

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

RESERVED ON : 14th NOVEMBER, 2014

DECIDED ON : 4th DECEMBER, 2014

+ CS (OS) 1841/2010

GLAXO GROUP LIMITED AND ANR. Plaintiffs

Through : Mr.Manav Kumar, Advocate.

VERSUS

INDKUS DRUGS & PHARMA PVT. LTD & ORS..... Defendants

Through : None.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. The plaintiffs have instituted the present suit for permanent injunction inter alia seeking to restrain the defendants from infringing its registered trademark “BETNOVATE” and infringement of copyright in the packaging pertaining thereto, passing off, delivery up and damages. The plaintiff No.1, viz. Glaxo Group Limited, is a company incorporated under the laws of United Kingdom. Plaintiff No.2 is a company incorporated under the Indian Companies Act. Plaintiff No.1 manufactures and markets various pharmaceuticals and medicinal

preparations and healthcare products in India through its affiliate being plaintiff No.2.

2. The plaintiffs submit that the present suit concerns the plaintiffs' statutory and common law rights over the:-

(a) trade mark 'BETNOVATE'

(b) distinctive coloured packaging/s for 'BETNOVATE-N' and 'BETNOVATE-GM' products of plaintiff and violation thereof by the defendants on account of use of the identical / deceptively similar marks.

The plaintiffs sell six variants of 'BETNOVATE' skin cream such as 'BETNOVATE', 'BETNOVATE-N', 'BETNOVATE-C', 'BETNOVATE-GM', 'BETNOVATE-S', 'BETNOVATE-M'. These variants are sold in distinctive outer-packaging. The packaging bears a distinctive get up, colour scheme and arrangement of features as described in para (13) of the plaint.

3. It is further averred that the trademark 'BETNOVATE' is used by the plaintiffs in respect of topical creams and is used for treatment of skin irritation, itching, swelling and redness of skin. Medicinal preparations bearing the mark 'BETNOVATE' comprise 'Betamethasone'

as the base ingredient and are extremely popular and widely consumed by people world over.

4. It is averred in the plaint that the mark 'BETNOVATE' is an invented word having no dictionary meaning. Sale details have been depicted in para (11) of the plaint. It is further stated that the plaintiffs have incurred substantial expenditure towards advertising and promoting their products under the 'BETNOVATE' mark.

5. It is averred in the plaint that the plaintiffs adopted the mark 'BETNOVATE' in India and all over the world in 1963. Plaintiff No.1 is the registered proprietor of the mark 'BETNOVATE' in India vide Registration No.219258 in Class 5 dated 05.12.1963. The said trade mark registration has been duly renewed from time to time and is in full legal force, conferring on the plaintiffs the right to its exclusive use. It is further averred that the plaintiff No.1 has obtained registration of the mark 'BETNOVATE' in more than 30 countries.

6. It is pleaded that in the month of March, 2010, the plaintiffs were altered to the sale of skin cream products by the defendants under the mark 'BETO-VATE', in packaging virtually identical to that used by the plaintiffs in respect of their 'BETNOVATE' products. On making further inquiries, it transpired that defendants were manufacturing and

marketing skin cream products under three variants, viz. BETO-VATE-N, BETO-VATE-GM, and BETO-VATE-C, which have clearly been copied from the plaintiffs' trademark. The defendants are a private limited company engaged in the pharmaceutical business. The defendants manufacture and market medicinal / pharmaceutical preparations. The defendants' products are phonetically and visually similar to the plaintiff's products and are bound to mislead the public.

7. By an order dated 10.09.2010, the defendants were restrained from using the marks BETO-VATE, BETO-VATE-N, BETO-VATE-GM, and BETO-VATE-C and / or any variants thereof, as the case may be. Appearance was put on behalf of the defendants on 07.03.2011. By an order dated 08.05.2013, the defendants were proceeded ex-parte.

8. The plaintiffs examined PW-1 (Rakesh Chhabra) in their ex-parte evidence. I have heard the learned counsel for the plaintiffs and have examined the file. PW-1 (Rakesh Chhabra), constituted attorney of the plaintiffs, proved the averments in the plaint by filing an affidavit (Ex.PW-1/A). He also proved various documents (Ex.PW-1/1 to Ex.PW-1/12). It is stated on oath that the plaintiffs adopted the mark 'BETNOVATE' in India and all over the world in 1963 under Registration No.219258 Class 5 pertaining to pharmaceutical, veterinary

and sanitary substances. The said trademark has been duly renewed from time to time. It is further stated that the mark 'BETNOVATE' is an invented word having no dictionary meaning. It has the highest degree of distinctiveness, connoting the goods of the plaintiffs exclusively. Ex.PW - 1/6 depicts the worldwide sales of the 'BETNOVATE' products from 2000 to 2012. Sales in India for the period 2002 to 2012 have been shown in Ex.PW-1/7. The expenses incurred on advertisement have been detailed in para 14 of the affidavit. The copies of advertisements/promotional material for the mark 'BETNOVATE' that have appeared in various magazines, medical journals, etc. are exhibited as Ex.PW-1/8. The original samples of plaintiffs' products 'BETNOVATE-N', 'BETNOVATE-GM' and 'BETNOVATE-C' have been exhibited as Ex.PW-1/9. Ex.PW-1/11 shows the original samples of the defendants' products 'BETO-VATE-N' and 'BETO-VATE-GM'. Para (25) shows comparison of the defendants' products packaging for 'BETO-VATE-N' and 'BETO-VATE GM' with the plaintiffs similar products packaging. It is further deposed that both the plaintiffs and the defendants are in the same trade i.e. pharmaceutical and medicinal preparations. The defendants have no plausible reasons for adoption of deceptively similar trademark of the plaintiffs. A man of average intelligence and imperfect recollection is

bound to get confused as to the source or origin of goods for various reasons.

9. Statement of PW-1 (Rakesh Chhabra) has remained unchallenged and unrebutted. Adverse inference is to be drawn against the defendants for not appearing and contesting the present case. No plausible explanation has been given by the defendants for using the identical / deceptively similar marks as that of the plaintiffs without their permission. On perusing the unchallenged testimony of the plaintiffs, there is no doubt that the defendants are using the trademark 'BETO-VATE', which is deceptively similar to the plaintiffs' trademark 'BETNOVATE' in respect of identical goods i.e. skin ointments. The adoption of the trademark 'BETO-VATE', in respect of identical goods constitutes infringement of plaintiffs' registered trademark 'BETNOVATE'. The defendants have not only copied the plaintiffs' trademark 'BETNOVATE', but have also copied the product packaging in its entirety which amounts to infringement of plaintiffs' copyright therein. It is bound to mislead members of the trade and public into buying the defendants' products believing that they are made under licence or with the approval of the plaintiffs. The defendants' marks are visually, phonetically and structurally similar to the plaintiffs' registered

trademarks. It appears that the defendants have been solely motivated by the need to encash upon the goodwill and reputation earned by the plaintiffs and to earn easy and illegal profits by passing off their goods as the goods of the plaintiffs. The plaintiffs are accordingly entitled for a decree of permanent injunction in their favour and against the defendants. So far as the relief of damages is concerned, this Court has time and again awarded punitive damages in cases dealing with infringement of trademark and copyright in order to deter those who undermine the law and has also held that the defendants who choose to absent themselves from the proceedings must suffer the consequences. The learned counsel for the plaintiffs has in this regard placed reliance on the decisions of this Court in '*Time Incorporated vs Lokesh Srivastava & Anr.*', 2005 (30) PTC 3 (Del) and '*Proctor & Gamble Company vs Joy Creators*', 2011 (45) PTC 541 (Del). In the case of '*Time Incorporated*' (supra), this Court laid down as follows:

"The punitive damages are founded on the philosophy of corrective justice and as such, in appropriate cases these must be awarded to give a signal to the wrong doers that the law does not take a breach merely as a matter between rival parties but feels concerned about those also who are not party to this but suffer on account of the breach."

10. Similarly in ‘*Proctor & Gamble Company*’ (supra), this Court, relying upon its earlier judgments in ‘*Time Incorporated*’ (supra), ‘*Hero Honda Motors Ltd. Vs. Shree Assuramji Scooters*’, 2006 (32) PTC 117 (Del) and ‘*Microsoft Corporation Vs. Deepak Rawal*’, MIPR 2007 (1) 72, made the following apposite observations:

“Also, the Court needs to take note of the fact that a lot of energy and resources are spent in litigating against those who infringe the trademark and copyright of others and try to encash upon the goodwill and reputation of other brands by passing off their goods and/or services as those of that well known brand. If punitive damages are not awarded in such cases, it would only encourage unscrupulous persons who actuated by dishonest intention, use the well reputed trademark of another person, so as to encash on the goodwill and reputation which that mark enjoys in the market, with impunity and then avoid payment of damages by remaining absent from the Court, thereby depriving the Plaintiff an opportunity to establish actual profit earned by him from use of the infringing mark, which can be computed only on the basis of its accounts books. This would, therefore, amount to putting premium on dishonesty and give an unfair advantage to an unscrupulous infringer over those who have a bonafide defence to make and therefore come forward to contest the suit and place their case before the Court.”

11. In view of the aforesaid, a decree of permanent injunction is passed in favour of the plaintiffs and against the defendants restraining the defendants, their directors, principal officers, servants, agents and

representatives from manufacturing, selling, offering for sale, exporting, advertising, directly or indirectly dealing in medicinal products or other related goods under the trademark 'BETO-VATE' or under any other trademark deceptively similar to the plaintiffs' registered trademark "BETNOVATE", amounting to infringement of plaintiffs' registered trademark bearing No.219258. They are also restrained from infringement of copyright in the packaging pertaining thereto. The plaintiffs are also held entitled to punitive damages to the tune of ₹ One lac and also to the costs of the suit.

12. Decree-sheet be prepared accordingly.

13. The suit stands disposed of.

(S.P.GARG)
JUDGE

DECEMBER 04, 2014 / tr