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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision January 9th, 2008

+ CS(OS) 2107/2000

GLAXOINDIA LTD. Plaintiff
Through Mr. Manmohan Singh with Mr. Chander
Shekhar and Mr. Tajinder Singh, Advocates

versus

GRAFTECH CHEM Defendant
Through Nemo

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

1. Whether reports of local papers may
be allowed to see the judgment? Yes.
2. To be referred to the Reporter or not? Yes.
3. Whether the judgment should be
reported in the Digest? Yes.

% **MR. JUSTICE S. RAVINDRA BHAT (Open Court)**

1. This is a suit for permanent injunction. The plaintiff seeks for enforcement of its rights in respect of the artistic work NILVERM, a registered copyright assigned to it by a deed of assignment dated 31.9.1999. Though other reliefs were claimed, counsel for the plaintiff states that the suit would be pressed only so far as the relief of

injunction is concerned.

2. According to its averments, the plaintiff manufactures, markets and distributes a wide variety of pharmaceuticals and allied products. It is claimed that its products are known for reliability and excellence in quality. One of these includes a veterinary product formulation based on the product Tetramisole Hydrochloride which is marketed under the brand NILVERM.

3. The plaintiff claims to be the proprietor of the mark NILVERM and its application for registration under class 5 being No.525753 is alleged to be pending. According to the averments, the NILVERM design container label is registered as a copyright being No.A-44350/84. The plaintiff claims exclusive rights to this artistic work so as to prevent unauthorised user from passing off their goods by using such or similar or deceptively similar labels for marketing similar or related goods.

4. It is claimed that the features of the artwork registered under the copyright are the following :

- i) The base of the packing material is in white colour.
- ii) Two horizontal green bands of equal dimensions on the top.
- iii) The name of the chemical composition of the drug Tetramisole in green colour and the style and size of the English alphabet in it.
- iv) Five different kinds of animal heads in circles with green colour background.

v) The size and colour of English alphabets used in describing the brand name and directions for use printed in English in black colour.

5. It is claimed that on the left side as well as on the top of the container of another registered trademark “AGRIVET FARMCARE” has been shown which is the subject matter of a registered trademark being No.458778B and 58780 in favour of the plaintiff. Thus the plaintiff claims that it became owner of the artistic work in respect of the NILVERM copyright through an assignment deed executed by the ICI India Ltd., on 31.3.1999.

6. According to the averments the product marketed under the label NILVERM is of reputed quality and the general public associates with those of the plaintiff. It is also alleged that the purpose of the registration of copyright on the NILVERM was to use the exclusive design to indicate to the customers that the product sold are those of the plaintiff company.

7. It is averred that the defendant sought for cancellation of the copyright enquiry to the plaintiff through a proceeding before the Copyright Board. The proceeding had been filed against the then owner which had later amalgamated with the ICI India Ltd. The proceedings before the Copyright Board ended in dismissal of the application; the defendants thereafter approached the Andhra Pradesh High Court. It is alleged that in spite of having lost in the effort to

have the entry expunged, the defendant used and is continuing to use the same colour scheme, get up, layout and arrangement for the same and similar products which amount to infringement of the copyright owned by the plaintiff by virtue of the assignment deed.

8. The plaintiff has filed copies of photographs, comparing its products with those of the defendants. The defendant's tin container has a similar colour scheme as that of the plaintiff, and the defendant too is marketing the same product i.e. Tetramisole Hydrochloride (veterinary application) 30% W/W for verm remedy. The background of both the labels is in white and the main colour used is green. The plaintiff's label which is subject of the copyright, contains 5 pictures of different animals in a green backdrop and the defendant's label also contains similar get up with 5 such pictures in an identical get up with slight variations. It is alleged that, as a whole, the visual representation of the defendant's label violates that the plaintiff's registered copyright in as much as it seeks to pass off the same.

9. It is alleged that the defendant's use of the label is causing economic loss to the plaintiff and also is an attempt to pass off its reputation. It is averred that the plaintiff's products are known for their quality and excellence, and that having regard to the nature of the consumers and such products, considerable harm is likely to be caused to the plaintiff's market share. The plaintiff also averred that despite the defendants being called upon to desist from using the mark, no

action has been taken.

10. Despite issuance of summons and publication in the newspapers, no appearance was caused on behalf of the defendants and they were proceeded ex parte by order of the court dated 26.5.2005. The plaintiffs in support of its averments has filed affidavit evidence of Ms. Sree K.Patel, Vice President (Legal and Corporate Affairs). The said affidavit has repeated the averments in the plaint and also testified as to the worldwide reputation of the plaintiff's product, besides other details. The said witness has also deposed about the general reputation of the plaintiff's products and the veracity of the documents filed in support of the suit, as well as the other exhibits produced along with the affidavit.

11. This court has considered the documents on record. The plaintiff has relied upon documents containing two photographs of its registered label which is subject matter of copyright. They are white in colour and contain the expression "NILVERM" in green. The general colour scheme is green, with black as the dominant print colour in alphabets and words. The plaintiff's product also contains 5 pictorial representations of different animals. The defendant's container/tin has also been shown in the photographs. It is very similar and even identical in many respects to that of the plaintiff's. It embodies all the features, i.e., white background with green as the other colour and black being the colour for words. The defendant's tin has also used the

same theme and contains 5 pictorial representations of animals with a little variation. These photographs in the opinion of the court, show likelihood confusion of the product and are deceptively similar to the plaintiff's copyrights. The court has also considered the copy of the deed of assignment executed by M/s ICI India Ltd. through which the plaintiff acquired the right to the said works of Art .

12. The authorities on this issue i.e. National Sewing Thread Co.Ltd. Chidambaram Vs. James Chadwickand Bros. Ltd. AIR 1953 SC 357 have held that in a case of passing of action including passing of representation copyrights, the court has to be satisfied that the similarity between the plaintiff's marks and the offending mark is likely to cause deception and confusion. This must be so, from the stand point of the consumers. In this case the products are targetted to consumers who are not expected to be well versed in the English language. In such case the likelihood of the consumer confusing the product due to the case of visual representation is considerable .

13. The Supreme Court in Cadila Health Care Ltd. Vs. Cadila Pharmaceuticals Ltd., AIR 2001 SC 1951 stated :

"...Public interest would support lesser degree of proof showing confusing similarity in the case of trademark in respect of 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 pressure 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.....”

It was further observed that :-

“....While dealing with cases relating to passing off, one of the important tests which has to be applied in each case is whether the misrepresentation made by the defendant is of such a nature as is likely to cause an ordinary consumer to confuse one product for another due to similarity of marks and other surrounding factors.....”

14. On a plain application of the above principles, a comparison between the photographs of the plaintiff's products (containing its artistic label that is the subject of the copyrights), with those of the defendant's labels would show that the latter is infringing the copyright and seeking to pass off goods as that of the plaintiff. Therefore, the plaintiff is legitimately complaining that this action of the defendant has resulted in injury, to it.

15. The defendant has not chosen to appear in these proceedings at any stage or contest the averments. It has also not placed any evidence on the contrary on the record. In view of its above conduct and also upon an independent examination of the plaintiff's evidence and the materials, this court is satisfied that the relief sought for by the plaintiff should be granted.

16. Accordingly, a decree for permanent injunction is issued, restraining the defendants from infringing the copyright of the plaintiffs in the artistic label “NILVERM” which is the subject matter of the present suit. The defendant is restrained from manufacturing,

selling, offering for sale, advertising either by itself or through agents, servants, dealers, stockist, shopkeepers and representatives, in any tin, container either directly or indirectly which is similar to or identical with those of the plaintiff so as to cause confusion or deception to the consumers and general public. A permanent injunction will also issue to the defendants, their partners and agents and representatives restraining them from manufacturing, offering or advertising in India directly or indirectly, dealing in Tetramisole Hydrochloride as well as dealing in veterinary preparations which are substantial reproductions of the plaintiff's NILVERM packing so as to amount to infringement.

17. The suit is directed in the above terms.

(S. RAVINDRA BHAT)
JUDGE

JANUARY 09, 2008
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