

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:20.09.2019

Coram

The Hon'ble Mr. Justice **N.SATHISH KUMAR**

C.S.No.367 of 2000

&

A.No.4811 of 2018

APEX LABORATORIES LIMITED,
76, C.P.Ramaswamy Road,
Alwarpet, Chennai – 600 018.
Rep by its Managing Director.

...Plaintiff

Vs.

INDIA PHARMACEUTICALS
W 111 MIDC, Dombivili (East)
MUMBAI – 421 204.

...Defendant

Plaint filed under Order IV Rule 1 of O.S.Rules and Order VII
Rule 1 of CPC and Sections 55 and 62 of the Copyright Act, 1957
praying for

(a) granting a permanent injunction restraining the defendant,
either by themselves, their servants or agents or any one claiming
through or under them from committing an infringement of the
plaintiff's copyright in the artistic work ZINCOVIT label by the use of
the infringing BICAL label or any other label, work or representation

the use of which would be an infringement of the plaintiff's artistic work ZINCOVIT label.

(b) granting a permanent injunction restraining the defendant, either by themselves, their servants or agents or any one claiming through or under them from passing off or enabling others to pass off their goods as or for the well known and reputed goods of the plaintiff by using the BICAL label for pharmaceutical and/or Medicinal Preparations or like goods or any other label, work or representation which is in any manner deceptively or confusingly similar to the plaintiff's well known and reputed ZINCOVIT Label.

(c) directing the defendant to render a true account and to pay to the plaintiff a sum equivalent to the profits earned by the defendant through the sale of the said offending goods.

(d) in the alternative to pay to the plaintiff such sum as this Court may determine by way of damages for the passing off committed by the defendant.

(e) directing the defendant to surrender to the plaintiff for destruction all product cartons and labels, literature, promotional material etc., bearing the said offending mark, together with all implements used by the defendant for imprinting the said offending

mark.

(f) directing the defendant to pay to the plaintiff the costs of this suit.

For Plaintiff .. Mr.R.Sathish Kumar

For Defendant .. Ms.M.K.Aseena

JUDGEMENT

The suit has been filed by the plaintiff for the following reliefs;

(a)for granting a permanent injunction restraining the defendants either by themselves, their servant or agents or any one claiming through or under them from committing an infringement of the plaintiff's copy right in the artistic work 'ZINCOVIT' label by the use of infringing BICAL label or any other label work or representation the use of which would be an infringement of the plaintiff's artistic work 'ZINCOVIT' label;

(b)granting a permanent injunction restraining the defendant, either by themselves, their servant or anyone claiming through or under them from passing off or enabling others to pass off their goods as or for the well known and reputed goods of the plaintiff by using the BICAL Label for Pharmaceutical and/or Medical preparations or like goods or any other Label work or representation which is in any

manner deceptively or confusingly similar to the plaintiff's well known and reputed 'ZINCOVIT' Label;

(c)directing the defendant to render a true account and to pay to the plaintiff a sum equivalent to the profits earned by the defendant through the sale of the said offending goods in the alternative to pay to the plaintiff such sum as this Court may determine by way of damages for the passing off committed by the defendant;

(d)directing the defendant to surrender to the plaintiff for destruction all product cartons and labels, literature, promotional material etc., bearing the said offending mark, together with all implements used by the defendant for imprinting the said offending work;

(e)directing the defendant to pay to the plaintiff the costs of the suit and for any other such order.

2.It is the contention of the defendant that they are having a license granted by the Competent Authority for manufacturing of the "BICAL Syrup" under the provisions of the Prevention of Food Adulteration Act, 1954. Prior to the plaintiff launching the 'ZINCOVIT SYRUP', the defendant is in process of manufacturing and selling of the

said product i.e., 'BICAL SYRUP' only as the food article. The artistic idea cannot be said to be in violation of the Copyright of the plaintiff as there is no common similarities bound to occur. The names of the products and quantities are clearly mentioned by the defendants Syrup and the same are not similar to the product belonging to the plaintiff's 'ZINCOVIT SYRUP'. There is also vast variation in the price of the products.

3.In a nutshell, it is the contention of the defendant that they have not violated any Copyright. On the basis of the rival pleadings, the following issues are framed by this Court;

"(i)whether the plaintiff has got copyright under the name and style of ZINCOVIT?"

(ii)Whether the plaintiff is entitled to permanent injunction restraining the defendant, their men and agent from using the name ZINCOVIT label?

(iii)Whether the plaintiff is entitled to permanent injunction restraining the defendant from passing off or enabling others to pass off their goods violating the alleged copyright?

(iv)Whether the plaintiff is entitled to rendition of accounts from the defendant as prayed for?

(v)Whether the plaintiff is entitled to get damages from the defendant for violating any copyright?

(vi)Whether the defendant has to surrender all product cartons and labels, literature, promotional material etc., bearing the alleged trade mark for destruction?

(vii)To what reliefs the parties are entitled?"

4.On the side of the plaintiff P.W.1 was examined and Exs.P.1 to P.7 were marked and P.W.1 was cross examined. Thereby, the suit has been decreed earlier. Thereafter, exparte decree was set aside and again, exparte order was passed. However, on the application filed by the defendant to set aside the exparte decree, once again exparte decree was set aside and the matter was placed before the Additional Master for recording evidence. Despite the final opportunity given by this Court, the defendant has not adduced any evidence.

5.Once again the matter came before this Court on 19.09.2019, this Court taking note of the conduct of the defendant remaining exparte twice and the suit is pending from the year 2009, his conduct clearly exhibits his intention not to proceed with the suit again and set

him the exparte and posted the matter for arguments today.

6.Heard the learned counsel appearing on behalf of the plaintiff and also the learned counsel appearing on behalf of the defendant, who has made her submissions.

7.It is the contention of the learned counsel that the plaintiff's is a registered mark. Exs.P.4 & P.5 clearly demonstrate that both marks are absolutely identical with the exception of the above said word mark. This itself clearly indicates that there is infringement. P.W.1 in his evidence has spoken about the manner in which the two marks have been identical and the defendant has infringed. Ex.P.4 is a label of the plaintiff. Ex.P.5 is the label of defendant and such comparison by the Court indicates that both are identical with eachother. Ex.P.2 indicate that the plaintiff have adopted the mark in the year 1988 and using the same since 1990.

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8.In such view of the position, the very contention of the defendant that there is prior user cannot be countenanced without any evidence in this regard. Ex.P.4 is a registered and had a copyright

which includes artistic work. As soon as mark is registered, which includes artistic work, the defendants cannot now contend that he is a prior user and there is no violation of the copyright of the plaintiff. Similarly, contention raised in the written submission that this Court has territorial jurisdiction cannot be countenanced for the simple reason that since the suit is filed under Section 62 of the Act. If any Copyright is violated, the plaintiff can maintain a suit within the jurisdiction of this Court. As far as the infringement of copyright, merely because the defendant resides outside the jurisdiction of this Court, the leave also not necessary to institute a suit before this Court, when the plaintiff resides within the jurisdiction of this Court.

9. In such view of the matter, this Court is of the view that, territorial jurisdiction issue raised cannot be countenanced. The evidence of P.W.1 remains unchallenged. The products also clearly establish that the plaintiff copyright has been violated and they have been infringed. Further, the contention of the defendant that they are prior user has not been established on record. In view of the same, this Court is of the further view that if the trademark is registered without limitation of colour, it shall be deemed to be registered for all the

colours. The registration infact goes in favour of the plaintiff as no limitation regarding colour, so it should be deemed to be for all colors.

10.Hence, the suit is decreed with prayers a & b alone. As far as damages specifically not placed before this Court, the same is not granted. In the result, the suit is decreed with above prayers a & b alone with costs. Consequently, the connected Application is closed.

20.09.2019

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Index: Yes/No

Internet: Yes/No

To

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