

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

RESERVED ON : 1st OCTOBER, 2014

DECIDED ON : 5th NOVEMBER, 2014

+ CS (OS) 1917/2009

BESTOCHEM FORMULATIONS (I) LIMITED Plaintiff

Through : Mr.Surinder Singh, Advocate.

VERSUS

ALPS PHARMACEUTICALS (PVT.) LTD. & ORS.

..... Defendants

Through : None.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. The plaintiff has instituted the present suit for permanent injunction to restrain the defendants from infringing the trademark and passing off their goods as that of defendants. Briefly the facts pleaded in the plaint are :

2. The plaintiff company – Bestochem Formulations (I) Ltd. is a company duly incorporated and registered under the Companies Act. It is a well known organization in the field of manufacturing, sale and

distribution of pharmaceuticals and medicines since 18.09.1985. It enjoys a very high reputation for its products because of excellent quality and efficiency. Its total turnover runs into crores of rupees. The plaintiff is proprietor of more than 150 brands in its portfolio. It operates all over India in various States. The plaintiff has given details of the sales for the year 1998-99 to 2007-08 in para (6) of the plaint.

3. Further case of the plaintiff is that well known trademark “COLISPAS” was adopted and used by the plaintiff and its predecessors in business since the year 1986. Mankind Pharma, one of the members of the group companies of the plaintiff adopted the trademark “COLISPAS” containing medicinal product ‘Mefenamic Acid and Dicyclomine HIC tablets’ which are the active ingredients of the medicine of subject matter. From August, 1986 till November, 1997, Mankind Pharma extensively, continuously and openly used the said trademark during the course of trade. By virtue of award dated 06.02.1995 passed in suit No.174 of 1995 the rights of the trademark “COLISPAS” were granted in favour of the plaintiff company. The award was duly accepted and became the Rule of the Court by virtue of Order dated 11.11.1997. The sale under the trademark “COLISPAS” from 1990 till 2009 has been depicted in para (11) of the plaint. It is averred that the plaintiff and its predecessors in

business are the honest and bona fide adopter, originator, inventor and true owner and lawful proprietor of the said trademark “COLISPAS” in respect of medicines and pharmaceutical preparations. An application for registration of the trademark “COLISPAS” under application No.514909 dated 10.08.1989 was filed but was abandoned due to non-prosecution. The plaintiff has filed a fresh application for registration of the trademark in its name claiming the use since 1986 and it is pending for disposal before the Registrar of Trademarks. Being a prior adopter, regular and extensive user for more than 23 years, the plaintiff has acquired enviable goodwill, reputation and common law rights over the trademark “COLISPAS”.

4. Further case of the plaintiff is that on 05.02.2009, it wrote a letter to the office of the Drug Licensing & Controlling Authority, Uttarakhand and apprised them about the illegal use of the trademark “COLISPAS” by defendants No.1 & 2. However, no action was initiated. On 27.04.2009, the plaintiff issued a cease and desist notice to defendant No.2. On 15.05.2009, the defendants through their attorney replied it and demanded certain information which was given by letter dated 24.06.2009. It is alleged that the defendants have adopted the identical trademark “COLISPAS” for the medicinal preparations knowingly that it

is owned and used by the plaintiff and its predecessors. The adoption and use by the defendants is an attempt to create confusion and deception amongst the purchasing public. The defendants' trademark "COLISPAS" is virtually identical to the plaintiff's trademark. It is an imitation of the plaintiff's old and reputed trademark. The mark has been adopted to tarnish the goodwill and reputation of the plaintiff and is in violation of common law rights. Hence the present suit.

5. Ex-parte restraint order was granted in favour of the plaintiff by an order dated 13.10.2009. Defendants No.1 & 2 did not appear despite service and were proceeded ex-parte. Appearance was put on behalf of the defendant No.3 who initially contested the claim of the plaintiff. However, subsequently, plaintiff and defendant No.3 settled the dispute and it was disposed of by an order dated 01.03.2012 after recording defendant No.3's statement, whereby he undertook not to use the trademark "COLISPAS" in respect of any pharmaceutical medical preparations or for any other goods.

6. The plaintiff produced its ex-parte evidence by way of affidavit dated 02.10.2009 (Ex.PW1/A). Mr.Vijay Prakash (PW-1) appeared in the witness-box and proved the averments of the plaint in the

affidavit (Ex.PW1/A). He also proved various documents Ex.PW-1/1 to Ex.PW-1/8 in support of his case.

7. I have heard the learned counsel for the plaintiff and have examined the file. The evidence filed by the plaintiff has gone unrebutted and unchallenged. The contents of the plaint have been proved by PW-1 (Mr.Vijay Prakash) and there are no valid reasons to disbelieve the statement. From the unchallenged testimony of the plaintiff, it can be concluded that the use of trademark “COLISPAS” being adopted and used by the plaintiff for the last more than 23 years in relation of the medicines and pharmaceutical preparations by the defendants for their products is bound to cause confusion and deception in the mind of the customers. No justification has been shown by the defendants No.1 & 2 for the use of similar trademark of the plaintiff for its medicinal products which has distinctive character and composition. It is stated that the salt used by the plaintiff in its products is Mefenamic Acid, Dicyclomine Hydrochloride : colour – Tartrazine (Ex.PW-1/9), whereas the salt used by the defendants in their products is Dicyclomine HCL, Paracetamo : colour Tartrazine (Ex.PW-1/10).

8. The plaintiff’s ex-parte evidence has established bona fide use of the trademark “COLISPAS” by them since long. The defendants

No.1 & 2's use of the identical trademark "COLISPAS" without their approval for medicinal products amounts to infringement of the plaintiff's trademark "COLISPAS". The rival marks are deceptively similar and are likely to cause confusion in the mind of unwary purchasers. The purchasers are not expected to be well-versed with the chemical compositions of the medicinal preparations. Adverse inference is to be drawn against the defendants who opted not to contest the suit and offer any plausible justification for user of the mark "COLISPAS".

9. The next aspect to be considered is the issue of damages on account of infringement of trademark of the plaintiff and also for loss of sales and reputation. The defendants have deliberately stayed away from the present proceedings as a result of which an enquiry into the accounts of the defendants for determination of the charges cannot take place.

10. In '*Microsoft Corporation vs. Deepak Raval*', MIPR 2007 (1) 72, this Court observed that in our country the Courts are becoming sensitive to the growing menace of piracy and have started granting punitive damages even in cases where due to absence of defendant, the exact figures of sale made by them under the infringing copyright and / or trademark, exact damages are not available. The justification given by the Court for award of compulsory damages was to make up for the loss

suffered by the plaintiff and deter a wrong doer and like-minded from indulging in such unlawful activities.

11. In '*Larsen and Toubro Limited vs. Chagan Bhai Patel*', MIPR 2009 (1) 194, this Court has observed that it would be encouraging the violators of intellectual property, if the defendants notwithstanding having not contested the suit are not burdened with punitive damages.

12. In '*Time Incorporated vs. Lokesh Srivastava and anr.*', 2005 (30) PTC 3 (Del) while awarding punitive damages ₹ 5 lacs in addition to compensatory damages also of ₹ 5 lacs, R.C.Chopra, J. observed that it was time the Courts dealing actions for infringement of trade marks, copyrights, patents, etc. should not only grant compensatory damages but also award punitive damages with a view to discourage and dishearten law-breakers who indulge in violations with impunity out of lust for money so that they realize that in case they are caught, they would be liable not only to reimburse the aggrieved party but would be liable to pay punitive damages also, which may spell financial disaster for them.

13. Considering the facts of the present case, on the basis of the evidence placed on record, it has been established that the defendants indulged in passing off the goods with the mark "COLISPAS" to the public at large without taking permission from the plaintiff. Since, they

have chosen not to appear, it may not be of any use to pass a decree of rendition of accounts. The plaintiff will nevertheless be entitled to the damages in the light of the judicial dicta observed in *Times Incorporated* (supra) and the other cited cases. The defendant No.3 has already settled the dispute with the plaintiff. No compensation / damages were claimed from him at that time.

14. In the light of above discussion, I am of the view that the plaintiff has proved its case against the defendants No.1 & 2 and is entitled for the decree prayed for. Accordingly, the suit is decreed with costs in favour of the plaintiff and the defendants No.1 & 2 and their representatives are restrained from manufacturing, selling, trading and marketing medicinal and pharmaceutical products under the trademark “COLISPAS” or any other identical / similar mark. The plaintiff shall also be entitled to damages to the tune of ₹ 1 lac.

15. Decree-sheet be prepared accordingly.

(S.P.GARG)
JUDGE

NOVEMBER 05, 2014 / tr