

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO.6072 OF 1999

IPCA Laboratories Pvt. Ltd.)
A company incorporated under)
the Companies Act, 1913, having)
its office at 142-AB-Kandivli)
Industrial Estate, Kandivli (West))
Mumbai 400 067.) ...Plaintiff

Versus

M/s Savita Pharmaceuticals Pvt. Ltd.)
A company incorporated under the)
Companies Act, 1956 having its office)
At Daman.) ...Defendant

Mr. Rashmin Khandekar, along with Mr. Minesh Andharia, i/b Shantilal & Co.
for the Plaintiff.

Mr. Harish Kamath, company secretary of the Plaintiff abovenamed, present.

None for the Defendants.

CORAM: S.J. KATHAWALLA, J.

DATE: 29th June 2015

ORAL JUDGMENT:

1. This is an action for infringement of copyright and passing off.
2. The Suit is today listed under the caption “for ex-parte decree”.
3. On 8th June 2015 when this matter was listed for directions before this Court, the Advocate for the Defendant informed this court that till date

he had not met any officer/ representative of the Defendant and the Advocates who had sent the matter to him was also not in contact with him. Therefore, this matter was placed for '*Ex-parte Decree*'.

4. On 25th June 2015, when the matter again came up for hearing, in view of the request made by the Advocate for the Defendant, this court granted discharge to the Advocate for the Defendant from appearing in the matter.
5. Even today, none appear for the Defendant. I have therefore proceeded to consider the Plaintiff's case on merits.
6. It is the Plaintiff's case that in or about 1994, the Plaintiff coined, conceived and adopted a trade mark consisting of the word "APPETONE" in respect of medicinal and pharmaceutical preparation, being multivitamins. It is submitted that in or about September 1994, the Plaintiff got prepared a label, carton (mono) and a bigger carton for multiple packing, inter alia, containing original artistic works, design, layout and get up from one Mr. Avinash Anant Raje who was working as an artist with the Plaintiff at the relevant time. The said labels and cartons were developed by Mr. Raje for and in the course of his employment with the Plaintiff. The said label and cartons contained a distinctive color scheme of red, black and yellow color. The said label and cartons were of red color with the feature appearing thereon in other colors. The Plaintiff submits that on the said label, the Plaintiffs'

trade mark “APPETONE” appears prominently against the white background which is followed by an artistic representation of a running soccer player along with the ball wearing a yellow-color T-shirt and a black-colored short pant. It is submitted that the whole device is an original artistic work of which the Plaintiff is the owner. A copy of the said label (mono) and the bigger carton is produced at S. No. C1 and C2 (pages 91 and 92) to Compilation of Documents.

7. The Plaintiff submits that it commenced manufacturing and exporting of medicinal preparation under its trade mark “APPETONE” and the aforesaid artistic label from January 1995. Copies of certain representative invoices in this regard are at Annexure J-1 to J-11 (pages 161 to 172).
8. It is submitted that by a Loan License Arrangement dated 29th June 1996 between the Plaintiff and one Gelsules Medicap Pvt. Ltd., the said Gelsules Medicap Pvt. Ltd. agreed to manufacture various medicinal preparations for the Plaintiff under the Plaintiff’s aforesaid trade mark and labels. A copy of this agreement is produced at Annexure G-1 (page 120) of the Compilation of Documents.
9. It is further submitted that a similar agreement was entered into by the Plaintiff with the Defendant on 30th August 1996. In pursuance of the said Agreement, the Defendant manufactured and supplied to the

Plaintiff the said multivitamin preparation including ones bearing the aforesaid trade mark “APPETONE” and in the labels/cartons as set out above. A copy of this Agreement is at Annexure H to the Compilation of Documents (pages 142 to 159).

10. The learned counsel for the Plaintiff has relied upon the following clauses from the said agreement which are reproduced hereinbelow:-

“4. SAVITA hereby covenants with IPCA as follows:

.....

.....

.....

(xii): Not to claim any right to or under any of the trade marks patents or process connected with any of the products or manufacture and/or sell any products under a trade mark connected with the Products or under a name phonetically or otherwise similar to trade names connected with the Products;

6. It is hereby agreed and declared by both parties as follows:

(a) SAVITA expressly acknowledges that it shall at no time acquire any right, title or interest in the know-how or data communicated to it by IPCA in relation to the manufacture or the said Products under this Agreement and the same shall remain the sole and exclusive property of IPCA

(b) That the property in all the raw materials, packing materials, literature and any other article delivered which IPCA may have to incur by reason of failure or neglect on the part of SAVITA in the performance of its obligations”.

It is therefore submitted on behalf of the Plaintiff that the parties always understood that the entire intellectual property with respect to the aforesaid trade mark and/or label shall always vest in the Plaintiff.

11. It is submitted that in or around May 1998, the Plaintiff came across a similar medical preparation being a multivitamin and iron capsule sold under an identical trade mark "APPETONE" with virtually identical labels as set out above which were manufactured and sold by the Defendant. Copies of the said labels are at Annexures K-1 to K-3 to the Compilation of Documents (pages 173 to 175)
12. It is submitted that the Defendant has used an identical and/or deceptively similar trade mark as also has infringed the Plaintiff's copyright in the artistic work in its labels on account of use of virtually identical labels. It is submitted that a clear case of infringement of copyright and passing off is therefore made out.
13. Learned counsel for the Plaintiff also points out that by an order dated 26th July 2002, interim relief was not granted in favour of the Plaintiff. This was because the Defendant had raised a contention that the Plaintiff was not the proprietor of the trade mark or the labels which it sought to enforce in the present proceedings. It is submitted that this being an issue to be decided at trial on appreciation of evidence led by both parties, an injunction at the interlocutory stage was not granted.
14. In support of its case, the Plaintiff has led evidence of Mr. Harish Kamath, the Company Secretary of the Plaintiff by filing his Affidavit in lieu of Examination in Chief. The witness confirms the correctness of the contents of his Affidavit. The Affidavit inter alia essentially

reiterates what is stated in the Plaint. Through the evidence, the Compilation of Documents is tendered in court which is taken on record and marked Exhibit X (Colly). Learned counsel for the Plaintiff submits that photocopies of documents are tendered because the originals were destroyed in the July 2005 deluge.

15. I have considered submissions advanced by the learned counsel appearing for the Plaintiff. While the Plaintiff's witness has stepped in the box in support of the Plaintiff's case, the Defendant has not even filed its Written Statement. There is nothing on record that militates against anything which is averred in the Plaint and deposed to by the witness. There is no dispute as regards prior user by the Plaintiff of its trade mark as also labels and the same is evidenced from the Agreement dated 30th August 1996 between the Plaintiff and the Defendant. The only defense of the Defendant as regards proprietorship cannot be considered without the Defendant contesting the matter by filing its Written Statement and leading oral and documentary evidence in support of its defence. In this view of the matter, it is not possible for this court to consider this defense of the Defendant. Even otherwise, between the Plaintiff and the Defendant, admittedly the Plaintiff is the prior user of the aforesaid trade mark and/or labels.

16. I am therefore of the view that the Defendant has copied the Plaintiff's trade mark and labels. The impugned mark/labels are clearly identical and/or deceptively similar to the Plaintiff's mark and/or label.

17. As mentioned hereinabove, the Defendant has remained absent despite service of writ of summons by the Plaintiff. The evidence of the Plaintiff's witness is uncontroverted. The Plaintiff is not pressing for any damages. In assessing the similarity of labels, no oral evidence is necessary. In the circumstances, the suit is decreed in terms of prayer clauses (a), (b) and (c) which are reproduced hereunder:

“(a) that the Defendants by themselves, through their directors, servants, representatives, distributors, dealers, agents, printers, stockists, agents and/or otherwise howsoever be restrained by a perpetual order and injunction of this Hon'ble Court from in any manner using and/or causing to be used the impugned label and/or the impugned cartons being Exhibits 'C1 to C3' hereto respectively or any other label and/or cartons which is/are an obvious and/or colourable imitation of the Plaintiffs label and/or cartons so as to infringe the Plaintiffs copyright in the artistic works, design, layout, colour scheme and get up contained in the Plaintiffs label and/or cartons being Exhibits 'A1 to A3' hereto respectively in any manner whatsoever;

(b) that the Defendants by themselves, through their directors, servants, representatives, distributors, dealers, printers, stockists, agents and/or otherwise howsoever be restrained by a perpetual order and injunction of this Hon'ble Court from in any manner using in relation to any medicinal preparations the trademark “APPETONE” or any other deceptively similar trademark to the Plaintiffs trademark “APPETONE” so as to pass off and/or enable others to pass off the Defendants goods as and for the goods of the Plaintiffs;

(c) that the Defendants by themselves, through their directors, servants, representatives, distributors, dealers, printers, stockists, agents and/or otherwise howsoever be restrained by a perpetual order and injunction of this Hon'ble Court from in any manner using in relation to any medicinal preparation the impugned label and/or cartons being Exhibits 'C1 to C3' hereto and/or any other deceptively similar label and/or cartons to the Plaintiffs label and/or cartons being Exhibits 'A1 to A3' hereto respectively and/or to place upon the market any medicinal preparation having a trade dress similar in any manner to the Plaintiffs being Exhibits 'A1 to A3' hereto so as to pass off and/or enable others to pass off the Defendants goods as and for the goods of the Plaintiffs.”

18. The suit is accordingly disposed off. Refund of court fees, if any, as per Rules. The office shall return the original documents to the Advocate for the Plaintiff upon the Advocates for the Plaintiff handing over photostat copies of the said documents duly certified by them as true copies.

(S.J. KATHAWALLA, J.)