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

+ CS(COMM) 413/2019

SUN PHARMA LABORATORIES LTD. Plaintiff

Through: Mr. Sachin Gupta, Ms. Jasleen Kaur,
Ms. Rajnandini Mahajan and
Mr. Pratyush Rao, Advocates.

versus

APEX LABORATORIES PVT. LTD. & ANR. Defendants

Through: Mr. J. Sai Deepak, Mr. G. Nataraj,
Mr. Avinash K. Sharma and
Ms. Radhika Roy, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

ORDER

% **07.08.2019**

I.A. 10696/2019 (Exemption)

1. Exemption allowed, subject to all just exceptions.

I.A. 10694/2019 (under Order 11 Rule 1 (4))

2. Keeping in view the averments in the application, Plaintiff is permitted to file additional documents within a period of thirty days. Accordingly, present application is allowed subject to just exceptions. The filing of the additional documents shall be in strict compliance of the provisions of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015.

3. The application is disposed of.

CS(COMM) 413/2019

4. Let the plaint be registered as a suit.

5. Issue summons to the Defendants. Mr. G. Nataraj learned counsel for the Defendants accepts summons and confirms that the complete paper book has been received by Defendants. The written statement to the plaint shall be filed positively within 30 days from date of receipt of the order. Along with the written statement, the Defendants shall also file an affidavit of admission/denial of the documents of the Plaintiff, without which the written statement shall not be taken on record.

6. Liberty is given to the Plaintiff to file a replication within 15 days of the receipt of the written statement. Along with the replication, if any, filed by the Plaintiffs, an affidavit of admission/denial of documents of the Defendants be filed by the Plaintiff, without which the replication shall not be taken on record. If any of the parties wish to seek inspection of any documents, the same shall be sought and given within the timelines.

7. List before the Joint Registrar for marking of exhibits on 21st October, 2019. It is made clear that any party unjustifiably denying documents would be liable to be burdened with costs.

8. List before Court on 17th September, 2019.

I.A. 10695/2019 (under Order 39 Rule 1 & 2, CPC)

9. The Plaintiff by way of this application seeks permanent injunction restraining infringement of trade mark, threat to public health, delivery up, etc. against the Defendants.

10. The case of the Plaintiff as stated in the plaint is that it is a company incorporated under the Companies Act, 2013 and is a wholly owned subsidiary of Sun Pharmaceutical Industries Limited (hereinafter 'SPIL'). SPIL coined and adopted the mark 'TRAPEX', in the year 1984. However, the Plaintiff started using the mark "TRAPEX" commercially in the year 1988 and has been using the same since then. The Plaintiff has also been using the mark "TRAPEX 2" for its medicine. The word "TRAPEX" has been coined from the words TRAP and ANXIETY as "TRAPEX" which is a Schedule H drug is used to treat anxiety and seizures and is sold in the form of tablets.

11. Plaintiff claims to have a valid and subsisting trademark registration for "TRAPEX" and claims to be the prior user and the registered owner of the said trademark. The details of the registration as enumerated in the Plaint are as under:

TRADE MARK REGISTRATION

TRADEMARK	NO. & DATE	CLASS & GOODS
TRAPEX	423183 dated 14.06.1984	Class 5: Medicinal and Pharmaceutical preparations

12. The Plaintiff claims to have expended substantial sums of money on sales promotion, advertisement and publicity of its said goods bearing the said trade mark. Further, due to the continuous and extensive use of the said trade mark and large sales of the said goods as also wide publicity given to its goods bearing the said trade mark, the Plaintiff claims to have acquired immense reputation and goodwill in the said trade mark and the details of its sales turnover are shown in paragraph 13 of the plaint.

13. Defendant No. 1, namely Apex Laboratories Pvt. Ltd. is a company incorporated under the Companies Act, 2013 and is engaged in the marketing and selling of pharmaceutical preparations. Defendant No. 2, Pure and Cure Healthcare Pvt. Ltd. is also a company incorporated under the Companies Act, 2013 and is engaged in the manufacturing of the impugned product "ITRAPEX".

14. Learned counsel for the Plaintiff states that in the first week of August 2019, Plaintiffs' representative came across the Defendants' pharmaceutical preparation "ITRAPEX" being sold in the pharmacy, namely R.S.B. Pharma Pvt. Ltd.. He submits that the Defendants' medicine under the impugned mark contains the salt *Itraconazole* and is a 'Schedule H' drug used to treat fungal infections. "ITRAPEX" is being sold in the form of Capsules. Plaintiff claims to be the prior user and the registered trademark owner of the trademark "TRAPEX". Further, Defendant's trademark application No. 3105605 dated 26th November 2015 in Class 5, on a proposed to be used basis for the goods, has been refused by the Registrar

of Trademarks, vide order dated 6th August 2018 on the ground that the impugned mark is objectionable under Section 9/11 of the Trade Marks Act, 1999.

15. Subsequently, Plaintiff accessed the website of Defendant No. 1, with the domain name <http://www.apexlab.com/> and found out that the Defendants' product under the impugned mark is also listed on the said website. It is further contended that the Defendants' act constitutes infringement of Plaintiff's registered trademark and is a threat to public health and interest as Defendants' impugned mark "ITRAPEX" is visually, structurally as well as phonetically similar to the Plaintiff's registered mark and is likely to cause confusion and deception in the mind of public. Plaintiffs' counsel further contends that Defendants being in the pharma trade cannot be insensitive to the public safety and interest and being a subsequent entrant should not have adopted a mark, which is deceptively similar to the Plaintiffs' registered and prior used mark.

16. Defendant is not on caveat. However, Mr. J. Sai Deepak, learned counsel for the Defendants appears without notice and has opposed the present application on several grounds. Firstly, he referred to paragraph 12 of the plaint and argued that there are rectification proceedings pending adjudication before the Registrar of Trademarks in respect of the Plaintiff's mark "TRAPEX". He submitted that though rectification proceedings are at the instance of a third party i.e. Raptakos, Brett and Co. Ltd., however Section 124 (1) of the Trade Marks Act, 1999 would still be attracted and the present proceedings are liable to be stayed. Further, Mr. Sai Deepak

strongly contends that the Defendant's drug is used for a different indication i.e. for fungal infection and therefore there is no likelihood of any confusion and deception. He also urged that though Plaintiff's drug is also a 'schedule H' drug, however being a controlled substance, it is subject to several other restrictions under the Narcotic Drugs And Psychotropic Substances Act, 1985. Plaintiff's drug cannot be dispensed by a pharmacy simply on the basis of medical prescription. The pharmacist has to maintain a record regarding the physician, the quantity dispensed, etc in a separate register as required under the Narcotics Drugs and Psychotropic Substances (Regulation of Controlled Substances Order, 2013). There are sufficient safeguards in law that would ensure that there is no risk to the consumers who require the drug of the Plaintiff and this would also rule out the element of confusion. He also argued that Defendant has adopted the mark "ITRAPEX" on the basis of the salt *Itraconazole* which is part of its composition and Defendant's company name. Plaintiff cannot have any exclusive right over a salt name and there are several other drugs in the market which have similar names because of the salt composition. Lastly, it was argued that the Defendants have been in the market since 2017.

17. Needless to say, all the contentions of Defendant would have to be examined in detail at appropriate stage. Defendant is not on caveat and has appeared only to oppose grant of ex-parte orders. Thus for now, the Court has to examine if the Plaintiff satisfies the three well known ingredients *viz* prima facie case; balance of convenience; irreparable loss for grant of ad-interim injunction. The prima facie case has to be evaluated on the basis of the submissions advanced by the learned counsels as also on the basis of the

averments made in the pleadings. The Defendant's mark ITRAPEX has entirely subsumed Plaintiffs registered trademark TRAPEX. The the only difference is that the Defendant's mark has been prefixed with the letter "I". Therefore there cannot be any doubt in saying that defendant's mark is deceptively and glaringly similar Plaintiff's mark. Plaintiff' is the registered proprietor of the mark and has been using the mark since 1988. Defendant is concededly a newcomer and the adoption of the mark that is nearly identical is uncanny and cannot be allowed to continue. The use of the defendant's mark is prima facie infringement of Plaintiff's mark. Defendant's submission that no one can have the exclusive right over the name of the salt is not a factor that would dissuade the court to grant ad-interim injunction. Defendant had sought registration of its mark claiming that it is capable of being registered. The registration application having been rejected, defendant cannot be permitted to take a contradictory plea. Defendant's submission that it's drug is being used for a different indication/disease, cannot be the predominant factor that would weigh upon the court to decide the request for grant of injunction in favour of the Plaintiff. Pertinently, the Court cannot lose sight of the fact that the two trademarks are identical and are being used for treatment of different diseases. There is a possibility of endangering the health of the public in the present case. No matter Plaintiff's drug being a controlled substance and requires stringent measures to be adhered by the pharmacy, yet the possibility of confusion and mistake cannot be ruled out for prescription drugs which look alike and sound alike. The decision of Supreme Court relating to infringement of trademark of drugs in *Cadila Health Care Ltd. v. Cadila Pharceuticals Ltd.* (2001) 5 SCC 73, is pertinent in this regard.

The relevant portion of the said judgment reads 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 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.”

18. Having regard to the aforesaid facts, the Court is satisfied that the Plaintiff has made out a prima facie case and the balance of convenience also lies in favour of the Plaintiff and irreparable loss would be caused in case the Defendants are not restrained by way of a order of injunction. Accordingly, till the next date of hearing, the Defendants, their Directors, their assignees in business, their distributors, dealers, stockists, retailers/chemists, servants and agents are restrained from manufacturing, selling, offering for sale, advertising directly or indirectly dealing with pharmaceutical preparations having the impugned mark “ITRAPEX” or any other trade mark as may be deceptively similar to the Plaintiffs trade mark “TRAPEX” amounting to infringement of its trade mark registered under no. 423183. Since Mr. Sai Deepak submits that the Defendants are already in market and the order passed by this Court will cause them

serious and severe prejudice. It is clarified that the order will not apply with respect to the goods which have already been manufactured and have left the factory premises of the Defendant as on the date of passing of this order. The Defendants are directed to file an affidavit within a period of one week from today, giving full particulars of the batch number and details of the drugs which have been manufactured on the date and time of passing of this order. The order is passed on 7th August, 2019, at 12:17 PM.

19. Needless to say that the opinion expressed by the Court is only a prima facie view and contentions of the parties and merits of their case shall be examined at the stage of final decision of the application, uninfluenced by the observations made in this order.

20. List before the Joint Registrar for completion of pleadings on 21st October 2019.

21. List before the Court on 17th September 2019.

SANJEEV NARULA, J

AUGUST 07, 2019

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