

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 25.01.2017

PRONOUNCED ON: 10.02.2017

CORAM:

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

CS.No.387 of 2009

Apex Laboratories Private Limited
Chennai-18

Plaintiff

Vs

M/s.Sidpha Laboratories, Mumbai-16

Defendant

Prayer:- This Civil Suit is filed under Order IV Rule 1 of the Original Side Rules read with Order VII Rule 1 of CPC and read with Sections 134 and 135 of the Trade Marks Act, 1999 and Sections 55, 58 and 62 of the Copyright Act, 1957, for the reliefs as stated therein.

For Plaintiff : Mr.R.Sathish Kumar

For Defendant : Set Exparte

JUDGEMENT

This civil suit has been filed, to pass a judgement and decree, against the Defendant:-

- a) granting permanent injunction, restraining the Defendant from in any manner infringing the Plaintiff's registered trade mark ZINCOVIT by using the offending trade mark ZINCOVIT or any other mark or marks which are identical and similar to the Plaintiff's registered trade mark ZINCOVIT.
- b) granting permanent injunction, restraining THE

Defendant from in any manner infringing the Plaintiff's copyrighted artistic work ZINCOVIT by using the offending artistic work ZINCOVIT or any other work or works which are identical and similar to the Plaintiff's registered copyrighted artistic work ZINCOVIT.

- c) granting permanent injunction restraining the Defendant from in any manner passing off of its pharmaceutical products bearing the offending trade mark and the artistic work ZINCOVIT as and for the celebrated pharmaceutical products of the Plaintiff bearing the registered trade mark and the copyrighted artistic work ZINCOVIT either by manufacturing, selling or offering for sale or in any manner advertising the same.
- d) directing the Defendant to surrender to the Plaintiff the entire stock of unused offending cartons bearing the offending trade mark ZINCOVIT together with blocks and dyes for destruction.
- e) directing the Defendant to render true and faithful accounts of profits earned by the Defendant through the sale of pharmaceutical products sold under the offending trade mark ZINCOVIT and directing payment of such profits to the Plaintiff for the passing off committed by the Defendant.
- f) directing the Defendant to pay the costs of the suit to the Plaintiff.

2. The case of the Plaintiff is that the Plaintiff is carrying on the business of manufacturing and selling of pharmaceutical products. The Plaintiff had adopted the trade mark ZINCOVIT on 16.3.1988 for their products, namely syrups and tablets and had obtained registration of the said trade mark under No.487453 in Class 5, which is still in force. The Plaintiff had also obtained drug licence on 9.3.1990 and commenced sales of their products under the said trade mark. The Plaintiff had also registered their carton ZINCOVIT under the

Copyright Act, 1958, under No.A-54243/97. The Plaintiff had also spent huge amounts for promoting the sales of their products under the said trade mark in all types of media. The sales turnover has been increasing every year. The products of the Plaintiff had attained very great reputation in the market. The Plaintiff had also filed suits against the third parties and obtained an order of interim injunction against the said parties.

3. It had been further stated in the plaint that the Plaintiff came to know in April 2009 that the Defendant had started manufacturing and selling pharmaceutical products under the identical carton bearing the offending artistic work and the trade mark ZINCOVIT. The Defendant had copied the trade mark as well as the copyrighted artistic work of the Plaintiff with a view to enrich themselves unjustly on the reputation and goodwill built up by the Plaintiff. It had been further stated that use of the same is bound to create confusion in the market. By use of the offending trade mark by the Defendant, the Plaintiff would be put to irreparable loss, hardship and injury, which cannot be compensated in terms of money. Hence, this civil suit has been filed for the reliefs as stated above.

4. Though the Defendant was served long back, no written statement had been filed and hence, the matter was posted under the caption of 'Undefended Board'. For non filing of the Written Statement, the Defendant was set exparte on 20.09.2010 and Exparte Evidence was ordered to be recorded. One N.Lalitha, Senior Executive (Legal) of the Plaintiff Company had filed the

proof affidavit for his chief examination and receipt of 6 documents. In the Exparte Evidence, the Senior Executive had examined himself as PW.1 and marked Exs.P1 to P6 as documentary evidence.

5. In this civil suit, the Plaintiff had sought for the reliefs (a), (b), (c), (d) and (e) relating to infringement of the trademark, infringement of the copyrighted artistic work and passing off the trade mark of the Plaintiff by the Defendant and to surrender of the materials by the Defendant for destruction and render of accounts of profits by the Defendant, respectively.

6. In respect of the reliefs (a) to (d), apart from the fact that the Defendant did not let in evidence whatsoever and remained exparte, this court finds that there are valid evidence, both oral and documentary, adduced by the Plaintiff. Therefore, taking into consideration the materials on record and there was also payment of court fee by the Plaintiff, this Court is of the view that the reliefs (a) to (d) as prayed for by the Plaintiff can be granted along with costs.

7. In so far as the relief (e), namely, to pass a judgement and decree, directing the Defendant to render accounts of profits made by the Defendant on account of the usage of the trademark and copyright of the Plaintiff by the Defendant is concerned, though for non filing of the written statement, the Defendant had been set exparte, which resulted in recording of the exparte evidence, in order to sustain such a claim for rendering of accounts of profits, there should be valid evidence on the side of the Plaintiff, but, on a perusal of the oral and documentary adduced by the Plaintiff, this court finds no valid

evidence both oral and documentary to show that the Plaintiff had sustained loss of profit because of the use of the trademark and copyright of the Plaintiff by the Defendant. The Plaintiff also did not produce any evidence to show that the Defendant had unlawfully gained against the Plaintiff. Therefore, in the absence of any evidence, showing that the Plaintiff had directly suffered and incurred business loss owing to the usage of the trademark and copyright of the Plaintiff by the Defendant, this court holds that the relief (e) sought for by the Plaintiff for a direction to render accounts of profits would not lie and accordingly, the same cannot be granted.

8. In the result, considering the oral and documentary evidence, viz. Ex.P1 to Ex.P6 adduced by PW.1, this Court is of the view that the Plaintiff has proved the suit claim only in respect of the reliefs (a) to (d) and that the Plaintiff has failed to prove the relief (e) by letting in legally acceptable oral and documentary evidence. Accordingly, this civil suit is decreed only in respect of the reliefs (a) to (d) as prayed for with costs. In so far as the relief (e) is concerned, this civil suit is dismissed.

10.02.2017

Index:Yes/No
Web:Yes/No
Srcm

1. List of Witnesses Examined on the side of the Plaintiff:-

1. P.W.1 - N.Lalitha

2. List of Exhibits Marked on the side of the Plaintiff:-

S.No	Exhibit	Description	Date
1	Ex.P. 1	Resolution passed by the Board of Directors of the plaintiff company	
2	Ex.P. 2	Certified copy of the registration certificate	17102016
3	Ex.P. 3	Attested photocopy of the copyright registration certificate for the trademark ZINCOVIT	22101997
4	Ex.P. 4	Attested photocopy of the drug license issued in favour of the plaintiff	09031990
5	Ex.P. 5	Carton of the plaintiff for the trademark ZINCOVIT	15122010
6	Ex.P. 6	Defendants carton ZINCOVIT	

3. List of Witnesses Examined on the side of the Defendant:-

Nil

4. List of Exhibits Marked on the side of the Defendant:-

Nil

10.02.2017

C.V.KARTHIKEYAN, J.

Scm

Pre-Delivery Judgement in
CS.No.387 of 2009

10.02.2017

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