

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 21.12.2018

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

C.S.No.414 of 2017  
and O.A.Nos.564 to 566 of 2017

M/s.Apex Laboratories Pvt. Ltd.,  
29, IIIrd Floor, SIDCO Garment Complex,  
Guindy, Chennai - 600 032.

.. Plaintiff

Vs.

Dr.Ajaat Shatru,  
trading as Sidpha Laboratories,  
Rameshwari Pariser,  
Rampur Road,  
Patna - 800 006

.. Defendant

This Civil Suit is preferred, under Order VII Rule - 1 of Civil Procedure Code, 1908 and Order IV Rule 1 of O.S Rules of the Madras High Court, read with Sections 27, 28, 29, 134, 135 of the Trademarks Act, 1999 and Sections 51, 55, 62 of the Copyrights Act, 1957, praying to;

a) For a permanent injunction restraining the Defendants, by itself, its partners, men, servants, agents, distributors, stockiest, representatives or any one claiming through or under them from in any manner infringing the plaintiff's registered trademarks ZINCOVIT by using an identical trademark ZINCOVIT as part of their trademark or any other trademark deceptively similar to the plaintiff's registered trademarks with the 7 colour

strips label or in any other manner whatsoever;

b) For a permanent injunction restraining the Defendant, by itself, its partners, men, servants, agents, distributors, stockiest, representatives or any one claiming through or under them from in any manner committing acts of copyright infringement by using, in the course of trade, labels/artistic works which are a substantial reproduction of plaintiffs' registered copyright Under Nos. A-112788/2014 and A-112789/2014 or such other registered copyrights in colour scheme, get up and layout for their ZINCOVIT syrup, drops tablets etc., or in any other manner whatsoever;

c) For a permanent injunction restraining the Defendants, by itself, its partners, men, servants, agents, distributors, stockiest, representatives or any one claiming through or under them from in any manner passing off and/or enabling others to pass off the Defendants' products under the trademark ZINCOVIT as and for the plaintiffs' products by manufacturing, selling, or offering to sell, distributing, displaying, printing, stocking, using, advertising their products with a trademark and/or label or artistic work that is identical in colour scheme, get up and layout with that of the plaintiff's ZINCOVIT trademark or artistic work or in any manner whatsoever;

d) To the defendants be ordered to surrender to plaintiffs for destruction of all products, labels, cartons, dyes, blocks, moulds, screen prints, packing materials and other materials bearing the trademark ZINCOVIT label or any mark deceptively similar to plaintiffs' trademark and artistic work ZINCOVIT label.

e) For a preliminary decree be passed in favour of the plaintiffs directing the Defendants to render account of profits made by use of trademark and copyright in the artistic work ZINCOVIT label and a final decree be passed in favour of the Plaintiffs for the amount of profits thus found to have been made by the Defendants after the latter have rendered

accounts;

f) for damages of Rs.25,00,000/-.

g) for costs of the suit; and

h) pass such further or other reliefs as this Court may deem fit and necessary in the circumstances of the case and thereby render justice.

For Plaintiff : Mr.R.Sathish Kumar

For Defendants : No appearance

### JUDGMENT

There is a sole plaintiff and a lone defendant in this suit.

2. This suit is listed under the caption 'FOR ARGUMENTS' today (21.12.2018) after recording of *ex-parte* evidence before learned Additional Master -I of this Court.

3. Before looking at the merits of this case, exhibits and deposition, it is necessary to examine the jurisdiction of this Commercial Division qua this suit.

4. Mr.R.Sathish Kumar, learned counsel on record for sole plaintiff is before this Commercial Division. Learned counsel, referring to the plaint, brings to the notice of this Commercial Division that this suit is one

complaining of infringement of plaintiff's registered trademarks, registered copyrights and passing off qua plaintiff's registered trademarks and registered copyrights. Injunctive reliefs in this regard have been claimed besides incidental and ancillary reliefs pertaining to surrender of offending material and accounts. There are also prayers for damages and costs besides the usual residuary limb of prayer as contained in any prayer paragraph.

5. *Inter-alia* referring to the prayer, learned counsel submitted that this suit will qualify as a 'Commercial Dispute' within the meaning of sub-clause (xvii) of Section 2(1)(c) of 'The Commercial Courts Act, 2015' ('said Act' for brevity). Sub-clause (xvii) of Section 2(1)(c) of said Act reads as follows:

*'(xvii) intellectual property rights relating to registered and unregistered trademarks, copyright, patent, design, domain names, geographical indications and semi-conductor integrated circuits;'*

6. A perusal of the plaint and the prayer limbs reveal that there is no difficulty in accepting this submission that this suit qualifies as a 'Commercial Dispute' under sub-clause (xvii) of Section 2(1)(c) of said Act.

7. In the light of the prayers, which have been alluded to supra, Section 134(1) of 'Trademarks Act, 1999' ('TM Act' for brevity) and Section

62(1) of 'The Copyright Act, 1957' ('CR Act' for brevity) are attracted, is learned counsel's say. There is no difficulty in accepting this submission also. In the light of Section 134(1) of TM Act and Section 62(1) of CR Act being attracted, this Commercial Division will have jurisdiction to entertain this suit under first proviso to Section 7 of said Act, is learned counsel's further say.

8. If jurisdiction is under first proviso to Section 7 of said Act, it will suffice if the lis qualifies as a 'Commercial Dispute' within the meaning of Section 2(1)(c) of said Act and 'specified value' as in Section 2(1)(i) read with Section 12 of said Act is of no relevance.

9. In the light of the broad spectrum of the dispute/lis in this suit, there is no difficulty in determining jurisdiction of this Commercial Division and holding that this Commercial Division will have jurisdiction to entertain this suit.

10. Having determined jurisdiction of this Commercial Division, it is necessary to examine the trajectory of this suit.

11. It is submitted that sole defendant has not chosen to come before this Commercial Division either in person or through a counsel and obviously not completed pleadings by filing written statement in spite of being duly served with suit summons. Owing to this, sole defendant was set *ex-parte*

vide proceedings dated 26.07.2018, is learned counsel's say.

12. Proceedings dated 26.07.2018 reads as follows:

*'Service on the defendant had been completed by the Master on 08.06.2018. When the matter came up on 13.07.2018, this Court directed the name and address of the defendant to be printed in the cause list. Accordingly, the name and address of the defendant is printed in the cause list.*

*2. There is no representation either in person or through counsel. The defendant is set ex-parte.*

*3. Post the matter before the learned Additional Master No.1 for recording of ex-parte evidence on 06.08.2018.*

*4. After recording of evidence, the matter to be posted before this Court.'*

13. After sole defendant being set *ex-parte*, this suit was set down for recording *ex-parte* evidence before learned Additional Master-I on 17.12.2018 and 03.10.2018. On these two days, Mr.D.Jude F.L.S.Durai Pandian, who is Chief Vigilance Officer in the plaintiff company, has deposed as P.W.1. A copy of Board resolution of the plaintiff company *inter-alia* authorizing P.W.1 to depose on behalf of plaintiff company has been marked as Ex.P1. On these two days, as many as 15 documents have been marked as Ex.P1 to Ex.P15. Details of 15 documents marked are as follows:

| <i>S.No.</i> | <i>Exhibits</i> | <i>Description of Documents</i>                                                                                                       |
|--------------|-----------------|---------------------------------------------------------------------------------------------------------------------------------------|
| 1            | P1              | The copy of the Board Resolution in favour of the deponent dated 19.12.2016. (Marked after comparing and verifying with the original) |

| <b>S.No.</b> | <b>Exhibits</b> | <b>Description of Documents</b>                                                                                             |
|--------------|-----------------|-----------------------------------------------------------------------------------------------------------------------------|
| 2            | P2              | <i>The certified copy of Trade Mark Registration under No.487453, dated 16.03.1988 for the trade mark ZINCOVIT.</i>         |
| 3            | P3              | <i>The letter dated 26.04.2012 from the drug control authority pertaining to Trade Mark ZINCOVIT.</i>                       |
| 4            | P4              | <i>The certified copy of Trade Mark Registration under No.2158593, dated 13.06.2011 for the trademark ZINCOVIT.</i>         |
| 5            | P5              | <i>The certified copy of Trade Mark Registration under No.2158594, dated 13.06.2011 for the trade mark ZINCOVIT.</i>        |
| 6            | P6              | <i>The copy right Registration of the plaintiff for the artistic work ZINCOVIT under No.112788/2014 dated 12.12.2014.</i>   |
| 7            | P7              | <i>The copy right Registration of the plaintiff for the artistic work ZINCOVIT under No.112789 dated 12.12.2014.</i>        |
| 8            | P8              | <i>The copy right Registration of the plaintiff for the artistic word ZINCOVIT under No.115854 dated 02.01.2017.</i>        |
| 9            | P9              | <i>The copy of the food licence in favour of the plaintiff for a ZINCOVIT products.</i>                                     |
| 10           | P10             | <i>The copies of invoices for sale of products bearing trade mark ZINCOVIT.</i>                                             |
| 11           | P11             | <i>The copy of the judgment of this Hon'ble Court in C.S.No.384/2009 dated 10.02.2017.</i>                                  |
| 12           | P12             | <i>The copy of the Registration Document pertaining to the defendants trade mark SIDPHA ZINCOVIT PLUS dated 23.07.2009.</i> |
| 13           | P13             | <i>The copies of the labels of the plaintiffs trade mark and copy right ZINCOVIT.</i>                                       |
| 14           | P14             | <i>The copies of labels of the defendants bearing trade mark and copy right SIDPHA ZINCOVIT PLUS.</i>                       |
| 15           | P15             | <i>The certified copy of Trade Mark Registration No.1843074 in Class 30 in favour of the defendant.</i>                     |

14. Learned counsel submitted that plaintiff's trademark registrations have been marked as Exs.P2, P4 and P5. While, Ex.P2 is a registration under class 5, Exs.P4 and P5 are registrations under class 30. The registrations include word mark and label marks. These three trademark registrations of the plaintiff namely 'Exs.P2, P4 and P5' shall collectively be referred to as 'suit TMs' for the sake of convenience and clarity.

15. The details of aforesaid trademark registrations i.e., suit TMs are as follows:

| <i>Sl.No.</i> | <i>Trademark No.</i> | <i>Mark type</i> | <i>Mark</i>                                                                           |
|---------------|----------------------|------------------|---------------------------------------------------------------------------------------|
| 1             | 487453               | Word             | ZINCOVIT                                                                              |
| 2             | 2158593              | Device           |    |
| 3             | 2158594              | Device           |  |

16. Besides suit TMs, plaintiff also has copyright registrations and those copyright registration certificates have been marked as Ex.P6, P7 and P8. To be noted, while Ex.P6 is for Syrup carton, Ex.P7 is for Drops carton and Ex. P8 is for Tablets carton. Details of the three copyright registrations are as follows:

**Registration No:A-112788/2014, Dated: 12/12/2014**

**Copyright Office**  
Government of India

**Extracts from the Register of Copyrights**

Dated: 12/12/2014

**REGISTRATION NUMBER: A-112788/2014**

1. Name, address and nationality of the copyright owner: M/S. APEX LABORATORIES PVT. LTD., 20, THIRD FLOOR, SIDCO GARMENT COMPLEX, GURUDY, CHENNAI-600032, INDIA

2. Nature of the application moved in the copyright of the work: ARTISTIC WORK/ARTISTIC WORK

3. Title of the work: ZINCovit Syrup (7 COLOURS LABEL)

4. Language of the work: ENGLISH

5. Name, address and nationality of the author and if the author is deceased, date of his decease: S.S. SANKARANARAYAN, MANAGING DIRECTOR, M/S. APEX LABORATORIES PVT. LTD., 20, THIRD FLOOR, SIDCO GARMENT COMPLEX, GURUDY, CHENNAI-600032, INDIA

6. Whether the work is published or unpublished: PUBLISHED

7. Year and country of first publication and name, address and nationality of the publisher: 2015 INDIA, M/S. APEX LABORATORIES PVT. LTD., 20, THIRD FLOOR, SIDCO GARMENT COMPLEX, GURUDY, CHENNAI-600032, INDIA

8. Year and country of subsequent publications, if any, and names, addresses and nationalities of the publishers: 2016 INDIA, M/S. APEX LABORATORIES PVT. LTD., 20, THIRD FLOOR, SIDCO GARMENT COMPLEX, GURUDY, CHENNAI-600032, INDIA

9. Name, address and nationality of the owner of various rights comprising the copyright in the work and the extent of rights held by each, together with particulars of assignments and licences, if any: M/S. APEX LABORATORIES PVT. LTD., 20, THIRD FLOOR, SIDCO GARMENT COMPLEX, GURUDY, CHENNAI-600032, INDIA

10. Name, address and nationality of other persons, if any, entitled to assign or license all rights comprising the copyright: N/A

11. If the work is an 'Artistic work', the location of the original work, including name, address and nationality of the person in possession of the work. In the case of an architectural work, the year of completion of the work should also be shown: M/S. APEX LABORATORIES PVT. LTD., 20, THIRD FLOOR, SIDCO GARMENT COMPLEX, GURUDY, CHENNAI-600032, INDIA

12. If the work is an 'Artistic work', whether it is registered under the Designs Act 2000 or not: N/A

13. If the work is an 'Artistic work', whether it is registered under the Designs Act 2000 or not: N/A

14. If the work is an 'Artistic work', whether it is registered under the Designs Act 2000 or not: N/A

15. If the work is an 'Artistic work', whether it is registered under the Designs Act 2000 or not: N/A

16. Remarks, if any: A COPY OF THE WORK IS ANNEXED.

DEPUTY REGISTRAR OF COPYRIGHTS



**Registration No:A-112789/2014, Dated: 12/12/2014**

| Copyright Office<br>Government of India<br>New Delhi - 110055                                                                                                                                                   |  | Extracts<br>from the Register<br>of Copyrights                                                               |  |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|--------------------------------------------------------------------------------------------------------------|--|
| Date: 10/11/2014                                                                                                                                                                                                |  | A-112709/2014                                                                                                |  |
| 1. Recipient's Name                                                                                                                                                                                             |  | PVS AND LABORATORIES PVT. LTD., 20, TITIG FLOOR,<br>SECTOR-44, COMPLEX, GURGAO, CHENNAI-600032<br>INDIA      |  |
| 2. Name, address and nationality of the applicant                                                                                                                                                               |  | GURGAO                                                                                                       |  |
| 3. Nature of the subject matter claimed by the copyright of the work                                                                                                                                            |  | ARTIST, 3D MODEL                                                                                             |  |
| 4. Class and category of the work                                                                                                                                                                               |  | SCULPTURE, DESIGN OF BUILDING OR PART THEREOF                                                                |  |
| 5. Title of the work                                                                                                                                                                                            |  | UNNAMED                                                                                                      |  |
| 6. Language of the work                                                                                                                                                                                         |  | S. D. K. AND LABORATORIES PVT. LTD., 20, TITIG FLOOR,<br>SECTOR-44, COMPLEX, GURGAO, CHENNAI-600032<br>INDIA |  |
| 7. Name, address and nationality of the author and the author in respect of the work                                                                                                                            |  | S. D. K. AND LABORATORIES PVT. LTD., 20, TITIG FLOOR,<br>SECTOR-44, COMPLEX, GURGAO, CHENNAI-600032<br>INDIA |  |
| 8. Whether the work is published or unpublished                                                                                                                                                                 |  | PVS AND LABORATORIES PVT. LTD., 20, TITIG FLOOR,<br>SECTOR-44, COMPLEX, GURGAO, CHENNAI-600032<br>INDIA      |  |
| 9. Year and country of first publication and work address and nation of the first publisher                                                                                                                     |  | PVS AND LABORATORIES PVT. LTD., 20, TITIG FLOOR,<br>SECTOR-44, COMPLEX, GURGAO, CHENNAI-600032<br>INDIA      |  |
| 10. Name and address of the copyright owner, if any, and name, address and nationality of the publisher                                                                                                         |  | PVS AND LABORATORIES PVT. LTD., 20, TITIG FLOOR,<br>SECTOR-44, COMPLEX, GURGAO, CHENNAI-600032<br>INDIA      |  |
| 11. Name, address and nationality of the owner of the work, if any, and name, address and nationality of the publisher, if any                                                                                  |  | PVS AND LABORATORIES PVT. LTD., 20, TITIG FLOOR,<br>SECTOR-44, COMPLEX, GURGAO, CHENNAI-600032<br>INDIA      |  |
| 12. Name, address and nationality of other persons, if any, who have any right in the work                                                                                                                      |  | PVS AND LABORATORIES PVT. LTD., 20, TITIG FLOOR,<br>SECTOR-44, COMPLEX, GURGAO, CHENNAI-600032<br>INDIA      |  |
| 13. If the work is a literary work, the subject of the subject matter, the title, the author, the publisher, and the name of the work in the subject of the work, if any, and the name of the publisher, if any |  | PVS AND LABORATORIES PVT. LTD., 20, TITIG FLOOR,<br>SECTOR-44, COMPLEX, GURGAO, CHENNAI-600032<br>INDIA      |  |
| 14. If the work is a literary work, the title of the work, the author, the publisher, and the name of the work in the subject of the work, if any, and the name of the publisher, if any                        |  | PVS AND LABORATORIES PVT. LTD., 20, TITIG FLOOR,<br>SECTOR-44, COMPLEX, GURGAO, CHENNAI-600032<br>INDIA      |  |
| 15. If the work is a literary work, the title of the work, the author, the publisher, and the name of the work in the subject of the work, if any, and the name of the publisher, if any                        |  | PVS AND LABORATORIES PVT. LTD., 20, TITIG FLOOR,<br>SECTOR-44, COMPLEX, GURGAO, CHENNAI-600032<br>INDIA      |  |
| 16. If the work is a literary work, the title of the work, the author, the publisher, and the name of the work in the subject of the work, if any, and the name of the publisher, if any                        |  | PVS AND LABORATORIES PVT. LTD., 20, TITIG FLOOR,<br>SECTOR-44, COMPLEX, GURGAO, CHENNAI-600032<br>INDIA      |  |



**Registration No:A-115854/2017, Dated: 02/01/2017**

 **Copyright Office**  
Government of India

 **सत्यमेव जयते**

**Extracts from the Register of Copyrights**

Registration Number: **A-115854/2017**

1. Name, address and nationality of the applicant: **W.S. ANIL LABORATORIES PVT LTD., 26, 26RD FLOOR, SAKSHI COMPLEX, CHENNAI, INDIA**

2. Nature of the applicant's interest in the copyright: **Author**

3. Title of the work: **EXTRACT TABLETS (7 CONJUGATED)**

4. Language of the work: **English**

5. Name, address and nationality of the author of the work: **W.S. ANIL LABORATORIES PVT LTD., 26, 26RD FLOOR, SAKSHI COMPLEX, CHENNAI, INDIA**

6. Whether the work is a derivative work: **No**

7. Date of completion of the work: **2016**

8. Name and address of the publisher: **W.S. ANIL LABORATORIES PVT LTD., 26, 26RD FLOOR, SAKSHI COMPLEX, CHENNAI, INDIA**

9. Name and address of the proprietor: **W.S. ANIL LABORATORIES PVT LTD., 26, 26RD FLOOR, SAKSHI COMPLEX, CHENNAI, INDIA**

10. In the event of an original work, the name and address of the author: **W.S. ANIL LABORATORIES PVT LTD., 26, 26RD FLOOR, SAKSHI COMPLEX, CHENNAI, INDIA**

11. In the event of a derivative work, the name and address of the author of the original work: **W.S. ANIL LABORATORIES PVT LTD., 26, 26RD FLOOR, SAKSHI COMPLEX, CHENNAI, INDIA**

12. In the event of a derivative work, the name and address of the author of the derivative work: **W.S. ANIL LABORATORIES PVT LTD., 26, 26RD FLOOR, SAKSHI COMPLEX, CHENNAI, INDIA**

13. In the event of a derivative work, the name and address of the proprietor: **W.S. ANIL LABORATORIES PVT LTD., 26, 26RD FLOOR, SAKSHI COMPLEX, CHENNAI, INDIA**

14. In the event of a derivative work, the name and address of the proprietor of the original work: **W.S. ANIL LABORATORIES PVT LTD., 26, 26RD FLOOR, SAKSHI COMPLEX, CHENNAI, INDIA**

15. In the event of a derivative work, the name and address of the proprietor of the derivative work: **W.S. ANIL LABORATORIES PVT LTD., 26, 26RD FLOOR, SAKSHI COMPLEX, CHENNAI, INDIA**

16. Signature of the applicant: **[Signature]**

17. Date of registration: **02/01/2017**

18. Date of completion of the work: **2016**

**HIGH COURT OF JUDICATURE MADRAS**

**सत्यमेव जयते**

**Zincovit**

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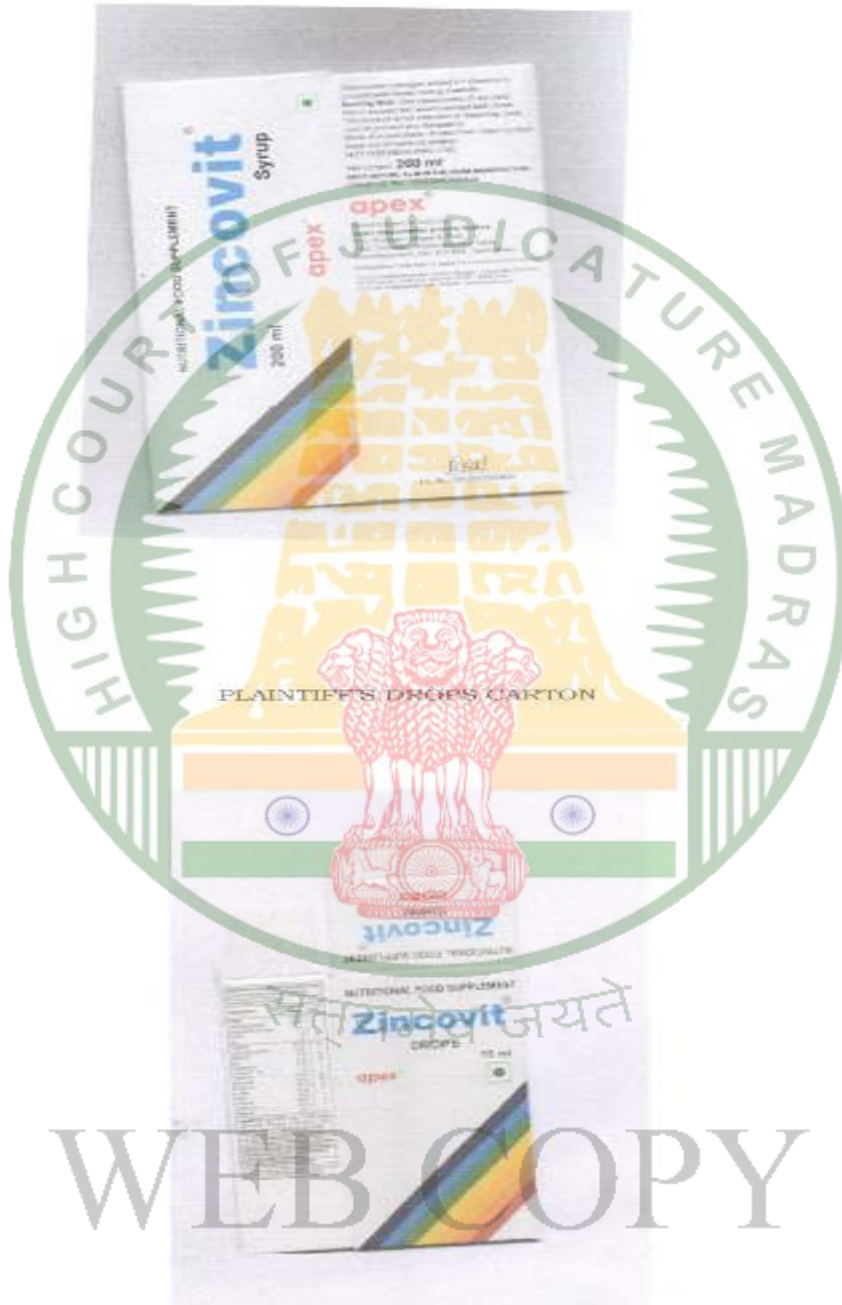
17. The aforesaid three copyright registrations shall be referred to as 'suit CRs' for the sake of convenience and clarity.

18. Learned counsel, before referring to the alleged offending mark of the defendant, submitted that defendant in the instant case is a habitual infringer. Learned counsel submits that plaintiff earlier had a different carton, not relatable to suit CRs, but relatable to suit TMs. Those cartons contained depiction of fruits on the same and that was infringed by the defendant. Therefore, plaintiff filed a suit in C.S.No.387 of 2009 and the sole defendant remained *ex-parte* in the said suit also. As the sole defendant remained *ex-parte*, the said suit came to be decreed by this Court on 10.02.2017 and the judgment copy has been marked as Ex.P11.

19. Learned counsel submits that while a market survey was made to ensure that the decree vide Ex.P11 judgment is being adhered to plaintiff stumbled upon the alleged offending label in the instant case.

20. To be noted, changed new label of plaintiff, which is relatable to suit TMs and suit CRs, has been marked as Ex.P13 and the same is as follows:

PLAINTIFF'S SYRUP CARTON



21. The offending label of the sole defendant is as follows:



22. The aforesaid two being the rival marks i.e., Ex.P13 & 14 the same were compared, by applying the time honored litmus test in this regard laid down by Hon'ble Supreme Court in the celebrated Parle Judgment, reported in *Parle Products (P) Ltd. Vs. J.P. and Co., [(1972) 1 SCC 618]*. The relevant paragraph is paragraph 9 and the same reads as follows:

*'9. It is, therefore, clear that in order to come to the conclusion whether one mark is deceptively similar to another, the broad and essential features of the two are to be considered. They should not be placed side by side to find out if there are any differences in the design and if so, whether they are of such character as to prevent one design from being mistaken for the other. It would be enough if the impugned mark bears such an overall similarity to the registered mark as would be likely to mislead a person usually dealing with one to accept the other if offered to him. In this case we find that the packets are practically of the same size, the colour scheme of the two wrappers is almost the same; the design on both though not identical bears such a close resemblance that one can easily be mistaken for the other. The essential features of both are that there is a girl with one arm raised and carrying something in the other with a cow or cows near her and hens or chickens in the foreground. In the background there is a farm house with a fence. The word "Gluko Biscuits" in one and "Glucose Biscuits" on the other occupy a prominent place at the top with a good deal of similarity between the two writings. Anyone in our opinion who has a look at one of the packets today may easily mistake the other if shown on another day as being the same article which he had seen*

*before. If one was not careful enough to note the peculiar features of the wrapper on the plaintiffs' goods, he might easily mistake the defendants' wrapper for the plaintiffs' if shown to him some time after he had seen the plaintiffs'. After all, an ordinary purchaser is not gifted with the powers of observation of a Sherlock Homes. We have therefore no doubt that the defendants' wrapper is deceptively similar to the plaintiffs' which was registered. We do not think it necessary to refer to the decisions referred to at the bar as in our view each case will have to be judged on its own features and it would be of no use to note on how many points there was similarity and in how many others there was absence of it.'*

23. To be noted, Parle Principle was affirmatively referred to by Hon'ble Supreme Court as late as in the year 2000 in ***S.M.Dyechen Vs. Cadbury (India)*** reported in **(2000) 5 SCC 573**.

24. To elaborate a little more on how this Commercial Division compared the rival marks i.e., Exs.P13 and P14, it is to be stated that Ex.13 was first seen, taken away from the sweep of my eyes and little later, rival mark of defendant Ex.P14 was seen. While seeing the P14, I asked myself the question as to whether a man of average intelligence with ordinary prudence and imperfect recollection will be lulled into the belief that what he is seeing now i.e., Ex.P14 is what he had seen earlier i.e., Ex.P13. In the considered opinion of this Commercial Division, to my mind the answer is

clearly in the affirmative. It is not only in the affirmative but it is also an emphatic monosyllabic 'YES'. This Commercial Division says monosyllabic 'YES' as in the considered opinion of this Commercial Division, the affirmative answer does not require any qualification. It does not admit of any exception either. Therefore, the answer is not only in the affirmative but also monosyllabic i.e., 'YES'.

25. Having said this, before moving on to plaint prayer, one aspect of the matter is to be looked into. Learned counsel very fairly brought to the notice of this Commercial Division that further examination of the mark and further study, revealed that sole defendant has obtained a trademark registration being trademark No.1843074 in class 30. This is from the Trademark Registry in Kolkata. Date of registration is 23.07.2009 and it is valid up to 23.07.2019. Certificate says trademark type is 'device' and it is a word mark. Registration has been obtained for 'SIDPHA ZINCOVIT PLUS', which is depicted in the trade mark registration certificate as follows:

WEB COPY

26. The trademark registration certificate has been marked as Ex.P15. To be noted, Ex.P15 is a Legal Use Certificate.

27. Adverting to Ex.P15, learned counsel submitted that there are clear conditions and limitations in Ex.P15, as it says that goods for sale in the eastern part of India only. This is under the caption 'Restrictions' and it reads as follows:

'Restrictions: GOODS FOR SALE IN THE EASTERN PART OF INDIA ONLY'.

28. Relevant provision in TM Act with regard to proceedings against an entity/individual, which has a registered mark, is in Section 28(3) and the same reads as follows:

*'28.....(3) Where two or more persons are registered proprietors of trade marks, which are identical with or nearly resemble each other, the exclusive right to the use of any of those trade marks shall not (except so far as their respective rights are subject to any conditions or limitations entered on the register) be deemed to have been acquired by any one of those persons as against any other of those persons merely by registration of the trademarks but each of those persons has otherwise the same rights as against other persons (not being registered users using by way of permitted use) as he would have if he were the sole registered proprietor.'*

29. Referring to Section 28(3), learned counsel submitted that factual matrix of this will straight away fit into that portion of Sub Section (3) of Section 28 which is within parenthesis.

30. As mentioned supra Ex.P15 has clear limitation/restriction. Learned counsel submits that suit TMs are applicable pan India whereas Ex.P15 clearly has a limitation i.e., applicable only in Eastern part of India and therefore it falls within the exceptions carved out in Section 28(3) i.e., that portion of Section 28 within parenthesis.

31. One more aspect of the matter is the registration which the defendant has obtained is for 'SIPHA ZINCOVIT PLUS' which has been described as a device type of trademark. However, the manner in which mark has been depicted by the sole defendant in Ex.P15 which has been extracted and reproduced supra is being reproduced infra. The same is as follows:

32. The manner in which the trademark has been depicted on the carton shows a clear case of deception as 'SIDPHA' prefix and 'plus' suffix are infinitesimally small font in comparison to Zincovit. Therefore, in the light of Section 28(3) i.e., owing to exception carved out therein and owing to complete deceptive nature of depiction of the mark by the defendant, the comparison made by applying litmus test in Parle principle and the result operate in this case.

33. This takes us to the prayer paragraph in the plaint. The prayer in the plaint paragraph is paragraph 37 and the same reads as follows:

*'37. The Plaintiffs therefore, prays that this Hon'ble Court may be pleased to grant a judgment and decree on the following terms:-*

*a) For a permanent injunction restraining the Defendants, by itself, its partners, men, servants, agents, distributors, stockiest, representatives or any one claiming through or under them from in any manner infringing the plaintiff's registered trademarks ZINCOVIT by using an identical trademark ZINCOVIT as part of their trademark or any other trademark deceptively similar to the plaintiff's registered trademarks with the 7 colour strips label or in any other manner whatsoever;*

*b) For a permanent injunction restraining the Defendant, by itself, its partners, men, servants, agents, distributors, stockiest, representatives or any one claiming through or under them from in any manner committing acts of copyright infringement by using, in the course of trade, labels/artistic works which are a substantial reproduction of plaintiffs' registered copyright Under Nos. A-112788/2014 and A-112789/2014 or such other registered copyrights in colour scheme, get-up and layout for their ZINCOVIT syrup, drops tablets etc., or in any other manner whatsoever;*

*c) For a permanent injunction restraining the Defendants, by itself, its partners, men, servants, agents, distributors, stockiest, representatives or any one claiming through or under them from in any manner passing off and/or enabling others to pass off the Defendants' products under the trademark ZINCOVIT as and for the plaintiffs' products by*

*manufacturing, selling, or offering to sell, distributing, displaying, printing, stocking, using, advertising their products with a trademark and/or label or artistic work that is identical in colour scheme, get up and layout with that of the plaintiff's ZINCOVIT trademark or artistic work or in any manner whatsoever;*

*d) To the defendants be ordered to surrender to plaintiffs for destruction of all products, labels, cartons, dyes, blocks, moulds, screen prints, packing materials and other materials bearing the trademark ZINCOVIT label or any mark deceptively similar to plaintiffs' trademark and artistic work ZINCOVIT label.*

*e) For a preliminary decree be passed in favour of the plaintiffs directing the Defendants to render account of profits made by use of trademark and copyright in the artistic work ZINCOVIT label and a final decree be passed in favour of the Plaintiffs for the amount of profits thus found to have been made by the Defendants after the latter have rendered accounts;*

*f) for damages of Rs.25,00,000/-.*

*g) for costs of the suit; and*

*h) pass such further or other reliefs as this Court may deem fit and necessary in the circumstances of the case and thereby render justice.'*

34. A perusal of prayer paragraph (extracted and reproduced supra) reveals that there are 8 limbs of prayers therein. While, sub-paragraphs (a), (b) and (c) pertain to injunctive reliefs against infringement of trademarks, infringement of copyrights and passing off qua suit TMs and suit CRs, the prayers in sub-paragraph (d) and (e) pertain to surrender of

offending material and for accounts respectively. Sub-paragraph (f) is for 25 lakhs damages, sub-paragraph (g) is for costs and sub-paragraph (h) is the usual residuary limb of any prayer paragraph.

35. In the aforesaid backdrop, I perused the deposition of P.W.1 and also 15 Exhibits alluded to supra. The deposition of P.W.1 and exhibits are in tandem with plaintiff averments and they buttresses the plaintiff averments. In other words, plaintiff has proved its case qua prayers in sub-paragraphs (a), (b) and (c) and the plaintiff is entitled to decree as sought for therein. It follows as a sequitur that plaintiff is entitled to the reliefs for surrender of offending material as well as accounts as contained in sub-paragraphs (d) and (e).

36. With regard to sub-paragraphs (f), it is for damages of Rs.25,00,000/- (Rupees Twenty Five Lakhs only). Though there is no direct evidence for damages, conduct of the defendant and the fact that the defendant has been actually selling products using Ex.P14 carton reveals that defendant has certainly gained by riding on plaintiff's intellectual property. Be that as it may, as there is no direct evidence, prayer in sub-paragraph (f) is not acceded to.

37. Prayer in sub-paragraph (g) is for costs and sub-paragraph (h) is the usual residuary limb of any prayer paragraph. This Commercial Division

deems it appropriate to consider prayers in sub-paragraphs (g) and (h) together.

38. A perusal of aforesaid trajectory of litigation shows that the defendant, after having been duly served, has not chosen to come before this Commercial Division either in person or through a counsel and has not completed pleadings, leaving the plaintiff to carry this matter through this Court for nearly 1 ½ years expending time, money and energy. Moreover the defendant, as rightly pointed out by the learned counsel for plaintiff, is habitual qua infringement. There is already a decree against the defendant with regard to earlier labels of the plaintiff and that judgment is marked as Ex.P11. Plaintiff has changed its carton. On the teeth of Ex.P11, the defendant has also changed carton and the changed carton is a slavish copy and slavish imitation of plaintiff's changed carton/label. This clearly shows that the plaintiff has not only an exclusive right, but has popularity over marks qua suit TMs and suit CRs. It is clear that the defendant has not only copied plaintiff's mark, but even changed its changed carton to make it deceptively similar as that of the changed carton of the plaintiff also confirming the position that defendant is riding on plaintiff's intellectual property rights. Plaintiff is therefore entitled to costs.

39. This conduct of the defendant, is certainly a very vexatious way of defending suits. The defendant's act of getting 'SIDPHA ZINCOVIT PLUS'

registered in the Trademark Registry in Kolkata, albeit with a limitation is also a clear attempt on the part of the defendant to try and evade the arm of law with regard to infringement of suit TMs and suit CRs. However, this Commercial Division has come to the considered conclusion that Ex.P15, owing to limitation therein, falls within the exception carved out in Section 28(3) of TM Act.

40. This takes us to compensatory costs that have been contemplated under Section 35-A of amended 'The Code of Civil Procedure, 1908' ('CPC' for brevity) as amended by said Act. Post amendment to Section 35-A of amended CPC, there is no financial cap for awarding compensatory costs. A perusal of Section 35-A of amended CPC reveals that compensatory costs can be awarded for false and vexatious defence. To be noted, in the considered opinion of this Commercial Division, false and vexatious defence includes false and vexatious methods of defending a suit. The defendant in the instant case, remained *ex-parte* in the first suit (Ex.P11), allowed *ex-parte* judgment to be passed, on the teeth of *ex-parte* decree/judgment, changed the label and trailing plaintiff's changed/new label and when faced with the instant suit, again remained *ex-parte*. This in the considered opinion of this Commercial Division is clearly a vexatious way of defending suits. Vexatious defence as in Section 35-A of amended CPC as amended by said Act in the considered view of this Commercial Division includes

vexatious ways of defending and prosecuting the suit. Therefore, there is no hesitation in my mind to hold that this is a fit case not only for imposition of costs, but also for compensatory costs, considering the habitual conduct of defendant and particularly, conduct of the defendant in not coming before this Commercial Division, not once but in the successive suits, which is clearly a conduct which needs to be deprecated.

41. Therefore, this Commercial Division considers it appropriate to impose compensatory costs of Rs.10,00,000/- (Rupees Ten Lakhs only) in the instant case.

Suit is decreed with costs and compensatory costs on above terms. Consequently, connected interlocutory applications are closed.

सत्यमेव जयते

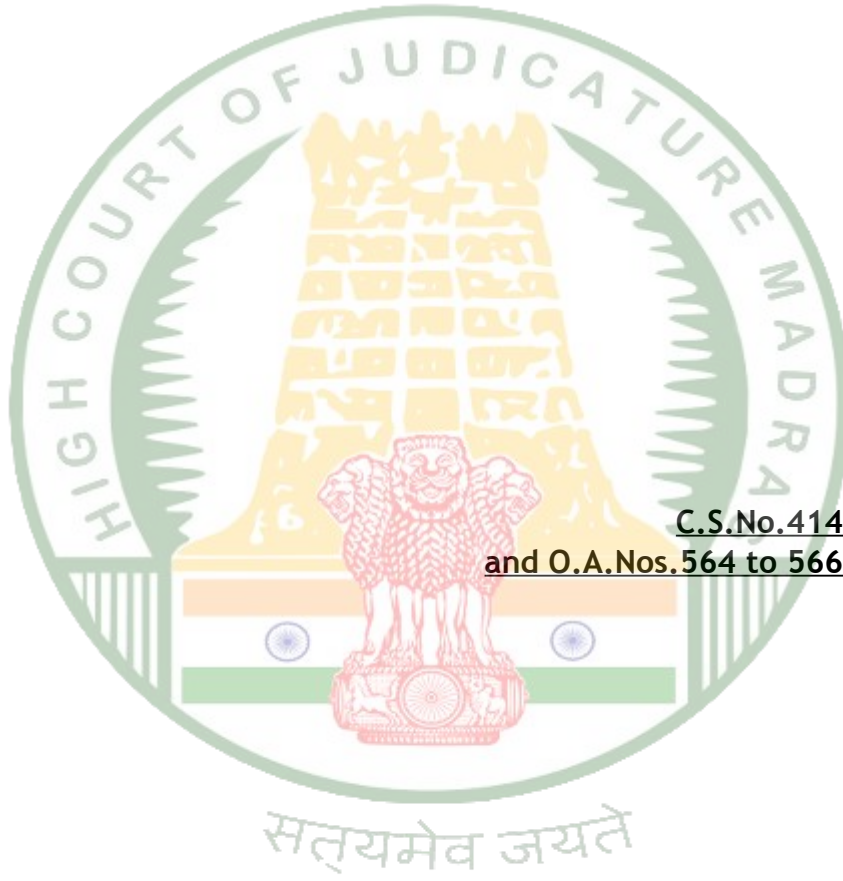
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