

+ **CS(OS) 846/2005**

**M/S. VIRBAC ANIMAL
HEALTH INDIA PVT. LTD.** Plaintiff

Versus

Through: Ex-parte

1. Whether reporters of Local papers may be allowed to see the judgment? No
2. To be referred to the reporter or not? No
3. Whether the judgment should be reported in the Digest? No

1. The plaintiff has instituted this suit with respect to its trade mark "AGRIMIN FORTE" in relation to supplement of animal and fish feed. The grievance in the plaint is the action of the defendant of manufacturing and marketing mineral mixtures with Amino Acid for animal feed supplement under the trade mark "AGRIWIN FORTE" and of having also copied the art work of the plaintiff on its polythene bags in which the goods of the plaintiff are sold. The plaintiff claimed copyright in the said art work. The plaintiff claimed the relief of permanent injunction restraining the defendant from passing off its goods as that of the plaintiff and from infringing copyright of the plaintiff in the said artwork and the ancillary reliefs of delivery, accounts and costs. The suit was originally filed by M/s GlaxoSmithkline Pharmaceuticals Ltd. During the pendency of the

suit, IA No. 12852/2006 under Order 22 Rule 10 of the CPC was filed on the ground that the trade mark as well as the packing material had been assigned to the present plaintiff. The said application was allowed on 21st November, 2006.

2. Summons of the suit were issued to the defendant. The summons sent were received back with the remarks “no such factory at the given address” as recorded in the order dated 9th December, 2005. The plaintiff was directed to furnish the fresh address of the defendant. In the order sheet of 31st January, 2006, it is recorded that the plaintiff had furnished the latest address of the defendant and the defendant was ordered to be served on the same. The plaintiff while furnishing the fresh address described the defendant as “Kumar Medical Hall (Punjab, Herbal), Near New Bus Stand, Barnala-148 101”, while the address originally given was “M/s. Punjab Herbals, Rajkot Road, Barnala-148 101, Punjab; Administration Office Great Western Building, SBS Road, Fort, Mumbai-400 023.” The address given in the amended memo of parties filed subsequently pursuant to the application under Order 22 Rule 10 of the CPC being allowed is also as shown in the original memo of parties.

3. Pursuant to the fresh address as aforesaid being filed by the plaintiff, on 16th October, 2006 an advocate appeared for the defendant and both counsels sought adjournment for moving an application. Thereafter the application under Order 22 Rule 10 of the CPC as aforesaid came to be filed and which was allowed on the no objection of the counsel aforesaid who had appeared for the defendant. After another adjournment for the purposes of compromise, IA No. 1733/2007 for appointment of Local Commissioner and IA No. 1734/2007 for filing the written statement

came to be filed by one M/s. Kumar Medical Agencies, near New Bus Stand, Barnala. The written statement was also filed along with this application. From these applications it is borne out that the advocate aforesaid who had appeared before the Court was the advocate for the said M/s. Kumar Medical Agencies and not of the defendant Ms. Punjab Herbals. The said M/s Kumar Medical Agencies in their applications and written statement pleaded that the summons of the suit pursuant to the fresh address aforesaid filed by the plaintiff had been served on them. They further pleaded that they were not M/s Punjab Herbals against whom the suit had been filed and had no connection with Punjab Herbals; they further averred that they were carrying on business of a chemist shop and were not carrying on business of manufacture and sale of the product "AGRIMIN FORTE or AGRIWIN FORTE". They also averred that their premises be got inspected by a Local Commissioner and which inspection would bear out that they were not engaged in the said business of manufacture or of sale of goods with respect whereto the suit was filed.

4. The suit was thereafter adjourned from time to time. The advocate earlier appearing and who was as aforesaid was for M/s. Kumar Medical Agencies and not for the defendant, also stopped appearing before the Court and on 5th July, 2007, IAs No. 1733/2007 and 1734/2007 were dismissed and the defendant was ordered to be proceeded against ex parte. The plaintiff has filed the affidavit by way of examination in chief of its General Manager (Supply Chain), Mr. Manoj K. Roy.

5. The witness of the plaintiff has besides proving the authorization in his favour as Exhibit PW-1/1 and PW-1/2 deposed that the trade mark and packing material with respect whereto the suit had been filed had been assigned by M/s GlaxoSmithkline

Pharmaceuticals Ltd to the present plaintiff vide assignment deed dated 31st July, 2006 Exhibit PW-1/3. He has proved the Polythene Bags in which the goods of the plaintiff are sold as Exhibit PW-1/4 and the Polythene Bags in which the defendant was selling the goods as Exhibit PW-1/7. The mark was subsequently registered and which registration certificate has been proved as Exhibit PW-1/5. He has otherwise reiterated the contents of the plaint. In the affidavit, he has also deposed that he had gone through the written statement filed by the defendant (and which in fact is the written statement filed by M/s. Kumar Medical Agencies). He has stated that M/s. Kumar Medical Agencies and Punjab Herbals are pertaining to the same proprietor.

6. The suit is against M/s Punjab Herbals. The plaintiff was only directed to give fresh address of Punjab Herbals. The plaintiff, however, while giving the fresh address changed the name of the defendant. This is not permissible in law. The suit which is filed against the M/s Punjab Herbals could not be changed to that against M/s Kumar Medical Hall or M/s Kumar Medical Agencies without the permission of the Court and which was not sought.

7. Though in the aforesaid facts, the defendant M/s Punjab Herbals was not served; but since the witness of the plaintiff has deposed that the proprietor of M/s Punjab Herbals and of M/s Kumar Medical Agencies is the same, even though, neither has the name of the said proprietor been disclosed nor any other particulars given; since that is the ex parte evidence available on the record, the same is accepted.

8. Otherwise the perusal of the packing material/polythene bags of the plaintiff and the defendant show that the defendant has infringed the copyright in the artist work of the plaintiff. I find

identify in the manner of writing the trade mark as well as in the other essential features of the copyright of the plaintiff. The plaintiff on its packing material is depicting the head of cows, fish and poultry and defendant has also adopted the same pictorial marks. Even otherwise the entire getup, placing of the nutritious value and the contents is the same. So much so, that the placement of the Star mark and the use of the word 'High Power' have also been adopted. The quantities are also the same i.e. 5 KG.

9. Similarly, with respect to "AGRIMIN FORTE or AGRIWIN FORTE", there is a high possibility of deception and confusion.

10. The plaintiff has therefore become entitled to the relief of injunction in terms of para 19 (a) and (b) of the plaint. However, in the aforesaid facts and circumstances, I do not find the plaintiff entitled to the other reliefs of delivery or accounts or damages or even costs. The decree sheet be drawn up.

**RAJIV SAHAI ENDLAW
(JUDGE)**

**March 26, 2009
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