

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

DECIDED ON: 14.05.2010

+ **CS (OS) 2195/2003, I.A. Nos.954/2007 & 7447/2007 & 7448/2008**

GLAXO GROUP LTD. & ANR. Plaintiffs

Through: Mr. Sushant Singh with
Ms. Neha Kapoor, Advocates.

versus

DEEVEE BIOLOGICALS PVT. LTD. & ANR. Defendants

Through: None.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

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

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

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The previous order sheets reveal that despite repeated efforts, the defendants could not be served. The plaintiff applied for and is permitted to serve the defendants by substituted service. The order of 26.4.2010 records that publication had been effected in accordance with the Court's directions on 10.11.2009. The order also recorded that citation has been received. On that date as well as on the previous dates, i.e. 14.12.2009 and 29.1.2010, no-one appeared on their behalf. Today also the defendants are unrepresented. The first defendant has filed written statement but has chosen not to contest the proceedings for the last many hearings. In the circumstances, the defendants are set down *ex parte*.

I.A. No.954/2007

The plaintiff applies under Order-22, Rule-10 CPC for substitution contending that during the pendency of the proceedings, the second plaintiff by virtue of the Assignment Deed dated 31.7.2006, parted with the trademark rights that are the subject matter of the suit along with all other trademarks to M/s Virback Animal Health India Pvt. Ltd., who are now the registered trademark proprietors. A copy of the Assignment Deed dated 31.7.2006 containing the terms of the transaction has been filed. The Schedule-1 to the said Assignment Deed refers to the trademarks in question i.e. “Astovet” in class-5&31 (Registration Nos.1189609 & 1189608) respectively.

Since the defendants have not opposed the application and chosen not to appear in the proceedings, the Court is satisfied that the application deserves to be accepted.

I.A. No.954/2007 is, therefore, allowed in the interest of justice.

CS (OS) 2195/2003

1. The first plaintiff is incorporated under English law; the second plaintiff is registered under the Companies Act, with its office at Mumbai. They are hereafter called “the plaintiffs”. It is submitted that the Indian company was incorporated in 1924 and changed its name in 1950 and subsequently changed its name later; it is a public limited company w.e.f. 1968 with more than 58,000 Indian equity shareholders.

2. The plaintiffs claim to be the member of the Glaxo Smithkline group of companies of which Glaxo Smithkline plc is the parent company; it was formed following the merger of the first plaintiff and Smithkline Beecham PLC. It is contended that the Glaxo Smithkline has sales in excess of US \$ 37 Billion and profit before tax of US \$ 11.22 Billion as of 2004; its pharmaceuticals sales account for 4 % of the total revenue. It is also submitted that the plaintiffs have an estimated 6.5% share of the pharmaceuticals market. The plaintiffs mention about their extensive international operations and also that they have 40,000 sales outlets and units in India, including manufacturing units in the country.

3. The plaintiffs claim to be the owners of various pharmaceutical formulations and licensed to produce them; these include the drugs such as BETNOVATE, PIRITON, CEFTUM, FORTUM, ZINETAC, OSTOCALCIUM AND OSTOCALCIUM VET. The plaintiffs have produced their annual reports for the year, 2001, 2002, 2003 and 2004, and marked by them as Exhibit P-1 to P-5. The plaintiffs claim protection of their proprietary rights over the trademark

OSTOCALCIUM/OSTOCALCIUM VET, in the present suit. It is submitted that OSTOCALCIUM was registered in Class-5 as far back as in 1942 and its registration has been renewed and continues to be in force. Trademark registration certificates have been produced, in support of this claim. It is submitted that the same mark was registered in class-5 in 1977 in respect of veterinary formulation and medicinal additives to feed and foodstuff for animals and birds. This trademark being no.5226 is sought to be evidenced by filing Ex P-6. It is contended that the trademarks OSTOCALCIUM AND OSTOCALCIUM VET have acquired distinctive connotation, exclusive to the plaintiffs' goods.

4. The plaintiffs claim that in August, 2003, they became aware that the first defendant, a manufacturer of pharmaceuticals products has adopted and used the trade mark OSTOVET in respect of liquid food supplement for live stock and poultry. The plaintiffs rely upon a notice issued to the defendants marked as Ex P-8 and the reply dated 23.10.2003 produced as Ex-P-9. The plaintiffs submit that the defendants' use of the OSTOVET mark in respect of the same formulations is not *bona fide* and is meant to infringe and pass off their (the plaintiffs') mark OSTOCALCIUM and OSTOCALCIUM VET with a view to cash in on its reputation. It is submitted that having regard to the fact that the marks are similar if not being identical and the fact that the consumer public is the same with the added dimension that trade channels are also similar, the defendants' use of OSTOVET amounts to an infringement and passing off.

5. The plaintiffs have produced, in substantiation of its allegations about the infringement, copies of the defendants' packaging as well as photographs of their products, along with the photograph of the defendants' mark and product. It is urged that the colour combination adopted by the defendants in their label OSTOVET with similar pink and yellow colour predominating in the label and a white band containing images of animals betrays their intention to pass off their product as that of the plaintiffs. In support of the claim for reputation in their mark, the plaintiffs have produced their sales figures in respect of OSTOCALCIUM VET for 15 years. This reveals that in 1989, the total sales were in the range of ₹ 10.43 crores whereas in 2003, it had increased to ₹ 27 Crores..

6 As noted previously, despite repeated attempts, the defendants could not be served; ultimately, the plaintiffs were permitted to serve the defendants through substituted service which was done as is evident from the order of 26.04.2010. The case was - after summons were served - listed before the Joint Registrar; no appearance was put in. In these circumstances, the

plaintiffs had relied upon the affidavit evidence filed on their behalf of one Ms. Sree K. Patel and the averments in the suit.

7. The provisions contained in Sections 29 (1) & (2) of the Trademarks Act, 1999 confer statutory protection to registered trademark owners; if the rival goods bear the same mark in respect of the same product or class of product or the marks are presented in a manner closely similar to or identical with the plaintiff's registered mark, the Courts are, by virtue of Section-29 (3) and the weight of the authority of several decisions of the Supreme Court (*Kaviraj Pandit Durga Dutt Sharma V. Navratan Pharmaceutical Laboratories*, 1965 (1) SCR737; *Ruston and Hornby Ltd. v. Zamindara Engineering Co.* [1970] 2 SCR222 and *Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd.* [2001] 2 SCR743) entitled to presume infringement, in such circumstances. Section-29 (3) of the Trademarks Act raises a presumption that once similarity or identity of the impugned mark with that of the registered mark is established, infringement should be presumed.

8. On an overall conspectus of the circumstances, what is discernable is that the plaintiffs are the owners/proprietors of OSTOCALCIUM VET, a veterinary formulation for animals since 1977. This word mark is used as an essential or dominant component in the label and packaging of its products. The defendants' mark OSTOVET though seemingly dissimilar is at the same time presented in an identical or nearly identical label and packaging. Although, there could be some doubt as to about whether OSTO *per se* can be registerable, yet, in the circumstances of this case and having regard to the long usage of the mark by the plaintiffs, its increased sales and the manner of the marks' presentation, the defendants' unexplained use of the OSTOVET mark and the label as well as packaging in which the same products are marketed under, fulfills the test of infringement. The Court also observes that the class of customers need not always be discerning since veterinary products are purchased both by English speaking and non-English speaking consumers. In the latter category, the label and presentation could well be determinative. Having regard to these and the undeniable fact that the trade channels for both the products are the same, the Court can safely infer and presume dishonest intention by the defendants and rely upon the presumption under Section 29 (3).

9. In view of the above findings, this Court is of the opinion that the plaintiffs are entitled to the decree of permanent injunction restraining the defendants from marketing, selling, offering for sale and distributing pharmaceuticals and veterinary products under the trademark

OSTOVET or any other mark that are deceptively similar to the plaintiffs' trademark OSTOCALCIUM and OSTOCALCIUM VET and also to restrain the defendants from using an identical label with the same or similar colour combination as that of the plaintiffs. As far as the reliefs of injunction and other consequential orders are concerned, the plaintiffs have not shown the degree of harm and commercial injury suffered by them. In the circumstances, it would be unsafe for the Court to saddle the defendants with a decree of damages.

10. In view of the above findings, the suit is decreed in terms of paragraph-30 (a) and (b) of the plaint with costs. The plaintiffs are also entitled to counsel's fee quantified @ ₹ 50,000/-.

**S. RAVINDRA BHAT
(JUDGE)**

MAY 14, 2010
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