

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

% Decided on: 27th July, 2017

+ **CS(COMM) 1328/2016**

GLAXO GROUP LIMITED Plaintiff

Represented by: Ms. Shwetasree Majumdar, Ms.
Tanya Varma and Mr. Utkarsh
Joshi, Advocates.

versus

AAR ESS REMEDIES PRIVATE LIMITED & ORS..... Defendants

Represented by: None.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

I.A. No. 11786/2016 (under Order XI Rule 1 (4) (as amended by the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015)

1. By this application the plaintiff had sought leave to file the additional documents if need be.
2. Learned counsel for the plaintiff seeks to withdraw the application as no further documents are required to be filed.
3. The application is dismissed as withdrawn.

I.A. Nos. 11787/2017 and 8435/2017 (under Section 151 CPC)

1. By this application the plaintiff seeks to place the figures relating to the sales and promotional expenditure incurred by the plaintiff towards sale of products under its trademarks FORTUM, FORTAM, ZINACEF, AUGMENTIN and FORTAZ and towards promotion of trademark in sealed cover.

2. The documents have already been placed in sealed cover and are taken on record.

3. Application is disposed of.

CS(COMM) 1328/2016 and I.A. No. 8434/2017 (under Order XIII Rule 2 CPC-by plaintiff)

1. Plaintiff in the present suit has sought the following reliefs:

- “(a) An order of permanent injunction restraining the Defendants, their partners, proprietors, servants, agents, affiliates, sister concerns and all other in active concert or participation with them from manufacturing, selling, offering for sale, advertising, directly or indirectly dealing in products that are identical or deceptively similar to the plaintiff’s registered trademarks, thus amounting to an infringement thereof.*
- (b) An order of permanent injunction restraining the defendants, their partners, proprietors, servants, agents, affiliates, sister concerns and all other in active concert of participation with them from manufacturing, selling, offering for sale, advertising, directly or indirectly dealing in products bearing trademarks, product packaging or trade dress that is identical or deceptively similar to the plaintiff’s trademarks, product packaging or trade dress so as to pass off their goods and business as those of the plaintiffs.*
- (c) An order for permanent injunction restraining the defendants, their partners, proprietors, servants, agents and all others in active concert or participation with them from manufacturing, selling, offering for sale, advertising directly or indirectly dealing in products in packaging that is an infringement of the plaintiff’s copyrights;*
- (d) An order for rendition of accounts of profits directly or indirectly earned by the defendants from the infringing*

activities and wrongful conduct and a decree for the amount so found due to be passed in favour of the plaintiffs;

- (e) An order for delivery up to the plaintiffs by the defendants of all infringing goods, advertising material, blocks, dies, etc. bearing the plaintiff's trademarks, trade dress and/or product packaging for the purpose of erasure/destruction;*
- (f) A sum of ₹1,00,01,000/- for a decree of damages as valued for the purpose of this suit towards loss of sales, reputation and goodwill of the plaintiff's trademark, trade dress and copyright caused by the activities of the defendants.*
- (g) An order for costs in the present proceedings”*

2. Summons in the suit were issued to the defendants on 28th September, 2016 and an ex parte ad interim order was passed in favour of the plaintiff and against defendants, their partners, proprietors, servants, agents etc. from selling, offering for sale, advertising, directly or indirectly dealing in products bearing marks, packaging or trade dress that is identical or deceptively similar to the trade marks FORTUM, FORTAM, FORTAZ, AUGMENTIN and ZINACEF. Defendant Nos. 1, 2 and 3 were served on 28th December, 2016, 5th November, 2016 and 3rd November, 2016 respectively. However, neither anyone appeared on their behalf nor any written statement was filed within the stipulated statutory period on their behalf. Thus the defendants were proceeded ex-parte vide order dated 1st February, 2017.

3. By I.A. No. 8434/2017 the plaintiff prays for summary judgment in terms of Order XIII-A Rule 2 read with Section 151 CPC. Though as per

Order XIII-A CPC at least 30 days notice to the defendants is required to be issued before fixing the suit for hearing on summary judgment; as noted, the defendants have already been proceeded ex-parte vide order dated 1st February, 2017. Thus summary judgment can be passed on the basis of pleadings accompanied by the statutory affidavits under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 and the documents filed.

4. As per the plaint, plaintiff is a British Pharmaceutical Company, headquartered in London, United Kingdom. The plaintiff carries out its business in India through its wholly owned subsidiary Glaxosmithkline Pharmaceutical Ltd. incorporated under the Companies Act, 1956 having its registered office in Mumbai and a branch office at E-339, Ground Floor, Greater Kailash, New Delhi-110048. The plaintiff is stated to be one of the World's leading global healthcare company responsible for research and development of a broad range of innovative products in pharmaceuticals, vaccines and consumer healthcare.

5. The present suit relates inter alia to the following trademarks of the plaintiff namely FORTUM, FORTAM, AUGMENTIN and ZINACEF which are registered in favour of the plaintiff in India. The plaintiff is also the proprietor of trademark FORTAZ which is registered in several countries of the world including United Kingdom, United States and Canada since 1983, 1984 and 1986 respectively. By virtue of trademark FORTAZ registered in various countries resulting in immense trans-border and spill over reputation the plaintiff is also the common law owner of the trademark FORTAZ in India.

6. The trademark FORTAZ, which is used overseas in respect of the plaintiff's injectable antibiotic product containing the active ingredient ceftazidime, is sold in India under the trademark FORTUM since 1989. This product has acquired immense reputation and goodwill over the years. The plaintiff has invested huge amounts of money in various commercial activities of their product in order to develop the brand FORTUM in India.

7. The trademark AUGMENTIN was adopted by the plaintiff in the year 1978 and was launched in the United Kingdom in the year 1981. This brand was first launched in India in the year 1994 and has acquired a reputation of the most trusted drug of pediatricians in India. The plaintiff is not only the proprietor of the trademark AUGMENTIN but of all the composite marks containing the word AUGMENTIN such as AUGMENTIN ES-600, AUGMENTIN XR, AUGMENTIN XL, AUGMENTIN DUO etc.

8. The plaintiff is also the proprietor of the trademark ZINACEF.

9. The plaintiff has adopted a distinctive packaging for its product with the trademark AUGMENTIN which consists of a green and white colour combination. The word AUGMENTIN appears in white text enclosed in a green coloured rectangular box with a white and green outer packaging. The plaintiff has used the same packaging continuously and extensively since the year 2008. The overall layout getup and colour scheme of product AUGMENTIN constitutes the trade dress of the plaintiff. This also qualifies as an original artistic work within the meaning of Section 2(c) of the Copyright Act, 1957.

10. Cosmas Research Lab Ltd. (defendant No.3) is the manufacturer and AAR ESS Remedies Pvt. Ltd. (defendant No.1) is the marketer of an antibiotic formulation under the mark MERRYCLAV DUO which is for the

same active substance as the plaintiff's product being sold under the trademark AUGMENTIN DUO and therefore for identical goods. The defendants' product, apart from its use of an identical suffix 'DUO' as the plaintiff is also being sold in an identical trade dress and product packaging. Cosmas Pharmceals Limited (defendant No.2) is the sister concern of defendant No. 3 and has applied for registration of the mark FORTAZ in Class 5 which is identical to the plaintiff's trademark.

11. The packaging comparing the plaintiff's and the defendants' product is reproduced as under:

Plaintiff's packaging :



Defendant's packaging :



12. A chart comparing the plaintiff's and defendants' product is as under:

Plaintiff's product	Defendants' product
The packaging has a unique colour scheme of green and white with a red line on the left side of the package.	The packaging has an identical colour scheme of green and white with a red line on the left side of the package.
The trademark of the plaintiff's AUGMENTIN is written in white letters enclosed in a green rectangular box.	The name of the product MEERYCLAV is written in identical white letters enclosed in a green rectangular box.
On the reverse side of the packaging, the same colour scheme, of green and white is present along with a red line on the left side of the package.	On the reverse side of the packaging, the identical green and white colour scheme is maintained along with the same red line on the left side of the package.
AUGMENTIN is written in white letters enclosed in a rectangular box with a green backdrop.	MERRYCLAV is written in white letters enclosed in a rectangular box with a green backdrop.
The word 'DUO' written in green font in a stylized manner appears next to the rectangular box containing the word AUGMENTIN on both the front and the back.	The word 'DUO' written in green font in an identical style appears next to the rectangular box containing the word MERRYCLAV on both the front and the back.

13. Despite the legal notice sent by the plaintiff to the defendant No. 3 on 1st March, 2016 and reminder to legal notice in April, 2016, the defendant No. 3 did not respond and continued with the infringing activities. In July, 2016 the plaintiff came across an application in Trademarks Journal for the mark FORTAZ which was filed in the name of defendant No. 2. The plaintiff found out that the defendant No. 2 had applied for registration of the mark FORTAZ in November, 2011 on the basis of a claim of ‘proposed use’. The plaintiff also discovered that defendant No.2 had also applied for registration of the mark ZENACEF under No. 2240585 in Class-5 which is deceptively similar to the plaintiff’s trademark ZINACEF registered under No. 334233 in Class-5 since 9th March, 1978.

14. Thus as per the plaintiff the defendants are guilty of following wrongs:

- (a). Adoption of the trademarks FORTAZ and ZENACEF which are infringing variants of the plaintiff’s trademarks FORTAM/FORTUM and ZINACEF.
- (b). Adoption of the trademark FORTAZ for use on products that would be passed off as the plaintiff’s products on account of the plaintiffs’ proprietorship and use of the trademark FORTAZ overseas.
- (c). Passing off the defendants products under the mark MERRYCLAV DUO for and as the products of the plaintiff under the trademark AUGMENTIN DUO in deceptively similar product packaging, including the infringement of the plaintiff’s copyright in the said product packaging.
- (d). Passing off the defendants’ business and products as being authorized by or emanating from the plaintiff.

15. To substantiate claim in respect of prayer (a) in the plaint the plaintiff has placed on record copies of the registration certificates and proof of renewal thereto of its trademarks in India. Documents filed in respect of AUGMENTIN are at page 10 in the documents file; in respect of FORTUM at page 17; in respect of FORTAM at page 20 and in respect of ZINACEF at pages 22/23. In respect of infringement of its trademark ZINACEF, FORTUM and FORTAM as noted above the plaintiff claims quia timet action on the basis of applications filed by the defendants in respect of pharmaceutical drugs FORTAZ and ZENACEF, on discovery by the plaintiff pursuant to publication in the Trademarks Journal on 30th May, 2016 wherein defendant No.2 claims the drugs 'proposed to be used'. The defendant's claim for the mark ZENACEF which was 'proposed to be used' by the defendants infringes the trademark of the plaintiff's trademark ZINACEF directly. Further a proposed user of trademark FORTAZ also infringes the plaintiff's trademark FORTAM being a variant only by change of one word that is 'Z' replacing 'M'. Further plaintiff has also placed on record that it is a proprietor of trademark FORTAZ for a similar drug globally in the countries like United States of America, Canada and United Kingdom etc.

16. As regards use of the trade dress by defendants in respect of drug MERRYCLAV 625 DUO the plaintiff has placed on record packages which are similar to the design and pattern of the plaintiff's drug AUGMENTIN 625 DUO for the same salt, that is, amoxicillin, clavulanic acid tablet. A purchase invoice dated 1st December, 2015 for the drug MERRYCLAV 625 DUO has been placed on record at page 9 of the documents file.

17. The defendants have been proceeded ex-parte and thus have not rendered accounts of profits. No party can be permitted to benefit by evasion of court proceedings. In view of the infringement of the plaintiff's trademarks ZINACEF and FORTAM/FORTAZ, passing off the plaintiff's trademark FORTAX which enjoys an international reputation and trade dress and passing of the plaintiff's copyright in the packaging for the drug AUGMENTIN 625 DUO having been proved, the plaintiff is entitled to injunction and damages.

18. This Court in the decisions reported as 2013 (53) PTC 441 Glaxo Group Ltd. vs. Rajesh Bansal & Ors., 196 (2013) DLT 296 Ranbaxy Laboratories Ltd. vs. Crystal Pharmaceuticals and 2013 (54) PTC 357 (Del) Macleods Pharmaceuticals Limited vs. Procare Laboratories Pvt. Ltd. awarded punitive damages for a sum of ₹5 lakhs for infringement of a single trademark.

19. In the present case in view of the multiple violations, this Court deems it fit to grant compensatory and punitive damages of ₹20 lakhs in favour of the plaintiff and against the defendants.

20. Consequently, the suit is decreed in favour of the plaintiff and against the defendants jointly and severally in terms of prayers (a), (b) and (c) and damages to the tune of ₹20 lakhs are awarded in favour of the plaintiff and against the defendants jointly and severally.

21. The suit is accordingly disposed of.

(MUKTA GUPTA)
JUDGE

JULY 27, 2017
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