



\$~34

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

+ CS(COMM) 566/2021, I.A. 14678/2021 (Order XXXIX Rules 1 and 2 of the CPC) , I.A. 907/2022 (Section 151 of the CPC for condonation of delay of 8 days in filing reply by D-2 to I.A.14678/2021)

USV PRIVATE LIMITED Plaintiff
Through Ms. Shwetasree Majumder, Ms.
Prithvi Singh and Ms. Eva Bishwal, Advs.

versus

PURE AND CURE HEALTHCARE
PVT. LTD AND ANR. Defendants
Through Mr. Pranav Sapra, Advocate for
Defendant No.1
Ms. Sindoor VNL and Ms. Twinkle Rathi,
Advs. for Defendant No. 2

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T (O R A L)

% **08.02.2022**
(By Video Conference on account of COVID-19)

CS(COMM) 566/2021

1. Heard learned counsel for the parties, and with the consent, the present suit is being disposed of, as Ms. Shwetasree Majumder, learned counsel for the plaintiff has, subject to the Court, granting permanent injunction in terms of the prayers in the suit, agreed to give up the claims for costs and damages.

2. The plaintiff is a reputed pharmaceutical company. To



vouchsafe its claim to the reputation and goodwill in the market, the plaintiff sets out the annual turnover of the plaintiff as well as figures spent by the plaintiff in expenses advertising etc. As the Defendant 2 is not disputing the repute of the plaintiff, it is not necessary to enter into these details.

3. The present suit alleges infringement by the Defendant 2, of the trademark “D-RISE”, registered in favour of the plaintiff, under which the plaintiff manufactures and sells Vitamin D3 capsules. The trademark was registered in favour of the plaintiff on 17th September, 2010 in Class 5, on a proposed to be used basis. Thereafter, the said trademark is being continuously used by the plaintiff for manufacturing and selling Vitamin D3 capsules and has acquired a secondary meaning in the market, as it is indelibly associated with the products of the plaintiff. The registration of the trademark stands renewed and is presently valid till 17th September, 2030.

4. The plaintiff markets its Vitamin D3 capsules in a strip having a distinctive elliptical shape, with the capsules arranged in a distinctive pattern. Front and rear views of the strip have been provided in the plaint and may be reproduced thus:

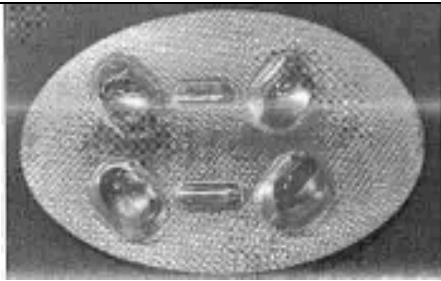


5. A photograph of the front and rear views of the packet in which the plaintiff, clears, markets and sells its Vitamin D3 capsules under the registered trademark “D-RISE” is also provided in the plaint and may be reproduced as under:



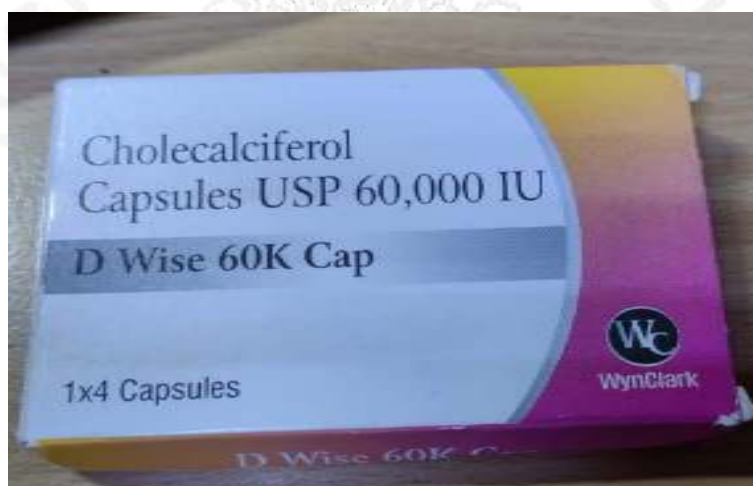


6. Defendant 2 is also manufacturing and clearing Vitamin D3 (also known as cholecalciferol) capsules, incidentally of the same strength as those of the plaintiff, i.e. 60000 IU, under the mark “D WISE”. The arrangement of the capsules of the Defendant 2 and the shape of the strip is clearly imitative of the trade dress of the plaintiff, as is apparent from the photographs of the defendants’ strip, as under:

PLAINTIFF'S PRODUCT	DEFENDANTS' PRODUCT
FRONT BUSTER PACK	
	
BACK BLISTER PACK	



7. The photographs of the front and rear views of the strip of the package in which the Defendant 2 sells its products, are also provided in the plaint. They look thus:





8. At a bare glance, the trademark “D WISE”, of the Defendant 2, is phonetically similar to the registered trademark “D-RISE” of the plaintiff. When orally uttered, the two expressions are practically indistinguishable.

9. The fact that Defendant 2 is also marketing its product in the strip of the same shape and arrangement of capsules as that, i.e. by adopting the same trade dress as that used by the plaintiff, is an indicator of the fact that the Defendant 2 is seeking to capitalize on the goodwill of the plaintiff. The strip of the defendants, along with the phonetic similarity of the trademark of the defendants, viz-a-viz that of the plaintiff is clearly likely to lead a customer of average intelligence and imperfect recollection to confuse the product of the Defendant 2 with that of the plaintiff or at least to infer an association between the two, which is sufficient to constitute infringement within the meaning of Section 29 of the Trademarks Act, 1999.

10. In the circumstances, a clear case of infringement, by the defendants, of the plaintiff’s registered trademark as well as plaintiff’s trade dress and an attempt to pass off the defendants’ products as those associated with the plaintiff, is made out in the facts of the case.

11. The plaintiff has been using the mark since January, 2011 and a licence granted to it in December, 2010. As already noted earlier, the plaintiff’s mark stands registered in its favour since 17th September, 2010.



12. As against this, Ms. Sindoor, learned counsel for Defendant 2, acknowledges that her client has been manufacturing and marketing the product using the impugned mark since March, 2020. As such, even on the test of priority of user, the plaintiff would be entitled to an injunction as sought in the plaint.

13. The prayer clause in the plaint reads as under:

“In light of the foregoing, it is most respectfully prayed that this Hon'ble Court may be pleased to issue:

a) An order for permanent injunction restraining the Defendants, their directors, sister concerns, partners, contract manufacturers, distributors, stockists, marketer, dealers, retailers, servants, agents and all others acting in active concert with them from manufacturing, marketing, offering for sale, selling, advertising, directly or indirectly dealing in any pharmaceutical and medicinal products under the mark 'D WISE' or any other mark identical or deceptively similar to the Plaintiffs registered trademark 'DRISE'.

b) An order for permanent injunction restraining the Defendants, their directors, sister concerns, partners, contract manufacturers, distributors, stockists, marketer, dealers, retailers, servants, agents and all others acting in active concert with them from manufacturing, marketing, offering for sale, selling, advertising, directly or indirectly dealing in products using identical and/or similar trade dress for its strip/blister packaging and dealing in any pharmaceutical and medicinal products under the mark 'D WISE' or any other mark identical to deceptively similar to the Plaintiffs registered trademark 'D-RISE' so as to result in an act of passing off its goods as those of the Plaintiff.

c) An order for delivery up to the Plaintiff by the Defendants of all infringing goods, including strips, cartons, containers, labels, stationery or any other



printed matter bearing the infringing trademark 'D WISE' or any other mark identical to deceptively similar to the Plaintiffs registered trademark 'D-RISE'.

d) An order for rendition of accounts of profits directly or indirectly earned by the Defendants from their wrongful conduct and infringing activities and a decree for the amount so found to be passed in favour of Plaintiff.

e) A sum of Rs.2,00,01,000/- for a decree of damages as valued for the purposes of this suit towards loss of sales, reputation and goodwill of the Plaintiffs trademark caused by the activities of the Defendants.

f) An order as to the costs of the proceedings.

g) Any further order as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.”

14. Ms. Shwetasree Majumder, learned counsel for the plaintiff has, on instructions, given up the prayers for costs and damages, i.e. prayers d) to f) and presses prayers a) to c).

15. As such, a case is set out hereinabove, a clear case for grant of injunction in terms of prayers a) to c) is made out.

16. As such, the defendants, their directors, sister concern, partners, contractor, manufacturer, distributors, stockists, marketers, dealers, retailers, servants, agents and all other acting on their behalf, are enjoined, permanently, from marketing, manufacturing, offering for sale, selling, advertising, directly or indirectly dealing in any pharmaceutical or medicinal products under the mark “D WISE”, or any other mark identical or deceptively similar to the plaintiff's



registered “D-RISE” mark as would amount to infringement of the said mark or passing of the product of the defendants as those of the plaintiff and be liable to present in an inference of association between the product of the defendants and that of the plaintiff.

17. This order would extent to all stocks, which are lying with the defendants or lying with the distributors, dealers or stockists.

18. The suit stands decreed accordingly. Decree-sheet be drawn up by the Registry.

19. As the suit stands decreed prior to trial, following the judgment passed in *Munish Kalrav. Kiran Madan*¹, the plaintiff shall be entitled to refund of the court fees deposited by it.

20. All pending applications also stand disposed of.

C. HARI SHANKAR, J

FEBRUARY 8, 2022

r.bararia

¹2019 SCC OnLine Del 8021