

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

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**Reserved on: 12th March, 2018
Pronounced on: 12th April, 2018**

+ **CS(COMM) 712/2018**

VIOR(INTERNATIONAL) LTD & ANR Plaintiffs

Through : Ms.Vaishali Mittal and Ms.Vrinda
Gambhir, Advocates.

versus

MAXYCON HEALTH CARE
PRIVATE LIMITED & OTHERS Defendants

Through : None being *ex parte*.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. The plaintiffs have filed this suit for restraining the defendants from infringement of Indian Patent No.221536; infringement of copyright in the literary work; dilution & tarnishment of brand image of the plaintiffs; malicious falsehood; delivery up; rendition of accounts; damages etc against the defendants.

2. At the outset, it is to be noted during pendency of the suit, vide order dated 22.12.2015 the suit against defendant No.1 was not pressed and the none appeared on behalf of the defendant No.2 despite service. The proceedings were treated as *ex parte* against sole remaining defendant. Subsequently, plaintiffs moved the IA No.6394/2017 under Order 1 Rule 10 of the CPC and vide order dated 07.12.2017 defendants No.2 & 3 were added in addition to the sole defendant. The plaintiff filed the amended plaint and memo of parties.

3. The suit is premised on the ground the defendants are manufacturing and selling the impugned API as is claimed is the plaintiffs' invention in Indian Patent No.221536. In addition, the defendant no.1 is infringing the copyright that vests with the plaintiff No.2 with respect to its literary work. The brief facts leading to the filing of this suit, as alleged, are:-

a) the plaintiff No.1 is a company incorporated under the laws of Switzerland and is one of the world's leading companies in treatment of iron deficiency and iron deficiency anaemia. The plaintiff No.1 is a registered proprietor of Indian Patent No.221536 (hereunder referred to as IN'536);

b) the plaintiff No.2 is a company incorporated under the Companies Act, 1956 and is the authorized licensee of the plaintiff No.1 to be able to manufacture and commercialize the product using the process as claimed in IN'536, *Ferric Carboxymaltose* in India;

c) The characteristics of the suit patent are given as hereunder:

i. The suit patent relates to a 'product-by-process' invention which is a novel water soluble iron carbohydrate complex which is a complex of iron (ferric) and oxidation product of one or more maltodextrins and a process for making the same;

ii. The invention is used for intravenous treatment of iron deficiency when oral iron preparations are ineffective or cannot be used. The properties of the complex, in particular its stability, make high dosing, up to 1000mg iron, possible. These characteristics make it the first non-dextran iron complex for high intravenous (I.V.) iron dosing which can

be administered by I.V. injection within less than 15 minutes;

iii. The suit patent is an established, valid and subsisting patent and has a term of 20 years from 20th October 2003 in India. No pre-grant or post grant opposition has been filed against this patent;

iv. The plaintiff No.1 has obtained patent protection for the water soluble ferric carboxymaltose in several countries. The corresponding US Patent 7'612'109 has even been listed on the US Food & Drug Administration's Orange Book as the "drug substance" patent covering ferric carboxymaltose;

v. The WHO has conferred the product covered by the suit patent with the International Non-proprietary Name (INN Name) – FerricumCarboxymaltose [WHO Drug Information volume 22 (1) 2008];

vi. USAN Council has adopted the name ferric carboxymaltose for this iron carbohydrate complex used in the treatment of patients with iron deficiency anaemia.

d) The plaintiffs learnt of the defendant No.1's activities of in the second week of December, through its website http://maxyconhealthcare.com/about_us.html, through which the defendant no.1 has falsely misrepresented the plaintiff no.1 has given an IP license to the defendant No.1 to manufacture and commercialize the impugned API as claimed in IN'536.

e) In addition, the defendant no.1 has blatantly copied the literary write-up/content of the plaintiff No.2's website www.emcure.co.in, thereby amounting to infringement of the copyright that vests with the plaintiff No.2 with respect to that literary work. Such activities of the defendant no.1 also amount to

dilution and brand image of the plaintiffs' thereby resulting in unlawful enrichment.

f) Thereafter, the defendant No.1, despite the operation of an ad-interim injunction against it, continued its infringing activities through the defendant No.3 and under the able guidance of the defendant No.2.

4. As noted above, the proceedings against defendants are treated as *ex parte*.

5. During the course of evidence, the plaintiff has examined sole witness *PW1* Shri Pankaj Pahuja who tendered his affidavit of evidence as *Ex.PW1/A* and relied upon the documents *Ex.PW1/1 to Ex.PW1/23* as well as Mark E to Mark H - wherein the original of *Ex.PW1/1* was with the Collector of Stamps, East District, Delhi for stamp purposes and originals of documents *Ex.PW1/2, Ex.PW1/3, Ex.PW1/12 to Ex.PW1/15* and *Ex.PW1/18* were seen and returned. On the issue of pecuniary damages, impleadment of new defendants this witness again entered the witness box and exhibited the supplementary affidavit as *Ex.PW1/B* while relying upon documents as *Ex.PW1/A1 to Ex.PW1/A5* respectively.

6. Before proceeding further, let me go through the documents exhibited by the witness. *Ex.PW1/1* and *Ex.PW1/3* are the copies of power of attorney and authority letter respectively from the plaintiff No.1 in favour of the witness – Shri Pankaj Pahuja; *Ex.PW1/2* is the copy of Power of Attorney by plaintiff No.2 in favour of witness; *Ex.PW/4* is the print outs of extracts about the plaintiff No.1; *Ex.PW1/5* is the print out about the plaintiff No.1's global presence from website of plaintiffs;

Ex.PW1/6 is print out of an extract about the plaintiff No.1's Iron Products taken from website; *Ex.PW1/7* is the print out extract about plaintiff No.2; *Ex.PW1/8* is an article about the positive effect of Ferric Carboxymaltose in the heart patient; *Ex.PW1/9* is the review article for use of Ferric Carboxymaltose in Iron deficiency; *Ex.PW1/10* are other articles for advantage and benefits of inventions covered by the patent; *Ex.PW1/11* are copies of various suits filed by the plaintiff to curb the unauthorized activities against the goodwill and reputation; *Ex.PW1/16* is article about successful launch of product in USA; *Ex.PW1/17* is article on cost benefit of product in question; *Ex.PW1/18* is copy of plaintiffs inlay for Encicarb; *Ex.PW1/19* is print out providing the details about the defendant from the Ministry of Corporate Affairs; *Ex.PW1/20* is print out from website of defendant claiming to be actively carrying out business in various European, African and South East Asian countries; *Ex.PW1/21* is print out from website of CEO's message and on careers; *Ex.PW1/22* is print out from defendant's website on careers; and *Ex.PW1/23* is comparison of the content copies by defendants from plaintiff No.2's website; *Ex.PW1/A1* is material for propagating the business on the website of third party by defendants No.2 & 3; *Ex.PW1/A2* is the affidavit of the investigator; *Ex.PW1/A3* is the article of defendant No.1 of products offered on the website of third party; *Ex.PW1/A4* is the contact details and ranging product and services by the defendants; and *Ex.PW1/A5* is the certificate under Section 65B of the Indian Evidence Act, 1872 regarding the electronic records/print out etc.

7. The plaintiffs thus proved the following documents:-

- a) The patent certificate granted by the Indian Patent Office and ownership documents pertaining to IN'536 as Ex.PW1/13;
- b) The certified copy of the granted patent specification including the claims as Ex.PW1/14;
- c) A certified copy of the e-register of the patent as Ex.PW1/15;
- d) Articles evidencing the positive effect of ferric carboxymaltose as Ex.PW1/8 to Ex.PW1/10 (colly);
- e) A copy of the USAN Council indicating the adoption of the name Ferric Carboxymaltose for this iron carbohydrate complex used in the treatment of patients with iron deficiency anaemia as Mark E;
- f) A copy of the CAS Registry number for the suit patent as Mark F;
- g) A relevant extract from the World Health Organisation (volume 22- number 1- (2008) indicating the International Non-proprietary Name (INN Name) – FerricumCarboxymaltosum as Mark G.
- h) Copies of the relevant orders of this Court filed by the plaintiff to safe-guard its patent rights as Ex.PW1/11;
- i) Copy of the Form -16 filed before the Indian Patent Office with respect to IN'536 reflecting the non-exclusive license agreement granted to plaintiff No.2 by the plaintiff No.1 as Ex.PW1/12;
- j) Information substantiating the existence and functioning of the defendant No.1 from the website of Ministry of Corporate Affairs www.mca.gov.in as Ex.PW1/19(colly);
- k) Extracts from the defendant No.1's website indicating the false association with the plaintiff No.1 as Ex.PW1/20(colly);
- l) Extracts from the defendant No.1's website evidencing the blatant copying of the write-up/content by the said defendant from the plaintiff No.2's website as Ex.PW1/21(colly) and Ex.PW1/22(colly);
- m) Comparison chart highlighting the copyright infringement of the literary work by the defendant No.1 as Ex.PW1/23(colly);

- n) Extracts from the defendant No.3's website showing the infringing activities of the defendant No.1 and under the guidance of the defendant No.2 as Ex.PW1/1-A1 (colly);
- o) Investigators affidavit filed by the Plaintiffs revealing that the Defendants supply Ferric carboxymaltose, the impugned API for sale and purchase within the jurisdiction of this Court as Ex.PW1/1-A2;

8. From the pleadings and the evidence of PW1, the plaintiffs have proved the acts of the defendants are in complete contravention and disregard of the plaintiffs' existing and valid patent IN'536 and it amount to infringement of the plaintiffs' rights. The defendants thus violate Section 48 of the Patents Act, 1970 which prescribed the patentee has an exclusive right to make, use, sell, import and distribute the patent.

9. While determining whether a patent has been infringed, it is necessary to construe the claims which are allied to be infringed. The acts of the defendants to deal with the impugned API clearly relates to the product Ferric Carboxymaltose as has been claimed by the plaintiff No.1 in its independent claim 1. Further, such a product cannot be clinically effaceable without using the process as claimed.

10. In addition, a conjoint reading of Section 51 of the Copyright Act, 1957 along with Section 14 of the Act would confer exclusive rights upon the owner of the copyright and any person or entity reproducing the work in any material form would be liable for the act of copyright infringement. Thus, the act of the defendant No. 1 of blatantly copying the content of the plaintiff No.2's website is violation of the copyright

vested with the plaintiff No.2 and amounts to infringement of copyright by the defendant No.1.

11. In *R.G Anand vs M/S. Delux Films &Ors* 1978 AIR 1613, the Supreme Court of India observed that in a suit for copyright infringement, it should determine whether or not the similarities are on a fundamental or substantial aspects.

12. The literary work of the defendant No.1 in its website is substantially similar to the content of the plaintiff No.2, thus such an adoption is *mala fide* and is with a clear intention on the part of the defendant to save himself of the labour.

13. Moreover, the acts of the defendant No.1 in publication of a statement indicating a false association with the plaintiff No.1 amounts to tort of malicious falsehood.

14. For the reasons aforesaid, the suit of the plaintiff is decreed in accordance with paragraph Nos.27 (a), (b), (c), and (d) of the amended plaint.

15. Besides the above, the plaintiffs have claimed for damages in the tune of ₹ 1,00,01,000/-. The plaintiffs relies upon a decision by the Division Bench of this Court in paragraph number 69 and 70 of *Hindustan Unilever Limited v. Reckitt Benckiser India Limited*, 2014 (57) PTC 495 [Del] [DB]; wherein this Court was pleased to grant damages in the tune of ₹ 20.00Lac. The said decision relied upon *Rookes v. Barnard*, [1964] 1 All ER 367; which stated as follows:

“Wrongful conduct by the Defendant which has been calculated by him to make a profit for himself which may well exceed the compensation payable to the Claimant”

16. The plaintiffs further assert the aforesaid acts of the defendants are nothing short of oppressive, arbitrary and unconstitutional, thus satisfying the condition as stipulated in *Rookes (supra)*. The act of the defendant No.1 to continue and carry on its infringing activities only highlight the fraction of the mala fide and malicious intent of the defendants to further their profits.

17. Under the given facts and circumstance of this case the defendants have recused themselves from the proceedings and continued its infringing activities despite an injunction order operating against it. The damages should be awarded not merely to compensate the plaintiffs for the loss that has been sustained by reasons of the defendants' wrongful act, but also to punish the defendants in an exemplary manner and vindicate the distinction between a willful and innocent wrongdoer.

18. The punitive damages need to be granted taking into account the mala fide conduct of the defendants, which is clearly not proportional to the quantum of actual damages that the plaintiff has proven through documentary evidence filed in the suit on the following factors viz defendants despite service, chose not to contest the present proceedings; and it has been in contempt of the injunction order dated 22.12.2014 and producing the infringing product and making them available for sale through online websites.

19. Besides above the learned counsel for plaintiffs have claimed the rendition of accounts of profit illegally earned by defendants or in the

alternate damages to the extent of ₹1,00,01,000/-. The plaintiffs are also concerned with the punitive damages and relied upon *Jockey International Inc & Anr vs. R. Chandra Mohan & Ors* 211 (2014) DLT 757 which read as under:-

“43. I am in agreement with the aforesaid submission of learned counsel for the plaintiffs that damages in such cases must be awarded and a defendants, who chooses to stay away from the proceedings of the Court, should not be permitted to enjoy the benefits of evasion of court proceedings. Any view to the contrary would result in a situation where a defendants who appears in Court and submits its account books would be liable for damages, while another defendants who, chooses to stay away from court proceedings would escape the liability on account of failure of the availability of account books. A party who chooses not to participate in court proceedings and stays away must, thus, suffer the consequences of damages as stated and set out by the plaintiffs. There is a larger public purpose involved to discourage such parties from indulging in such acts of deception and, thus, even if the same has a punitive element, it must be granted. R.C. Chopra, J. has very succinctly set out in Time Incorporated's case (supra) that punitive damages are founded on the philosophy of corrective justice.”

20. Under the given facts and circumstances of this case where the defendants reclused themselves from the proceedings, cannot be permitted to enjoy the benefits of evasion or covert priorities as has been selling the goods and has been infringing the plaintiffs' mark certainly makes the defendants liable to pay the damages to the plaintiffs. Hence, a decree for a sum of ₹10.00 Lac in favour of the plaintiffs and against defendants, is passed on account of infringing the registered marks, trade dress and violating interim order. The plaintiffs shall also be entitled to interest @ 10% pa on the damages so awarded from the date of filing of the suit till the date of realisation. The costs of the suit is also awarded to the plaintiffs and against the defendants. Decree Sheet be drawn.

YOGESH KHANNA, J

APRIL 12, 2018/M