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

+ **CS(OS) 1695/2009**

CADILA PHARMACEUTICALS LTD. Plaintiff
Through: Mr. Kapil Kher, Advocate with
Mr. Rishi Manchanda, Ms. Harsha and
Ms. Namita Sharma, Advocates

versus

MEDI PHARMA & ANOTHER Defendants
Through: *Ex-parte*.

CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI

ORDER
01.09.2016

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1. The plaintiff has instituted the present suit against the defendants No.1 and 2 praying inter alia for a decree of permanent injunction restraining them, their directors, partners, agents, stockists, distributors etc. from manufacturing, marketing, selling, offering for sale, directly or indirectly dealing in any product under the trademark, "POLYCAP" or any other mark, which is identical/deceptively similar to the plaintiff's trademark, "POLYCAP". Further, the plaintiff has prayed for rendition of accounts, delivery up etc. against the defendants.

2. Learned counsel for the plaintiff states that the present suit is uncontested and summons were duly served on the defendants No.1 and 2 in terms of the order dated 14.09.2009 but neither of them chose to enter appearance. Pertinently, defendant No.2 was proceeded against

ex-parte on 08.10.2009 and after service was effected on the defendant No.1 through publication, it was also proceeded against ex-parte on 27.11.2014. Vide order dated 08.10.2009, the defendants were restrained from manufacturing or marketing, or selling directly or indirectly, or advertising under the mark, "POLYCAP" or any other deceptive or confusing mark, similar to the plaintiff's trademark, "POLYCAP", till further orders. Ex-parte evidence has since been led by the plaintiff, who has produced Shri N.S. Krishnan, the authorised signatory of the company as PW-1. The Board Resolution dated 03.09.2009, issued in favour of PW-1 is marked as Ex. PW1/1

3. Counsel for the plaintiff submits that the plaintiff is engaged in the business of manufacturing and marketing of pharmaceutical and medicinal preparations and products, included in Class 5, for the past 52 years and has adopted several trademarks for different products, some of which are registered and others are pending registration. The trademark, "POLYCAP", which was adopted by the plaintiff in the year 2006, has been used for drug formulation meant for consumption by patients with multiple risk factors for secondary prevention of coronary heart disease. The said word is stated to be a coined word and has been adopted by the plaintiff for its drug formulation.

4. The plaintiff has relied upon an Agreement dated 09.11.2006, executed between it and Hamilton Health Sciences Corporation, Canada, a company engaged by the plaintiff for carrying out research in the subject medicine, marked as Ex. PW1/2. A copy of the letter dated 21.12.2007 exchanged between the plaintiff and the Medical Advisor, Ahmedabad, Government of Gujarat for conducting clinical trial of the

said medicine has been filed and marked as Ex. PW1/3. The letter dated 18.12.2007 issued by the Directorate General of Health Services, Nirman Bhawan, New Delhi, granting a NOC to the plaintiff for conducting clinical trials in respect of the drug formulation sold under the trademark, "POLYCAP", is marked as Ex.PW1/4. Form 46 dated 09.07.2009 issued by the Central Drugs Standard Control Organisation, Directorate General of Health Services, New Delhi, granting approval for manufacture of the drug formulation in question as a capsule has been marked as Ex.PW1/5. The expenses incurred by the plaintiff on the clinical trial of the said drug has been filed and marked as Ex. PW1/6.

5. On conclusion of the clinical trial, vide letter dated 22.07.2009, the Food and Drugs Control Administration, Gandhi Nagar, Gujrat had granted permission to the plaintiff to manufacture the subject drug formulation on the conditions stipulated therein, (Ex. PW1/7). On 07.12.2006, the plaintiff had filed an application for registration of the trademark, "POLYCAP" with the Registrar of Trademarks with the date of user mentioned as 03.10.2006, (Ex.PW1/8). The advertisement published in the trademark journal dated 01.03.2009, relating to the plaintiff's trademark, "POLYCAP" has been marked as Ex.PW1/9. The invoices filed by the plaintiff to demonstrate the sale of the said medicine have been collectively marked as Ex.PW1/10 (colly). The strips of the medicines sold by the plaintiff under the trademark "POLYCAP" have been marked as Ex. PW1/11 and the carton in which the said medicines are packaged has been marked as Ex.PW1/12. The strip of the product of the defendants has been marked as

Ex.PW1/13.

6. It is stated by learned counsel for the plaintiff that within a period of 30 days from the date the plaintiff was granted permission to market the medicine in question under the trademark, "POLYCAP", it had sold capsules worth Rs.76 lacs (approx.). The trademark, "POLYCAP" is stated to have acquired a high degree of distinctiveness as a source of preventing coronary heart disease/stroke in patients with multiple risk factors. The plaintiff has bonafidely and continuously been using the said trademark for marketing and selling its drug formulation mentioned above and has thus acquired an impressive goodwill and reputation in the market in respect thereof.

7. The cause of action for instituting the present suit against the defendants has been spelt out in para 27 of the plaint, wherein the plaintiff has averred that it was informed by the field staff that they have come across certain formulations being sold in the market by the defendant No.1 under the name and style of "POLYCAP" and the said formulations are meant to be used as a multi-vitamin. The defendant No.2, an entity based in Panchkula, Haryana was identified as the manufacturer of the said drug sold under the name, "POLYCAP". Counsel for the plaintiff states that neither the defendant No.1 nor the defendant No.2 have any authority/license to manufacture, prepare, sell or distribute the preparation under the trademark, "POLYCAP" and the same is nothing but a dishonest act of imitating the plaintiff's trademark, "POLYCAP". He argues that if the defendants are permitted to market and sell their medicine under the name, "POLYCAP" or any other name that is identical/deceptively similar to

the plaintiff's mark, "POLYCAP", it will not only cause irreparable loss and injury to the plaintiff's reputation in the market, but would also be of a great risk to the public at large, who would be induced into purchasing the said medicine under a bonafide impression that the same prevents coronary heart disease/stroke, whereas it is only a multi-vitamin tablet.

8. Counsel for the plaintiff states that though the plaintiff has asked for the relief of delivery up and rendition of accounts in the suit, in view of the letter dated Nil, addressed by the defendant No.1 to the plaintiff and received by it on 23.09.2009 (Ex.PW1/14) and the letter dated Nil addressed by the defendant No.2 to the plaintiff received by it on 23.09.2009 stating *inter alia* that they have stopped manufacturing/selling the brand "POLYCAP" w.e.f. 22.09.2009 (Ex.PW1/15) and have withdrawn and destroyed the stocks in the market, he does not wish to press the said reliefs and seeks to confine the prayers in the suit to clauses (1) and (2) alone.

9. The Court has heard the learned counsel for the plaintiff, perused the averments made in the plaint and carefully examined the documents filed by the plaintiff. In view of the averments made in the plaint, duly supported by the affidavit by way of evidence filed by PW-1, who had produced all the original documents on 28.08.2015, when his deposition was recorded, and further, having regard to the contents of the letters addressed by the defendants No.1 and 2 to the plaintiff, (Ex.PW1/14 and Ex.PW1/15)) stating *inter alia* that they have stopped manufacturing/ marketing the impugned product under the name "POLYCAP" and have undertaken *inter alia* that they would not do so

in the future, it is deemed appropriate to decree the present suit in favour of the plaintiff and restrain the defendants from manufacturing, marketing or selling, directly or indirectly or advertising any medicinal product under the mark, “POLYCAP” or any other mark that is identical/deceptively similar to the plaintiff’s trademark, “POLYCAP”, which may amount to passing off their products as that of the plaintiff. Decree sheet be drawn accordingly.

10. The suit is disposed of with no orders as to costs.

SEPTEMBER 01, 2016

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HIMA KOHLI, J