

अनुराग सेन
ANURAG SAIN
IN THE COURT OF SH. ANURAG SAIN, DISTRICT JUDGE
(COMMERCIAL COURT)-01, PATIALA HOUSE COURT
NEW DELHI
District Judge, Patiala House Courts, New Delhi
कमरा संख्या-101, Main Building
परिचलन कक्षा, नई दिल्ली
Patiala House Courts, New Delhi

CS (COMM) 990/2022

Wings Pharmaceuticals Pvt. Ltd.

D-6, Udyog Nagar, Indl. Area,
New Delhi-110041.

Email address : legal@wingspharma.com

...Plaintiff.

Vs.

Nukind Healthcare Pvt. Ltd.

Khasra No.176, Neb Sarai,
New Delhi -110068.

...Defendant No.1

Apple Formulations Pvt.Ltd.

Flat No.24C, 2nd Floor, Pocket B,
Sector-G, Mayur Vihar-III, New Delhi-110096.

...Defendant No.2

M/s Naval Enterprises

Through its Proprietor,
Mr. Ishwar Kukreja
F-47, Second Floor, Okhla Industrial Area
New Delhi-110020

...Defendant No.3

Appearance : Sh. Sachin Gupta, Advocate for the plaintiff.

Date of pronouncement of the order : 20.01.2023.

ORDER

1. By this order, I propose to decide the prayer of ex-parte ad-interim injunction and application for appointment of local commissioner.

2. The plaintiff, Wings Pharmaceuticals Pvt Ltd has filed the suit for permanent injunction, passing off, unfair trade competition and rendition of accounts etc.

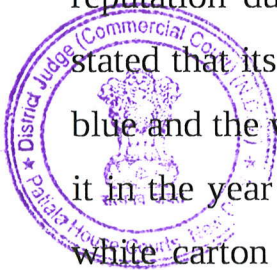
for infringement of their trademark rights against the defendants Nukind Healthcare Pvt. Ltd. etc.

3. Alongwith the suit, applications U/o 39 Rule 1 & 2 CPC r/w Section 151 CPC and under Order 26 Rule 9 r/w Section 151 CPC have been filed for exparte ad-interim injunction and appointment of the Local Commissioner.
4. Briefly, the facts as alleged in the plaint are that the plaintiff was incorporated in the year 1987 and is a company under Companies Act 2013, having its registered office at D-6, Udyog Nagar Indl.Area, New Delhi. It is also the case of the plaintiff that it was the part of Wings Group which group has three business entities i.e. Wings Pharmaceuticals Pvt Ltd, Wings Biotech (now Wings Biotech LLP) and Wings Biotech LLP. Vide assignment deed dated 25.03.2022 between Wings Biotech LLP and Wings Pharmaceuticals Pvt Ltd agreed to assign and transfer benefit, title interest and right along with goodwill of the business in the goods and services to the plaintiff. It is also the case of the plaintiff that over the years, plaintiff has grown phenomenally in segments like Acute, OTC, Life care, personal care and consumer care. Plaintiff invented and adopted the trademark ORASORE in 1998 and has been using the same since then. Its products under the mark ORASORE are available in different variants including ORASORE gel, ORASORE mouth ulcer tablet and ORASORE dental gel. Its trademark ORASORE has been used for treating mouth ulcers since the year 1998. It has marketed the brand name ORASORE through TV advertisements, danglers, posters, leaflets etc. It has number of trade dress in Blue and white packaging in other languages like Malayalam, Tamil, Hindi, Bengali etc. It has filed and obtained registration for the trademark ORASORE (word) under no. 787554 dated 14.01.1998, in class 5 for goods namely pharmaceutical and medicinal preparations on proposed to be used basis. It is claimed that the said mark is still valid and subsisting. Its




group entity namely Wings Biotech also obtained registration for the trademark ORASORE MOUTH + First Aid under no. 3506438 dated 04.03.2017 in class 5 and ORASORE मुंह का+फर्स्ट एड under no. 3506440 dated 04.03.2017 in class 3. The said trademark applications have now been assigned to the plaintiff.

5. It is stated in the plaint that blue and white trade dress and device mark were developed and adopted by the plaintiff in the year 1998 and at the time of adoption, no third parties were using any similar trade dress or combination of colours in the industry. Its blue and white carton packaging/trade dress including colour combination, get up, placement of features constitute singularly and collectively an original artistic work within the meaning of Section 2 (c) of the Copyright Act, 1957 and thus, it is entitled to copyright protection under the provisions of Section 14 of the Copyright Act. It also got registered copyright under no. A-137528/2021. It is stated that any unauthorized reproduction or imitation or use of such imitation by any unauthorized person would constitute infringement of its copyright under Section 51 of the Copyright Act which is liable to be enjoined under Section 55 of the said Act.
6. It is stated that the sales of plaintiff's blue and white carton packaging/trade dress in the year 2022-23 was Rs. 52,85,60,074/-. Its trademark ORASORE and ORASORE blue and white dispenser, Mono Carton and Lami Tube packaging/trade dress has acquired distinctiveness and enviable goodwill and reputation due to extensive, long and continuous use since year 1998. It is stated that its trade dress has been designed and developed to give it a Sleeker blue and the white trade dress and device mark were developed and adopted by it in the year 1998. It as a part of re-branding exercise, adopted the blue and white carton packaging/trade dress containing various distinctive devices. In



2009, on the ORASORE blue and white packaging, the style of writing ORASORE with a hiphen along with tagline 'Quick Relief from pain mouth ulcers' and मुँह में छालों की दर्द से तुरंत आराम with an image exhibiting an actor,

taglines in hindi with placement of . In the year 2015 and 2018, it incorporated certain changes as detailed in para 17 (b) and (c). It is claimed that plaintiff's trademark ORASORE and ORASORE blue and white dispenser, Mono carton and Lame Tube Packaging trade dress have acquired a status of well known mark within the meaning of Section 2 (1) (zg) of the Trademarks Act, 1999.

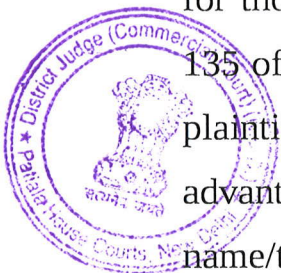
7. It is claimed that the defendants are connected and are engaged in the impugned activities of manufacturing and marketing of the impugned products. It is alleged that in the first week of December 2022, plaintiff came across the defendant's product under the impugned mark U-SORE being sold in the markets of Delhi namely CP, Janpath, Khan Market etc. in a clandestine manner without issuance of an invoice and the products are also found selling online on various e-pharmacy websites across India. It is claimed that defendant no.1's application for registration of the mark U-Sore Mouth Ulcer Gel (label) under application no.2343446 dated 05.06.2012 in class 5 for goods, namely "pharmaceuticals, medical and veterinary preparations etc.' claiming false use since 24.05.2012, which was currently stands refused vide order dated 15.05.2018.

8. It is claimed that defendants have unethically and unlawfully adopted the impugned mark USORE and USORE blue and white dispenser, Mono carton and Lami Tube packaging/trade dress. It is alleged that the defendants' impugned mark USORE is visually, structurally and phonetically and deceptively similar to the plaintiff's registered trademark ORASORE and such



use by the defendants constitutes infringement of plaintiff's registered trademark ORASORE under nos. 787554 dated 14.01.1998 in Class 5, ORASORE MOUTH + FIRST AID (word) under no. 3506438 dated 04.03.2017 in class 5 and ORASORE MOUTH + FIRST AID (HINDI) under no. 3506440 dated 04.03.2017 in Class 3. It is alleged that use of the impugned USORE blue and white carton packaging/trade dress by defendants is colourable imitation and substantial reproduction of ORASORE, blue and white Carton packaging/trade dress in respect of its overall colour combination, lay out, placement and arrangement of features and devices.

9. It is alleged that the defendants have taken key elements of what registers in a common person's mind on seeing a product i.e. distinctive blue and white colour combination of the dispenser, mono carton and lami tube packaging/trade dress along with term '*2 minute pain relief, mouth ulcer image, dotted patterns* etc. These features are strong enough to create confusion in the minds of a common person on account of imperfect recollection and overall similarity and idea conveyed by the trade dress and packaging of both the parties. It is stated that defendants' products manufactured and marketed by it under the impugned mark USORE and USORE blue and white dispenser etc are visually and structurally deceptively similar to the plaintiff's trademark ORASORE, its formative variants along with blue and white dispenser etc which will directly and adversely affect its goodwill and reputation and it will amount to passing off the defendant's goods for those of the plaintiff which action is liable to be injuncted under Section 135 of the Trademarks Act. It is stated that defendants are competing with the plaintiff in the same field of activities, selling the identical products taking advantage of brand equity and goodwill built up by the plaintiff in the trade name/trade dress.



10. It is stated that plaintiff is not claiming complete and absolute monopoly over the use of single colour. It is averring that the specific and unique blue and white colour combination as a part of its dispenser etc/packaging/trade dress has imprinted itself on the subconscious minds of the consumers due to its prominence in the market and strategic marketing activities. It is alleged that irreparable harm would be caused to the plaintiff due to passing off and unfair competition practice by the defendants. A customer finds the defendants' products presuming it to be a product as that of the plaintiff and shall expect the same high standards which the plaintiff has strived to achieve for its products.

11. I have heard Sh. Sachin Gupta, ld. counsel for the plaintiff and perused the plaint and the documents.

12. Ld. Counsel for the plaintiff submitted that present is a passing off action in relation to trade dress, get up, lay out, colour scheme and placement of distinctive features of the plaintiff's trademark ORASORE.

13. In support of his arguments, ld. Counsel has placed reliance on following judgments:

1. M/s South India Beverages Pvt. Ltd. Vs. General Mills Marketing Inc. & Anr., 2014 SCC Online Del 1953;

2. Marico Ltd. Vs. Mukesh Kumar and Ors., 253(2018)- DLT8 and;

3. Rukhmani Keshwani Trading as Viswas Agarbatti Store Vs. Raju Agarbatti Works & Anr., FAO (Comm) No. 188/2022, decided on 08.12.2022.

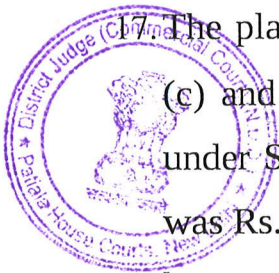
14. Ld. Counsel also produced the products to contend that the visual impression gathered from the trade dress of the competing products is that the trade dress,

get up, lay out the color scheme and the placement of distinctive features of plaintiff ORASORE products have been substantially copied by the defendants. There is every likelihood that an unwary and gullible customer will get confused.

15. I have given my thoughtful consideration to the rival contentions and perused the documents.

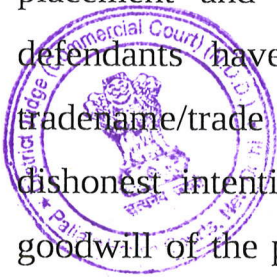
16. A perusal of the documents reveals that the plaintiff is one of the leading manufacturers of pharmaceutical and consumer healthcare products and has acquired goodwill and reputation over a period of time in the healthcare sector in India. It has significant presence across the distribution channel with its products and as per the case of plaintiff it invented and adopted the trademark ORASORE in 1998 and has been using the same since then. As averred, its mouth ulcer gel being sold under the trademark ORASORE is an instant pain relief gel and its products are available in different variants. Distinctiveness of its packaging also acquires great significance as a source identifier of its goods. It has obtained registration for the trademark ORASORE in class 5 for the goods namely pharmaceuticals and medicinal preparations and the trade dress of plaintiff has been designed and developed to give it a sleeker modern look which it adopted in 1998 and at that time, no third parties were using any similar trade dress or combination of colours in the industry.

17. The plaintiff has demonstrated its products/trade dress in para 17 (a), (b) and (c) and has also claimed its copyright stating to be its original artistic work under Section 2 (c) of the Copyright Act. Its sales figure in the year 2022-23 was Rs. 52,85,60,074/-. According to the plaintiff, its trademark and trade dress have acquired status of well known mark under Section 2 (1) (zg) of the Trademarks Act, 1999.



18. The plaintiff has demonstrated that the defendants who are in the same field had filed an application for registration of the trademark USORE in class 5 for the goods, pharmaceuticals and veterinary preparations claiming use since 24.05.2012. It is stated that the said application currently stands refused vide order dated 15.05.2018. It is alleged the the defendants' impugned goods are being advertized on URLs/websites as detailed in para 34 of the plaint. The plaintiff has alleged that the defendants have unethically and unlawfully adopted the said mark infringing its copyright with intention to pass off its products as that of the plaintiff using unfair practice which is against the public interest. It is stated that the plaintiff came across to the defendants products in the first week of December, 2022 under the impugned mark USORE, blue and white dispenser, mono carton and lamitube packaging/trade dress being sold in the markets of Delhi, Connaught Place, Janpath, Khan Market etc in a clandestine manner without issuance of an invoice.

19. In this case, the counsel for the plaintiff has produced both the products and on comparative study, I find that defendants impugned product USORE is visually and structurally similar to the plaintiff's registered trademark ORASORE. Its use may cause confusion and deception to the unwary customers. Use of the impugned USORE blue and white carton packaging/trade dress by the defendants is colourable imitation to its overall colour combination, layout, placement and arrangement of features and device. It appears that the defendants have manufactured/marketed their products using the above tradename/trade dress which is visually and structurally deceptive, with a dishonest intention. It will directly and adversely affect the reputation and goodwill of the plaintiff's products in the market. It would also lead to unfair competition.



20. In the case of *Marico Ltd v/s Mukesh Kumar and ors, (Supra)*, the court studied the comparative photographs of plaintiff's and defendant's products. In that case, plaintiff was not claiming exclusivity as a stand alone factor but in a combination of parts which included the blue colour. The relevant portion of the said judgment reads as under:-

"60. In the case of passing off and for that purpose infringement of trademark which are already in existence, the second or for that purpose the subsequent comer has certain obligation to avoid unfair competition and become unjustly rich by encashing on the goodwill or reputation of the prior comer. They have to establish and bank upon on their own trade dress or distinctive features so as to establish their own merit and reputation and attract the attention of the purchasing public and if there are no substantial dissimilarities of marks, colour combination, getup or layout on the container or packing or covering of the goods of the prior comer these are likely to create confusion in the minds of customers between his goods and the goods of the prior comer in the market as underlying and hidden intention of the second comer is to encash upon the successful rival.

62. Significance of trade dress and colour combination is so immense that in some cases even single colour has been taken to be a trademark to be protected from passing off action. Colour combination is a trademark within the definition of the TMM Act as there is no exclusion in the definition. Even a single colour has been held to be a trade mark. There may be exception also. Exception is that where the colour cannot be protected as the blue colour is for the ink and red colour is for the lipstick. Red and white has nothing to do with the pink. Teeth as white line and gum as pink colour alone at least sometimes can meet the basic requirements as a trademark. Colour depletion theory is unpersuasive only in cases where a blanket prohibition is being sought."

21. In the case of *Baker V. Master Printers Union of New Jersey, 47 USPQ 69 at 72 (D.N.J.1940)*, it was held that:

"The most successful form of copying is to employ enough points of similarity to confuse the public with enough points of difference to confuse the courts. Few would be stupid enough to make exact copies of another's mark or symbol."



22. In the present case, plaintiff is the prior user of the mark ORASORE which it has been continuously using since 1998. Its trademark is registered and is valid and subsisting. Its trademark ORASORE and blue and white carton packaging/trade dress has acquired goodwill and reputation.
23. In the case of *Amritdhara Pharmacy v. Satyadeo Gupta*, AIR 1963 SC 449, it was held that since time immemorial the Supreme Court has consistently sounded a note of caution that the competing marks have to be compared keeping in mind an unwary purchaser of average intelligence and imperfect recollection.
24. From the averments made in the plaint and the documents placed on record, I find that the plaintiff has prima facie in its favour. The balance of convenience also lies in favour of plaintiff and if ad-interim injunction is not granted in favour of the plaintiff, and against the defendants, it will suffer irreparable loss and injury and damage in its business.
25. As a result, ad-interim injunction is granted in favour of the plaintiff and against the defendants restraining the defendants, their directors, proprietor or partners, their assignees in business, licensees, franchisee, distributors and dealers from manufacturing, selling, offering for sale, advertising, directly or indirectly dealing in medicinal or pharmaceuticals products or any other products under the mark USORE and USORE or any other trademark/tradename/domain name which may amount to infringement of the plaintiff's trademark ORASORE registered under nos. 787554, 3506438 and 3506440; from dealing in the impugned ORASORE blue and white Dispenser, Mono Carton and Lami Tube packaging, trade dress or any other Carton packaging/Trade Dress as may be a colourable imitation or substantial production of ORASORE blue and white dispenser, Mono Carton and Lami



Tube packaging/trade dress amounting to infringement of copyright of the plaintiff's registered under no. A-137528/2021; and from dealing in pharmaceutical products under the impugned ORASORE blue and white carton packaging/trade dress or any other trade dress/packaging as may be colourable imitation or substantial reproduction of plaintiff's well known ORASORE blue and white Carton packaging/trade dress amounting to passing off its goods as those of the plaintiff..

26. In respect to the prayer made u/o 26 Rule 9 CPC, **Sh. Vibhore Garg, Advocate, Enrol.No.D-5643/2022, Contact No.7747830100, Chamber No.G-321, Lawyers Chamber Block, Karkardooma Courts, Delhi** is appointed as the Local Commissioner to visit premises of the defendants at Nukind Healthcare Pvt. Ltd., Plot No.68, Phase – 1, Block C, DLF industrial Area, Sector 32, Faridabad, Haryana-121003 its godowns, stores, branches, if any, and to seize the impugned goods etc. under the brand name USORE or USORE blue and white carton packaging/trade dress which is identical/deceptively similar to the plaintiff's related marks in relation to its impugned goods and business. Fees of the Local Commissioner is assessed at Rs. 1.00 lakh exclusive of travel expenses and tax to be paid in advance.

27. The commission shall be carried out preferably within 15 days from today after giving notice of the commission to the defendants at the spot. Local Commissioner to submit report within two weeks of the execution of the commission. The complete paper book be provided to the Local Commissioner by the plaintiff alongwith copy of this order well in time.

28. The Local Commissioner shall seize/take in custody all impugned goods bearing the brand name USORE or USORE blue and white carton packaging/trade dress or any other mark/logo which is identical and

deceptively similar to the plaintiff's mark in relation to its impugned goods and business.

29. After preparing inventory of the material/ stock, the same be released to the defendants on Superdari or in case of non-availability of defendants, the seized material/stock may be given on Superdari to the representative of the plaintiff. The Local Commissioner shall sign the account books, if any, of the said defendants including ledger, cash register, stock register, invoice, books etc.

30. The Local Commissioner shall be at liberty to get the locks, if any, broken in execution of the duties as such.

31. On the request made by Local Commissioner, the concerned SHO shall immediately provide police aid to the Local Commissioner for smooth performance of duties as such.

32. The plaintiff/ applicant may also arrange for videography, photography, photocopy etc, if required.

33. The representative and counsel for the plaintiff may accompany the Local Commissioner.

34. Provisions of Order 39 rule 3 CPC be complied with by the plaintiff and affidavit in support of the compliance be filed in the court within 10 days from today.

35. Issue summons of the suit for settlement of issues and notice of interim applications to the defendants by all permissible modes i.e. on filing of PF/RC/Speed Post/Courier/E-mail and FAX, whatsapp etc. E-mail address,



whatsapp number and/or FAX number of defendants may be furnished by plaintiff along with the process. Process be filed at the earliest.

36. In case plaintiff wants service through email/FAX/Whatsapp, plaintiff is required to file the affidavit in this regard about the correctness of contact details of defendants and the said affidavit may be filed along with process and the soft copy of complete paper book in PDF format must be provided to the defendants by way of email or otherwise through the process serving agency along with summons.

37. Copy of the order be given dasti to the counsel for the plaintiff as prayed for. Copy of the order be also sent to the learned Local Commissioner by E-mail or other modes for execution of the commission.

38. Matter be fixed for the following steps:

a: For service of summons / notice to the defendants.

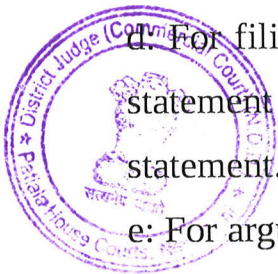
b: For filing of report by learned court commissioner as per directions.

c: For filing of written statement along with the documents with list of documents as per provisions by defendants within thirty days from the date of service of summons by giving advance copy to the plaintiff.

d: For filing of replication/rejoinder by the plaintiff in response to the written statement of the defendants, if so required within 45 days of receipt of written statement.

e: For arguments on application under order 39 rules 1 and 2 CPC.

39. For the purpose of arguments on this application defendants may first file a reply in response to the application along with the documents atleast three days prior to the NDOH by giving advance copy to the plaintiff / counsel by way of hard copy.



अनुराग सेन

ANURAG SAIN

जिला न्यायाधीश, वाणिज्यिक न्यायालय
District Judge (Commercial Court)-01

कक्ष संख्या-01, मुख्य भवन

पटियाला हाऊस कोर्ट, नई दिल्ली
Patiala House Courts, New Delhi

40. Question of ad-interim ex parte injunction and the appointment of Local Commissioner disposed of accordingly.

41. Put up on 21.04.2023.



Pronounced in the
Open Court on this
20th Day of January 2023

(Anurag Sain)

District Judge-01

(Commercial Court) Patiala House Court

New Delhi

जिला न्यायाधीश (वाणिज्यिक न्यायालय)-01
District Judge (Commercial Court)-01
जिला नई दिल्ली / Distt. New Delhi
कक्ष संख्या 01, मुख्य भवन
Room No. 01, Main Building
पटियाला हाऊस कोर्ट, नई दिल्ली
Patiala House Courts, New Delhi