

\$~

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

+ **CS(OS) 1857/2015 & I.A. 12950/2015**

M/S. WOCKHARDT LIMITED Plaintiff
Through: Mr. Ankit Sahni, Advocate.

versus

ZENITH REMEDIES PVT. LTD. Defendant
Through: None.

% Reserved on : 17th August, 2017
Date of Decision: 25th August, 2017

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J

1. Present suit has been filed for permanent injunction restraining infringement of trade mark and copyright, passing off, delivery up, and damages etc. The prayer clause in the plaint is reproduced hereinbelow:-

“(i) For an order for perpetual injunction restraining the Defendant, its directors, principal officers, servants, retailers, stockiest, distributors, representatives and agents from manufacturing, selling, offering for sale, stocking, advertising, directly or indirectly dealing in any pharmaceutical products or any allied and cognate products under the impugned trademark SPASMO-DON or any other trade mark/marks which are identical/deceptively similar to the Plaintiff's said registered trademarks 'SPASMO-PROXYVON' and 'SPASMO-D' amounting to infringement of the aforesaid registered trademarks of the Plaintiff.

(ii) *For an order for perpetual injunction restraining the Defendant, its directors, principal officers, servants, retailers, stockiest, distributors, representatives and agents from manufacturing, selling, offering for sale, stocking, advertising, directly or indirectly dealing in any pharmaceutical products or any allied and cognate products under the impugned infringing artistic cartons/blister packs which are colourable limitation of the Plaintiff's artistic cartons/blister packs amounting to an infringement of the Plaintiff's copyright.*

(iii) *For an order for perpetual injunction restraining the Defendant, its directors, principal officers, servants, retailers, stockiest, distributors, representatives and agents from manufacturing, selling, offering for sale, stocking, advertising, directly or indirectly dealing in any pharmaceutical products or any allied and cognate products under the impugned trademark SPASMO-DON or any other trade mark/marks which are identical/deceptively similar or have an identical/deceptively similar getup placement, colour combination etc. to the Plaintiff's said registered trademark 'SPASMO-PROXYVON' and its products packagings amounting to passing off.*

(iv) *For an order for Rs.15 lacs as damages suffered by the Plaintiff on account of the illegal trade activities of the Defendant by using the impugned infringing trade mark SPASMO-DON.*

(v) *For an order for Rs.5 lacs as punitive damages against the Defendant for knowingly and deliberately indulging in illegal trade activities by adopting and using the impugned trade mark and infringing artistic packaging for its product 'SPASMO-DON'.*

(vi) *For an order for delivery for purposes of destruction of all impugned cartons, capsules, blister packs, packaging*

material, labels, dies, boxes, advertising material, etc. and any other infringing copies or media used by the Defendant in pursuit of their illegal activities.

(vii) For an order directing the Defendant to disclose on oath and by way of filing unimpeachable documentary evidence the details about their stockiest, distributors, wholesalers, agents/sub-agents, etc. and the extent of business carried out by the Defendant including the details of their various movable and /or immovable assets including their bank account(s).

(viii) For costs in the proceedings.

(ix) For such further relief/reliefs to which the Plaintiff be entitled looking into the facts and circumstances of the case.”

2. At the very outset, the learned counsel for the plaintiff stated that he wished to press only prayers (i), (ii), (iii) and (viii) of the plaint. He specifically gave up his claim for delivery up, disclosure, damages and punitive damages.

3. On 03rd July, 2015, this Court granted an ex-parte ad interim injunction in favour of the plaintiff and against the defendant. The relevant portion of the said order is reproduced hereinbelow:-

“In the circumstances, till the next date of hearing, the defendant, its directors, principal officers, servants, stockists, distributors, agents and retailers are restrained from manufacturing itself, permitting others to manufacture on its behalf, selling, offering for sale, advertising, directly or indirectly dealing in any pharmaceutical goods or any other allied and cognate goods under the deceptively similar trade mark “SPASMO-DON” or any trademark which is identical or deceptively similar to the registered trade mark “SPASMO-PROXYVON” of the plaintiff.”

4. Since defendant did not enter appearance despite service, it was proceeded ex parte vide order dated 19th November, 2015. However, on 12th July, 2016, the defendant appeared through counsel and sought time to file an appropriate application for setting aside ex parte order. On 01st September, 2016, the counsel for defendant confirmed that the aforesaid application had been filed vide Diary No.220335. Subsequently, on 25th November, 2016, the counsel for defendant further stated that he had filed his Vakalatnama in the month of September, 2016 vide Diary No.20330. On 19th April, 2017, the counsel for defendant failed to appear in Court and therefore, the plaintiff tendered ex parte evidence in support of its case.

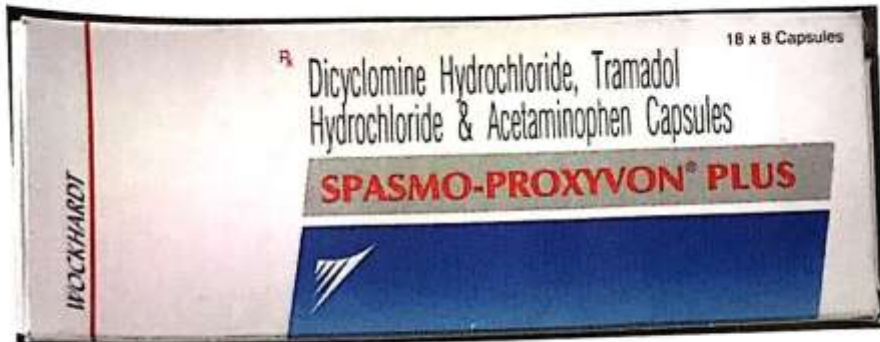
5. It is the plaintiff's case that plaintiff company is a leading manufacturer of Pharmaceuticals preparations etc. and has been carrying on its business since last than more than four and half decades having a worldwide turnover in 2014 of Rs.4,830 crores.

6. It has been further stated in the plaint that plaintiff in the month of January, 1977, invented/coined and adopted a distinctive trade mark SPASMO PROXYON and the same is registered under Class 5 of the Trade Marks Act, 1999. Apart from the said trade mark, the plaintiff has several other similar trademarks which have been registered namely, SPASMO PROXIVAN, SPASMO-PROXYVON, SPASMO-PROXYVON FORTE and SPASMO-D.

7. It is also stated in the plaint that plaintiff is the owner of Copyright in the distinctive artistic feature comprising the aforesaid blister packaging as well as the cartons. The plaintiff is the first publisher and lawful owner of the same.

8. Learned counsel for plaintiff stated that in the third week of June, 2015, it came to the plaintiff's knowledge that defendant is engaged in manufacturing and selling a similar pharmaceutical product with deceptively similar trade mark/packaging i.e. SPASMO-DON. The comparison of plaintiff's and defendant's product is reproduced hereinbelow:-

PLAINTIFF'S PRODUCT



DEFENDANT'S PRODUCT



9. The plaintiff has filed its evidence by way of affidavit of PW-1 Mr. Vinay Kumar Taneja.

10. PW-1 has proved the registration certificates of the plaintiff's trade marks as Ex.PW-1/3 to Ex.PW1/8. PW-1 has further proved that the mark SPASMO-PROXYVON is in continuous use by the plaintiff and proved the invoices of sales being Ex.PW1/11 to Ex.PW1/51. The witness has also proved the infringing carton and product of the defendant as Ex.PW1/52 and Ex.PW1/53 respectively.

11. Having heard learned counsel for the plaintiff and having perused the ex parte evidence as well as documents placed on record, this Court is of the opinion that plaintiff has proved the facts stated in the plaint and has also exhibited the relevant documents in support of its case. Since the plaintiff's evidence has gone unrebutted, said evidence is accepted as true and correct.

12. Consequently, the allegations that the adoption of impugned trademark 'SPASMO-DON' and its packaging by defendant amounts to infringement of plaintiff's mark SPASMO- PROXYVON is accepted. This Court is also of the view that the use of impugned mark and similar packaging by the defendant is bound to cause incalculable loss of reputation and loss of sales to the plaintiff.

13. The Supreme Court in ***Cadila Health Care Ltd. versus Cadila Pharmaceuticals, AIR 2001 SC 1952*** with respect to medicinal products has observed as under:

“32. Public interest would support lesser degree of proof showing confusing similarity in the case of trade mark in respect of medicinal products as against other non-medicinal products. Drugs are poisons, not sweets. Confusion between

medicinal products may, therefore, be life threatening, not merely inconvenient. Noting the frailty of human nature and the pressures placed by society on doctors, there should be as many clear indicators as possible to distinguish two medicinal products from each other. It is not uncommon that in hospitals, drugs can be requested verbally and/or under critical/pressure situations. Many patients may be elderly, infirm or illiterate. They may not be in a position to differentiate between the medicine prescribed and bought which is ultimately handed over to them.....

33. The decisions of English courts would be relevant in a country where literacy is high and the marks used are in the language which the purchaser can understand. While English cases may be relevant in understanding the essential features of trade mark law but when we are dealing with the sale of consumer items in India, you have to see and bear in mind the difference in situation between England and India. Can English principles apply in their entirety in India with no regard to Indian conditions? We think not. In a country like India where there is no single common language, a large percentage of population is illiterate and a small fraction of people know English, then to apply the principles of English law regarding dissimilarity of the marks or the customer knowing about the distinguishing characteristics of the plaintiff's goods seems to overlook the ground realities in India. While examining such cases in India, what has to be kept in mind is the purchaser of such goods in India who may have absolutely no knowledge of English language or of the language in which the trade mark is written and to whom different words with slight difference in spellings may sound phonetically the same. While dealing with cases relating to passing off, one of the important tests which has to be applied in each case is whether the misrepresentation made by the defendant is of such a nature as is likely to cause an ordinary consumer to confuse one product for another due to similarity of marks and other surrounding factors. What is likely to cause confusion would vary from case to case. However, the appellants are right in contending that where

medicinal products are involved, the test to be applied for adjudging the violation of trade mark law may not be on a par with cases involving non-medicinal products. A stricter approach should be adopted while applying the test to judge the possibility of confusion of one medicinal product for another by the consumer. While confusion in the case of non-medicinal products may only cause economic loss to the plaintiff, confusion between the two medicinal products may have disastrous effects on health and in some cases life itself. Stringent measures should be adopted specially where medicines are the medicines of last resort as any confusion in such medicines may be fatal or could have disastrous effects. The confusion as to the identity of the product itself could have dire effects on the public health.”

(emphasis supplied)

14. Consequently, present suit is decreed in accordance with prayers (i), (ii) and (iii) of the plaint as well as actual costs incurred by the plaintiff. The costs shall amongst others include the lawyers’ fees as well as the amount spent on purchasing Court-fees. Registry is directed to prepare a decree sheet accordingly.

AUGUST 25, 2017

mk/js

MANMOHAN, J