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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION (L) NO. 563 OF 2017
IN
SUIT (L) NO. 159 OF 2017
WITH
LEAVE PETITION NO. 98 OF 2017

Lupin Ltd	...Plaintiffs
<i>Versus</i>	
Human Life Science (HLS) & Anr	...Defendants

Mr Amit Jamsandekar, with Alka Paralkar, with Heena Shah, i/b VA Associates, for the Plaintiffs.

CORAM: G.S. PATEL, J
DATED: 24th March 2017

PC:-

1. Mr Jamsandekar files an Affidavit of Service. It reports that intimation was left as long as three days. The packets were not collected and were left unclaimed. This is good service.¹

2. The Petition for Leave under Clause XIV is deemed to have been served. For the reasons set out therein, it is made absolute.

1 See order dated 22nd November 2016 in Commercial Suit No 110 of 2016 (previously, OS Suit No.206 of 2015), *Crown Worldwide Holdings Ltd & Anr v Crown Relocations Movers and Packers*.

3. The Suit is an action in trade mark infringement and passing off. The Plaintiff is a well-known manufacturer of pharmaceutical. It has several marks to its registration. One of this is **Corcal** for Coral Calcium Tablets. It uses the mark **Corcal** in conjunction with various suffixes such as “PLUS” “D” and so on. The details of registration and applications are set out in the plaint and need not be reproduced at length here. There can be no dispute about these, all matters of record.

4. As to use, there is material referred to in paragraph 8 of the plaint and material annexed to the plaint in the form of randomly selected invoices, authenticated statements of sales and so on. The statement of sales indicates that for the year 2016-2017 (April to July), sales of the **CORCAL**-branded products were in excess of Rs. 715 lakhs. There are also statements of year-wise consolidated statements for the **CORCAL** brand name. Promotional expenses are also authenticated and annexed.

5. The Plaintiffs say that in January 2017 they chanced upon a rival product by the Defendant under the mark **KORKAL**. The mark used is **KORKAL MAX**. This is also said to be a Coral Calcium Tablet, with certain additions. A sample of the carton is at Exhibit “H” at page 84 and Mr Jamsandekar points out that the infringement and passing off is obvious *inter alia* this to the sheer carelessness of the Defendants. On the carton itself while extolling the benefits of the rival product, the Defendants have used the name of the Plaintiffs’ product. The inscription on the carton says “*Corcal Max is an excellent dietary supplement*” — but **CORCAL MAX** is the Plaintiffs’ product, not the Defendant’s.

6. I should imagine the entire application for ad-interim relief at this *prima facie* stage is sufficiently established simply on this. As to question of similarity, there can be no doubt. There is phonetic, structural and visual similarity. That this is confusing and deceptive is also undeniable.

7. On the question of passing off, I have very little doubt that the Plaintiffs have been able to make out a sufficient *prima facie* case on all three of the necessary tests. Reputation is established from two distinct angles. First, there is a clear identification of the product with the brand name and the source. The brand name **CORCAL** is only linked to the Plaintiffs and to no one else. When consumers buy such a product, they asked for the brand CORCAL and not a Coral Calcium tablet in a generic sense. Added to this, of course, is the factum of sales and expenses though that may not be in itself determinative in establishing reputation because what is required to be done is to show that persons buy the product by its source or brand. But perhaps the best proof is the Defendant's adoption of a mark that is so similar to that of the Plaintiffs' and, of course, their telling slip in the text on the carton to which Mr Jamsandekar has (somewhat gleefully) drawn my attention. There can be no other explanation for the Defendants' adoption of the mark except actively to deceive consumers into believing that the Defendant's product is the Plaintiffs'. The entire adoption of the mark seems *prima facie* calculated to deceive. This satisfies the requirement of misrepresentation to the extent necessary at this stage. Actual damage, of course, need not be proved.

8. I am satisfied that there is an ample *prima facie* case is made out for the grant of relief and that the balance of convenience favours the Plaintiff to whom irretrievable prejudice will be caused if the necessary injunctions are not granted.

9. There will, therefore, be an ad-interim order in terms of prayer clauses (a) and (b), which reads thus:

“(a) That pending the hearing and final disposal of the present suit, the Defendants by themselves, its Directors, C&F and other agents, stockists, and/or all other persons claiming through or under them or controlled by them, be restrained by a temporary order and injunction of this Hon'ble Court from using, in any manner/form, directly or indirectly the impugned mark **KORCAL** being Exhibit “H” by itself or in combination with any prefix/suffix or any other similar/deceptively similar mark thereto or similar/deceptively similar to the said trade marks **CORCAL** so as to infringe the Plaintiff's registered trade mark **CORCAL** bearing the registration Nos. 2328770, 2331721, 2331722;

(b) That pending the hearing and final disposal of the present suit, the Defendants by themselves, its Directors, C&F and other agents, stockists, and/or all other persons claiming through or under them or controlled by them, be restrained by a temporary order and injunction of this Hon'ble Court from using, in any manner/form, directly or indirectly the impugned mark **KORCAL** being Exhibit “H” by itself or in combination with any suffix or any other similar/deceptively similar mark thereto or similar/deceptively similar to the said trade marks **CORCAL** so as to pass-off or enable others to pass-off the goods of the Defendants as and for the goods of the Plaintiff

or as being associated with or emanating from or having any connection with the Plaintiff;”

10. Affidavit in Reply to be filed and served on or before 30th June 2017. Affidavit in Rejoinder, if any, to be filed and served on or before 31st October 2017.

11. List the Notice of Motion for hearing and final disposal on 30th November 2017.

12. The ad-interim reliefs will continue to operate until the hearing and final disposal of the Notice of Motion.

(G. S. PATEL, J.)