

* **HIGH COURT OF DELHI : NEW DELHI**

Judgment pronounced on: 18.07.2011

+ **CS (OS) No. 2109/2008**

NOVARTIS AG ... Plaintiff

Through: Mr Praveen Anand, Adv. with
Mr Varun Anand, Adv.

Versus

ALLENBURY BIOTECH PVT. LTD. & ANR. ... Defendants

Through: Nemo.

Coram:

HON'BLE MR. JUSTICE MANMOHAN SINGH

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

MANMOHAN SINGH, J.

1. The present suit has been filed by the plaintiff seeking permanent injunction, restraining infringement of trade mark and copyright; passing off, damages and delivery up.

2. The plaintiff is a company incorporated under the laws of Switzerland, having its corporate office at CH 4002, Basel, Switzerland. The plaintiff company is a global leader in healthcare and a manufactures

and markets pharmaceutical products and preparation for distribution all over the world. Its products are also sold and distributed in India through its majority owned subsidiary Novartis India Limited.

3. It is averred in the plaint, that the plaintiff is the proprietor of the trade mark TRIAMINIC in respect of medicinal formulation containing the active ingredients Chlorpheniramine Maleate, Dextromethorphan as Pseudoephedrine HCl. The trade mark TRIAMINIC is a coined word and has not been derived from nay of the active ingredient present in it. It is a distinctive trade mark nad has been used in India since the year 1990 when One Pearl Organics Ltd. which was later named as Wanbury Ltd., was the distributor of the plaintiff's TRIAMINIC products in India until the year 2003. Another product of the plaintiff is a cough syrup under the trademark T-MINIC. The detail of the plaintiff is the registered owner of the following trade marks in India:

Mark	Registration (or Application) No.	Registration Date	Class
TRITUSSIC	207209	12.09.1990	5
T-MINIC	1324855	09.12.2004	5

4. It is stated in the plaint, that the registration of the trade mark TRIAMINIC was originally granted in the name of Sandoz Ltd. then the plaintiff took necessary steps to bring its name on record before the

Registrar of Trademarks as the subsequent proprietor of the said registration. As per the plaintiff, due to extensive use all over India for a long time, their trademark has earned a high reputation and the use of the said trademark has become inseparably associated with the products of the plaintiff. And because of the superior quality of the product and distinctiveness of the trademark, the plaintiff has acquired valuable common law and statutory rights therein.

5. Further, it is stated by the plaintiff, that the packaging /trade dress of its products, being sold under the trademarks TRIAMINIC and T-MINIC bears distinctive colour scheme and getup and the plaintiff is the owner of the copyright in artistic work comprised in TRIMINIC packaging/trade dress which includes unique and distinctive arrangement of features, colour combination and lay out. The details of certain essential and distinct features of the plaintiff's TRIAMINIC product are as follows:-

- (i) A white background and an orange colour strip positioned at the top of the packaging which goes around the packaging.
- (ii) The words 'Triaminic syrup' are written in bold black letters in the center of the orange strip with the word 'Triaminic' positioned above the word 'syrup'.
- (iii) Below the orange strip and towards the center of the packaging is a small double lined box with an illustration of

man's head inside it.

- (iv) There are two dots shown on the face of the man representing his forehead and nasal area.
- (v) The word 'Antihistamine and Decongestant' appear above the double lined box and the words "For effective relief from symptoms of cold" appear just below it.
- (vi) Adjacent to the box, clearly written in bullet points, are the words-
 - running nose
 - stuffy nose,
 - repeated sneezing
- (vii) The words, "Due to common cold, hay fever, sinusitis & other upper respiratory tract disorders" appear below the double lined box.
- (viii) Running vertically from top to bottom of the packaging is a thin red line which essentially divides the packaging into two halves.

6. It is further stated in the plaint, that at the time of filing this suit, the plaintiff had pending litigations against its former distributor Wanbury Ltd. regarding certain post-termination issues and as a fallout of the disputes therein and a misrepresentation to the All India Organization of Chemists and Druggists (AIOCD) about the scope of the matters in

controversy between the parties, the AIOCD directed its members not to distribute those products of the plaintiff which are under the brand TRIAMINIC. Since 2004, the plaintiff has been prevented from marketing its products under the brand TRIAMINIC due to factors beyond its control and has filled this gap with its brand T-MINIC. Vide order dated 10.03.2005 in O.M.P. 302/2004, this court held that there is no bar on the plaintiff from using the trademark TRIAMINIC. The plaintiff exercises due diligence in monitoring the misuse of its registered in the market to safeguard the interest of the consumers and to defend its rights on the trade mark TRIAMINIC.

7. According to the plaintiff, it recently discovered that the defendant No.1, Allenbury Biotech Pvt. Ltd. which is registered company having its office at E-29, Amar Colony, Lajpat Nagar-IV, New Delhi engaged in the business of pharmaceuticals and dealing in pediatric products, is marketing a cough syrup under the trademark TRIAMINIC and it is also using the plaintiffs dealers in Delhi to distribute the infringing products. The defendant is selling its products in a virtually identical getup and colour combination as the plaintiff's TRIAMINIC/T-MINIC and with identical literature with only minor modifications.

8. It is stated by the plaintiff, that the use of its registered trademark in respect of identical goods amounts to infringement not only of its trademarks TRIAMINIC but also of the trademark T-MINIC. The

defendants have deliberately adopted the trade mark of the plaintiff with a view to rake in the business and illegally benefit from the reputation and goodwill of the plaintiff and by this act of the defendants, the plaintiff is likely to suffer irreparable and incalculable monetary losses and apart from that it will also damage the reputation and goodwill of the plaintiff. Therefore the plaintiff has come to the court seeking injunction restraining the defendants from manufacturing, selling, distributing or in any manner dealing in pharmaceutical preparations under the trademark TRIAMINIC or any other deceptively similar mark which is similar to the plaintiff's registered trademarks TRIAMINIC, T-MINIC, TRIATUSSIC.

9. Though the defendants have filed the written statement, the defendants 1 and 2 had not been appearing before the Court since 03.07.2009. Therefore, they were proceeded ex-parte vide order dated 12.03.2010. The plaintiff was granted time to adduce the evidence by way of affidavit. The plaintiff thereafter filed the evidence by way of affidavit of Mr Vishal Mishra who was examined in chief on 28.05.2011 and thereafter the matter was sent before the Court for final arguments on 11.07.2011. After hearing the arguments on 11.07.2011, the judgment was reserved.

10. In the written statement, the defendants have raised the following defences:

- a. The plaintiff has concealed the fact that earlier there was pending litigation in the form of OMP No.302/2004 which was withdrawn by the plaintiff on 19.09.2005 and according to the defendants, in view of withdrawal of the petition, the defendants were entitled to use the impugned trade mark.
- b. The defendants have also dissimilarity of their products as well as the packaging material.

11. The plaintiff in para 12 and 13 of the reply to the preliminary objection has raised the following submission:

“12-13. That the contents of paragraphs 12 and 13 are vehemently denied once again as being false, vexatious and are not based on any facts or evidence. The Plaintiff has clearly and unequivocally stated the true facts and circumstances, surroundings the said trademarks. The said trademark TRIAMINIC was coined by the Plaintiff and had been used extensively in India since 1990. As a result of a misrepresentation by its erstwhile distributor to the All India Organizations of Chemists and Druggists, the said organization called upon its members not to distribute the Plaintiff's product under the brand TRIAMINIC. The Plaintiff had been selling its TRIAMINIC products in India since 1990 till the said ban was put in place. However this ban has now subsequently been revoked and the Plaintiff is now free to resume the sale of its products under the brand TRIAMINIC in India. The said order dated 10.03.2005 in OMP No.302 of 2004 merely shows that there is no bar on the Plaintiff from using its Trademark TRIAMINIC and the subsequent withdrawal of the said suit has no

bearing on the observation and finding of the Hon'ble Court. The Plaintiff has concealed absolutely no facts before this Hon'ble Court and has enumerated all the relevant facts and information for this Hon'ble Court's consideration.

It is clear from the above, that the Defendants have been able to make out no legally valid arguments or averments in support of their claims and have offered absolutely no documentary proof in support of its claims over the TRIAMINIC mark or copyright in T-MINIC and TRIAMINIC product packaging. The Defendants appeared to have confined themselves to making false and misleading averments without any evidence in support thereof. The Plaintiff herein craves leave to refer and rely on its averments in the corresponding paragraphs in its plaint.”

12. I have compared the packaging of the parties which are available from page 1 to 9 of the list of documents filed along with the plaint. It is clear that the trade mark used by the defendants as well as packaging are almost identical. No justification whatsoever has been given by the defendants to appropriate the same trade mark as well as packaging. It is clear from the record that the defendants have designed the packaging while placing the packaging of the plaintiff through their designer. Thus, it is a clear case of infringement of trade mark, copyright and passing off. Even otherwise, the defendants have failed to prove their case as made out in the written statement. Even the evidence produced by the plaintiff has remained un rebutted. The plaintiff adduced the ex-parte evidence by way of affidavit of PW-1 Mr Vishal Mishra

which is exhibited as Ex.PW-1/A. In the affidavit, he proved the following documents:

1. Letter of authority dated 21.12.2010 whereby he was authorized to depose the affidavit has been proved as Ex.PW-1/1.
2. Power of attorney executed in favour of Col. J.K. Sharma to institute the suit has been proved as Ex.PW-1/2.
3. Extracts from the internet evidencing Novartis's business activities all over the world and various products manufactured and marketed by Novartis have been proved as Ex.PW-1/3 (Colly.).
4. The original trade mark Certificate for use in legal proceedings for TRIAMINIC has been proved as PW-1/4.
5. The trade mark certificates from various countries have been proved as Ex.PW-1/A (Colly.).
6. Online extracts from various trade mark offices showing the registration for TRIAMINIC have been proved as Ex.PW-1/5A (Colly.).
7. The original certificate for use in legal proceedings for T-MINIC has been proved as Ex.PW-1/6.
8. The print out from the trade mark registry for TRIATUSSIC trade mark has been proved as Ex.PW-1/7.
9. The original packaging of the plaintiff's TRIAMINIC syrup has been proved as Ex.PW-1/8.
10. The original packaging of Novartis's T-MINIC syrup has been proved as Ex.PW-1/9.
11. The original packaging of Novartis's T-MINIC tablets has been proved as Ex.PW-1/10.

12. Various publicity material and globally published advertisements for promoting TRIAMINIC have been proved as Ex.PW-1/11.
13. Order dated 10.03.2005 passed in OMP No.302/2004 has been proved as Ex.PW1/12.
14. An original certificate of Chartered Accountants verifying the sales figures for the years 2005 to September, 2009 for product under the T-MINIC mark has been proved as Ex.PW-1/13.
15. Original sales invoices for T-MINIC in different parts of India have been proved as Ex.PW-1/14 (Colly.)
16. The original products i.e. T-MINIC labels, writing pads, note pads etc. have been proved as Ex.PW-1/15.
17. The original brochure/pamphlet has been proved as Ex.PW-1/16.
18. Extracts from the Registrar of Companies as regards the defendants have been proved as Ex.PW-1/17.
19. The report of Ms Madhavi Chopra, Local Commissioner, dated 02.11.2008 has been proved as Ex.PW-1/18.
20. The report of Mr Mohammad Faraz, Local Commissioner, dated 03.11.2008 has been proved as Ex.PW-1/19.
21. The report of Mr Amardeep Singh, Local Commissioner, dated 06.11.2008 has been proved as Ex.PW-1/19A.
22. The letter dated 21.11.2008 written by the defendants has been proved as Ex.PW-1/20.

13. The suit of the plaintiff is accordingly decreed in terms of paragraph 26(a), (b) and (c) of the plaint. The plaintiff is also entitled for

the punitive damages to the tune of Rs.2 lac. Decree be drawn accordingly. The plaintiff shall also be entitled for the costs of the suit.

MANMOHAN SINGH, J.

JULY 18, 2011

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