltd. v. Cadila Pharmaceuticals, (2001) 5 SCC 73 and held as under:

> "25. The drugs have a marked difference in the compositions with completely different side effects, the test should be applied strictly as the possibility of harm resulting from any kind of confusion by the consumer can have unpleasant if not disastrous results. The courts need to be particularly vigilant where the defendant's drug, of which passing off is alleged, is meant for curing the same ailment as the plaintiff's medicine but the compositions are different. The confusion is more likely in such cases and the incorrect intake of medicine may even result in loss of life or other serious health problems. In this regard, reference may usefully be made to the case of Glenwood Laboratories, Inc. v. American Home Products Corp., 173 USPQ 19 (1972) 455 F. Reports 2d, 1384 (1972), where it was held as under:
>
> > "The products of the parties are medicinal and applicant's product is contraindicated for the disease for which opposer's product is indicated. It is apparent that confusion or mistake in filling a prescription for either product could produce

> harmful effects. Under such circumstances, it is necessary for obvious reasons, to avoid confusion or mistake in the dispensing of the pharmaceuticals."
>
> 22. The other argument of the counsel for the defendant that the plaintiff's product is available in tablets and oral suspension form and the defendant's product is available in injection form has also no force as it has been seen from experience of the pharmaceuticals products available in all over the world that most of the companies are making pharmaceuticals products in both the forms i.e. tablets as well as in injection form under the same trade mark. As per well settled law, the actual confusion and deception is not required in order to prove the case of passing off even if the defendant has adopted the mark innocently and the court comes to the conclusion that the two trade marks are deceptively similar, injunction under the said circumstances has to be granted. Actual deception is not required in an action of passing off. Century Traders v. Roshan Lal Duggar & Co., AIR 1978 Del 250. Therefore there is no chance of confusion and deception."

40. Mr. Mehta submitted that the argument of the appellant that no medical literature or peer study to establish adverse effect had been produced is one which is liable to be noticed only to be summarily rejected since it was incumbent upon the appellant to show on the basis of convincing material and evidence that taking one medicine for the other would be safe or have no adverse consequences. Mr. Mehta reminded us of the words of caution penned by the Supreme Court when it had observed that *"medicines are poison and not sweets"* and which sentiment has been reiterated by the learned Single Judge.

41. Learned senior counsel also assailed the contention of the appellant when they urged that surrounding circumstances, such as packaging, strength and other factors would have a material bearing on

the question which stands raised. It was in this connection submitted that *Cadila Healthcare*, which constitutes the *locus classicus* on the subject, nowhere alludes to packaging, mode of administration or price as being factors pertinent to evaluating the issue of confusion. In any case, they argued, the decision of this Court in **Nutrica Pusti Healthcare vs. Morepen Laboratories**[23] categorically holds and clarifies that packaging, form, and strength are factors wholly irrelevant in pharmaceutical disputes concerning medicines. It was submitted that *Nutrica Healthcare* had categorically held that while the aforenoted parameters may have some relevancy when the action relate to trademarks for goods pertaining to daily or regular use, the same would have no bearing on medicines and drugs.

42. It was then submitted that the mode of administration of the drug manufactured by Glenmark is wholly irrelevant bearing in mind the undisputed fact that the DPI is not liable to be purchased every time "INDAMET" is procured by a patient.

43. Insofar as the submission with respect to competing products being scheduled drugs aimed at treatment of different ailments, our attention was drawn to the following conclusions as were recorded and returned by the learned Single Judge:

> "**10.** Mr. Lall has strongly relied upon the limitation on the specification of the goods relating to Sun Pharma's registration of "ISTAMET XR CP" bearing no. 2753891 by emphasizing that it can only be applied for "pharmaceutical preparations for the treatment and prevention of diabetes" falling in Class 5. This limitation of goods combined with the fact that registration is

[23]2021 SCC OnLine Del 2631

further subject to the restriction that the 'mark has to be read as a whole' demonstrates that no monopoly can be claimed on the term "ISTAMET", particularly in respect of all goods falling under Class 5.

11. Mr. Lall has also laid stress that the distinct packaging of two products removes any source of confusion, which are compared as under: -

SUN PHARMA'S PRODUCT	GLENMARK'S PRODUCT
Outer Box Packaging - white base background with black font	Outer Box Packaging - colour combination of white, red and blue
Inner Packaging- Blister packaging- silver colour	Inner Packaging- white bottle with sealed cap
 	

12. Beyond the variations already noted, Mr. Lall has also drawn attention to the dissimilarities in the Maximum Retail Price

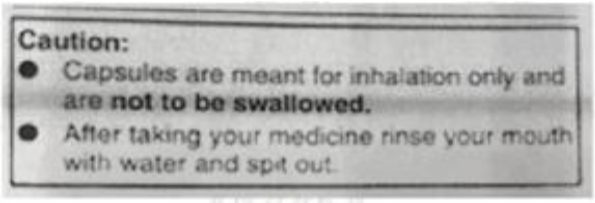
(MRP) of the two products. Furthermore, he emphasizes that the therapeutic applications of the products differ significantly. Sun Pharma's product is designed for diabetes management, while Glenmark's is formulated for asthma treatment. He also distinguishes the mode of administration for each product and points out that Sun Pharma's medication is taken orally, whereas Glenmark's product is inhaled using a device akin to a DPI, like Rotahaler.

13. In evaluating this case, the Court holds that the specificity outlined in Sun Pharma's registration, which confines their pharmaceutical product to be utilized for diabetes, should not be interpreted narrowly, as Mr. Lall proposes. When it comes to pharmaceutical products, it is crucial to consider the perspective of the end consumer. This viewpoint, often of a person with average intelligence, has consistently been deemed to be the guiding factor by this Court. Therefore, given the similarities between the products, we cannot discount the potential for confusion or misunderstanding when ordinary consumers are faced with similar-looking prescription drugs, even if their therapeutic applications differ significantly. This is particularly relevant in the context of public health, where any ambiguity could potentially lead to harmful consequences.

14. Bearing in mind the established legal principles mentioned earlier, we will now address the various points of differentiation emphasized by Mr. Lall. The suffix “MET” in Sun Pharma's product “ISTAMET” is an abbreviation derived from the first three letters of “Metformin Hydrochloride”, the active ingredient in the drug. Likewise, the “MET” in Glenmark's “INDAMET” is based on a different active compound, “Mometasone Furoate”. Although Glenmark has emphasized that the difference in these compounds as a significant point of distinction, however, in the Court's view, the marked similarity between Glenmark's and Sun Pharma's brand names overshadow these differences in composition, due to the shared suffix “MET.” This could cause substantial confusion among consumers suffering from either asthma or diabetes, potentially leading to serious consequences. It is important to note that, in pharmaceuticals, minor differences in composition or formulation can yield significantly varied effects on the body, including potential side effects. It is thus critical that the public is not misled into purchasing a product under the belief that it has a specific composition or formulation, only to discover it contains different active ingredients. A more stringent test must be applied to pharmaceutical products, given their significant

impact on public health and safety. Consumers trust these brand names for their respective health conditions and consequently, any ambiguity concerning a drug's composition or formulation could result in grave health repercussions.

15. Mr. Lall fervently posited that, should a consumer mistakenly consume Glenmark's "INDAMET" in place of Sun Pharma's "ISTAMET," intended for the treatment of Type 2 Diabetes, no adverse effects would ensue; the medication would simply be excreted from the body. This assertion does not find favor with the Court, especially considering the explicit warnings provided on the packaging of Glenmark's "INDAMET" drug, which read as follows:



16. Glenmark's product labeling clearly advises users against ingesting the "INDAMET" capsule in the same manner as an oral tablet, presumably due to associated health risks. As such, Mr. Lall's assertion that accidental ingestion would result in no harm seems unfounded, and moreover, this assertion is unsupported by any scientific evidence or research. No authoritative report, study, or peer-reviewed publication has been submitted to indicate the potential repercussions of accidental consumption of either party's medication. In fact, Mr. Lall's assertion is controverted by Mr. Gupta, who states that in a situation where a person suffering from diabetes accidentally consumes Glenmark's "INDAMET" drug meant for asthma, blood sugar levels of the patient will increase on account of the molecules of "Indameterol" and "Mometason" present in the drug and also on account of the patient missing out on their actual prescribed dosage of "ISTAMET". If untreated, damage could occur to the blood vessels and could aggravate the potentiality of heart disease, stroke, kidney disease, vision problem and even nerve problems.

17. As illustrated by Mr. Gupta there is also a second scenario where a person suffering from asthma accidentally takes Sun Pharma's "ISTAMET" drug which is used to treat diabetes. That, as highlighted by him, can lead to Hypoglycaemia and continuing such dosage would lead to dramatic fall in a person's blood sugar

levels leading to Hypoglycaemic coma which can have varied outcomes including death. Further, considering that the person taking "INSTAMET" is suffering from asthma, he would be miss out on his prescribed dosage of "INDAMET" which may worsen his asthma over time.

18. Thus, the clinical consequence of the accidental consumption of an incorrect drug is a 'grey area' and cannot be a point of differentiation for this Court to rule out any possibility of confusion between the two drugs. On the contrary, the scenarios illustrated by counsel underscore the need for a rigorous assessment.

19. Mr. Lall has contended that confusion can be averted as the "INDAMET" medication is intended to be used alongside a Dry Powder Inhaler or DPI such as a Rotahaler, which is always prescribed to first-time users. However, this argument doesn't stand as a solid distinguishing factor, given that the Rotahaler is not packaged with the drug but must be purchased separately, and it can indeed be obtained independently. Mr. Gupta has counter-argued, stating that there are asthma treatments available in tablet form. Consequently, an asthma patient could inadvertently consume the "ISTAMET" tablet, failing to detect any anomaly. Additionally, it's entirely plausible that a user of the "INDAMET" medication, due to the deceptive similarity of the trademarks, could inadvertently obtain the "ISTAMET" drug and then administer it in a powdered form via the Rotahaler. Thus, the method of administration cannot serve as the sole differentiator for the products and bears little relevance in this assessment."

44. Proceeding then to the issue of an asserted contradictory stand taken before the Trademark Registry, Mr. Mehta pointed that the learned Single Judge had clearly found that the defendant's mark was never cited as a conflicting mark. It was the submission of Mr. Mehta that the stand taken by the predecessor of the plaintiff would clearly not bind or operate as estoppel. This more so when deceptive similarity is essentially a question of law. Mr. Mehta sought to draw strength for

the aforesaid proposition from the following principles as culled out by the Court in **Sona Mahindra vs SONA BLW**[24]**:**

> **"52**. It must be stated here that the learned senior counsel for the appellants had relied upon a letter dated June 23, 2011 from the attorneys of SONA BLW precision forgings ltd. to the Trade Marks Registry, in reply to objections raised by the Trade Marks Registry that the Trade Mark 'SONA BLW' is devoid of any distinctive character and that there are similar marks already on the Register. They would submit that there is a clear admission therein that all the cited marks by the Registry share the word 'SONA' and still peacefully co-exist on the Register without incidence of any confusion or deception. They have also referred to the judgments of the Division Bench of this Court in S.K. Sachdeva (supra) and Raman Kwatra (supra), in an attempt to distinguish the judgments in the cases of Telecare Network (supra) and H&M (supra) which find mention in the impugned judgment. It must be stated at this juncture that the correspondence dated June 23, 2011, was not available before the learned Single Judge. The findings of the impugned judgment that the correspondence of the respondents with the Trade Marks Registry is not material for adjudication, has been made with respect to the correspondence of the respondent No. 2 with the Trade Marks Registry dated November 21, 2008. However, even with regard to the correspondence dated June 23, 2011, we find ourselves in agreement with the conclusion arrived at by the learned Single Judge. This we say so, as the correspondence on which the reliance has been placed by the appellants is exchanged between the German company SONA BLW Precision forgings ltd. and the Trade Marks Registry, before the Trade Mark 'SONA BLW' was assigned to the respondent No. 1 and of which a separate registration has been taken by the respondent No. 1 in India. Surely, the correspondence dated June 23, 2011 relied upon by the appellant is not emanating from the respondent No. 1and as such the said letter cannot act as an estoppel against the respondent No. 1."

45. Another decision which was cited in this respect was that of **Telecare Network vs. Asus Technology**[25], and where the Court had observed as under:

[24] 2023 SCC OnLine Del 2184 (DB)

> **"41**. Once a mark is registered, the certificate of registration has to be seen as it is. Post grant of registration of the mark ZEN, neither the Examination Report dated 01st May, 2010 nor the plaintiff's reply are relevant documents. In H&M Hennes & Mauritz AB v. HM Megabrands Pvt. Ltd., (2018) 251 DLT 651 it has been held as under:—
>
> > "15. The plea of the defendants, of the plaintiffs, at the time of seeking registration and when confronted with 'HMT', 'HMV', 'HMW', 'H.M. Tex Kamal' and 'H.M.C.', having taken a stand that the mark has to be considered in entirety, may be considered at this stage. The question to be adjudicated is, whether the plaintiffs, having taken such a stand, is estopped from suing for infringement. The question, in my opinion, cannot be answered in abstract and has to be answered on facts. None of the businesses, marks whereof as aforesaid the plaintiffs were confronted with, were in any business even remotely connected to business of the plaintiffs. In fact the marks HMT & HMV were abbreviations of their earlier names Hindustan Machine Tools and His Masters Voice respectively and which businesses, over the years had come to be referred by their abbreviation. Merely because the plaintiffs at the stage of seeking registration took a stand as aforesaid, cannot stop the plaintiff from exercising its statutory and natural rights. There is no estoppel against statute."
>
> **42**. In any event, as there is no estoppel against statute, the stand taken by plaintiff in reply to the examination report is not relevant."

46. Mr. Mehta then submitted that cyclostyled responses to examination reports cannot possibly constitute a basis for deciding valuable legal rights. Learned senior counsel in this respect cited a decision handed down by a learned Judge of this Court in **Anil Verma vs R.K. Jewellers**[26], and where it was held:

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[25] 2019 SCC OnLine Del 8739
[26] 2019 SCC OnLine Del 8252

> **"29.** A perusal of the examination report issued for trademark no. 2626911 of the Plaintiff shows that there was not a single prior application or registered mark which was cited as an identical or a descriptively similar mark. However, in the search report filed by the Defendant, the defendant's mark is shown as a prior application. The stand of both the parties in the Trademark Registry has been self-defeating to say the least. The court agrees with the submission of Mr. Kirpal that cyclostyled oppositions and cyclostyled responses to examination reports, cannot be the basis for deciding valuable legal rights. The Plaintiff filed 'copy-paste' responses to the examination reports even when there was no conflicting mark which was cited. The response filed by the Plaintiff to the examination report is quite vague and ambiguous in as much as the Plaintiff merely stated as under:
>
> > "The said trade mark/logo is our own invention and there is no similarity with other registered or applied trademarks.
> >
> > …
> >
> > We submit that the Trademark of Our Clint is "CASH FOR GOLD" Which is Taken as A Whole, Graphically and Structurally Different from The Mark Cited in The Report."

47. Mr. Mehta also assailed the submission of the appellant based on a list of third-party products which included the words "MET". It was submitted that by the time the suit came to be instituted, "INTAMET" and "ASTAMET" were not even available in the market. Insofar as "VISTAMET" is concerned, it was pointed out that it had been abandoned while "INSTAMET" had lapsed on account of non-renewal. The aforesaid cited drugs and products, according to Mr. Mehta, being no longer available, would clearly not constitute material which could be said to have a bearing on the correctness of the view taken by the learned Single Judge. Insofar as "ESTIMET" is concerned, it was

submitted that although the appellant had produced a strip of the said drug for the first time during the course of arguments bearing a manufacturing date of June 2022 and expiring in May 2024, Sun Pharma despite extensive market queries and searches had been unable to identify the same as a product widely circulating in the market.

48. Both Mr. Rohatgi and Mr. Mehta then submitted that the learned Single Judge had correctly come to conclude that "ISTAMET" is liable to be viewed as constituting the dominant feature with "XR" and "CP" being merely generic nomenclatures widely used in the pharmaceutical industry. It was contended that the learned Single Judge had rightly come to the conclusion that the competing marks were structurally and phonetically similar when compared as whole without dissecting the suffix "MET". It was submitted that notwithstanding the well-recognized rule of 'anti-dissection', the dominant feature of a mark is one which can be legally taken into consideration while answering an issue relating to deceptive similarity. Learned senior counsels in this respect drew our attention to the following principles as enunciated by a Division Bench of the Court in **United Biotech vs Orchid Chemicals**[27]:

> **"37.** The perusal of the judgment of the learned Single Judge would further demonstrate that 'Anti-dissection Rule' is discussed and applied holding that such a dissection is generally not permissible and can be applied only in exceptional cases. After taking note of the law on subject, the dissection of marks as suggested by the appellant is termed as 'artificial one'. We would

[27] 2012 SCC OnLine Del 2942 (Del)

do nothing but to extract the said discussion from the impugned order as we are in agreement with the same:

> "23. No fault can also be found with the approach of the IPAB in comparing the two competing marks as a whole. That is in fact the rule and the dissection of a mark is an exception which is generally not permitted. The anti-dissection rule is based upon a common sense observation of customer behaviour as explained in McCarthy on Trade Marks and Unfair Competition [J Thomas Mc Carthy, IV Ed., Clark Boardman Callaghan 2007] under the sub-heading "Comparing Marks: Differences and Similarities. The treatise further states:
>
> > "23.15 …. The typical shopper does not retain all of the individual details of a composite mark in his or her mind, but retains only an overall, general impression created by the composite as a whole. It is the overall impression created by the mark from the ordinary shopper's cursory observation in the marketplace that will or will not lead to a likelihood of confusion, not the impression created from a meticulous comparison as expressed in carefully weighed analysis in legal briefs."
> >
> > "In litigation over the alleged similarity of marks, the owner will emphasize the similarities and the alleged infringer will emphasize the differences. The point is that the two marks should not be examined with a microscope to find the differences, for this is not the way the average purchaser views the marks. To the average buyer, the points of similarity are the more important that minor points of difference. A court should not engage "technical gymnastics" in an attempt to find some minor differences between conflicting marks. However, where there are both similarities and differences in the marks, there must be weighed against one another to see which predominate."
>
> 24. The dissection of the marks as suggested by learned counsel for UBPL is an artificial one. He wanted 'ZID' which was the generic part of the marks to be substituted by some other word like 'TIS' or 'BES' and then the two marks to be compared. This submission is based on the

> decision in Astrazeneca UK Limited where 'Mero' was identified as the generic part of the mark derived from the active pharmaceutical ingredient. In the first place, no such submission appears to have been made before the IPAB. Secondly, the type of dissection suggested, i.e. separating 'FOR' and 'ZID' and then replacing 'ZID' with 'another word 'TIS' before comparing the marks does not appear to be permissible in law. As already noticed it is not just the generic part 'ZID' that is common to both marks. The further prefix 'OR' too is common. In other words, 'ORZID' is common to both marks. No parallel can therefore be drawn with the facts in Astrazeneca UK Limited. A person of average intelligence and imperfect recollection seeking to buy CEFTAZIDIME injection would hardly undertake any 'dissection' exercise, much less in the manner suggested by learned counsel for UBPL, to discern the fine distinction between the marks. Also, unlike a consumer durable product, the variations in the size of font, colour scheme, trade dress of the label for a medicine would not make much of a difference. In the considered view of the Court, the IPAB has applied the correct test in coming to the conclusion that FORZID is deceptively similar to ORZID."

49. Reliance was also placed on the following principles as were elucidated in *South India Beverages:*

> **"16**. This rule mandates that the Courts whilst dealing with cases of trademark infringement involving composite marks, must consider the composite marks in their entirety as an indivisible whole rather than truncating or dissecting them into its component parts and make comparison with the corresponding parts of arrival mark to determine the likelihood of confusion. The raison d'tre underscoring the said principle is that the commercial impression of a composite trademark on an ordinary prospective buyer is created by the mark as a whole and not by its component parts [994 F.2d 1359, 1362 (9th Cir. 1993) Fruit of the loom, Inc. v. Girouard; 174 F. Supp. 2d 718, 725 (M.D. Tenn. 2001) Autozone, Inc. v. Tandy Corporation].
>
> **xxxx xxxx xxxx**
>
> **19.** Though it bears no reiteration that while a mark is to be considered in entirety, yet it is permissible to accord more or less

importance or ‘dominance’ to a particular portion or element of a mark in cases of composite marks. Thus, a particular element of a composite mark which enjoys greater prominence vis-à-vis other constituent elements, may be termed as a ‘dominant mark’.

20. At this juncture it would be apposite to refer to a recent decision of this Court reported as 211 (2014) DLT 296 Stiefel Laborataries v. Ajanta Pharma Ltd. The Court whilst expounding upon the principle of ‘anti-dissection’ cited with approval the views of the eminent author on the subject comprised in his authoritative treatise-McCarthy on Trademarks and Unfair Competition. It was observed:

> “41. The anti-dissection rule which is under these circumstances required to be applied in India is really based upon nature of customer. It has been rightly set out in McCarthy on Trademarks and Unfair Competition about the said rule particularly in Para 23.15 which is reproduced hereunder:
>
> 23.15 Comparing Marks : Differences v. Similarities
>
> [1] The Anti-Dissection Rule
>
> [a] Compare composites as a Whole: Conflicting composite marks are to be compared by looking at them as a whole, rather than breaking the marks up into their component parts for comparison. This is the “anti-dissection” rule. The rationale for the rule is that the commercial impression of a composite trademark on an ordinary prospective buyer is created by the mark as a whole, not by its component parts. However, it is not a violation of the anti-dissection rule to view the component parts of conflicting composite marks as a preliminary step on the way to an ultimate determination of probable customer reaction to the conflicting composites as a whole. Thus, conflicting marks must be compared in their entireties. A mark should not be dissected or split up into its component parts and each part then compared with corresponding parts of the conflicting mark to determine the likelihood of confusion. It is the impression that the mark as a whole creates on the average reasonably prudent buyer and not the parts thereof, that is important. As the Supreme Court observed: “The commercial impression of a trademark is derived from it as a whole, not from its elements separated and considered in detail. For this reason,

it should be considered in its entirety." The anti-dissection rule is based upon a commonsense observation of customer behaviour: the typical shopper does not retain all of the individual details of a composite mark in his or her mind, but retains only an overall, general impression created by the composite as a whole. It is the overall impression created by the mark from the ordinary shopper's cursory observation in the marketplace that will or will not lead to a likelihood of confusion, not the impression created from a meticulous comparison as expressed in carefully weighed analysis in legal briefs. In litigation over the alleged similarity of marks, the owner will emphasize the similarities and the alleged infringer will emphasize the differences. The point is that the two marks should not be examined with a microscope to find the differences, for this is not the way the average purchaser views the marks. To the average buyer, the points of similarity are more important that minor points of difference. A court should not engage in "technical gymnastics" in an attempt to find some minor differences between conflicting marks.

However, where there are both similarities and differences in the marks, there must be weighed against one another to see which predominate.

The rationale of the anti-dissection rule is based upon this assumption: "An average purchaser does not retain all the details of a mark, but rather the mental impression of the mark creates in its totality. It has been held to be a violation of the anti-dissection rule to focus upon the "prominent" feature of a mark and decide likely confusion solely upon that feature, ignoring all other elements of the mark. Similarly, it is improper to find that one portion of a composite mark has no trademark significance, leading to a direct comparison between only that which remains." [Emphasis Supplied]

21. The view of the author makes it scintillatingly clear, beyond pale of doubt, that the principle of 'anti dissection' does not impose an absolute embargo upon the consideration of the constituent elements of a composite mark. The said elements may be viewed as a preliminary step on the way to an ultimate determination of probable customer reaction to the conflicting composites as a whole. Thus, the principle of 'anti-dissection' and identification of 'dominant mark' are not antithetical to one

another and if viewed in a holistic perspective, the said principles rather compliment each other."

50. Having noticed the rival submissions which were addressed, the first question which arises for consideration is the correctness of the conclusions rendered by the learned Single Judge with respect to deceptive similarity. As was noticed by us hereinbefore, the learned Judge had found that the competing marks "ISTAMET" and "INDAMET" were structurally and phonetically similar. The learned Judge had also found that although the registration in favour of Sun Pharma bids one to view the composite mark "ISTAMET XR CP", the dominant feature of that mark is liable to be recognized as being "ISTAMET". It was in challenge to the aforesaid conclusions that both Dr. Singhvi and Mr. Sibal had argued that if "XR CP" was liable to be excluded, the suffix "MET" which was *publici juris* must also be accorded similar treatment. According to learned senior counsels if the aforesaid process of reasoning were adopted for the purposes of answering the question of deceptive similarity, it would be apparent that there is a marked difference between the two competing marks, namely, "ISTA" and "INDA" and the grant of injunction thus being clearly unjustified. It was in the aforesaid context that learned senior counsels had referred to the decisions rendered in *Schering* and *Astrazeneca.*

51. We at the outset note that the issue which stands raised would have to be examined bearing in mind and at the forefront the stringent, exacting and uncompromising standards which are liable to be adopted

when we test an action for infringement or passing off pertaining to competing marks in the pharmaceutical sector as opposed to any other genre of products. It would be pertinent to recollect that in *Cadila Healthcare* the Supreme Court was concerned with the asserted similarity between the brand names "FALCITAB" and "FALCIGO". The Trial Judge had refused interim injunction on the basis that they differed in appearance, formulation and price. The aforesaid order of the Trial Judge was affirmed by the High Court. Although the Supreme Court in *Cadila Healthcare* refused to interfere with the judgment impugned and had disposed of the Special Leave Petition with directions for expeditious conclusion of the trial itself, there were notable observations which came to be rendered and which are of significant import.

52. Indisputably, our courts have consistently held that the question of confusion is essentially one of first impression. It is in the aforesaid backdrop that courts have held that the issue of deceptive similarity has to be answered from the point of view of a man of average intelligence with imperfect recollection. The tests which were propounded in **Re Pianotist Co application**[28] as far back as in 1906 have consistently guided courts in answering issues of deceptive similarity. In *Pianotist* those principles were explained in the following words:

> "You must take the two words. You must judge of them, both by their look and by their sound. You must consider the goods to which they are to be applied. You must consider the nature and

[28] (1906) 23 RPC 774

> kind of customer who would be likely to buy those goods. In fact, you must consider all the surrounding circumstances; and you must further consider what is likely to happen if each of those trade marks is used in a normal way as a trade mark for the goods of the respective owners of the marks. If, considering all those circumstances, you come to the conclusion that there will be a confusion—that is to say, not necessarily that one man will be injured and the other will gain illicit benefit, but that there will be a confusion in the mind of the public which will lead to confusion in the goods—then you may refuse the registration, or rather you must refuse the registration in that case."

53. It has also been recognized by courts that while a close scrutiny or comparison of the two competing marks may disclose some points of distinction, the question itself is liable to be answered from the point of view of the unwary purchaser and who is unlikely to expend sufficient amount of time examining the marks scrupulously or with a degree of exactness. Yet another precept which precedents require us to bear in consideration is the essential features of a trademark and in such situations marked or slight differences in get-up, packaging or the manner in which the marks are written fading into insignificance. Ultimately a challenge of infringement or passing-off would have to be answered on the anvil of a resemblance so near and unerring that it is likely to deceive or cause confusion.

54. We note that *F. Hoffmann-La Roche* was dealing with the issue of deceptive similarity in the context of usage of the words "DROPOVIT" and "PROTOVIT". While examining the challenge which stood raised, the Court pertinently observed that the question of likelihood of confusion is neither liable to be considered nor answered on a meticulous comparison of two words nor our courts liable to

undertake a *"letter by letter and syllable by syllable"* comparison. All of the aforesaid principles, so enunciated, are a reiteration of the underlying precept being of the marks being examined from the gaze of a man of average intelligence and imperfect recollection. In *F. Hoffmann-La Roche* the Supreme Court ultimately came to conclude that the two words were so dissimilar that there existed no reasonable probability of confusion either from a visual or phonetic point of view.

55. However, *Cadila Healthcare* assumes significance insofar as medicines and drugs are concerned in light of the following observations which were rendered:

> **"21.** It will be useful to refer to some decisions of American courts relating to medicinal products. In the case of *American Cynamid Corpn.* v. *Connaught Laboratories Inc.* [231 USPQ 128 (2nd Cir 1986)] it was held as under:
>
> "Exacting judicial scrutiny is required if there is a possibility of confusion over marks on medicinal products because the potential harm may be far more dire than that in confusion over ordinary consumer products."
>
> **22.** It may here be noticed that Schedule 'H' drugs are those which can be sold by the chemist only on the prescription of the doctor but Schedule 'L' drugs are not sold across the counter but are sold only to the hospitals and clinics. Nevertheless, it is not uncommon that because of lack of competence or otherwise, mistakes can arise specially where the trade marks are deceptively similar. In *Blansett Pharmaceuticals Co.* v. *Carmick Laboratories Inc.* [25 USPQ 2nd, 1473 (TTAB 1993)] it was held as under:
>
> "Confusion and mistake is likely, even for prescription drugs prescribed by doctors and dispensed by pharmacists, where these similar goods are marketed under marks which look alike and sound alike."

23. In the case of *Glenwood Laboratories, Inc.* v. *American Home Products Corpn.* [173 USPQ 19 (1972)455 F Reports 2d, 1384 (1972)] the Court of the United States had held that:

"The fact that confusion as to prescription drugs could produce harm in contrast to confusion with respect to non-medicinal products is an additional consideration for the Board as is evident from that portion of the opinion in which the Board stated: 'The products of the parties are medicinal and the applicant's product is contraindicated for the disease for which the opposer's product is indicated. It is apparent that confusion or mistake in filling a prescription for either product could produce harmful effects. Under such circumstances, it is necessary for obvious reasons, to avoid confusion or mistake in the dispensing of the pharmaceuticals.'

The board's view that a higher standard be applied to medicinal products finds support in previous decisions of this Court, *Clifton* v. *Plough* [341, F 2d 934, 936, 52, CCPA 1045, 1047 (1965)] ('it is necessary for obvious reasons, to avoid confusion in the dispensing of pharmaceuticals'), *Campbell Products, Inc.* v. *John Wyeth & Bro. Inc*. [143, F 2d 977, 979, 31 CCPA 1217 (1944)] ('it seems to us that where ethical goods are sold and careless use is dangerous, greater care should be taken in the use of registration of trade marks to assure that no harmful confusion results')."

24. In the case of *R.J. Strasenburgh Co.* v. *Kenwood Laboratories, Inc.* [106 USPQ 379 (1955)] as noted in the decision of *Morgenstern Chemical Co. case*, it had been held that:

"Physicians are not immune from confusion or mistake. Furthermore it is common knowledge that many prescriptions are telephoned to the pharmacists and others are handwritten, and frequently handwriting is not unmistakably legible. These facts enhance the chances of confusion or mistake by the pharmacists in filling the prescription if the marks appear too much alike when handwritten or sound too much alike when pronounced."

25. The drugs have a marked difference in the compositions with completely different side effects, the test should be applied strictly as the possibility of harm resulting from any kind of confusion by the consumer can have unpleasant if not disastrous results. The courts need to be particularly vigilant where the defendant's drug, of which passing-off is alleged, is meant for curing the same ailment as the plaintiff's medicine but the

> compositions are different. The confusion is more likely in such cases and the incorrect intake of medicine may even result in loss of life or other serious health problems. In this regard, reference may usefully be made to the case of *Glenwood Laboratories, Inc.* v. *American Home Products Corpn.* [173 USPQ 19 (1972)455 F Reports 2d, 1384 (1972)] where it was held as under:
>
> "The products of the parties are medicinal and the applicant's product is contraindicated for the disease for which opposer's product is indicated. It is apparent that confusion or mistake in filling a prescription for either product could produce harmful effects. Under such circumstances it is necessary for obvious reasons, to avoid confusion or mistake in the dispensing of the pharmaceuticals.""

56. The aforesaid principles as propounded clearly point towards a more exacting and stringent test being adopted when an action of infringement or passing-off comes to be laid in respect of drugs. As was pertinently observed by the Supreme Court in *Cadila Healthcare,* in the case of drugs, the tests to be adopted is that of *"exacting judicial scrutiny"*. It was further held that the mere fact that the drug was being sold on the basis of a prescription or dispensed by pharmacists would also not constitute a reliable determinant which would dilute the strict view test as articulated by it while attempting to answer the question of possibility of confusion. This the Supreme Court so held bearing in mind the injurious or detrimental possibilities attendant to an inadvertent purchase, sale and consequential consumption of a drug. It also took into consideration the harmful effect that a usage of a drug may have even though the competing products may be meant for curing an identical ailment. Not stopping at this, the Court also found that notwithstanding the pharmaceutical market being regulated by prescriptions and the dispensation of products being overseen and

supervised by trained physicians, those factors would not allay the fears and apprehensions attendant to an incorrect or inappropriate drug being accidentally dispensed. This is evident from the following observations appearing in Paras 27 and 28 of the report:

> "**27.** As far as the present case is concerned, although both the drugs are sold under prescription but this fact alone is not sufficient to prevent confusion which is otherwise likely to occur. In view of the varying infrastructure for supervision of physicians and pharmacists of medical profession in our country due to linguistic, urban, semi-urban and rural divide across the country and with high degree of possibility of even accidental negligence, strict measures to prevent any confusion arising from similarity of marks among medicines are required to be taken.
>
> **28.** Here it will be useful to refer to the decision of *Morgenstern Chemical Co. case* where it has been held as under:
>
> "(5) In the field of medical products, it is particularly important that great care be taken to prevent any possibility of confusion in the use of trade marks. The test as to whether or not there is confusing similarity in these products even if prescribed and dispensed only by professionally trained individuals does not hinge on whether or not the medicines are designed for similar ailments. The rule enunciated by Judge Helen in *Cole Chemical Co.* v. *Cole Laboratories* [DC Mo 1954, 118 F Supp 612, 616, 617, 101, USPQ 44, 47, 48] is applicable here:
>
> 'The plaintiff and the defendant are engaged in the sale of medical preparations. They are for ultimate human consumption or use. … They are particularly all for ailments of the human body. Confusion in such products can have serious consequences for the patient. Confusion in medicines must be avoided.
> ***
> Prevention of confusion and mistakes in medicines is too vital to be trifled with.'
> The observations made by Assistant Commissioner Leeds of the Patent Office in *R.J. Strasenburgh Co.*v. *Kenwood Laboratories, Inc*. [106 USPQ 379 (1955)] USPQ 380 are particularly apt, that:
> 'Physicians are not immune from confusion or mistake. Furthermore it is common knowledge that many prescriptions are

> telephoned to the pharmacists and others are handwritten, and frequently handwriting is not unmistakably legible. These facts enhance the chances of confusion or mistake by the pharmacists in filling the prescription if the marks appear too much alike when handwritten or sound too much alike when pronounced.'
>
> The defendant concedes that physicians and pharmacists are not infallible but urges that the members of these professions are carefully trained to detect difference in the characteristics of pharmaceutical products. While this is doubtless true to dos (*sic*) not open the door to the adoption by manufacturers of medicines of trade marks or names which would be confusingly similar to anyone not exercising such great care. For physicians and pharmacists are human and in common with the rest of mankind are subject to human frailties. In the field of medicinal remedies the courts may not speculate as to whether there is a probability of confusion between similar names. If there is any possibility of such confusion in the case of medicines public policy requires that the use of the confusingly similar name be enjoined (see *Lambert Pharmacol Ltd.* v. *Bolton Chemical Corpn.* [DCNY 1915, 219 F 325.326])."

57. More significantly, the Supreme Court proceeded to hold and spoke of a lesser degree of proof being applicable in the case of medicinal products while answering the question of confusing similarity and the same being warranted in order to subserve large public interest. These observations are found in para 32 of the report, which is extracted hereinbelow:

> **"32.** Public interest would support lesser degree of proof showing confusing similarity in the case of trade mark in respect of medicinal products as against other non-medicinal products. Drugs are poisons, not sweets. Confusion between medicinal products may, therefore, be life threatening, not merely inconvenient. Noting the frailty of human nature and the pressures placed by society on doctors, there should be as many clear indicators as possible to distinguish two medicinal products from each other. It is not uncommon that in hospitals, drugs can be requested verbally and/or under critical/pressure situations. Many patients may be elderly, infirm or illiterate. They may not be in a

position to differentiate between the medicine prescribed and bought which is ultimately handed over to them. This view finds support from *McCarthy on Trade Marks*, 3rd Edn., para 23.12 of which reads as under:

"The tests of confusing similarity are modified when the goods involved are medicinal products. Confusion of source or product between medicinal products may produce physically harmful results to purchasers and greater protection is required than in the ordinary case. If the goods involved are medicinal products each with different effects and designed for even subtly different uses, confusion among the products caused by similar marks could have disastrous effects. For these reasons, it is proper to require a lesser quantum of proof of confusing similarity for drugs and medicinal preparations. The same standard has been applied to medical products such as surgical sutures and clavicle splints.""

58. Equally instructive are the following principles which came to be identified by our Court in *Novartis AG:*

21. I do not accept the submission of the learned counsel for the defendant as I feel that it is more dangerous if the pharmaceuticals products bearing the same mark is used for different purposes for the same ailment or even otherwise. I also do not accept the contention of the defendant's counsel that there would be no confusion if the product contain different ingredients/different salt. In my opinion, it is more dangerous and harmful in the trade if the same trade mark is used for different ailments. The Apex court has already dealt with this proposition of law in the case of Cadila Healthcare Ltd. v. Cadila Pharmaceuticals, (2001) 5 SCC 73 : (2001) 21 PTC 300 (SC) and held as under:

"25. The drugs have a marked difference in the compositions with completely different side effects, the test should be applied strictly as the possibility of harm resulting from any kind of confusion by the consumer can have unpleasant if not disastrous results. The courts need to be particularly vigilant where the defendant's drug, of which passing off is alleged, is meant for curing the same ailment as the plaintiffs medicine but the compositions are different. The confusion is more likely in such cases and the incorrect intake of medicine may even result in loss of life or other serious health problems. In this regard, reference may usefully be made to the case of Glenwood Laboratories,

Inc. v. American Home Products Corp, 173 USPQ 19(1972) 455 F. Reports 2d, 1384 (1972), where it was held as under:

> "The products of the parties are medicinal and applicant's product is contraindicated for the disease for which opposer's product is indicated. It is apparent that confusion or mistake in filling a prescription for either product could produce harmful effects. Under such circumstances, it is necessary for obvious reasons, to avoid confusion or mistake in the dispensing of the pharmaceuticals."

22. The other argument of the counsel for the defendant that the plaintiffs product is available in tablets and oral suspension form and the defendant's product is available in injection form has also no force as it has been seen from experience of the pharmaceuticals products available in all over the world that most of the companies are making pharmaceuticals products in both the forms i.e. tablets as well as in injection form under the same trade mark. As per well settled law, the actual confusion and deception is not required in order to prove the case of passing, off even if the defendant has adopted the mark innocently and the court comes to the conclusion that the two trade marks are deceptively similar, injunction under the said circumstances has to be granted. Actual deception is not required in an action of passing off. Century Traders v. Roshan Lal Duggar & Co., AIR 1978 Del 250 : 1 Supp PTC 720 (Del) (DB). Therefore there is no chance of confusion and deception.

59. As is evident from the aforesaid extracts, our Court found that a difference in ingredients or salts which make up competing pharmaceutical products, would not be aspects which could be said to be germane when it come to the question of likelihood of confusion. It also negated the mode and method of ingestion as well as the form of the competing products. This is evident from para 22 of the report and where the Court held that the fact that the competing products were dispensed either in the form of a tablet or an oral suspension would be wholly irrelevant.

60. We find that the aspect of heightened scrutiny was also emphasized by a Division Bench of the Bombay High Court in *Macleods Pharmaceuticals*. While enunciating the first principles which must be borne in mind, the Bombay High Court in paras 21 and 22 held as follows:

> **"21.** This Court in the decision of *Boots Company Plc, England* (supra) after considering various judgments held that there are **three tests** which have to be considered for deciding the question whether the trade mark is deceptively similar to the other mark or not and they are:—
>
> (1) **The mark has to be considered as a whole,**
>
> (2) **It is a question of first impression and**
>
> (3) **The question has to be considered from the view point of a man of average intelligence**.
>
> **22.** The Delhi High Court in *Win-Medicare Pvt. Ltd.* (supra) after considering the relevant decisions on the question of misrepresentation or deception between two trade marks held that **following Rules of Comparison can be culled out from various pronouncements of the Courts from time to time**:
>
> I. **Meticulous Comparison not the correct way**.
>
> II. **Mark must be compared as a whole**
>
> III. **First Impression**.
>
> IV. **Prima Facie view not conclusive**.
>
> V. **Structural Resemblance**.
>
> VI. **Similarity in Idea to be considered."**

61. The test of "exacting judicial scrutiny", when we are called upon to deal with medicinal products was reiterated and re-affirmed as would be evident from para 23:

23. The Supreme Court in the decision between *Milment Oftho Industries* (supra) after reviewing the law on the subject held as follows:

> "**8. In respect of medicinal products it was held that exacting judicial scrutiny is required if there was a possibility of confusion over marks on medicinal products because the potential harm may be far more dire than that in confusion over ordinary consumer products.** It was held that even **though certain products may not be sold across the counter, nevertheless it was not uncommon that because of lack of competence or otherwise that mistakes arise specially where the trade marks are deceptively similar.** It was held that **confusion and mistakes could arise even for prescription drugs where the similar goods are marketed under marks which looked alike and sound alike. It was held that physicians are not immune from confusion or mistake.** It was held that it was common knowledge that **many prescriptions are telephoned to the pharmacists and others are handwritten, and frequently the handwriting is not legible.** It was held that **these facts enhance the chances of confusion or mistake by the pharmacists in filling the prescription if the marks appear too much alike**.
>
> (**Emphasis added**)"

62. After noticing the decision in *Cadila Healthcare*, the Bombay High Court culled out the following principles:

> **"25.** The principles which are emerging from the decisions set out hereinabove are summarised in the following manner:
>
> (a) When a particular medicinal or a pharmaceutical product is involved as the impugned trade mark which may deceive the public or cause a confusion with respect to another trademark, it is the Court's primary duty to take utmost care to prevent any such possibility of confusion in the use of trademarks.
>
> (b) Confusion in case of a non-medicinal or a nonpharmaceutical product may only cause economic loss to the person, but on the other hand, a confusion in terms of medicinal or a pharmaceutical product may have disastrous effect on the health. Hence, it is

proper to require a lesser quantum of proof of confusing similarity for such products.

(c) The Court may not speculate as to whether there is a probability of confusion between the marks. Mere existence of the slightest probability of confusion in case of medicinal product marks, requires that the use of such mark be restrained.

(d) While arriving at a conclusion with respect to the similarity and confusion between medicinal products, the same should be examined from the point of view of an ordinary common man of average intelligence instead of that of a specialised medicinal practitioner. Courts must decide the same from the view point of man with average intelligence considering multiple factors such as the first impression of the mark, salient features of both the products, nature of the commodity, overall similarity and the possibility of the same creating a confusion amongst the public at large.

(e) The primary duty of the Court is towards the public and the purity of the register. Duty of the Court must always be to protect the public irrespective of what hardship or inconvenience it may cause to a particular party whose trade mark is likely to deceive or cause confusion.

(f) The following rules of comparison can be culled out from various pronouncement of Court from time to time.

(i) Meticulous comparison is not the correct way.

(ii) Mark must be compared as whole.

(iii) First impression.

(iv) Prima facie view is not conclusive.

(v) Structural resemblance.

(vi) Similarity in idea to be considered.

(g) The main object of maintaining trade mark register is that the public should know whose goods they are buying. It is therefore essential that the register should not contain the trade mark which is identical by which purchaser may likely to be deceived by thinking that they are buying the goods of a particular company/industry whereas he is buying the goods of another company/industry."

63. On an overall consideration of the aforesaid, we are of the considered opinion that the finding of deceptive similarity and likelihood of confusion as ultimately rendered by the learned Judge clearly merits no interference. The learned Judge has on a prima facie evaluation come to conclude that a comparison of the marks "ISTAMET" and "INDAMET" meets the test of structural and phonetic similarity. That conclusion cannot, by any stretch of imagination, be said to be either manifestly erroneous or perverse. We are inclined to accept the principles as lucidly culled out in *Macleods Pharmaceuticals* and where their Lordships propounded the test in respect of drugs to be the *"mere existence of the slightest possibility"* of confusion. The aforesaid enunciation of the legal position is clearly in accord with the tests laid down by the Supreme Court in *Cadilla Healthcare*. In our considered opinion, the question of likelihood of confusion in case of competing drugs would have to be answered on a basis distinct from those that we may employ for ordinary consumer products. We would be erring if we were to fail to adopt strict principles of proof when it comes to drugs bearing in mind the need to completely obviate the possibility of an error or mistake. The test of confusing similarity, as McCarthy in his seminal work explains, stands *"modified"* and spoke of a *"lesser quantum of proof"* being required when the subject be drugs and medicinal preparations.

64. The appellant, however, questioned the exclusion of the words "XR CP" while returning the aforenoted findings. This argument was addressed in the backdrop of Sun Pharma's registration itself being for

a composite mark and the registration itself mandating that the mark was liable to be viewed as a whole. However, and in our considered opinion, the learned Single Judge was clearly justified in identifying the dominant feature of the mark. While it is true and well-settled that the principle of anti-dissection applies, we note that in *South India Beverages* itself the Court had accorded judicial sanction to a process of identification of the dominant feature of a trademark. As is manifest from a reading of paragraph 19 of the report, the Court had held that notwithstanding the first principle being of viewing two competing marks in their entirety, it would be open to acknowledge a dominant element of the mark for the purposes of examining questions of infringement and passing-off. We consequently note that the acknowledgement of a dominant element of a mark would not fall foul of the anti-dissection rule. This since even when a trademark is viewed as a whole and in its entirety, there may be situations where the question would have to be answered on the basis of what emerges to be the prominent feature of the mark. Undisputedly, "XR" and "CP" are *publici juris* in the pharmaceutical industry and are easily recognizable as referring to "extended release" and "combipack". It is in the aforesaid backdrop that the learned Judge appears to have identified the prominent features of the two competing marks to be "ISTAMET" and "INDAMET".

65. The submission of Dr. Singhvi and Mr. Sibal, of the learned Judge being obliged to consequently also erase from consideration the word "MET", cannot possibly be countenanced since that would have

clearly amounted to undertaking a wholesale reconstruction of the two competing marks and would in any case not constitute a safe basis for the purposes of answering the question of likelihood of confusion. We note that the learned Judge while answering the question in favour of the plaintiff has essentially identified the prominent features of the two marks and thus not committing the folly of dissecting the two words in a manner which would have led to the marks themselves disintegrating. While anti-dissection is the primary rule, courts are entitled to acknowledge and identify the dominant elements of a mark if circumstances so warrant. Undoubtedly, the word "MET" was an integral part of both competing marks. It was intended to convey the existence of an essential ingredient or salt of the two products. It would therefore be wholly incorrect to remove the words "MET" while answering the question which stood posited. The approach as advocated by the appellant would essentially require us to pulverise and granulate the two competing marks. That cannot possibly be the approach liable to be adopted while examining the aspect of deceptive similarity.

66. More importantly, a purchaser of average intelligence cannot be expected to break down tradenames in the manner as suggested or undertake such an exercise at the time of the transaction. A consumer would have viewed the two competing marks as INDAMET and ISTAMET while ignoring the words XR and CP since those abbreviations are well known to be representative of additional attributes of a formulation which normally has no correlation to the actual ingredients of the two products. The learned Judge thus in our

considered opinion correctly analysed and answered the issue of deceptive similarity.

67. In *Schering* the Court was called upon the examine a challenge raised by the appellant who was marketing drugs under the trade name TEMODAL/TEMODAR as opposed to that of the respondent which was TEMOKEM. The principal question which appears to have arisen was whether the appellant could claim an exclusive right to the use of a generic abbreviation concerned with "TEMOZOLOMIDE". Both the parties before the Court were admittedly manufacturing a product containing the compound "TEMOZOLOMIDE". The decision is thus liable to be appreciated in the aforesaid context. Similar was the position which obtained in *AstraZeneca*. It becomes pertinent to note in this context that Sun Pharma was not claiming an exclusive right to the use of the abbreviation "MET". The case of Sun Pharma was that the dominant features of the two competing marks were liable to be viewed as a whole for the purpose of answering the question of deceptive similarity. The decisions cited by the appellants are thus clearly distinguishable.

68. Another ground which was urged in the appeal was of the manner in which the two competing drugs were liable to be administered. The appellants had contended that "INDAMET" could be ingested only with aid of a DPI or a Rotahaler. It was on the aforesaid basis that it was vehemently urged that it would only be the "INDAMET" capsule which could have been inserted in the DPI and

thus consumed. The appellants in this respect had also sought to draw strength from the disclaimer as appearing on the "INDAMET" strip and insofar as it declared and warned consumers from the same being taken orally. This, according to learned senior counsels, is an aspect which has been incorrectly appreciated by the learned Single Judge.

69. We, however, find that the aforesaid contention clearly does not merit acceptance bearing in mind the undisputed fact which emerged in the course of hearing, namely, of the DPI or Rotahaler not being an integral part of the sale transaction and being only a one-time purchase. One cannot, therefore, discount the possibility of "INDAMET" being independently purchased by a patient who already possessed a DPI or a Rotahaler. The sale of "INDAMET" was not shown to be combined with the purchase of a DPI or a Rotahaler in every instance. It would, therefore, be incorrect to answer the question of likelihood of confusion based on the mere possibility of the DPI being purchased simultaneously and alongwith a replenishment dose of "INDAMET". This we so hold on facts in addition to the consistent position struck by precedents which have unequivocally held that the manner of ingestion, be it in the form of a tablet or a liquid suspension or for that matter the way it is liable to be administered, namely, orally or as an injectable, would be factors wholly immaterial for the purposes of considering the question of deceptive similarity and likelihood of confusion.

70. The appellants had also strenuously urged that Sun Pharma had failed to produce any evidence which may have established that

"INDAMET" would have an adverse effect if taken or consumed by a patient suffering from diabetes. It was urged that no scientific literature or peer studies had been placed on the record and which may have warranted an injunction being granted. We note that the learned Single Judge had specifically noticed this contention, namely, of an accidental ingestion not resulting in harm. The Court, however, took into consideration the admitted fact that "ISTAMET" was meant solely to treat diabetes while undisputedly, "INDAMET" was confined to the treatment of asthma.

71. In our considered opinion, in light of the aforenoted undisputed facts it was not incumbent upon the plaintiff to establish or prove that the taking of "INDAMET" would have an adverse effect on a diabetes patient. This issue has been rightly answered by the learned Single Judge who has borne in consideration the adverse consequences of a diabetic missing out on prescribed dosages of a medication meant to control and regulate blood sugar levels. The learned Single Judge took note of situations and contingencies where a failure to regularly take "ISTAMET" may either lead to a dramatic fall or a spike in a person's blood sugar levels. Similar would be the position if an asthmatic were to miss out on taking "INDAMET" and attempted to address the onset of a severe asthmatic attack by taking "ISTAMET". "ISTAMET", which is a specialised drug meant solely to treat and control diabetes would neither ameliorate the patient's condition nor arrest the attack and which itself may lead to fatal consequences. A diabetic could face an identical situation when experiencing hypoglycaemia. The absence

of peer studies and scientific literature was thus wholly immaterial for the purposes of considering the grant of injunctive relief.

72. We ultimately bear in mind the indubitable fact that ISTAMET and INDAMET are meant to attend to chronic ailments. It would therefore be perilous to ignore the test of heightened scrutiny as propounded in *Cadilla Healthcare* while considering the issue of deceptive similarity. We also bear in mind the undisputed fact that "ISTAMET" had been available in the market right from 2011 whereas the appellant chose to launch its product only on 16 June 2022 and that too after an opposition to its mark had come to be filed by the respondent on 27 May 2022. The question of balance of convenience was thus rightly answered by the learned Single Judge while passing the impugned order.

73. That leaves us to deal with two additional questions which were raised at the behest of the appellant and were based on prosecution estoppel and the asserted availability of drugs with similar sounding prefixes and suffixes.

74. Insofar as the issue of prosecution estoppel is concerned, we find that the stand taken by the plaintiff by way of the amendment application which was moved in the pending appeal was that the competing marks were in fact deceptively similar. Once that amendment application came to be allowed, it would be deemed to be the consistent stand struck by the plaintiff from the inception of the suit itself. In any view of the matter, that appeal itself has come to be

ultimately allowed with the learned Judge taking note of the registration held by Sun Pharma in respect of "ISTAMET XR CP" and the word "ISTAMET" forming part thereof. It was in the aforesaid backdrop that the appeal was allowed and the application directed to be advertised before acceptance. The stand taken by Merck thus clearly pales into insignificance.

75. The argument based on third party trademarks including the suffix "MET" would have to meet a similar fate bearing in mind our findings rendered hereinabove and upon having found that MET could not have been removed from consideration while examining the question of deceptive similarity. We have for reasons set out in the preceding parts of this decision already held that the learned Judge was justified in identifying the dominant feature of the two competing marks to be INDAMET and ISTAMET. Merely because "XR" and "CP" were removed from consideration in the course of identification of the prominent features of the two marks would not warrant the marks themselves being reconstructed in the manner as suggested by the appellant. This, in any case, since this was not a matter where Sun Pharma was claiming an exclusive right to use the suffix 'MET'.

76. Accordingly, and for all the aforesaid reasons, the appeal fails and shall stand dismissed. We uphold the injunction granted by the learned Single Judge. The interim order dated 26 July 2023 operating on this appeal shall in consequence stand vacated.

77. Though needless to state, we observe that our findings and conclusions as appearing in the body of this decision are based solely on a prima facie evaluation of the facts presented before us and for adjudging whether the learned Judge was justified in granting the interim injunction. They shall consequently have no impact on the rights and contentions of parties on merits.

YASHWANT VARMA, J.

DHARMESH SHARMA, J.

APRIL 16, 2024/kk