

In the Court of Sh. Surinder S. Rathi, Id. Addl District Judge, Patinda House Courts, New Delhi

Sh. SURINDER S. RATHI
ADJ-03/PHC/NDD
NEW DELHI

T.M No.- 366/16

M/s. Sun Pharmaceutical Pvt. Ltd.
8C, 8th Floor, Hansalaya Building
15, Barakhamba Road
Connaught Place
New Delhi-110001

.....Plaintiff

Vs.

1. M/s. Apollo Hospitals Enterprises Ltd.
Registered Office-Cum 19, Bishop Gardens
Raja Annamalaipuram
Chennai- 600 028
2. Maxcure Nutravedics Limited
Registered office
B-7, Laxmi Towers, LSC C-Block
Saraswati Vihar, Delhi-110034

.....defendants

Order- 26.04.2016

Fresh suit was received by way of assignment.

Present: Ld. Counsel Sh. Sachin Gupta for the plaintiff.

Perusal of plaint shows that it is a suit U/s 134, 135, 27 and 29 of Trade Mark Act, 1999 seeking permanent injunction against defendants from usage of trademark "EPPFIZ" which is deceptively similar to plaintiff's registered trademark "PEPFIZ" apart from other reliefs.

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Issue summons of the suit on filing of PF/R/C and through authorised courier to the defendants and notice of applications under Order 39 Rules 1 and 2 R/w 151 CPC and application w/O 26 Rule 9 CPC.

Ld. Counsel for plaintiff has been prayed for ad-interim ex-parte injunction U/s. 135 of Trade Mark Act.

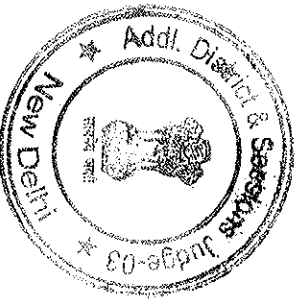
Submissions heard. File perused.

The case of the plaintiff is that they are owners of registered Trademark **“PEPFIZ”** for the purpose of pharmaceuticals and medicinal preparation since 1991. Plaintiff own the Trademark **“PEPFIZ”** and it has been using this mark since 2002.

The plaintiff has in the business of pharmaceuticals and medicinal preparation for Antacid under trademark **“PEPFIZ”**. The plaintiff has been using the said trade mark honestly, bonafidely, extensively, exclusively, continuously, commercially and in course of trade since 2002.

The plaintiff's product under the said trademark is freely and commercially available in India. The details of the said registration has also been provided in the plaint. The plaintiff has been regularly and continuously promoting its distinctive trademark through extensive advertisements, publicities promotions and marketing research and has been spending enormous amounts of money, efforts, skills and time.

It is alleged that the defendants are engaged in the business of



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manufacturing and marketing pharmaceuticals and medicinal preparations. The defendants have adopted and are using the trademark "EPTIZ".

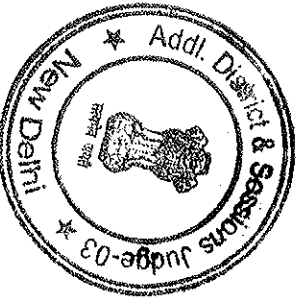
It is alleged that the defendants' impugned mark is deceptively identical and similar to the plaintiffs' trademark in each and every respect including phonetically, visually, structurally, in its basic idea and in its essential features and that the defendants have been using the same in the course of trade without the leave and license of the plaintiff.

The defendants are also passing off their impugned goods and business as that of the plaintiff.

It is alleged that the defendants has adopted and started using the impugned trade mark dishonestly, fraudulently and out of positive greed with a view to take advantage and to trade upon the established good will, reputation and proprietary rights of the plaintiff in the plaintiff's said trade mark. Because of such activities of the defendants, the plaintiff is suffering huge losses both in business and in reputation which cannot be compensated in terms of money.

In case titled **Kaviraj Pandit Durga Dutt Sharma vs Navaratna Pharmaceutical Laboratories, AIR 1965 SC 980** it was held that *action for infringement is a statutory remedy conferred on the registered proprietor of a registered trademark.*

In case titled **American Home Products vs. Mac Laboratories,**



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AIR 1986 SC 137 it was held that registration of trademark gives the proprietor the exclusive right to the use of the trademark in connection with the goods in respect of which it is registered.

In case titled **Encore Electronics Ltd. vs. Anchor Electronics and Electricals Pvt. Ltd., 2007 (35) PTC 714** it was held that phonetic similarity constitutes an important index of whether a mark bears a deceptive or misleading similarity to another.

In case titled **K.R. Chinna Krishna Chettiar vs. Sri. Ambal & Co. and Anr., AIR 1970 SC 146** it was held that resemblance between the two marks must be considered with reference to the ear as well as the eye.

In case titled **Amritdhara Pharmacy vs. Satyadeo Gupta, AIR 1963 SC 449** it was held that the rival marks have to be compared as a whole. The two competing marks must be judged both by their look and by their sound. All the surrounding circumstances must be considered.

In case titled **Keshav Kumar Aggarwal vs. M/s. NUT Ltd., 2013 (199) DLT 242** it was held that where the similarity between the Plaintiffs and the Defendant's mark is so close either visually, phonetically or otherwise and the court reaches the conclusion that there is an imitation, no further evidence is required to establish that the Plaintiffs rights are violated.



In the Steifel Laboratories vs Ajanta Pharma Ltd, 2014(59) PTC

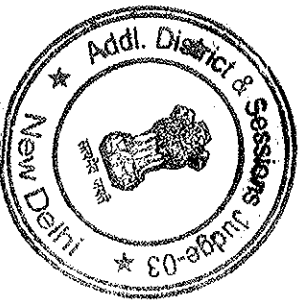
24(Del) case where in plaintiff's trademark CLINDOXYL was infringed by usage of trademark CLINOXIDE. While granting stay Hon'ble Delhi High Court observed-

“For grant of an ad-interim injunction in a dispute relating to rival trademarks, the plaintiff has to firstly prima facie establish priority in use to the use of the defendant and secondly has to prima facie establish commercial continuous user and thirdly deceptive similarity between the rival marks.”

The rival marks are Clindoxyl of the Plaintiffs on the one side and Clinoxid, Clinoxide and Clinoxide-A of the Defendant on the other. Applying the principles as enumerated above there is no iota of doubt that the rival marks are deceptively similar and are likely to cause confusion in the minds of unwary purchaser. The medicines are not prescription drugs and are available and sold across the counter and are sold to consumers for acne treatment.

In the Pankaj Goel Vs Dabur India Ltd 2008 (38) PTC 49 (DEL)

(DB) where in plaintiff-respondent pleaded that its registered trademark HAJMOLA is being infringed by appellant-defendant by using trademark RASMOLA. The Division Bench of our own Hon'ble Delhi High Court upheld the order of the Hon'ble Single Judge who found RASMOLA to be deceptively



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similar to HAJMOLA.

In other land mark case titled **United Biotech Pvt Ltd Vs Orchid Chemicals Pharmaceuticals Ltd 2012 (950) PTC 433 (DEL) (DB)** while discussing the issue of visual and phonetically similarity in trademarks it was ruled that the rival trademarks of the parties ORZID and FORZID are visually and phonetically similar and would cause deception in the minds of consumer in relation to medicine.

In view of the above submissions, the plaintiff has established a prima facie case in its favour and balance of convenience also lies in their favour. Plaintiff has shown prime facie that in case defendants are not restrained, it shall cause irreparable injury to the business and goodwill of the plaintiff which can not be compensated in terms of money.

Hence, the defendants, their agents, assignees, representatives, successors, distributors, stockist and all other acting for and on their behalf are hereby restrained till further orders from displaying, manufacturing, marketing, advertising, using, soliciting work, or by any other mode or manner dealing in or using the impugned trade marks “**EPFIZ**” or any other word which may be identical with and/or deceptively similar to the plaintiffs said trade mark “**PEPFIZ**” in relation to medicinal and pharmaceutical preparations including Antacid and related /allied cognate goods and from doing any other acts or



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deeds amounting to or likely to infringe plaintiff's registered trademarks and passing off.

At this stage, Ld. Counsel for the plaintiff also presses his application U/o 26 Rule 9 read with Section 151 CPC for appointment of Local Commissioner for preserving and protecting infringing evidence as per Section 135 of the Trade Mark Act, 1999. Accordingly, I appoint:-

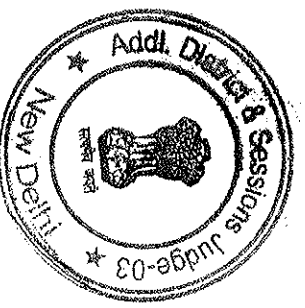
Sh. Sanjay Diwakar, Advocate, Enrollment no. D/692-R/1998, Office-Cum-Resi:- G-30, Masjid Moth, Greater Kailash-II, New Delhi-110048. Phone No- 9910458573 to visit the premises of defendants at :-
Maxcure Nutravedics Limited, Plot no. 13, Sector- 6A, IJF, Sidcul Haridwar- 249403, Uttarakhand.

The fee of the Local Commissioner is fixed at Rs. 1,00,000/- exclusive of travel and pocket expenses or tax to be paid in advance.

The commission shall be carried out preferably within 15 days from today, after giving notice of the commission to the defendants at the spot.

Ld. LC to submit their reports within two weeks of the execution of the commission. The complete paper book provided to Ld. LC by the plaintiff along with copy of this order.

The Local Commissioner shall seize all impugned goods and incriminating materials like stationery, packing material, pouches, cartons,

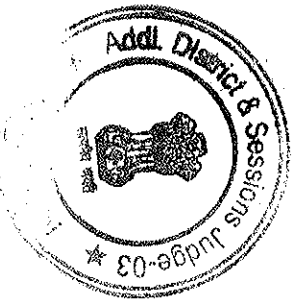


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blocks, bottles, containers, display boards, sign boards, advertising material, dies or blocks, semi-finished, unfinished packed, unpacked impugned goods or any other documents, wrapper etc. bearing the impugned trade marks “**PEPFIZ**” or bearing any other trademark identical with or deceptively similar to the plaintiff's trade mark “**PEPFIZ**” found at the aforementioned place of the defendants. After inventoring the stock, the same be released to the defendants on supardari or in case of non availability of defendants may be given on supardari to the representative of the plaintiff. The Local Commissioner shall sign the account books, if any, of the said defendants including ledgers, cash register, stock register, excise registers, invoices, books etc.

The Local Commissioner would be entitled to break open the locks in execution of the commission. On the request made by Id. LC the concerned SHO or the Deputy Commissioner of Police shall immediately provide police aid. The Local SHO/DSP/SP are also directed to provide all possible help to Id. LC in smooth carrying out of Commission. One copy of this order be supplied to Local SHO through plaintiff. All the Police Official shall maintain absolute secrecy for effecting execution of communication.

The plaintiff may also arrange for photography, videography etc, if required. The representatives of the plaintiff alongwith the counsel(s) of the plaintiff are permitted to accompany the Local Commissioner at the spot.



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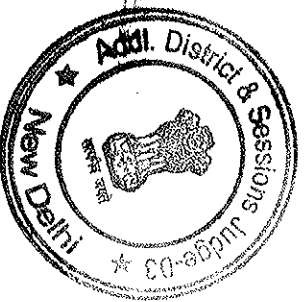
Report be submitted on or before the next date of hearing.

Compliance of Order 39 Rule 3 CPC be made within reasonable time.

As already ordered, issue summons of this suit and notice of the applications to the defendants on filing of PF/R/C/AD and authorised courier.

Steps be filed within two weeks for **18.07.2016**.

Copy of this order be given to the plaintiff Dasti as prayed.



**Ld. ADJ-03, Patiala House Courts,
New Delhi**

**(Surinder S. Rathi)
ADJ-03/PHC/NEW DELHI
26.04.2016**