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

\+ CS(COMM) 1278/2018, IA No.16882/2018 (u/O XXXIX R-1&2) & IA No.16884/2018 (u/O XXVI R-9&10 CPC)

G D PHARMACEUTICALS PRIVATE LIMITED..... Plaintiff

Through: Mr. Jayant Mehta, Mrs. Suhrita Majumdar, Mr. Eashan Ghosh, Mr. Afzal B. Khan & Mrs. Mitul Dasgupta, Advs.

Versus

HABIB ENTERPRISES & ANR. ..... Defendant

Through: Ms. Barkha Khattar & Mr. Sahil Agarwal, Advs. along with Mr. Anwar Parvez, son of D-1.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **12.12.2018**

1. This order is in continuation of the earlier order dated 10th December, 2018.

2. Though the report of the summons / notice issued to the defendants is awaited but the counsel for the plaintiff states that both the defendants have been served and the counsel for the plaintiff has in Court handed over an affidavit of service. The same is taken on record.

3. Ms. Barkha Khattar, Advocate appears for the defendant no.1 and on enquiry states that defendant no.1 M/s Habib Enterprises, a sole proprietary of Mr. Akhtar Parvez, was the manufacturer of the goods under the impugned mark 'BOROLEFINE' and Mr. Anwar Parvez, son of Mr. Akhtar Parvez is personally present in the Court.

4. It is also stated by the counsel for the defendant no.1, that (i) the defendant no.2 KBC Cosmetics was merely a retailer of the said product of the defendant no.1 and otherwise was not the manufacturer of the product under the impugned mark and / or had no right in the impugned mark; (ii) the defendant no.1, immediately on opposition being filed by the plaintiff to the application for registration of the mark by the defendant no.1, had not only withdrawn the application but also stopped the manufacturing under the impugned mark and stopped use of the impugned mark in any manner whatsoever; and, (iii) the defendant no.1, on 27th October, 2017, had also called back / withdrawn the products under the impugned mark from the market.

5. On enquiry, as to how the plaintiff has been able to procure the products under the impugned mark from the market and which were shown to this Court on 10th December, 2018, the counsel for the defendant no.1 states that the defendant no.1 was selling goods under the impugned mark with effect from 27th July, 2016 and the said goods had a lifetime of three years and some goods may have inadvertently remained in the market.

6. It has thus been enquired from the counsel for the defendant no.1, whether the defendant no.1 is willing to suffer a decree for permanent injunction as claimed by the plaintiff.

7. The counsel for the defendant no.1 replies in the affirmative.

8. The counsel for the plaintiff, on enquiry states that since the defendant no.1 is willing to suffer a decree for permanent injunction today itself, the plaintiff will not claim ancillary reliefs claimed in the plaint and leaves the aspect of costs to the discretion of this Court.

9. Considering, that the defendant on the very first date has agreed to suffer the decree for permanent injunction and further considering the fact that the defendant has benefited at least for a short while from use of the mark of the plaintiff, it is deemed appropriate to burden the defendant with costs of the suit assessed at the value of the court fees paid on the plaint and professional fee of Rs.1 lac. However, if the defendant no.1, within one month of today pays a sum of Rs.2,05,000/-, being the value of the court fees, to the plaintiff through counsel, the entire decree for costs shall stands satisfied and the plaintiff would not be entitled for costs towards professional fee.

10. As far as the defendant no.2 is concerned, there is no reason to disbelieve the affidavit of service of the plaintiff.

11. None having appeared for the defendant no.2 inspite of service, defendant no.2 is proceeded against *ex parte*.

12. A decree is passed, in favour of the plaintiff and

(i) against both the defendants, of permanent injunction, in terms of prayer paragraph 30(a),(b)&(c) of the plaint dated 4th December, 2018;

(ii) against the defendant no.1, of recovery of costs of Rs.3,05,000/-; however, if the defendant no.1 pays Rs.2,05,000/- within one month of today, the entire decree for costs shall stand satisfied; else, the defendant no.1, besides being liable for recovery of the entire costs of Rs.3,05,000/-, shall also be liable for interest thereon at 10% per annum from this date till the date of recovery.

13. On the statement of the defendant no.1 through counsel that there are no stocks under the impugned mark and that if there are any stocks, the impugned goods / mark shall be recalled / obliterated therefrom within one week of today, decree for delivery is not being passed but making it clear, that if the said statement of the defendant no.1 is found to be false, consequences shall follow.

14. Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

DECEMBER 12, 2018

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