

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date : 01.06.2015

CORAM

THE HONOURABLE MR. **JUSTICE R.SUBBIAH**

Original Application No.748 of 2014

and

Application No.7504 of 2014

in

Civil Suit No.609 of 2014

O.A.No.748 of 2014

Sun Pharma Laboratories Ltd.,
187, St.Mary's Road,
Alwarpet, Chennai-600 018,
rep. by its Authorized Signatory
Ms.Chandra Nahata.

.... Applicant/plaintiff

Vs.

Psycoremedies Ltd.,
227, Civil Street,
Rani Jhansi Road,
Ludhiana-141 001,
Punjab,

and manufacturing unit at

Village Latton Dana,
Ludiana-Chandigarh Highway,
Ludhiana-141 001,
Punjab.

... Respondent/Defendant

Original Application No.748 of 2014 has been filed under Order XIV Rules 8 of Original Side Rules r/w Order XXXIX Rules 1 & 2 & Section 151 of CPC for the reliefs stated therein.

For Applicant :Mr.P.S.Raman, Senior Counsel
for Mr.Arun C.Mohan

For Respondent :Mr.R.Satish Kumar
for Mr.P.C.N.Raghupathy

ORDER

Original Application No.748 of 2014 has been filed under Order XIV Rule 8 of Original Side Rules r/w Order XXXIX Rules 1 & 2 and Section 151 of C.P.C., praying to grant ad-interim injunction restraining the respondent, their manufacturers, distributors, stockists, servants, agents, wholesalers, retailers, legal representatives or any other person claiming under it, from in any manner manufacturing, selling, offering for sale, stocking, advertising directly or indirectly dealing in medicinal and pharmaceutical preparations infringing applicant's registered trademark SIZOPIN by use of almost identical trademark SYZOPIN or any mark identical or similar to applicant's registered trademark SIZOPIN or in any other manner whatsoever, pending disposal of the suit.

2.The applicant herein is the plaintiff and the respondent herein is the defendant in the suit. For the sake of convenience, the parties will be referred to as per their rankings in the suit.

3.The case of the plaintiff, in brief, is as follows__

3-1.The plaintiff is carrying on business as manufacturers of medicinal preparation for human consumption. The plaintiff is wholly a subsidiary of Sun Pharmaceutical Industries Ltd. The plaintiff involved in making active pharmaceutical ingredients and in branded markets many of the plaintiff's products are prescribed in chronic therapy areas like cardiology, psychiatry, neurology, gastroenterology, diabetology, respiratory etc., The

plaintiff is the registered proprietor of the mark SIZOPIN. Originally, in the year 1995, the trademark SIZOPIN was adopted by the predecessor of the plaintiff M/s.Sun Pharmaceutical Industries Ltd, in respect of pharmaceutical preparations for treatment of depression and schizophrenia. The said mark SIZOPIN is unique, inventive and distinctive. The said mark was extensively renowned throughout the market and amongst medical practitioners for the quality and efficacy of the products marketed thereunder. With a view to obtain statutory protection, the predecessor of the plaintiff applied for and obtained registration for the mark SIZOPIN under No.663317 dated 24.04.1995 in respect of medicinal and pharmaceutical preparations and substances included in Class 5. The Predecessor of the plaintiff was also granted appropriate license to manufacture and market tablets under the mark SIZOPIN by the Drug Control administration. The mark was openly, continuously and exclusively used by the predecessor of the plaintiff since its adoption and tremendous goodwill and reputation has accrued in respect thereof.

3-2.Further, vide a Scheme of Arrangement in the nature of Spin off and Transfer of Domestic Formulation Undertaking, the Indian business of the predecessor of the plaintiff along with the Intellectual Property were transferred to the plaintiff with all rights, title, interests and goodwill thereof. The said Scheme of Arrangement was duly approved and sanctioned by High Courts both at Gujarat and Bombay. In view of such transfer, the plaintiff became the exclusive proprietor of the registered trademark SIZOPIN along with the goodwill to the exclusion of others.

Further, in pursuance of the said Scheme of Arrangement, the plaintiff has proceeded before the appropriate authorities to effect the change of ownership in respect of all licenses and other documents pertaining to manufacture and marketing of the drug under the mark SIZOPIN. The plaintiff and its predecessor market their medicinal preparations under the trademark SIZOPIN through a well organized sales network of dealer/stockiest all over India on an extensive basis. The plaintiff and its predecessor have also spent a huge amount for popularizing its said preparations under the trademark SIZOPIN through advertisements, by circulation of trade literature, pamphlets, product manuals, visual aid, strategy booklet, letters/mailers addressed to hundreds of doctors etc. The plaintiff's medicinal preparations under the mark SIZOPIN has already been well received in the pharmaceutical trade. The sales promotional expenses incurred in respect of the mark SIZOPIN runs to several crores of rupees. By virtue of extensive publicity, long continuous use of the trademark SIZOPIN in respect of medicinal preparations, the mark has come to be identified only with the plaintiff and its predecessor.

3-3. While so, the plaintiff came across the defendant's medicinal preparation bearing the mark SYZOPIN. The defendant's mark SYZOPIN is almost identical with the plaintiff's registered trademark SIZOPIN. The mark SYZOPIN is phonetically, structurally and ocularly identical to the registered trademark SIZOPIN. The defendant has deliberately changed the letter 'I' with another phonetically identical letter 'Y' while copying plaintiff's registered trademark. The change introduced by the defendant is trivial and does not in

any manner distinguish the marks of the plaintiff and the defendant.

3-4. The plaintiff, upon becoming aware of such abuse of their registered trademark SIZOPIN by the defendant, issued a legal notice dated 11th July 2014 asking the defendant to cease and desist from manufacturing and marketing medical preparations bearing almost identical trade mark SYZOPIN and to furnish a written undertaking to that effect. The defendant, in reply to the notice issued by the plaintiff, vide letter dated 1st August 2014, have made untenable claims and has also refused to comply with the requisitions made in the notice of the plaintiff. Further, to their shock and dismay, the plaintiff came to know that the defendant has applied for registration of the mark SYZOPIN in respect of goods under Class 5. The defendant, having recognized the extensive goodwill and reputation enjoyed by the plaintiff in respect of the mark SIZOPIN, adopted the almost identical mark SYZOPIN and failed to stop using the same even when they came to know of the plaintiff's exclusivity over the mark SIZOPIN. Further, the deliberate intention of the defendant is exacerbated by the fact that having claimed the plaintiff's mark to be generic in nature, the defendant has proceeded to apply for a statutory protection of the impugned mark. Thus, the defendant has attempted to approbate and reprobate at the same time. Further, the defendant has also applied for rectification of plaintiff's mark before the Trademarks Registry, which is pending. The deliberate intention on the part of the defendant to infringe plaintiff's registered trademark and to pass off, irrespective of their knowledge of plaintiff's prior use and right in respect of the mark, is therefore apparent.

3-5. The defendant's mark SYZOPIN is *prima facie* visually, phonetically and structurally identical to the plaintiff's registered trademark SIZOPIN. The defendant has launched its medicinal preparation under the almost identical mark SYZOPIN subsequent to the plaintiff. The plaintiff, apart from being the registered proprietor of the mark SIZOPIN, is also divested of the tremendous goodwill garnered through undisputed prior adoption and long and continuous user of the said mark. The plaintiff's preparations bearing the mark SIZOPIN are well reputed and well established in the market long before the defendant adopted the deceptively similar trademark SYZOPIN. The defendant has no right to use the phonetically identical trademark SYZOPIN, which amounts to infringement of plaintiff's registered trademark. The defendant, having entered the market at a much later point of time, ought to have known the prior adoption and prior use of the mark SIZOPIN by the plaintiff, who are market leaders in pharma trade. In spite of the knowledge, the defendant has continued to use the impugned trade mark with deliberate and *mala fide* intention to cause confusion. This, coupled with the fact that the defendant has deliberately applied for registration of the impugned mark with the sole intent to subvert the rights of the plaintiff, shows their *mala fide* intention to ride on the goodwill and reputation of the plaintiff.

3-6. The defendant is using the trademark SYZOPIN with deliberate and *mala fide* intention to create an impression in the minds of the public that their products also emanate from the plaintiff's illustrious group of companies. An ordinary man with average memory and imperfect

recollection would not be in a position to differentiate between two phonetically identical marks and there is every likelihood that the defendant's mark being passed off as and for the plaintiff's well renowned mark in view of phonetic similarity. Hence, the plaintiff has filed the present suit for the following reliefs_

“(a)a permanent injunction restraining the defendant, their manufactures, distributors, stockists, servants, agents, wholesalers, retailers, legal representatives or any other person claiming under it from in any manner manufacturing, selling, offering for sale, stocking, advertising directly or indirectly dealing in medicinal and pharmaceutical preparations infringing plaintiff's registered trademark SIZOPIN by use of almost identical trademark SYZOPIN or any mark identical or similar to plaintiff's registered trademark SIZOPIN or in any other manner whatsoever;

(b)a permanent injunction restraining the defendant, their manufacturers, distributors, stockists, servants, agents, wholesalers, retailers, legal representatives or any other person claiming under it from in any manner manufacturing, selling, offering for sale, stocking, advertising directly or indirectly dealing in medicinal and pharmaceutical preparations under the trademark SYZOPIN or any other trademark that is identical and/or deceptively similar as that of the plaintiff's registered trademark SIZOPIN and/or use similar packaging as that of the plaintiff's products under the mark SIZOPIN so as to pass off the defendant's medicinal preparations as and for the medicinal preparations as and for the medicinal preparations of the plaintiff and/or in any other

manner whatsoever connected with the plaintiff;

(c)the defendant be ordered to pay to the plaintiff a sum of Rs.25,00,000/- as liquidated damages for committing acts of infringement against plaintiff's registered trademark so as to pass off its products as and for the plaintiff's products;

(d)the defendant be ordered and decreed to deliver up for destruction to the plaintiff all the preparations, dies, blocks, labels, packaging either filled or empty, brochures, leaflets, pamphlets, hand bills, hoardings, wall posters, calenders, carry bags, stationery items and such other sales promotional materials bearing and/or containing the impugned trademark SYZOPIN;

(e)a preliminary decree be passed in favour of the plaintiff directing the defendant to render accounts of profits made by it by use of the trademarks SYZOPIN which is identical and/or deceptively similar and a final decree be passed in favour of the plaintiff for the amount of profits found to have been made by the defendant after the latter has rendered accounts;

(f)for costs of the entire proceedings;"

Pending the suit, the plaintiff has filed the present original application viz., O.A.No.748 of 2014 seeking for the interim injunction as stated supra.

4.When Original Application No.748 of 2014 came up for hearing on 22.09.2014, this Court has granted interim injunction and ordered notice to the defendant.

5.On appearance, the defendant has filed the application viz.,

A.No.7504 of 2014 seeking to vacate the order of interim injunction granted by this Court vide order dated 22.09.2014 in O.A.No.748 of 2014.

6.The sum and substance of the contentions made by the defendant in the affidavit filed in support of the vacate interim injunction order are as follows_

6-1.The defendant's predecessor PSYCO REMEDIES (a proprietorship firm) was carrying on business of manufacturing and marketing of medicinal and pharmaceutical formulations since the year 1995 at Ludhiana in the State of Punjab and the running business of the said firm was taken over by PSYCO REMEDIES LIMITED (defendant herein), which is a company incorporated under the Companies Act, during October 2010. PSYCO REMEDIES LIMITED (defendant) has been formed by the Proprietor of the said firm along with close family members and relatives. The defendant-Company is continuously using several brand names for pharmaceutical products adopted and used by the defendant's predecessors (PSYCO REMEDIES). One of the trademarks adopted by the defendant's predecessor in the year 2002 was SYZOPIN for a medicinal product having main ingredient CLOZAPINE in tablet form, for the treatment of psychiatric disorders. The trademark SYZOPIN was coined by having taken the prefix SYZO from the defendant's similar sounding of trade name PSYCO and suffix PIN from the generic drug name CLOZAPINE.

6-2.The adoption of the said trade mark SYZOPIN by the defendant is honest and *bona fide* on the line of 'trade usage' adopted by

several pharmaceutical manufacturers in coining a trade mark for a drug from the main ingredients or components of the drug or by telescoping the letters from the name of disease or medical names or drug ingredient names in combination with the trade name (so as to indicate the origin), so as to suggest/enable the medicinal practitioners to understand the components of a particular drug name in order to facilitate them to prescribe the drug by merely looking into the brand name with suggestive parts (ingredients) in the brand names. This kind of 'trade usage' is prevalent among pharmaceutical manufacturers/traders. Apart from the mark SYZOPIN, the defendant has coined and adopted some other brand names for anti-psychotic medicines such as SYLONEX, SYCHOZINE, SYCONIL, SYZIRAL, SYNRAMINE, SYRAN, PSYDON, PSYDYL, which are duly registered under the Trade Marks Act, 1999.

6-3.The syllable SIZO is very common to the pharmaceutical trade, particularly for the drug products for the treatment of psychiatric disorders. Several marks have been registered with the prefix SIZO, besides several other marks which are pending registration with such prefix. As such, it is not open to any one to claim exclusive rights over the said syllable SIZO.

6-4.The main single ingredient of the defendant's drug SYZOPIN and the plaintiff's drug SIZOPIN is CLOZAPINE which is an anti-psychotic medicine and it works by changing the actions of chemicals in the brain. CLOZAPINE is used to treat severe 'schizophrenia' or to reduce the risk of suicidal behaviour in people with schizophrenia or similar disorders

(apparently the word SIZO is derived by the plaintiffs from SCHIZOPHRENIA). That is the reason the said generic drug has been classified as Schedule 'H' Drug by drug authorities and it should be given by druggist only on the prescription of Registered Medical Practitioners. In pharmaceutical circle, the said drug is known, referred and called as CLOZAPINE rather than by the trade marks of the plaintiff, defendant or of various other manufacturers/traders. Since this kind of drugs are being called with generic drug names, rather than the brand names in the medical and pharmaceutical circle, there will be no possibility of confusion or deception in the market, particularly when it is passed through the skilled persons like druggists and drug dealers. Both the defendant's products and the plaintiff's products are 'Schedule H Drug' and it will be given by the druggist on presenting a written prescription from the Registered Medical Practitioner. Therefore, it could not be supplied to the consumer without such prescription. Both the products are being passed through the hands of skilled persons, who by their training, experience and knowledge would take utmost care in supplying the drug to the consumers. Thereby there will not be any possibility of confusion or deception in the market inspite of the fact that the nature of both the goods are one and the same. Accordingly, the defendant's trade mark SYZOPIN is not at all identical with or deceptively similar to the plaintiffs' trade mark.

6-5. There is substantial difference in packaging of the products of the plaintiff and the defendant. There is a noticeable difference in style of writing of the two marks, besides having different color scheme, lay out and

indication of origin on the packaging of the defendant with the prominent display of 'PR' and name of the defendant's trade name. There is no misrepresentation on the defendant's part in presenting the defendant's trade mark SYZOPIN since the year 2002 to the consuming public because all their carton boxes and aluminium foils containing the tablet SYZOPIN are entirely different and distinctive from that of the plaintiff's trade mark SIZOPIN and their respective packaging materials. According to the defendant, no *prima facie* case has been made out as against the defendant. Thus, the defendant sought for vacating the interim order.

7.The plaintiff has filed a detailed reply affidavit denying the allegations made by the defendant in the application to vacate the interim injunction.

8.The learned senior counsel appearing for the plaintiff submitted that the plaintiff has been using the mark SIZOPIN continuously since 1995 consisting of the active ingredient 'CLOZAPINE' for treatment of depression and schizophrenia. The plaintiff has been using the said trademark for more than two decades and the said mark is arbitrary, invented and has no correlation to the active ingredient in the drug or the ailments for which it is applied. The said mark SIZOPIN was registered by the plaintiff's predecessor under TM.No.663317 in Class 5 with effect from 24.04.1995. The mark SIZOPIN besides, being arbitrary and distinctive in nature, has become associated exclusively with the plaintiff due to long, continuous and extensive usage. To substantiate his contention that the plaintiff has been

using the trademark SIZOPIN since 1995, the learned senior counsel for the plaintiff has produced number of documents before this Court viz., invoices for sale of the plaintiff's product tablets under mark SIZOPIN, dated 18.07.1997 and extract from medical journals listing plaintiff's SIZOPIN tablets. While so, the plaintiff came to know that the defendant is using the same trademark SYZOPIN, by deliberately changing one letter 'I' with phonetically identical letter 'Y', by copying the trademark of the plaintiff. Hence, the plaintiff issued a legal notice dated 11th July 2014 to the defendant asking them to cease and desist from manufacturing and marketing medical preparations bearing almost identical trade mark SYZOPIN. But, the defendant sent a reply making untenable claims and has also refused to comply with the requisitions made in the notice of the plaintiff, stating that their mark SYZOPIN was coined by them from its trade name PSYCO and drug ingredient -CLOZAPINE.

9. In this regard, the learned senior counsel appearing for the plaintiff submitted that the explanation given by the defendant in their reply notice for using the trademark SYZOPIN is absolutely false, because the words SYZO and PSYCO are absolutely different both phonetically and structurally. Though the defendant claims that the mark SYZOPIN is generic and various third parties are using the same, subsequent to the receipt of the legal notice from the plaintiff, the defendant has applied for the registration of the mark SYZOPIN on 13.08.2014. Therefore, the defendant is irrefutably estopped from claiming that the plaintiff's mark cannot be protected, when the

defendant itself has applied for the same. In fact, the defendant itself has accepted the mark SIZO and SYZO are identical. The theory of 'anti-dissection' makes it clear that a mark cannot be dichotomized in the manner sought by the defendant. The defendant's mark SYZOPIN is phonetically, visually and structurally identical to the plaintiff's registered trade mark SIZOPIN. In this regard, the learned senior counsel appearing for the plaintiff has also invited the attention of this Court to Section 29(3) of the Trade Marks Act and submitted that as per Section 29(3), if any case falling under Clause (c) of Sub-section (2) of Section 29, the Court shall presume that it is likely to cause confusion on the part of the public. Section 29(2)(c) of the Trade Marks Act says that if the identity of a impugned mark is similar to the registered trademark and identity of the goods or services are similar to the goods/services covered under the registered trademark, then the plaintiff is entitled for injunction. In the instant case, the defendant itself has not disputed the fact that the identity of the trademark and the identity of the goods are similar and hence, the plaintiff is entitled for injunction. In this regard, the learned senior counsel appearing for the plaintiff has relied upon the judgment reported in **1995 PTC 251 (M/s.Ciba Geigy Ltd and another Vs. M/s.Crosslands Research Laboratories Ltd)** wherein it has been held that the trademarks should be viewed as a whole; the test is if the phonetic, visual and basic idea of the marks resemble too closely, adoption of a leading characteristic or essential feature of registered mark causes infringement; additions made to the 'middle' of a mark have no bearing on comparison of overall structural and phonetic similarity of the marks;

pharmacies sell without prescriptions and can be confused; confusion can arise when deciphering a prescription.

10. Thus, by relying upon the said judgment, the learned senior counsel appearing for the plaintiff submitted that to decide the question of similarity between the two marks, the Court has to approach the issue from the point of a man of average intelligence and of imperfect recollection. In the instant case, since the defendant itself has admitted that the mark SIZO and SYZO are identical, certainly the defendant's mark would cause confusion in the mind of the general buyers.

11. That apart, the learned senior counsel appearing for the plaintiff submitted that though in the counter the defendant had stated that more than 20 drugs are being sold under the trademark with prefix SIZO and the syllable SIZO is very common to the pharmaceutical trade, the said drugs being sold under the trademarks with prefix SIZO referred by the defendant are not phonetically, visually and structurally similar to that of the plaintiff's registered trademark SIZOPIN. Further more, the use of the prefix SIZO by the third parties cannot be a defence for the defendant to justify their act of infringement of the plaintiff's registered trademark. In this regard, the learned senior counsel appearing for the plaintiff has also relied upon the judgment reported in **2009(41) PTC 51 (Novartis AG Vs. Crest Pharma Pvt Ltd & anr)** wherein it has been held as follows_

"32. The next contention of the defendant

is that there are number of other companies who are using the similar trade mark as that of the plaintiff, those are CEFF, SIMCEF, CEF, BECEF, SYCEF, CEACEF, SYCEF, SICEF and C-CEF. The contention of the defendant has no force as the defendants have failed to produce any evidence of the actual user of the said marks referred by the defendants. In order to take the said defence, the party has to give cogent evidence before this Court as to since when these trade marks are being used and what is the goodwill and reputation of the said trade marks. The defendant in the present case has not produced the samples of the third parties in order to show as to whether the said marks are being used and goods are available in the market or not. The similar defence raised in various cases has been dealt by the courts from time to time in the cases of *Century Traders (supra)*, *Corn Products Refining Co., Vs. Sahngriha Food Products Ltd., AIR 1960 Supreme Court 142 : PTC (Suppl)(I)13(SC)* and *Pankaj Goel Vs. Dabur India Ltd., 2008(38)PTC 49(Del)*. Relevant part of the decision of *Corn Product (supra)* is reproduced hereinbelow__

"17.The series of marks containing the common element or elements therefore only assist the applicant when those marks are in extensive use in the market. The onus of proving such user is of course on the applicant, who wants to rely on those marks. Now in the present case the applicant, the respondent before us, led no evidence as to the user of marks with the common element. What had happened was that Deputy Registrar

looked into his register and found there a large number of marks which had either 'Gluco' or 'Vita' as prefix or suffix in it. Now of course the presence of a mark in the register does not prove its user all. It is possible that the mark may have been registered but not used. It is not permissible to draw any inference as to their user from the presence of the marks or the register."

33.A mere filing of the search report from the trademarks office does not prove to whether the marks mentioned in search report was actually been used or not. It is imperative on the part of the party who relies upon the marks of third party to produce cogent and clear evidence of user in order to prove the defence of common marks to the trademark on the basis of the third party user. Hence, in the absence of valid and cogent evidence, the submission of the defendant cannot be accepted."

By relying upon the above said judgment, the learned senior counsel appearing for the plaintiff submitted that the defence taken by the defendant that since several drugs are being sold by various third parties with prefix SIZO, the defendant is also entitled to sell the drug with prefix SYZO, cannot be accepted. Thus, he prayed for making the interim injunction order absolute.

12.Per contra, the learned counsel appearing for the defendant submitted that the defendant has coined their trademark honestly from their

trade name and the ingredient; SY from Psycho remedies and ZOPIN from CLOZAPINE. Such trade usage in the pharma industry is well known and has been recognized by the Courts also. In fact, the defendant adopted the mark SYZOPINE in the year 2000 and started to use the same since 2002 after getting the drug approval. Since 2002, the trademark SYZOPIN has been used openly, continuously and without any interruption whatsoever. In support of his contention that the defendant has been using the mark SYZOPIN from the year 2002, the learned counsel for the defendant has also produced the sale invoices of the defendant's product under the mark SYZOPIN right from the year 2002. Further, the learned counsel for the defendant submitted that the plaintiff has known about the defendant's activities and at least ought to have known about the defendant. In this regard, the learned counsel for the defendant has also invited the attention of this Court to several medical journals from the year 2008 and demonstrated that the drugs of the plaintiff as well as the defendant are consistently featured together in the medical journals. Thus, according to the learned counsel for the defendant, this is a case of acquiescence and laches rather than the delay. Since the conduct of the plaintiff is not a mere delay, but one with laches and acquiescence on the part of the plaintiff, the plaintiff is not entitled for injunction. Further, the learned counsel for the defendant submitted that the products are used to treat 'Schizophrenia' which is a rather serious ailment. Therefore, the products are not to be treated like any other pharmaceutical product like paracetamol. In the instant case, the products cannot be purchased without a prescription as it is

a Schedule H drug and as such, there will not be any confusion in identifying the two marks. The learned counsel for the defendant has also relied upon the judgment reported in **2013(3) CTC 841 (Orchid Vs. Wockhardt)**, wherein it has been observed that Section 29 of the Act specifies that an infringement would occur only when an unregistered Proprietor uses a registered Trade Mark, which is likely to cause confusion on the part of the public or which is likely to have an association with the registered Trade Mark; therefore, if one sees the object and reasons under Section 29 of the Act, it is clear that it is meant to be used against the person, who is not entitled to use the said Trade Mark under 'law'; it is required to constitute an infringement. Thus, by relying upon the above said judgment, the learned counsel for the defendant submitted that in the instant case, absolutely there is no likelihood of causing confusion because the tablets produced by the plaintiff as well as the defendant could be sold only by prescription of the doctors. In this regard, the learned counsel for the defendant has also relied upon the unreported judgment of this Court delivered in *Application Nos.2102 & 2103 of 2012 in C.S.No.87 of 2012, Kivi Labs Ltd Vs. Sun Pharmaceuticals Pvt. Ltd, dated 01.10.2012*.

13.By way of reply, the learned counsel for the plaintiff submitted that claims of the defendant that they have been using the trademark SYZOPIN since 2002 and the plaintiff is aware of the mark of the defendant, are completely false. The defendant did not have any substantial presence in the market until about the time of initiation of the present proceedings. The

defendant's seemingly stray or sporadic use cannot be deemed to be knowledge or acquiescence, as the same would require an active act of encouragement from the plaintiff, which obviously is not the case herein. The learned senior counsel for the plaintiff submitted that since the defendant's mark did not enter the market substantially, the plaintiff has no occasion to know about the defendant's mark until the present suit is filed. Therefore, the submission made by the learned counsel for the defendant on the ground of delay and acquiescence, cannot be accepted.

14.Keeping the submissions made by the learned counsel on either, I have carefully perused the materials available on record.

15.It is the main submission of the learned counsel appearing for the plaintiff that they have been using the mark SIZOPIN continuously since 1995 consisting of the active ingredient CLOZAPIN for treatment of depression and schizophrenia. In this regard, the learned senior counsel for the plaintiff has also produced documentary evidence before this Court to show that the plaintiff has been using the trademark SIZOPIN right from the year 1995. In fact, the said mark was registered by the plaintiff's predecessor under TM.No.663317 in Class 5 with effect from 24.04.1995. While so, the plaintiff came to know that the defendant is using the mark SYZOPIN, by deliberately changing one letter 'I' with phonetically identical letter 'Y', by copying the trademark of the plaintiff. Therefore, according to the learned senior counsel for the plaintiff, the defendant has to be restrained

from using the mark SYZOPIN.

16. Though the defendant has raised several defences, at the time of argument the learned counsel for the defendant has not denied the case of the plaintiff that the plaintiff's mark SIZOPIN and the defendant's mark SYZOPIN are identical. It is the main defence of the learned counsel appearing for the defendant that the defendant is using the mark SYZOPIN since 2002 after getting the drug approval. According to the learned counsel appearing for the defendant, the defendant has been using the said mark SYZOPIN for the past 12 years without any interruption. It is assertive submission of the learned counsel appearing for the defendant that the plaintiff has also known about the defendant's activities; atleast ought to have known about the defendant. Having allowed the defendant to use the mark SYZOPIN for the past 12 years, now the plaintiff is estopped from restraining the defendant from using the mark SYZOPIN.

17. But, it is the reply of the learned senior counsel appearing for the plaintiff that since the plaintiff did not have any substantial business in the market, until the initiation of the present proceedings, the plaintiff was not aware of the business of the defendant and the trademark SYZOPIN. Therefore, it is the submission of the learned senior counsel appearing for the plaintiff that the ground of delay and acquiescence raised by the learned counsel for the defendant cannot be accepted.

18. But, on perusal of number of documents produced by the plaintiff itself, particularly medical journals (found in page 235 of the typed set of papers produced on the side of the plaintiff), I find that the plaintiff's trademark SIZOPIN as well as the defendant's trademark SYZOPIN are consistently featuring together since 2008. Therefore, *prima facie* it appears that the plaintiff ought to have had the knowledge about the presence of the defendant's trademark SYZOPIN for several years. It appears that till the defendant has filed the rectification application, the plaintiff has allowed the defendant to use the trademark SYZOPIN. Therefore, as contended by the learned counsel for the defendant, this is not a case of mere delay alone; this is a case of laches and acquiescence also. Though the plaintiff has denied the knowledge about the presence of the defendant's trademark SYZOPIN till 2014, I am of the opinion that since the evidence on record would show the presence of both the marks of the plaintiff and the defendant for quite a long period, the question as to whether the plaintiff had the knowledge about the defendant's mark or not, has to be considered only after recording the evidence. In the case of this nature, until and unless the plaintiff establishes by evidence that they are not aware of the presence of the defendant's trademark for several years, they are not entitled for interim injunction. But, in the instant case, the defendant has produced documents viz., copy of the invoices for sale of their products under the mark SYZOPIN since 2002. Hence, in my considered opinion, now, all of a sudden, the defendant cannot be restrained by the plaintiff from using the said mark. Though the plaintiff denies their knowledge about the presence of the defendant's mark, this

Court is of the opinion that since plaintiff has approached this Court after 12 years, the plaintiff has to establish their case only at the time of trial. I find *prima facie* that the case of the plaintiff suffers from not only mere delay, but also laches coupled with acquiescence. Since the defendant has been using the mark SYZOPIN for the past 12 years; if the defendant is restrained from using the said mark, definitely it will affect their business; whereas the plaintiff who has allowed the defendant to use the mark SYZOPIN for the past 12 years, would not suffer any loss, even if the defendant is allowed to use the mark, pending the suit. Therefore, I am of the opinion, the balance of convenience is not in favour of the plaintiff. Hence, the plaintiff is not entitled for injunction. Since the defendant has not denied the case of the plaintiff that both the marks of the plaintiff and the defendant viz., SIZOPIN and SYZOPIN are identical, I am of the opinion that it is not necessary to deal with the other submissions made by the learned senior counsel for the plaintiff. Therefore, only on the ground of laches and acquiescence, the plaintiff is not entitled for the continuation of the interim injunction order.

For the foregoing reasons, the Original Application No.748 of 2014 is dismissed and the interim injunction order is vacated. Consequently, Application No.7504 of 2014 is allowed.

01.06.2015

Internet : Yes / No
Index : Yes / No

R.SUBBIAH, J.

SSV

Pre-delivery order
in

O.A.No.748 of 2014
and
A.No.7504 of 2014
in
C.S.No.609 of 2014

01.06.2015