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

Date of decision: 16.04.2018

+ RFA (OS) (COMM) 13/2017

MOREPEN LABORATORIES LIMITED Appellant

Through: Mr. Naman Joshi and
Ms. Avshreya Rudy, Advs.

versus

M/S EAST WEST PHARMA Respondent

Through: Mr. T. Srinivas Murthy,
Ms. Sonakshi Malhan and
Mr. Senthil Jagadeesan, Advs.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K. CHAWLA

J U D G M E N T

A.K. CHAWLA, J.

1. The appellant (hereafter 'Morepen') is aggrieved by a judgment and orders that partly allowed its suit for permanent injunction, but denied the claim for damages.
2. The facts relevant to the appeal are that Morepen had instituted a suit against the respondent (hereafter 'East West') seeking reliefs of permanent injunctions, rendition of accounts and directions to handover all goods, packaging strip, unfinished products etc. bearing the trademark 'DOM' as also handover all plates, blocks, moulds, negative, duplicating equipments or other device used or to be used for printing or reproducing the copies of the cartons/packaging

material/strips bearing the mark 'DOM' and/or any other mark similar or identical to 'DOM DT'. In addition, Morepen also sought leave of the Court to file a separate suit for damages on account of losses suffered, which were attributable to East West. It proceeded on the premise that Morepen was primarily engaged in the production and marketing of pharmaceutical products since the year 1985 and in view of the importance of its intellectual proprietary information and rights, it had filed various applications with the Controller General of Patents, Designs and Trademarks and, *inter alia*, had various trademark registrations in its kitty and that in the year 1995, it had started manufacturing and marketing a medicine under the brand name 'DOM DT' under license no. MB/96/5 and MNB/96/6, which trademark was renewed and valid upto 14.08.2019.

3. It was stated that Morepen's product was highly prescribed and trusted medicines for quick and effective remedy for stomach infection, nausea and vomiting. For its marketing and sales promotion, Morepen asserted to have spent about ₹58 lakhs in the last five years. It was alleged that in the third week of January, 2013, Morepen came to know that a medicine under the brand name 'DOM' was being sold by East West for the purpose for which Morepen was manufacturing its medicine under its trademark 'DOM DT' and that the salt composition of both the products was the same. It was also alleged that East West had started using the trademark 'DOM' from the year 2010 to encash the goodwill and reputation of Morepen and to earn illicit profits.
4. Morepen's suit was thus filed by Morepen seeking decrees of

permanent injunction for infringement and passing off etc. With the institution of the suit, Morepen also sought leave to file a separate suit for damages on account of losses suffered on account of conduct of East West. As an interim measure, Morepen also sought interim relief of injunction(s) besides appointment of the Local Commissioner. Upon hearing, issuing the summons of the suit and the notice of the injunction application, the Court appointed a Local Commissioner to seize the infringing material and East West was also restrained from manufacturing, selling and offering to sale, advertising, directly or indirectly dealing in the pharmaceutical and medicinal products or other related products under the trademark 'DOM' or under any other mark deceptively similar to Morepen's trademark 'DOM DT' till further orders.

5. Though, a Vakalatnama was filed on behalf of East West, the latter did not join the suit proceedings and was proceeded ex-parte. Morepen led its ex-parte evidence and examined PW1 Mr. Deepak Talwar and closed PE. By the impugned judgment, the learned Single Judge decreed the suit restraining East West from selling, using, advertising the medicine under the brand name 'DOM' or any other identical or deceptively similar name to Morepen's medicine 'DOM DT' in respect of medicine used for stomach infection, nausea and vomiting. Feeling aggrieved of only part of the reliefs having been granted, the instant appeal has come to be preferred.
6. The learned counsel for Morepen submits that in view of the fact that the Court has found a case in its favour and made a Decree of

permanent injunction restraining East West from manufacturing or selling the products similar to its product, the learned Single Judge erred in not ordering the delivery-up of the infringement labels and marks for destruction of erasure as provided for under Section 135 of the Trade Marks Act, 1995. It was also contended that Morepen should have been granted leave to sue for damages as prayed for. It was thus contended that the Decree passed by the learned Single Judge was required to be modified to contain the remaining reliefs prayed for.

7. Learned counsel for East West submits that the said defendant stopped the manufacture of the medicine under the trademark 'DOM' and that no cause of action survived.
8. During the course of hearing, it transpired that I.A. No. 2591/2013 filed by Morepen under Order 2 Rule 2 read with Section 151 CPC was not pressed and was withdrawn after Morepen had led its ex-parte evidence. In *Deva Ram & Anr. vs. Ishwar Chand & Anr.*, (1995) 6 SCC 733, Supreme Court has held as under:

"The provisions of Order 2 Rule 2 indicate that if a plaintiff is entitled to several reliefs against the defendant in respect of the same cause of action, he cannot split up the claim so as to omit one part of the claim and sue for the other. If the cause of action is the same, the plaintiff has to place all his claims before the court in one suit as Order 2 Rule 2 is based on the cardinal principle that the defendant should not be vexed twice for the same cause.

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Order 2 Rule 2 CPC requires the unity of all claims based on the same cause of action in one suit. If the identity of causes of action is established, the rule would immediately become applicable and it will have to be held that since the relief claimed in the subsequent suit was omitted to be claimed in the earlier suit, without the leave of the court in which the previous suit was originally filed, the subsequent suit for possession is liable to be dismissed as the defendants in both the suits, cannot be vexed twice by two separate suits in respect of the same cause of action. But it does not contemplate unity of distinct and separate causes of action. If, therefore, the subsequent suit is based on a different cause of action, the rule will not operate as a bar."

It is not the case of Morepen that the leave, which it sought by filing the application I.A. No. 2591/2013, though abandoned later, proceeded on the premise of any distinct and a separate cause of action. It was thus imperative that in the absence of any leave granted by the Court as contemplated under Order 2 Rule 2, in view of the settled position of law as has been elaborated in the judgment (supra), initiation of any separate proceedings for any claim for damages etc., the issue sought to be agitated on that count, is wholly misconceived and meritless. Though, the impugned order does not specifically decline the prayer to that effect, non-grant thereof, is implicit thereunder.

9. As regards the delivery-up of the infringement labels and marks, we consider that at this stage of the proceedings, keeping in view the fact that the interim injunction orders were passed on 15.02.2013 and the

Local Commissioner had seized the infringing material on 23.02.2013, any order to be passed to that effect, for all practical purposes, would be inconsequential. Suffice to say, the Decree of permanent injunction, which restrains East West from selling, using and advertising the medicine under the brand name 'DOM' or any other identical or deceptively similar name to Morepen's medicine 'DOM DT' has become final and the products seized by the Local Commissioner on 23.02.2013, as it transpired during the course of hearing, had a shelf life of two years only. So, as of now, those products have become stale and are of no use. In the given factual conspectus, the modification sought is inconsequential.

10. In view of the foregoing, we do not see any merit in the appeal and is dismissed. All the pending applications also stand disposed of. No order as to costs.

A. K. CHAWLA, J

S. RAVINDRA BHAT, J

APRIL 16, 2018

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