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

+ **CS(COMM) 694/2018**

WOCKHARDT LIMITED Plaintiff

Through: **Mr. Piyush Joshi, Advocate.**

Versus

MAHA AVTAR HEALTHCARE PVT. LTD. Defendant

Through **Ex parte**

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Date of Decision: 21st March, 2018

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 infringement of trademark, copyright dilution, unfair competition, for rendition of accounts of profits/damages, delivery up etc. The prayer clause in the suit is reproduced hereinbelow:-

“(a) To grant a decree for permanent 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 SPAS PROXIVON or any other trade mark / marks which are identical / deceptively similar to the Plaintiff's said

registered trademarks 'SPASMO-PROXYVON' amounting to infringement of the aforesaid registered trademarks of the Plaintiff.

- (b) To grant a decree for permanent 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 imitation of the Plaintiff's artistic cartons/blister packs amounting to an infringement of the Plaintiff's copyright.*
- (c) Pass and pronounce a decree of permanent injunction by giving a direction to the defendants to forthwith surrender and hand over to the plaintiff company for destruction of all the goods/products that are an imitation of the Plaintiff Company trademark and of all material, goods, articles, utensils, stickers, hoardings, boxes and other material of the defendants bearing the mark SPASMO-PROXYVON / PROXYVON.*
- (d) Pass and pronounce a money decree on account of damages in favour of the Plaintiff company and against the defendants for payment of a sum of Rs. 20,00,000 or any higher sum as may be determined pursuant to the rendition of accounts of profits illegally earned by the defendants by selling the infringed goods; or in alternative.*
- (e) Pass and other relief as this Hon'ble Court may deem fit."*

2. At the outset, learned counsel for plaintiff gives up prayers (c) and (d) of the prayer clause to the suit as according to him the matter is ex parte and proving of damages is difficult at this stage.

3. Vide order dated 16th October, 2015 this Court granted an ex-parte ad interim injunction in favour of the plaintiff and against the defendant. The relevant portion of the ex-parte injunction order is reproduced hereinbelow:-

“3. In view of the arguments urged on behalf of the plaintiff, till further orders unless varied by the Court, defendant is restrained from in any manner manufacturing or selling any medicine/drug under the name SPAS PROXIVON or any other medicine or drug which is identical or deceptively similar to the trademark of the plaintiff being SPASMO PROXIVONS and its variations as under:-

Sr. No.	Trademark	Application No.	Application date/Date of registration	Renewal till/valid upto
1.	SPASMO-	327582	4.8.1977	4.8.2015
2.	SPASMO-PROXIVAN	462438	30.10.1986	30.10.2017
3.	SPASMO-	979000	22.12.2000	22.12.2020
4.	SPASMO- PROXYVON FORTE	1045849	19.9.2001	19.9.2021
5.	PROXYVON	313278	19.3.1976	19.3.2024
6.	PROXYVON	1047686	26.9.2001	26.9.2021

4. Despite appearing on 01st March, 2016, 24th November, 2016, 03rd February, 2017, 17th April, 2017, 25th April, 2017 and 12th May, 2017, the defendant did not appear thereafter and did not file its written statement. Accordingly, the defendant was proceeded ex-parte vide order dated 21st September, 2017 and the injunction granted against the defendant was confirmed.

5. It is stated in the plaint that the plaintiff is the registered owner of the trademark PROXYVON under Class 5 of the Trade Marks Act,

1999, which registrations are of the years 1976 and 2001 and are valid and subsisting.

6. In the plaint, it has also been averred that the plaintiff is the owner of the trademark SPASMO-PROXYVON, which was invented as a distinctive trademark in the year 1977 and was registered on 04th August, 1977 under Class 5 of the Trade Marks Act, 1999 and the plaintiff has been continuously using the said trademark since the year 1977. It is further stated that three other variations of this trademark have also been registered in favour of the plaintiff in the years 1986, 2000 and 2001.

7. It is stated in the plaint that the plaintiff manufactures and markets its products in distinctive blue colored capsules which are further packed in cartons having an eye-catching artistic get-up. It is further stated that the artistic features comprising the blister pack as well as the carton constitute original artistic work which had been authored by an employee of the plaintiff on a 'contract of service' basis and the plaintiff is the first publisher and lawful owner of the same.

8. It is averred in the plaint that the medicines which are sold under the aforesaid trademarks are used for treating irritable bowel syndrome and relieving muscle spasms and cramps in the gastrointestinal area.

9. It is further stated in the plaint that the plaintiff has spent crores of rupees in advertising and other trade promotional activities to popularize its aforesaid trade mark SPASMO-PROXYVON along with its distinctive packaging and the plaintiff has recorded sales of Rs. 1,93,89,79,326/- for the year 2015 under the said trademark.

10. Learned counsel for the plaintiff states that the defendant is manufacturing and marketing a pharmaceutical product bearing a deceptively similar blister/carton packaging and trade mark 'SPAS PROXIVON' to that of the plaintiff's product SPASMO-PROXYVON. He states that the pharmaceutical preparation which the defendant is manufacturing/marketing under the impugned trade mark SPAS PROXIVON is a similar pharmaceutical preparation and is used in the treatment of colicky pain, same as that of the plaintiff's product.

11. Learned counsel for the plaintiff states that being a medicinal product the interest of general consumer is adversely affected by selling medicines which do not have the same amount of refinement and quality as the medicines of the plaintiff. He states that a wrong use of the drug can cause unnecessary complications and endanger the health of the general public/consumers.

12. The plaintiff has filed its *ex parte* evidence by way of affidavit of Mr. Vinay Kumar Taneja (PW1) an authorised representative of the Plaintiff's company.

13. The plaintiff's witness (PW1) has proved registrations of the plaintiff's trademarks as Ex.PW1/3(Colly.) and the plaintiff's copyright registration as Ex.PW1/8. The plaintiff's witness has also proved certified copy of certificate of chartered accountant showing sales as Ex.PW1/6.

14. 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 SPASMO-PROXYVON trade mark has acquired reputation and goodwill in the mark in India.

15. From the evidence on record, it is apparent that without any explicit permission or authorization to use the plaintiff's trademark and its packaging, the defendant had malafidely copied the trademark SPASMO-PROXYVON and its packaging.

16. Further, as the plaintiff's evidence has gone unrebutted, 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 plaintiff 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."

17. Consequently, the allegation that the trademark, SPASMO-PROXYVON and its packaging used by defendant amounts to infringement of plaintiff's trademark and copyright, is correct. The use of the impugned mark and packaging by the defendant was bound to cause incalculable loss, harm and injury to the plaintiff and immense public harm.

18. Accordingly, present suit is decreed in accordance with the paragraph 27 (a) and (b) of the plaint along with the actual costs incurred by the plaintiff. The cost shall amongst others include the lawyers' fees, local commissioner's fee as well as the amounts spent on purchasing the court fees. Registry is directed to prepare a decree sheet accordingly.

MARCH 21, 2018
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MANMOHAN, J