

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY AND ORIGINAL CIVIL JURISDICTION
COMMERCIAL IP SUIT NO.15 OF 2003**

M/s IMA-PG India Pvt Ltd.)
 A company incorporated under the)
 Companies Act, 1956 having its registered)
 office at G-1, Everest Building, 156,)
 Tardeo Road, Mumbai 400 034) ..Plaintiff

Versus

1. Accupack)
 a partnership firm registered under)
 the Partnership Act, 1932 and having)
 its office at 309/6842, Trikal, 90 Ft. Road,)
 Pant Nagar, Ghatkopar (East) Mumbai-75)
 2. Mr. Anil Kumar, Partner)
 3. Mr. Bhagwan Gaikwad, Partner)
 4. Mr. Sheul Seth, Partner)
 all partners in the Defendant No.1)
 company and having their office at)
 309/6842, Trikal, 90 Ft. Road, Pant Nagar,)
 Ghatkopar (East) Mumbai- 400 075) ..Defendants

Ms K. C. Nichani for Plaintiff
 Mr. H. W. Kane a/w Mr. Piyush Shah I/b Ms Devyani Wanjara for Defendants

**CORAM : K.R.SHRIRAM, J.
DATE : 13th JUNE 2019**

ORAL JUDGMENT

1 Plaintiff is seeking a perpetual order and injunction to restrain defendants from in any manner using the name of plaintiff in relation to any

machine parts and change parts in particular machine parts and change parts of Cold Forming Machine TR 100 so as to enable defendants to pass off defendants goods or permitting any other persons to pass off defendants' goods as goods of plaintiff without plaintiff's permission and in particular relating to Cold Forming Machine TR 100. Plaintiff has also sought an order and decree to direct defendants to render true and faithful account of all the profits earned by them using plaintiff's name and/or technology and to pay over those amounts to plaintiff. Plaintiff has also sought an order and decree that defendants should deliver to plaintiff for destruction all designs, and drawings etc; for manufacturing of machine parts and changes parts of Blister Packaging Machine and Cold Forming Machine TR 100 removed by defendants from plaintiff's premises.

2 During the course of submissions, Ms Nichani appearing for plaintiff stated that plaintiff is only pressing for prayer clause (a), i.e., a perpetual order and injunction to restrain defendants from passing off defendants products particularly the Cold Forming Machine TR 100 as plaintiff's products.

3 At the outset, I have to note that in the entire plaint, there is no cause of action disclosed against defendant no.4. I do not also see any specific cause of action disclosed against defendant no.1, but Ms Nichani submitted that defendant no.1 became liable as defendant nos.2 and 3 are partners of defendant no.1 I do not find any such averment in the plaint.

4 Plaintiff's case is, defendant nos. 2 and 3 were employed with plaintiff from 12-06-1996 and 15-05-1996, respectively. Defendant no.2 was employed as Asst. Manager Production on shop floor and defendant no.3 was employed as Mechanical Draughtsman cum CAD Operator on computer designing. Defendant nos.2 and 3 left plaintiff's employment from 24-10-2001 and 26-11-2001, respectively. Admittedly, relieving letters have been issued to defendant nos.2 and 3 and all their dues have also been paid by plaintiff. It is plaintiff's case that they came across an introductory letter from defendant no.1 introducing themselves to be experts and manufacturing high quality products in pharmaceuticals packaging industry including Blister Packaging Machine parts and change parts in competition with the machine parts and change parts manufactured and sold by plaintiff to their various customers. But the plaint does not disclose anywhere what is the date of the introductory letter and when plaintiff found this introductory letter and from where. A perusal of this letter, which is annexed at Exhibit A to the plaint, shows that it is a typed copy of the letter and not even a photocopy let alone being an original. The typed copy of the letter is also incomplete because the name of addressee is missing. It has no signature. Plaintiff has also not explained from where it sourced this and in affidavit of P.W.-1 in examination in chief the witness states plaintiff does not even have a copy of the original of this letter. There is a lot to be stated about this letter, which I will dealt with it later.

5 It is plaintiff's case that defendant nos.2 and 3 during their course of employment with plaintiff came across the original design of the machine parts and change parts developed by principals of plaintiff and during the course of their employment defendant nos.2 and 3 surreptitiously and illegally removed designs / drawings from plaintiff's factory and have joined hands with defendant no.4 later to start defendant no.1 firm and are selling products directly in competition with plaintiff's products. It is plaintiff's case that employment contract with defendant nos.2 and 3 had an implied condition of employment that any information that defendant nos.2 and 3 will come across during the course of their employment with plaintiff shall be treated as confidential. According to plaintiff by making the representations as in Exhibit A to the plaint, defendants are guilty of passing off defendants products as plaintiff's products. In the written statement, which has been signed by all defendants but verified only by defendant no.4, defendants have naturally denied plaintiff's claim. As regards Exhibit A annexed to the plaint, in my view defendants have not denied the existence of the said document. Defendants have of course stated that the said document is only an introductory letter about defendant no.1, the claims of the expertise of the partners (defendant nos.2, 3 and 4) of the firm and the products sold by defendant no.1. Defendants have also denied plaintiff's proprietary rights in any machine and have taken a stand that there is nothing wrong when defendants market themselves as experts in

packaging machines and Blister packaging technology that is common to the trade. Defendants, however, have not denied the document per se. During the cross examination of plaintiff's witness, defendants counsel has relied on this document and asked question in cross examination in particular question no.57 and answer thereto, which reads as under:

“Q.57. Again I put it to you that the said Exhibit A to the Complaint to which you are referring shows only that the defendants are manufacturing spare parts / charge parts for the Cold Forming Machine TR-100 and not the machine itself ?

Ans: I deny. (Witness volunteers) I refer to Exhibit A to the complaint, wherein it is mentioned that they are manufacturing Blister Packing Machine and Cold Forming Machine TR-100.”

To various questions asked by defendants counsel, plaintiff's witness has also relied on this document at Exhibit A. Mr. Kane did submit that D.W.-1 during his cross examination has denied this document at Exhibit A. Mr. Kane relied upon question nos.30, 31, 32 and 33 of the questions in cross examination of D.W.-1 and answers thereto, to submit that Exhibit A to the complaint was not admitted document. I am afraid, I cannot agree with Mr. Kane because if a particular document has not been denied in the written statement, it will be deemed to have been admitted. Admission in pleadings is much better and more reliable than a denial in cross examination. Moreover, counsel for defendants who was cross examining P.W.-1 has also relied on the said Exhibit A to the complaint.

Therefore, I am inclined to consider this document as sufficiently proved and have directed the office to take it on record and marked it as **Exhibit P-3**. The contents thereof, as it is defendants' document, cannot be denied by defendants and has to be accepted as it is. But whether that will help plaintiff's case of passing off, is a different aspect and that has been dealt with later.

6 This court was pleased to frame the following issues by order dated 13-3-2013 read with order dated 8-4-2013 and the same read as under:

“(1) Whether the Suit as filed by the Plaintiffs is misconceived and not maintainable ?

(1-A) Whether the plaint discloses any cause of action against the Defendants ?

(2) Whether the Suit as filed by the Plaintiffs amounts to restraint of trade as alleged in para 3 of the Written Statement ?

(3) Whether the Plaintiffs prove that there was any implied condition of employment to treat any technical knowledge as confidential as alleged in para 4 of the Plaint by the Plaintiffs ?

(4) Whether the Plaintiffs prove that there was any breach by the Defendants in employment as alleged in para 4 of the Plaint ?

(5) Whether the Plaintiffs prove that there was any technology secret and exclusive to the Plaintiffs as alleged in para 5 of the Plaint ?

(6) Whether the Plaintiffs prove that the Plaintiffs are entitled to contend that there was any fraud as alleged in

para 8 of the Plaint ?

(7) Whether the Plaintiffs prove that the Defendants have unauthorizedly removed any technical knowhow and drawings of the manufacturing machine parts and change parts as alleged in para 8 of the Plaint.

(8) Whether the Defendants prove that there was any obligation on the Defendants as alleged in para 9 of the Written Statement ?

(9) Whether the Defendants passoff any goods of the Plaintiffs ?

(10) Whether any case is made out for Accounts as alleged by the Plaintiffs ?

(11) Whether the Plaintiffs are entitled to any relief, if so, what ?

(12) What order ?”

7 Plaintiff led evidence of one witness namely Mr. Saroj Pal (P.W.-1) and defendants led evidence only of defendant no.4, Mr. Shehul Seth (D.W.-1). Plaintiff produced only three documents, whereas through defendants while taking the evidence of D.W.-1 on record, court took on file 15 documents and marked them Exhibit D-1 colly to D-4 colly. While recording evidence of P.W.-1, defendants relied on two documents and confronted P.W.-1 and those two documents are Exhibit-D-5 and D-6, respectively.

8 For the purpose of prayer clause (a) for passing off, though this court has been pleased to frame 13 issues, having considered the pleadings,

in my view, only issue nos.1, 1-A, 9, 10, 11 and 12 are relevant. Issue no.10 also need not be dealt with, since, as noted earlier, Ms Nichani does not press prayer clauses (b) and (c) to the plaint. So what remains to be dealt with are only issue nos.1, 1-A, 9, 11 and 12.

9 Issue No.1:- Whether the Suit as filed by the Plaintiff is misconceived and not maintainable ?

Mr. Kane submitted that though plaintiff has not proved that plaintiff is entitled to exclusive use of any mark, it is plaintiff's case that the marks which plaintiff claim have been passed off by defendants as plaintiff's marks, are actually designed and belong to plaintiff's principals in Italy M/s IMA-SPA-Italy. Mr. Kane submitted that if at all anybody could have filed this suit, it was only the principals of plaintiff, i.e., M/s IMA-SPA-Italy and not plaintiff. Ms Nichani relied upon Section 203 of Contract Act to submit that if there is a foreign principal, then agents in India can file the suit. First of all Section 203 is not applicable to the present facts and circumstances. Plaintiff is not suing defendants under any contract. There cannot be any contract in a claim for passing off. Moreover, that is not plaintiff's case either in the plaint.

10 It is settled law that only a person who has a trademark registered in his name or claims to using the mark for a long time can claim a right over the mark. Plaintiff does not have the mark it is accusing defendants to have used to pass off their goods as that of plaintiff, registered

in its name or claims to be using for a long time. It is plaintiff's case in the plaint that it is their principals IMA-SPA Italy who have the right to the name and property. Therefore, even if not registered, a prior user can claim a right and accuse another of passing off. It is plaintiff's principals IMA-SPA Italy who can claim any right if at all and the suit should have been filed by IMA-SPA Italy or by plaintiff on their behalf. But that is not plaintiff's case in the plaint. For a passing off action an imitator or a competitor initiating sale of goods or services in the same name or by imitating that name has to cause injury to the business of the one who has the property in that name. Therefore, the suit is not maintainable in the name of plaintiff. It should have been by plaintiff's principals.

11 As regards Issue No.1-A:- Whether the plaint discloses any cause of action against Defendants, as noted in the beginning of this judgment, there is no cause of action disclosed against defendant nos.1 and 4 in the plaint and, therefore, under Order 7 Rule 11(a), the plaint as against defendant nos.1 and 4 has to be rejected and is hereby rejected.

12 Issue No.9:- Whether Defendants pass off any goods of the Plaintiff ?

Before I go into the factual aspects, in **Laxmikant V. Patel Vs. Chetanbhai Shah & Anr**¹ the Apex Court has very pithily explained what is required to be considered in an action for passing off. An action for passing-

1 AIR 2002 SUPREME COURT 275

off will lie wherever the defendant company's name, or its intended name, is calculated to deceive, and so as to divert business from the plaintiff, or to occasion a confusion between the two businesses. If this is not made out there is no case. The Apex Court has also held that where there is probability of confusion in business, an injunction will be granted even though the defendants adopted the name innocently. A competitor initiating sale of goods or services in the same name or by imitating that name results in injury to the business of one who has the property in that name. The law does not permit any one to carry on his business in such a way as would persuade the customers or clients in believing that the goods or services belonging to someone else are his or are associated therewith. The gist of passing off action or gist of conception of passing off is that goods are in effect telling a falsehood about themselves, are saying something about themselves which is calculated to mislead. The three elements of passing off action are the reputation of goods, possibility of deception and likelihood of damages to the plaintiff. In passing off action, plaintiff must prove a prima facie case, availability of balance of convenience in its favour and it suffering an irreparable injury in the absence of grant of injunction. Passing off cases are often cases of deliberate and intentional misrepresentation, but it is well-settled that fraud is not a necessary element of the right of action, and the absence of an intention to deceive is not a defence though proof of fraudulent intention may materially assist a plaintiff in establishing

probability of deception. It will be useful to reproduce paragraph nos.8, 9, 10, 11, 12 and 13 of Laxmikant Patel (supra).

“8. It is common in the trade and business for a trader or a businessman to adopt a name and/or mark under which he would carry on his trade or business. According to Kerly (Law of Trade Marks and Trade Names, Twelfth Edition, para 16.49), the name under which a business trades will almost always be a trade mark (or if the business provides services, a service mark, or both). Independently of questions of trade or service mark, however, the name of a business (a trading business or any other) will normally have attached to it a goodwill that the courts will protect. An action for passing-off will then lie wherever the defendant company's name, or its intended name, is calculated to deceive, and so to divert business from the plaintiff, or to occasion a confusion between the two businesses. If this is not made out there is no case. The ground is not to be limited to the date of the proceedings; the court will have regard to the way in which the business may be carried on in the future, and to its not being carried on precisely as carried on at the date of the proceedings. Where there is probability of confusion in business, an injunction will be granted even though the defendants adopted the name innocently.

9. It will be useful to have a general view of certain statutory definitions as incorporated in the [Trade Marks Act, 1999](#). The definition of trade mark is very wide and means, inter alia, a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others. Mark includes amongst other things name or word also. Name includes any abbreviation of a name.

10. A person may sell his goods or deliver his services such as in case of a profession under a trading name or style. With the lapse of time such business or services associated with a person acquire a reputation or goodwill which becomes a property which is protected by courts. A competitor initiating sale of goods or services in the same name or by imitating that name results in injury to the business of one who has the property in that name. The law does not permit any one to carry on his business in such a way as would persuade the customers or clients in believing that the goods or services belonging to someone else are his or are associated therewith. It does not matter whether the latter person does so fraudulently or otherwise. The reasons are two. Firstly, honesty and fair play are, and ought to be, the basic policies in the world of business. Secondly, when a person adopts or intends to adopt a name in connection with his business or services which already belongs to someone else it results in confusion and has propensity of diverting the customers and clients of someone else to himself and thereby resulting in injury.

11. Salmond & Heuston in Law of Torts (Twentieth Edition, at

p.395) call this form of injury as injurious falsehood and observe the same having been awkwardly termed as passing off and state:-

“The legal and economic basis of this tort is to provide protection for the right of property which exists not in a particular name, mark or style but in an established business, commercial or professional reputation or goodwill. So to sell merchandise or carry on business under such a name, mark, description, or otherwise in such a manner as to mislead the public into believing that the merchandise or business is that of another person is a wrong actionable at the suit of that other person. This form of injury is commonly, though awkwardly, termed that of passing off ones goods or business as the goods or business of another and is the most important example of the wrong of injurious falsehood. The gist of the conception of passing off is that the goods are in effect telling a falsehood about themselves, are saying something about themselves which is calculated to mislead. The law on this matter is designed to protect traders against that form of unfair competition which consists in acquiring for oneself, by means of false or misleading devices, the benefit of the reputation already achieved by rival traders”.

12. In *Oertli Vs. Bowman* (1957) RPC 388, (at page 397) the gist of passing off action was defined by stating that it was essential to the success of any claim to passing off based on the use of given mark or get-up that the plaintiff should be able to show that the disputed mark or get-up has become by user in the country distinctive of the plaintiffs goods so that the use in relation to any goods of the kind dealt in by the plaintiff of that mark or get up will be understood by the trade and the public in that country as meaning that the goods are the plaintiffs goods. It is in the nature of acquisition of a quasi-proprietary right to the exclusive use of the mark or get-up in relation to goods of that kind because of the plaintiff having used or made it known that the mark or get-up has relation to his goods. Such right is invaded by anyone using the same or some deceptively similar mark, get-up or name in relation to goods not of plaintiff. The three elements of passing off action are the reputation of goods, possibility of deception and likelihood of damages to the plaintiff. In our opinion, the same principle, which applies to trade mark, is applicable to trade name.

13. In an action for passing off it is usual, rather essential, to seek an injunction temporary or ad-interim. The principles for the grant of such injunction are the same as in the case of any other action against injury complained of. The plaintiff must prove a prima facie case, availability of balance of convenience in his favour and his suffering an irreparable injury in the absence of grant of injunction. According to Kerly (ibid, para 16.16) passing off cases are often cases of deliberate and intentional misrepresentation, but it is well-settled that fraud is not a necessary element of the right of action, and the absence of an intention to deceive is not a defence though proof of fraudulent intention may materially assist a plaintiff in establishing probability of deception. Christopher Wadlow in *Law of Passing Off*

(1995 Edition, at p.3.06) states that the plaintiff does not have to prove actual damage in order to succeed in an action for passing off. Likelihood of damage is sufficient. The same learned author states that the defendants state of mind is wholly irrelevant to the existence of the cause of action for passing off (ibid, paras 4.20 and 7.15). As to how the injunction granted by the Court would shape depends on the facts and circumstances of each case. Where a defendant has imitated or adopted the plaintiffs distinctive trade mark or business name, the order may be an absolute injunction that he would not use or carry on business under that name. (Kerly, ibid, para 16.97).

13 **In The National Sewing Thread Co. Ltd. Vs. Messers. James Chadwick and Bros Ltd.**², that was relied upon by Ms Nichani, the law has been laid down to say that plaintiff who alleges passing off must first establish that the public has grown accustomed to associate the particular name and label with him as the manufacturer or dealer in the article; there must be such an association between the number or the name or the label and plaintiff as to indicate an understanding of the public that the goods bearing that number, name or label came from plaintiff. It is whether a person exercising ordinary caution is likely to be deceived and not whether some ignorant and indiscriminating person might not be deceived. The resemblance must be such as to induce an average man exercising ordinary caution to suppose that in buying defendant's goods he is buying what has been manufactured by plaintiff. The test in all these cases is whether the general impression left in the mind of a customer who had previously bought plaintiff's goods is such that he is likely to accept the defendant's goods when they are offered to him in the belief that they are the plaintiff's.

2 AIR (35) 1948 Madras 481

Whether there is such a resemblance in the name and label of the defendant's goods as to render reasonably likely or probable that customers intending to buy plaintiff's goods would be so confused and deceived as to mistake the defendant's article for plaintiff's, is a question of fact.

14 The High Court of Justice – Chancery Division, England, in **Benchairs Ltd. Vs. Chair Centre Ltd.**³, has given the essence of passing off and the same reads as under:

“The essence of passing off is, it is said by Mr. Watson, and I agree, the false representation by the defendant that his goods are those of the plaintiff, as has been laid down by the authorities for well over a century in numerous cases. This is, for example, noted by Harman, L.J. in Hoffmann-La Roche Vs. D.D.S.A. (1972) R.P.C. 1 at 18, where he quotes the words of Lord Halsbury in Powell Vs. Birmingham Vingar Brewery Co. Ltd. (1897) A. C. 710, who in his turn is quoting the words of Turner, L. J. in Burgess Vs. Burgess (1853) 3 De G. M. & G. 896. If there is no such false representation there can be no passing off, and the mere copying of the shape of the plaintiffs' article is not in itself such a representation. Anyone is entitled, subject to some monopoly or statutory right preventing him, to copy and sell any article on the market, and false representation and passing off only arise when a defendant does something further which suggests that the article which he is selling is that of plaintiff. This he may do by a direct representation to that effect such as by the use of the plaintiffs' name or mark, or by an indirect representation such as by imitation to get-up by enclosing the article in a distinctive package which is similar to that used by the plaintiff.”

Therefore, when there is no false representation, there can be no passing off.

3 1974 R.P.C. (14) 429

15 The only witness who gave evidence on behalf of plaintiff was the Deputy General Manager, Finance and Accounts, who managed plaintiff's accounts and finance for the Mumbai Division. He had no technical background and no personal knowledge. P.W.-1 in paragraph 2 of his examination in chief has clearly stated that the evidence is based on the records available with the plaintiff in respect of the matter in hand. Nowhere he has deposed that he has personal knowledge. Even as regards the allegations against defendant nos.2 and 3, of alleged surreptitious removal of drawings and malafidely using the same in defendants products, the evidence of P.W.-1 says "I understand", apparently, etc.". Therefore, he is unsure.

 In answer to question no.8 in his cross-examination P.W.-1 confesses that he is not conversant with the technicalities of machines.

Question No.8 and answer thereto reads as under:

"Q.8. Can you tell me the difference between blister packing machine and cold forming machine ?

Ans:- Since I am from a commerce background I am not conversant with the technicalities of these machines. (witness volunteers) The machines are the same kind of machine."

 In answer to question no.10 in his cross-examination P.W.-1 also states since he is in the finance department, he will be giving the evidence on the basis of records. Question No.10 and answer thereto read as under:

“Q.10. Since you are in the finance department you will be giving your evidence on the basis of records ?

Ans:- Yes.”

16 It is settled law as noted earlier that plaintiff who alleges passing off must first establish that the public has grown accustomed to associate a particular product with that of plaintiff as the manufacturer or dealer in that product. There has to be an element of exclusivity attached to that product. P.W.-1 in response to question no.16 in his cross-examination has admitted that plaintiff has not disclosed any proof of their exclusive right of Blister Packaging Machines and Cold Forming Machines. Question No.16 and answer thereto read as under :

“Q.16. I put it to you that in your plaint you have not disclosed any proof of your exclusive right over blister packing machines and cold forming machines ?

Ans:- I agree.”

Therefore, the first hurdle that plaintiff has to prove that a particular product is synonymous to plaintiff has not been crossed.

17 There is absolutely no evidence led to prove that the general impression which a public has about Blister Packing Machines and Cold Forming Machines, i.e., reputation of the goods, is that they really belong to plaintiff and if anybody comes across a Blister Packing Machine, an average man will be induced to believe that machines available in market is that of plaintiff. No evidence has been led. Plaintiff has also not led any evidence

to show what is the sales turn over of plaintiff, how many customers buy these products of plaintiff and whether any customer or any average man got induced by seeing defendants products to buy defendants product on the assumption that it was that of plaintiff.

18 The entire basis of plaintiff's case is Exhibit P-3. For convenience and ease of reference Exhibit P-3 is reproduced, and it reads as under:

A C C U P A C K
Manufacturer of Blister Change Parts

309/6842, Trikal, 90 Ft. Road, Pant Ngr., Ghatkopar (E),
Mumbai-75
Off: 022-5121409, Fax: 5118059, Cell: 9821041364,
Email: accu_pack@yahoo.co.in

Dear Sir,

We take this opportunity to thank you for kind courtsey extended and as discussed with Mr. Vinay, we are pleased to furnish the following details.

1. Company profile and Establishment:-

We at ACCUPACK introduce ourselves as a production house for manufacturing High quality products in the Pharmaceuticals Packaging Industry, which includes Blister Packing Machines, change Parts, spare parts and servicing of the machines.

We started in the year 2001, We are 3 partners from various technical backgrounds, the first partner Mr. Anil Kumar is a Merchanical Engineer with an experience of more than 7 years in the field of manufacturing change parts and machine parts on high accuracy CNC machine and latest CAD/CAM softwares with M/s Precision Gears.

The second partner Mr. Bhagwan Gaikwad is a Mechanical Engineer with a background from design and has achieved extensive experience in designing various change parts and machine parts from last 7

years working with Precision Gears.

The third partner Mr. Shehul Sheth is a Mechanical Engineer with a background from marketing various cutting tools for CNC machines and other carbide cutting tools from last 5 years.

We have our set-up at Ghatkopar with highly experienced people from the respective field who look after servicing and repair of the spares and machines.

We manufacture Change Parts for all types of Blister packing machines including the latest Cold Forming Machine T 100 of Precision Gears. We also make change parts for export products or products where we have to incorporate company logos or names on the Blisters. We manufacture our products with latest design and development with the latest CNC machines and CAD/CAM softwares.

2. Client List and Turnover:-

We in this very short time have supplied many change parts with various combinations from combipacks to blisters with a perforation on it. Some of our major clients are:-

<i>01. Gujarat Liqui Pharmacaps</i>	<i>Baroda</i>
<i>02. Fredun Pharmaceuticals</i>	<i>Palghar</i>
<i>03. Duphar Pharmaceuticals</i>	<i>Mumbai</i>
<i>04. Dupen Laboratories</i>	<i>Vapi</i>
<i>05. Bravo Healthcare</i>	<i>Navi Mumbai</i>
<i>06. Famy Care</i>	<i>Mumbai</i>
<i>07. Sangrose Laboratories</i>	<i>Kerala</i>
<i>08. Lyka Laboratories</i>	<i>Ankleshwar</i>
<i>09. T. M. Thakore Pharmaceuticals</i>	<i>Mumbai</i>
<i>10. medico Remedies</i>	<i>Palghar</i>

2. Product List and Price List: Our range of products include.

A. Blister Change parts.

B. Machine Spare Parts.

C. Blister Packing Machines.

D. Encapsulation Dies & Spares

E. De-Blistering Machines.

F. Shredders (Crusher)

As you know the price of the product depends on the requirement of the client, so we would be able to quote the price after knowing the machine model and the product. We believe in delivering high quality products in minimum time with highly competitive prices. Normally we can provide a standard set of Blister change parts within 8 to 10 days.

As a matter of fact we can provide you the layout drawing with quotation of the product within 8 hours after the inquiry.

3. Details of the Sales Tax Income Tax: Our Sales Tax numbers are as follows:

A: B.S.T.R.C. No.400075/ S/1329 / Dt.21-11-2001

B: C.S.T.R.C.No.400075/C/1330/Dt.21-11-2001
The Income Tax No. of the partners are as follows:

1. Mr. Shehul Sheth : AGLPS 9390L
2. Mr. Anil Kumar : Applied for.
3. Mr. Bhagwan Gaikwad : Applied for.

We hope that we have provided all the information of our organisation and if needed any more please contact us.

We request you to provide an opportunity to serve you.

Thanking you and assuring you of our best service all the times.

*Yours truly
For Accupack
Sd/-
Shehul Sheth."*

19 At the outset, it appears to be a letter addressed by defendant no.1 to some prospective customer. It begins with "We take this opportunity to thank you for kind courtesy extended and as discussed with Mr. Vinay, we are pleased to furnish the following details." In this letter, defendant no.1 is only introducing itself and in the company profile and establishment it has given a background of defendant nos.2 to 4 who are the partners of

defendant no.1. In the introduction of defendant nos.2 and 3, it is mentioned that they have experience of more than 7 years of working with plaintiff. That can by no stretch of imagination be even remotely suggested to be passing off defendants' goods as that of plaintiff. Defendant no.1 of course has introduced itself as a production house for manufacturing high quality products in the pharmaceuticals industry, which includes Blister Packing Machines change parts, spare parts and servicing of the machines. Just because in the introduction in some part of the said letter defendants have stated that defendant nos.2 and 3 had 7 years experience of working with plaintiff, would not mean and cannot be construed that they are selling Blister Packing Machines of plaintiff or Blister Packing Machines similar or resembling machines of plaintiff.

20 Ms Nichani laid emphasis on the following portion of the said Exhibit P-3 namely “we manufacture change parts for all types of Blister Packing Machines including the latest Cold Forming Machine TR 100 of Precision Gears” Ms Nichani submitted that by mentioning this portion in the introductory letter defendants have represented themselves to be manufacturing Cold Forming Machine TR 100 of Precision Gears (plaintiff) and thereby have attempted to pass off their products as that of plaintiff.

21 I disagree with Ms Nichani. Defendants have only stated that they manufactured change parts for all types of Blister Packing Machines including latest Cold Forming Machines TR 100 of plaintiff. They have not stated that they are making the Cold Forming Machines TR 100 of plaintiff or Blister Packing Machines or spares of plaintiff. Defendants have only stated that they are making change parts for all types of Blister Packing Machines and those parts can also be used in plaintiff's Cold Forming Machines TR 100 model.

22 Ms Nichani then submitted that defendants product list include Blister Packing Machine. Blister Packing Machine is not a product of plaintiff but it is a general product available in the market. It is a machine, which Mr. Kane and Ms Nichani both submitted, that can be used for blister packing pharmaceuticals products. It is a kind of packing used for packing tablets. Blister is neither the make of machine nor as plaintiff claims to be making exclusively Blister Packing Machines. Plaintiff's model is called TR 100. There is no evidence anyway and even Exhibit P-3 does not include that defendant no.3 is making Blister Packing Machine and calling them TR 100 and also selling them with the label of plaintiff. In fact in a judgment of Delhi High Court in **M/s Cipla Vs. M. K. Pharmaceuticals**⁴, the court was dealing with Blister form of packing. In paragraph 4, the court has stated as under:

4 MIPR 2007(3) 0170

“..... in blister form of packaging. Blister form of packagings of tablets is common and prevalent packaging. It is used in almost for 50 per cent of tablets in the market. Plaintiff can have no monopoly over the particular form of packaging and cannot pray that no one else should pack its medicinal tables in blister form of packaging.”

23 Coming back on the issue of exclusivity, in answer to question no.28 in cross-examination, P.W.-1 agrees that there are many companies that are manufacturing Cold Forming Machines, Blister Packing Machines, different parts of their machine and also change parts for the said machines. But according to P.W.-1, the same are manufactured in an unorganised sector and those are duplicates. There is no evidence that those are duplicates or manufactured in unorganised sector. P.W.-1 also states that Blister Packing Machines are manufactured as per specification given by the customers of plaintiff and based on their specification plaintiff's design team designs the machines and send to their customers for their approval and once approved, plaintiff would manufacture the blister packs. Therefore, it is not that the product that plaintiff is manufacturing is in huge quantity and is available in the market. It is made customer specific.

Whether it can be stated that defendants product are manufactured with an intention or calculated to deceive, and so to divert business from plaintiff, or to occasion a confusion between the two businesses ? The question of any possible deception does not arise. Plaintiff has also not led any evidence to show that plaintiff's mark or get up has become, by user in the country, distinctive of plaintiff's goods. Defendants

mark or get up being deceptive, also would not arise in view of answer by P.W-1 in his cross examination to question no.28 and no.30. Question nos.28 and 30 and answers thereto read as under:

“Q.28. I put to you that there are many companies that are manufacturing cold forming machines, blister packing machines, different parts of that machines and also change parts for the said machines.

Ans. I agree but in unorganised sector that is duplicates.

Q.30. Who decides the specification of making blister packs ? Is it the manufacturer or the customer ?

Ans. The customer provides us the specification that he wants and our design team designs it accordingly and send it to the customer for their approval. Once the approval is obtained we manufacture the blister packs.”

24 Plaintiff has not led any evidence to show what is plaintiff's alleged proprietary right to the exclusive use of any mark or get up in relation to goods of that kind and plaintiff having used or made it known to the world at large that the mark or get up has relation to plaintiff's goods. Plaintiff has led no evidence to speak of. Plaintiff's entire grievance as could be culled out from plaint is defendant nos.2 and 3 who were in plaintiff's employment, used their experience in plaintiff's organisation where they spent almost 7 years to start rival and competitor business and introduced themselves as ex-employees of plaintiff. That can by no stretch of imagination even be labelled to be passing of defendant's products to be manufactured as plaintiff's products.

25 Ms Nichani submitted that defendant nos.2 and 3 did not step into the box to give evidence and therefore, should be construed as not having denied the allegations in the plaint and a decree should follow. Ms Nichani, however, did not elaborate under what law such a conclusion should be arrived at, and this court has not come across any such law.

26 In the circumstances, plaintiff has miserably failed in their case of passing off. Suit accordingly stands dismissed with costs in the sum of Rs.2,00,000/- .

27 Issues are accordingly answered.

(K.R. SHRIRAM, J.)