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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CS(COMM) 1315/2016

M/S.ANTEX PHARMA PVT LTD Plaintiff

Through: Mr. Sumit Rajput, Advocate.

versus

PURECA LABORATORIES (P) LTD & ORS Defendants

Through: None

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Date of Decision: 19th December, 2017

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J: (Oral)

1. Present suit has been filed for permanent injunction restraining violation of copyright by way of infringement and violation of rights in trademark/trade dress/label/package by way of passing off, unfair competition, dilution, rendition of accounts/damages, delivery up etc.

The prayers made in the suit are reproduced hereinbelow:-

“a. a decree for permanent injunction restraining the Defendants, their partners or proprietor as the case may be, their assigns in business, distributors, licensees and dealers from manufacturing, selling, offering for sale, advertising, directly or indirectly dealing in pharmaceuticals preparation including liver

tonics etc. or any other pharmaceuticals products under the impugned LIVRON-DS & LIVO Power DS packaging or any other packaging as may be a slavish or colourable imitation or substantial reproduction of LIVON-DS packaging in respect of colour combination, get up, lay out and arrangement of features, amounting to infringement of copyright of the Plaintiff therein.

- b. a decree for permanent injunction restraining the Defendants, their partners or proprietor as the case may be, their assigns in business, distributors, licensees and dealers from manufacturing, selling, offering for sale, advertising, directly or indirectly dealing in pharmaceuticals preparation including liver tonics etc. or any other pharmaceuticals products under the impugned trade mark(s) LIVRON-DS & LIVO Power DS and/or packaging pertaining thereto or any other trade mark(s) or packaging as may be identical to or deceptively similar with the Plaintiff trade mark LIVON-DS and/or packaging pertaining thereto as may lead to confusion or deception amounting to passing off of Defendants' goods or business for those of the Plaintiff or as may amount to unfair competition;*
- c. a decree directing the Defendants to deliver up all the infringing and impugned packaging, printed rolls of infringing packaging, machinery and equipments used in printing the infringing packaging, printing cylinders, their blocks, negatives or dyes, as the case may be, to an authorised representative of the Plaintiff for destruction and also provide the details of the other persons involved in printing the infringing packaging materials;*
- d. an order for rendition of accounts of profit illegally earned by the Defendants and a decree for an amount*

so found due or in the alternative, a decree for Rupees Twenty Lakhs (Rs. 20,00,000/-) towards compensatory and penal damages may be passed in favour of the Plaintiff and against the Defendants;

- e. award exemplary costs of the present proceedings in favour of the Plaintiff and against the Defendants; and*
- f. any other order as this Hon'ble Court deems fit and proper in the facts and circumstances of this case."*

2. At the outset, learned counsel for plaintiff gives up prayers (c) and (d) of the prayer clause to the suit. The statement made by learned counsel for plaintiff is accepted by this Court and plaintiff is held bound by the same.

3. Vide order dated 22nd May, 2015, this Court granted an ad interim injunction in favour of the plaintiff and against the defendants. The relevant portion of the ex-parte injunction order is reproduced hereinbelow:-

"In the circumstances, till the next date of hearing, the defendants, their proprietor or partners, their assignees in business, distributors, stockists, dealers, and agents are restrained from manufacturing, selling, offering for sale, exporting, advertising, directly or indirectly dealing in LIVRON-DS and LIVO POWER DS bearing the impugned packaging/get-up or any other packaging/get-up as may amount to imitation of the plaintiff's packaging/get up of LIVON-DS amounting to infringement of Copyright registration No. A-111144.

The plaintiff shall comply with the provisions of Order XXXIX, Rule 3 of the CPC within three days."

4. In the plaint it is stated that, the plaintiff is amongst one of the largest and highly reputed pharmaceutical companies in India and is known for specialty medicines like Anti-Retroviral, Anti-Asthmatics, Antibiotics, Anti-fungal, etc. It is stated that plaintiff launched a new liver tonic syrup range, for treatment of liver ailments, under the brand name LIVON-DS, in the year 2009. It is stated that the trademark application for the mark LIVON-DS under class 5 of the Trade Marks Act, 1999 is still pending.

5. It is stated in the plaint that the plaintiff's liver tonic syrup is manufactured and marketed under the trade mark LIVON-DS in a distinctive trade dress and packaging. It is averred in the plaint that the plaintiff's LIVON-DS packaging has been extensively used by the plaintiff and has a unique and impressionable overall get up and visual features which, when arranged together, render a distinctive visual appearance thereto, which is described hereinbelow:

- a. The LIVON-DS packaging is a rectangular shaped packaging having colour combination of orange, white and dark green;
- b. The packaging comprises a orange background with LIVON-DS written in stylized and bold white colour lettering;
- c. The trade name/house mark ANTEX appears within a dark green circle in dark green lettering;
- d. The left and right sides of the trade mark LIVON-DS are characterized by a white band and a dark green respectively with descriptive matters appearing thereon.

6. It is stated that the plaintiff's LIVON-DS packaging constitutes "original artistic works" within the meaning of section 2(c) of The Copyright Act and the said packaging is registered under the

Copyright Act, 1957.

7. It is further stated that on account of prior adoption, continuous and genuine substantial commercial use, enormous sales and painstaking quality control, the plaintiff's LIVON-DS product and its packaging have acquired enviable goodwill and reputation amongst the members of the public and the trade. The plaintiff's LIVON-DS product is also one of the market leaders in the 'liver tonic' category and enjoys huge trust amongst its consumers.

8. At the outset, learned counsel for the plaintiff states that, even though the plaintiff commenced use of the trademark LIVON-DS, for manufacturing and marketing of the aforesaid drug, from 2009, the plaintiff has invoices evidencing the sale of the drug only from May, 2010.

9. Learned counsel for the plaintiff states that the annual sales of its LIVON-DS product, for the past six financial years is as follows:-

Sl no.	Financial year	Turnover/Sales
1	2009-2010	25,663
2	2010-2011	11,15,918
3	2011-2012	10,40,621
4	2012-2013	30,52,445
5	2013-2014	36,09,756
6	2014-2015	48,59,985
Total		1,37,04,388

10. Learned counsel for the plaintiff states that in the fourth week of March 2015, the plaintiff purportedly came to know about the sale of liver tonic by the defendants under the impugned trade mark(s) LIVRON-DS and LIVO Power DS and its packaging. He states that the defendants are deliberately marketing their liver tonic, medicinal preparation etc. under the trade mark(s) LIVRON-DS and LIVO Power DS and in the packaging, which are slavish imitation of the plaintiff's trade mark LIVON-DS and the plaintiff's packaging of its product LIVON-DS. A comparison of the plaintiff and defendants packaging of its product is reproduced hereinbelow:-

Plaintiff's Product



Defendants' Product



11. He states that the defendants have adopted the trademark LIVRON-DS and LIVO Power DS for its liver tonic, which is

structurally as well as phonetically deceptively similar to the plaintiff's trademark, LIVON-DS. He further states that the defendants have deliberately imitated the distinctive LIVON-DS logo and have written LIVRON-DS and LIVO Power DS, comprising of an orange background written in stylized and bold white colour lettering, similar to that of the plaintiff's product LIVON-DS.

12. Learned counsel for the plaintiff contends that the use of the impugned trade mark(s) LIVRON-DS and LIVO Power DS and the packaging pertaining thereto by the defendants, amounts to misrepresentation and misappropriation of the plaintiff's goodwill in the trade mark LIVON-DS and their packaging. He states that such act constitutes unfair competition and dilution and sale of such infringing goods by the defendants would lead to the sale of spurious goods.

13. He states that the sale of such infringing goods would also lead the unwary public to believe that the goods offered by the defendants are associated with/or have a nexus to the plaintiff and the plaintiff is likely to suffer irreparable harm and damage by reason of this erroneous belief.

14. Learned counsel for the plaintiff also mentions that the defendant no.1 has stated in its written statement that they have already discontinued the use of the impugned trade dress.

15. The plaintiff has filed its ex-parte evidence by way of affidavit of Mr.Amardeep Bansal (PW1). The plaintiff's witness has proved the packaging pertaining to its trade mark LIVON-DS as Ex.PW1/4. The PW1 has further proved the copy of the registration certificate pertaining to the copyright in LIVON-DS packaging in favour of the

plaintiff as Ex.PW1/7. The witness has also proved the CA certificate pertaining to the plaintiff's annual turnover as Ex.PW1/8. PW1 has proved the specimen sales invoices pertaining to the plaintiff's trademark LIVON-DS as Ex.PW1/9(Colly).

16. Having heard learned counsel for plaintiff as well as having perused the papers, this Court is of the view that due to extensive use over substantial period of time, the plaintiff's trade mark/ trade dress/label/package have acquired reputation and goodwill in India.

17. From the evidence on record, it is apparent that without any explicit permission or authorization, the defendants have malafidely used the plaintiff's trade mark/trade dress/package/label as developed in respect of LIVON-DS liver tonic.

18. The defendant No.1 has stated in its defence that the word "liv" has become public juris and is generic to the trade in the field of pharmaceuticals. However, the defendants have not filed any evidence or even divulged any information so as to substantiate their claim about the said trade mark. Consequently, the said defence is rejected.

19. Further, as the plaintiff's evidence has gone un rebutted, said evidence is accepted as true and correct. The Supreme Court in ***Ramesh Chand Ardawatiya Vs. Anil Panjwani, AIR 2003 SC 2508*** has held as under:-

"33.In the absence of denial of plaint averments the burden of proof on the plaintiff is not very heavy. A prima facie proof of the relevant facts constituting the cause of action would suffice and the court would grant the plaintiff such relief as to which he may in law be found

entitled. In a case which has proceeded ex parte the court is not bound to frame issues under Order 14 and deliver the judgment on every issue as required by Order 20 Rule 5. Yet the trial court should scrutinize the available pleadings and documents, consider the evidence adduced, and would do well to frame the "points for determination" and proceed to construct the ex parte judgment dealing with the points at issue one by one. Merely because the defendant is absent the court shall not admit evidence the admissibility whereof is excluded by law nor permit its decision being influenced by irrelevant or inadmissible evidence."

20. Consequently, the allegation of the plaintiff that the trademark/trade dress/label/packaging used by the defendants amounts to infringement of copyright in packaging and passing off with respect to the trademark of the plaintiff stands proved. The use of the impugned mark and packaging by the defendants is also bound to cause incalculable losses, harm and injury to the plaintiff and immense public harm.

21. Accordingly, present suit is decreed in accordance with the prayers (a) and (b) of the plaint along with the actual costs incurred by the plaintiff. The cost shall, amongst others, include the lawyers' fees as well as the amounts spent on purchasing the court fees. Registry is directed to prepare a decree sheet accordingly.

MANMOHAN, J

DECEMBER 19, 2017

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